

Substantive Comment Writing Skills for the Public

Presented by

Mark Werkmeister



New Mexico Off Highway Vehicle Alliance (NMOHVA)

Why Are We Here?

- The federal land management agencies (BLM, USDA FS, etc.) are managing our public lands as they see fit.
- We go to meetings, we “collaborate”, we write letters, we sign petitions, we might even submit comments on the agency “plans”.
- But the agencies always seem to end up doing just what they want...
- Why don't we ever “win”?
- What does the opposition (and/or the Forest Service) know that we don't know?

NEPA

- Grrrrrr! Isn't NEPA to blame for many of the federal agency decisions? The agencies always seem to use NEPA to do what they want!
- **NOT TRUE! NEPA is just a tool.**
- Some organizations very successfully uses NEPA and other laws (Endangered Species Act, Clean Air Act, etc.) to force the agencies to follow their own regulations and help force the agencies to do what they want.
- They have figured out how to make NEPA work for them but after today....

You will know how to make NEPA work for you!

History/Background on this Training

- In 2008, NMOHVA started commenting on the first of the Travel Management Plans in New Mexico – Sandia Ranger District of the Cibola National Forest.
- Pan Pacific Services (Nora Hamilton) trained NMOHVA in early 2008 on “How to Write a Substantive Comment”.
- This training is based on Nora’s training and our own experience since 2008.

What is NEPA?

- Congress passed the National Environmental Policy Act (NEPA) in 1969.
- NEPA has two major purposes:
 - “Informed” decision-making by the federal government
 - Citizen involvement in the process

“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.” - A Citizen’s Guide to NEPA, Having Your Voice Heard from the Council on Environmental Quality, December 2007

NEPA and the CEQ

- NEPA (the Act itself) has two parts:
 - The intent of Congress (that of informed agency decision making and public involvement)
 - The creation of the Council on Environmental Quality, the “CEQ”, a division under the Executive Office of the President
- The CEQ writes the regulations that federal agencies MUST follow when they conduct an action that falls under NEPA... and almost ALL public land management decisions fall under NEPA!
- CEQ regulations apply to all Executive Branch agencies including the Forest Service, the Bureau of Land Management, the National Park Service, etc.
- CEQ regulations are found in the Code of Federal Regulations (CFR) at Title 40 Parts 1500 – 1508.

NEPA and the agencies

- The agencies take the CEQ's regulations and develop their own regulations for implementing the CEQ regulations (how the agencies must conduct their own NEPA-compliant analysis).
- CFR Title 36 Part 215 is where the Forest Service has its regulations, and the instructions to their employees are in their Forest Service Handbook (FSH) Chapter 1909.15.
- The BLM puts its regulations at CFR Title 43 Part 1610, and the instructions to employees is in BLM Handbook "1601 Planning."

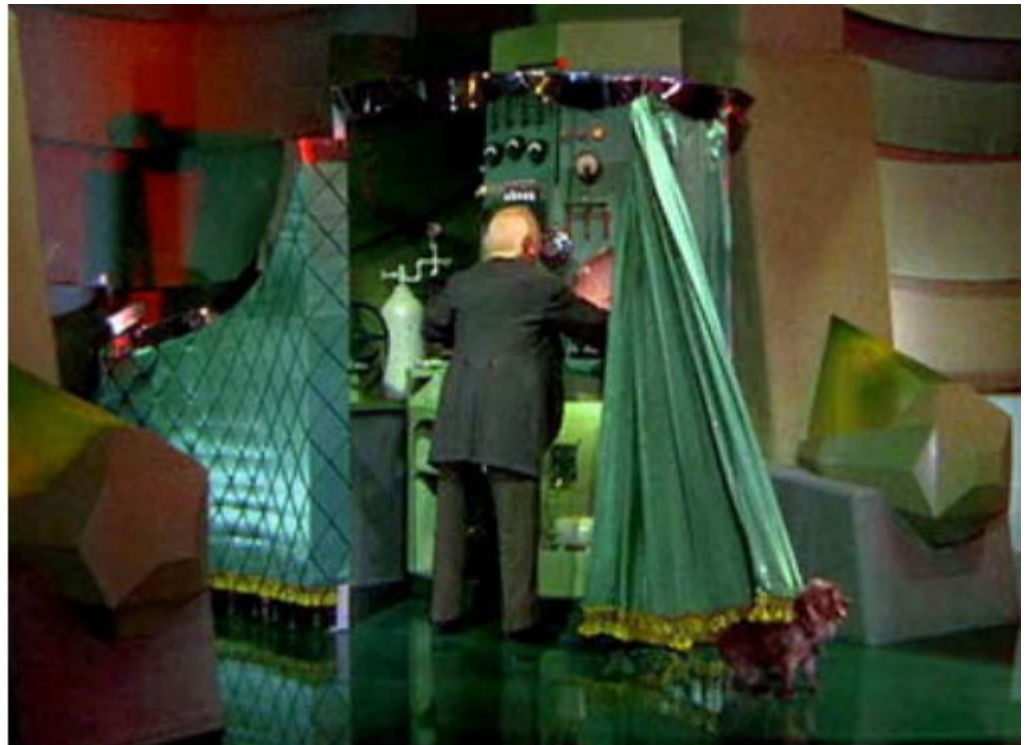
So what?

