

Mountainair Collaborative Meeting
May 21, 2019
Edgewood SWCD, Moriarty, NM

SUBSTANTIVE COMMENT WRITING SKILLS FOR THE PUBLIC

Mark Werkmeister
New Mexico Off Highway Vehicle Alliance (NMOHVA)

Attendance

Mark Werkmeister, NMOHVA
Joe Zebrowski, NM Highlands University, Mountainair Collaborative Facilitator
Dee Tarr, Claunch-Pinto SWCD, Mountainair Collaborative Point of Contact
Susan Ostlie, Great Old Broads for Wilderness
Nancy Savage, Great Old Broads for Wilderness
Karin Swanteson-Franz Great Old Broads for Wilderness
Barbara Rosensimon, Great Old Broads for Wilderness
Alan Barton, NM Forest & Watershed Restoration Institute
Steve Guetschow, Torrance County Planning & Zoning Coordinator
Marc Lafrancoine National Park Service, Salinas Pueblo Missions National Monument, Chief of Resources
Art Swenka, Estancia Basin Resource Association

Announcements

Joe Zebrowski

Sarah Browne announced yesterday that there will be a 2 to 3 week delay in rolling out the Cibola NF Draft Revised Plan. The idea is to post the plan on the Cibola NF website two weeks before the Notice of Availability (NOA) is published.

The NOA will either be July 19 or 26. The plan will be posted online 2 weeks prior to the date the NOA is done.

At the last meeting we chose Aug. 1 for the open house. We need to reconsider this date.

We also scheduled the MC kickoff meeting for July 10, and we'll have to reschedule that date.

Comment Writing

Mark Werkmeister

Mark has been on the board of the NMOHVA for 14 years, and recently rotated off. Mark participates in the Cibola Shared Stewardship Collaborative (CSSC) and all four of the local collaboratives.

Why are we here? The public land management agencies (USFS, BLM, etc.) manage public lands as they see fit. They take comments from the public, but it seems the agencies always do what they want. Why doesn't the public ever win? What does the opposition – the public land managers – know that we don't?

National Environmental Policy Act (NEPA) – people often growl in response to the term NEPA. Agencies seem to use NEPA to do exactly what they want. However, NEPA is not the problem. NEPA really just establishes a process that the agencies use to manage federal lands. The public has a role in NEPA, but the problem the public has is they don't understand NEPA well enough to use it properly. Some organizations, such as environmental groups, have used NEPA effectively to force the agencies to follow their own regulations.

The goal for this workshop is to learn how to make NEPA work for you.

History/Background on this Training

In 2008, the NMOHVA was involved in the Travel Management Planning process, which began on the Sandia Ranger District of the Cibola NF. The NMOHVA hired Pan Pacific Services, and Nora Hamilton trained them on writing substantive comments. This training started with Nora's training, and has been revised over the years based on the experiences of the NMOHVA. Some of the references in today's presentation may be a little dated and may be oriented towards travel management. The training was originally written for a specific audience, however, the process applies to plan revision and other federal processes.

What is NEPA?

NEPA was passed by Congress in 1969. Congress wanted a more informed decision-making process by the federal agencies, and wanted to see citizen involvement in the process. NEPA forced agencies to take on public involvement.

“Using the NEPA process, agencies are required to determine if their proposed actions have significant environmental effects and to consider the environmental and related social and economic effects of their proposed actions.” From *A Citizen's Guide to NEPA*, Dept. of Energy, 2007.

It is important to recognize that NEPA is not just about the environment, but also about social and environmental effects of federal agency actions. Over time, it has gotten more focused on the environment.

NEPA includes the intent of Congress and the creation of the Council for Environmental Quality (CEQ), which is an agency located in the White House that is charged with writing and updating NEPA regulations that apply to all federal agencies. All agencies must comply with the regulations that the CEQ issues when they carry out actions that fall under NEPA. CEQ regulations apply to all executive branch agencies including the Forest Service (USFS), the Bureau of Land Management (BLM), the National Park Service (NPS), etc.

CEQ regulations are found in the Code of Federal Regulations (CFR) at Title 40, parts 1500 – 1508. This is a short read and is useful to understand the law and use it to frame comments submitted to an agency during a NEPA process.

NEPA and the Agencies:

Agencies take CEQ regulations and develop their own agency-specific regulations for implementing NEPA and the CEQ regulations. The agency-specific regulations say how the agency must conduct their own NEPA-compliant environmental analyses.

The USFS regulations are at CFR Title 36, Part 215. The Forest Service Handbook also has regulations at Chapter 1909.15.

The BLM regulations are at 43 CFR 1610 and the BLM Handbook is at §1601.

The Dept. of the Interior and the Dept. of Agriculture have regulations as well.

NEPA's Inner Sanctum:

To paraphrase *The Wizard of Oz*: "I am the great and powerful federal agency – pay no attention to the little man behind the curtain."

Mark has seen that the agencies know the public doesn't understand NEPA, and this is good for them. If they get fewer comments, or fewer substantive comments, they have less work to do. The agencies try to keep a curtain on the process, so we'll pull that back.

Influencing USFS Decisions

Why do we have to use NEPA to influence USFS decisions? We are at this training because we suspect or fear the Cibola National Forest's Revised Forest Plan won't meet our needs and desires. There really is only one way to influence federal actions – you must know the rules the agency has to follow. You must know what your rights are and how to use them. Rights are defined and limited by federal regulations and law. There are no other options.

To many people, writing a comment is too much work. You have to read thick federal documents and think up good comments. But, this is what you have to do – there are no other ways to influence the process. If the public does not use their right to comment, the agency can just ignore the public and make any decision it wants to. The public cannot invent a new system or strategy and cannot stop the decisions by simply refusing to exercise its rights.

Writing Congress or the newspapers, petitions, using the internet, etc. don't change agency actions. The decisions are made by agencies, and are not influenced by Congress or the newspapers.

Some people think you can ignore the process and just file a lawsuit later. But, this doesn't work. If you don't participate in the administrative process, you lack standing to file a lawsuit later. There are 3 times for participation: scoping, comments on the draft, and objection. The last two are critical – you must file a comment during this period to be able to sue later. If you don't participate, you waive your right to sue. The USFS warns people about this during the process, since the legal precedent is so strong. This is clear in many planning documents, and also has been upheld by the U.S. Supreme Court.

The NEPA Process

The NEPA process consists of analyses used to arrive at a decision. The analyses come through the creation of a document, either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The process is a logical series of steps used to study an issue.

The first step is to describe the subject of the EIS. What is the issue? The problem? The proposed action?

The next step is to develop alternatives, which are different possible ways to carry out the proposed action. The objective is to figure out which alternative is the best fit for the defined issue. The agency is supposed to balance the needs of the public with the needs to protect the environment.

In our case, the action is a revised Forest Plan, accompanied by an EIS. We've seen proposed alternatives for the revised Forest Plan, but have seen little, if any, of the required analysis for that decision. The bulk of the accompanying EIS will be comprised of the required analysis.

Who writes the agency EIS? The agency creates an Interdisciplinary Team (ID Team or IDT). Membership in the IDT should reflect the different resource issues that will be analyzed.

Each alternative is analyzed by the IDT to see how it would affect each resource. This includes natural resources (e.g. trees, wildlife) and other resources like recreation and roads. Other parameters like social and economics are supposed to be considered also.

Each specialist on the IDT writes an individual report with analysis of the alternatives and recommendations, and these are presented as a summary and conclusions in the final draft.

The decision is then made by one person, identified at the beginning of the process. For forest plan revision, the forest supervisor is the decision-maker.

The decision-maker must choose only from the alternatives presented in the EIS. The decision-maker can pick pieces from different alternatives and put them together, but they cannot bring in new information that has not been analyzed. The EIS is supposed to include all the necessary information. The ID Team is powerful in this process – the team controls what information goes into the EIS. The team can influence what decision is made by what is included in the analysis and EIS. The info in the EIS must be accurate and correct as well. The public comments can correct information in the EIS.

The Public's Role

What is the public role in NEPA? The CEQ says the public must be allowed to participate, but the process goes forward even if the public does not choose to participate. The public has specific rights in the process, but the timing of these rights is limited. If the public does not participate, they forfeit their right to object or protest a decision, including challenging the decision in court. For the USFS, the 2012 Planning Rule created an objection process, that altered the procedure somewhat.

What do we want in the NEPA process? NEPA controls the process, not the decision itself. The theory is that a good NEPA process will help a decision-maker to make the right decision. But, this all depends on having the right information in the EIS, so the process of writing the EIS, including public input, is vitally important. If the public provides input and the EIS is correct and accurate, the decision should be a good one.

The big stumbling block in teaching this course is that the only way to successfully challenge a NEPA document is to show the agency has broken (or not complied with) NEPA law. In other words, the agency has not done the process right.

Comments do not argue against the decision. The object must be to show the agency EIS does not comply with NEPA. It does not follow CEQ regulations for a complete, honest and accurate

document. Most people try to argue against the decision, as this is what they want to alter. But this isn't how NEPA works – NEPA is about process, so the only way to create a challenge to NEPA is to challenge the process. You must show the agency did not follow the process correctly.

Again, the single most important concept in this training is that a comment should try to argue against the decision (e.g. the revised Forest Plan). A comment should try to correct inaccurate analyses or information, or add information that is missing. The only successful way to challenge a NEPA process is to show that the process was flawed, not the decision.

Every successful NEPA challenge is based on an error in the process. Challenges based on content are never successful. So, in writing a comment, we need to take substantive issues and turn them into process issues.

Steps in the NEPA Process:

- Notice of Intent (NOI)
- Scoping Period & Proposed Action
- Analysis
 - Logic and flow of the DEIS
 - Methods and data they used to arrive at their conclusions
 - Connection between the evidence and conclusion
- Draft is published
- Public comment period
- FEIS is published
- Record of Decision and FONSI for EA

Commenting

Comments are a BIG DEAL! There are only 3 opportunities to comment – during Scoping, then during the comment period that follows the issuing of the DEIS, and then during the Objection Period (or Protest for BLM) to the decision. The objection is an administrative (not a legal) process.

Comments really are the only way to influence the EIS – to be sure the EIS includes critical and correct information. If comments show the agency did not follow the prescribed process, the EIS can be “remanded” for changes.

Goal is to get the agency to create an accurate, professional and CEQ-compliant analysis. The agency decision must come from the alternatives in the DEIS, so the public must make sure the agency does not include anything in the draft that was not part of the analysis.

There is a possible argument that the EIS wrongly restricted the alternatives, if an opponent presents evidence that the alternatives were poorly constructed. CEQ regulations describe the range of alternatives which must be considered and analyzed.

Essentially, NEPA puts the public in the role of a guard dog. It is the public's responsibility to ensure an EIS is correct, accurate and complete. There are no other legal controls, and no other way to challenge an EIS except the NEPA process.

If the public doesn't challenge an agency, the agency can do what it wants.

What is a substantive comment? They are “comments that question with a reasonable basis the accuracy of information in the EIS.” So one thing a comment can do is challenge information in the EIS based on accuracy or completeness. A comment may also question, with reasonable basis, the adequacy of the environmental analysis. Or, a comment can present reasonable alternatives other than those presented in the EIS, or one that did not get a complete analysis. Finally, a comment can challenge a proposed action, and can lead to changes or revisions in the proposal itself, based on the scope of the original proposed action.

What does a substantive comment look like?

Example:

The EIS does not properly analyze grazing because _____. The analysis does not include important and readily available data. We provide the missing data. The FEIS should include it and the conclusions should be corrected to reflect the new information.

Most comments are not substantive in nature. Instead, people express opinions, values or beliefs (“the plan is bad”), may ask questions or demand answers, may try to negotiate compromises or concessions, may include threats, sarcastic or nasty comments, may tell personal stories, may make baseless predictions, etc.

A substantive comment is based on evidence and states a demonstrated outcome. Tell the agency what is missing.

The agencies have requirements regarding substantive comments. According to the USFS planning regulations (36 CFR 219.53(a), substantive comment is:

- Within the scope of the proposal
- Specific to the proposal
- Have a direct relationship to the proposal
- And include supporting reasons for the responsible official to consider.

An objection must refer to a previously submitted substantive comment submitted by the objector. The responsible official can determine if the appropriate connection is made.

An agency must respond to all comments (40 CFR 1503.4). The agency can:

- Modify alternatives
- Develop and evaluate alternatives not previously considered
- Supplement, improve or modify analyses
- Make factual corrections
- Or, explain why a comment does not merit further response, citing authorities or reasons

The content of the EIS is very important. Bad information leads to bad alternatives. Bad alternatives lead to bad or incomplete analyses. Bad analyses leads to bad decisions.

The only comments that have power to alter an EIS are substantive comments. Good comments show that the EIS is improper analysis because it did not follow the NEPA process or the agency regulations.

In the final EIS, the agency is required to respond to each substantive comment it receives, which point out flaws in the process. They may lump the comments together by topic – if several comments say the same thing, the agency responds once. But they must include responses in the FEIS.

CEQ regulations dictate both the structure and content of an EIS, including the chapters and sequence of material, which must be considered, how alternatives are analyzed and compared, the science and logic that must support all statements and conclusions, and that the conclusions must flow from the analysis – there must be a reasonable connection between the facts presented in the EIS and the decision.

Process errors are those that violate the NEPA-required process, and these violate the law and can be challenged by those who participated in the administrative process.

NEPA gives the public the right (and duty) to ensure the agency uses NEPA-compliant EISs. Good substantive public comments ensure the process was done correctly by identifying process errors. Process errors oppose a decision by showing the decision is based on a faulty or flawed process. A comment must show process errors in the EIS.

Reading an EIS

How can one read an EIS and find process errors? It is important to know how to read an EIS to find substantive errors. Organizations that have won NEPA challenges don't win by showing harm from a decision or by claiming the agency made the wrong decision. They win by making a case that the agency did not follow the rules established by NEPA.

A significant hurdle to commenting on an EIS is that EISs typically are big documents. They can be hundreds or thousands of pages. That is intimidating! But, if you know how an EIS is organized, it shouldn't be so intimidating. So, how can we make an EIS document less intimidating and simpler to use? First, look at the Table of Contents. And, online, you can click from the Table of Contents straight to the section you're looking for.

Also, the CEQ requires all EISs to have the same four sections.

- Purpose and Action
- Alternatives
- Affected Environment
- Environmental Consequences

The Purpose and Need for Action briefly explains the underlying purpose of the analysis. What is the problem the EIS is addressing?

The Alternatives are the heart of the EIS. Good alternatives compare the environmental impacts of all alternative courses of action that an agency can take to meet the Need for Action. The alternatives are supposed to sharply define the issue, and provide a clear choice among alternatives. Each alternative should be a different thing, not just gradations in the same thing. One alternative is the "no action" alternative, which means no change. This may not even be considered as a potential action (e.g., the agency wouldn't NOT write a revised forest plan – they are required to do so). But, the no action alternative is the baseline against which the other alternatives are measured.

The Affected Environment concisely describes the environment of the area affected by each alternative under consideration. This often is broken up into different resources that are impacted – e.g. vegetation, wildlife, soils, water quality, recreation, air quality. There also is a section on cumulative impacts, as well as social and economic impacts. There may be other impacts that are considered as well – cultural resources, tribal impacts, law enforcement, noise, etc.

Environmental Consequences includes the scientific and analytical basis for the comparisons included in the Alternatives. So, it shows how each alternative affects each of the components of the affected environment. It should show both direct and indirect effects, and their significance.

Once you become familiar with how an EIS is organized, it becomes easier to find information. Also, there is a lot of duplication in the document. If all the alternatives impact one of the affected resources the same way, the document still will repeat the analysis for each alternative.

An EIS may also have appendices, which include a lot of information. Typically, these include information that doesn't fit easily into the prescribed categories.

Writing Substantive Comments

So, how do we write substantive comments based on an EIS? There is no single best way to review an EIS and identify process errors. Each person or organization develops its own preferred way to do it. It takes practice. Often, the problem is not finding process errors, but usually there are so many, that the bigger issue is choosing which process errors to pursue. An EIS is written by many different people over a long time period, so there often are many things in an EIS that don't sync up. The process is very complex, and presents a coordination nightmare, so this often leads to many process errors.

In the case of a revised forest plan, the plan is, by design, a loose framework rather than a set of specific actions. So, this presents challenges in terms of identifying process errors and linking them to the decision. The forest plan sets the management direction for the national forest, not the rules through which the management is achieved. Therefore, the information may not be specific enough to identify as a process error.

In writing comments, stay focused on the process errors. Process errors always start with verbs, and the error is in HOW the process is done: formulating, selecting, including, eliminating, listing, identifying, comparing, connecting, analyzing, etc. Avoid arguing with results – this strays into content, not process. What you want to find is the errors that LEAD TO the conclusion or decision, not with the decision itself. So, looking at the decision, you need to go backwards through the process to find what the process was that led to that decision, and look for errors in the process – errors that violate NEPA.

Process errors should refer back to the law. For example, the CEQ does not specify any time frames or specificity of locations. Comments on such issues may not get consideration from the agency or may not be a reasonable basis for an objection because the comment doesn't lead to a violation of the law. Any specific EIS really involves very little "original" (site-specific) data collection or analysis. Often, due to staffing and funding limitations, the agency relies on comparable cases and analyses to draw conclusions about specific locations.

Errors in process must be used to discredit the content, i.e., the results of the process. NEPA and the CEQ define right and wrong ONLY for the process. There is no right and wrong for the content (the results).

Questions to ask when reviewing an EIS: “can they prove that?” “did they leave something out?” “is there something suspicious or illogical here?” Look for illogical conclusions, contradictions, missing information and unproven statements. You have show that a reasonable and prudent person would come to a different conclusion than the agency did.

Categories of common errors:

- How the EIS defines the problem
- How the EIS sets up the alternatives it will study
- How the EIS team does the analysis
- Violations of other regulations

The USFS has done a good job of reducing these errors compared to the past. The USFS is getting better at creating documents that conform to the regulations.

Describing the problem – look at the Purpose and Need. If the document implies a particular action by the agency, consider what the regulations actually say. Are there regulations that tell the agency what to do? Is the agency trying to assume authority not granted? If the agency has a problem in describing the problem, this leads to a bad analysis and a bad decision.

The goal of a comment should be to make the agency change the final version of the EIS so that the EIS is an accurate document. Once a good substantive comment is crafted, it also is important to tell the agency what it needs to do to fix the problem. A good comment narrows down the issue so that there is only one alternative for the agency – change the final EIS.

So, the three simple steps in writing a good substantive comment are (1) identify a process error, (2) explain the process error, and (3) suggest a solution to the error. This is the type of comment that will have an impact on the agency’s decision.