Welcome to the NEPA Inner Sanctum



"I am the GREAT and ALL-POWERFUL FEDERAL AGENCY ... Pay No Attention to that Little Man behind the curtain! "

We will go behind the curtain, and reveal how the NEPA process works....





Why Must We Use NEPA to Influence Forest Service Decisions?

- This is **THE** important question, and deserves a very careful answer. You came to the training because we suspect (fear?) that the Revised Cibola Forest Plan won't meet our needs (or desires).
- If you want to successfully oppose or change federal agency actions, you have only **ONE** choice. You must learn the rules the agency has to follow when it makes the decisions.
- You must learn what your rights are and when you must use them. **The goal of the training is to explain these rules and rights and, most importantly, how to use them effectively.**
- The good news is that there **ARE** rules the agencies must follow, and we **DO** have rights.
- The “bad news” is your rights are defined and limited by federal regulations with the force of law. **And there are no other options or methods.**

Writing Comments is Too Much Work!

- *“I'm going to be very clever and think up an easier way to do this.”*

THE TRUTH: You cannot invent some other strategy to oppose the closures. It is all defined by laws and regulations which strictly limit how and when the public can oppose what the federal land management agencies do. If the public doesn't use their rights properly, the agency can completely AND LEGALLY ignore us and make any decision it wants. The public cannot invent a new system or strategy and it cannot stop the decisions by simply refusing to exercise its rights.

- *If the agency tries to do something we don't like, I'll write to my senators and the newspapers. We'll start a petition on the internet and get a million signatures.*

THE TRUTH: The decision making process is defined by law and has nothing to do with the U.S. Congress or pressure from the media or the public. Petitions are useless. The agency people making these decisions are not elected officials. You can't threaten to vote them out.

Too Much Work!

- *“I don't want to bother with all this. It's too much work. We'll just file a lawsuit.”*

The TRUTH: It doesn't work that way. The agency must do the analysis and make the decision during a defined period called the “administrative process”.

There are only THREE times in this process when the public is allowed to have any say at all in this: Scoping Comments, Comments on the Draft, and the Objection/Protest. The last two are the critical ones. If you haven't exercised those two rights (submitted comments, then filed an Objection or Protest) the court can, and typically will, throw out your lawsuit without even listening to it. **The legal precedent is that if you refused to use your rights in the administrative process, you have waived your right to sue.** This precedent is so strong that the Forest Service actually warns the public about this in the EIS's.

No Short Cuts!

- According to 36 CFR 215.10, individuals and entities interested in commenting on the proposed plan revision must submit comments during the public comment period. Comments submitted outside of the notice and comment period are not considered.
- This decision is subject to judicial review under 36 CFR 215.10. People or organizations who have standing to sue outside of the notice and comment period may file an objection or request for a stay of implementation.



file an objection or request for a stay of implementation. Comments submitted outside of the notice and comment period are not considered.

Comments submitted outside of the notice and comment period are not considered. Comments submitted during the public comment period are considered. Comments submitted outside of the notice and comment period are not considered.

Forest Travel Management Record of Decision

- *“When an adequate remedy may be had within the Executive Department of the government, but nevertheless, a litigant fails or refuses to avail himself of the same, the judiciary shall decline to interfere.” – US Supreme Court in Abe-Abe et al vs. Manta*

How does the NEPA Process work?

- The NEPA process is an analysis process used to arrive at a decision. The analysis is done in a document, either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA).
Note: During this training, I will use the term “EIS” but it will mean whatever the appropriate environmental analysis document the agency is required to use (either an EIS or an EA).
- The process is (supposed to be) a logical series of steps used to study an issue. The first step is to describe the subject of the EIS. This is the “issue” the agency wants to make a decision about. The issue can be:
 - A problem (how to reduce wildfires or improve elk habitat),
 - A project (whether or not to build a bridge), or
 - A decision (allow a timber harvest, renew a grazing permit, or to revise the Forest Plan).

How does the NEPA Process work?

- Then the process looks at a variety of possible solutions for the issue. These possible solutions are called “alternatives”. The alternatives are compared to each other. The objective is to figure out which alternative is the best solution for the problem.
- No alternative is ever perfect, they always include trade-offs. Example: A bridge or road large enough to serve the public could have negative effects on a stream. The EIS is supposed to compare the needs of the public with the need to protect the stream (the “informed decision making” Congress intended).

A Revised Forest Plan

- The decision at hand is a revised Forest Plan for the Cibola National Forest. This document must (per NEPA) be supported by its accompanying EIS. We have 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 comprised of the required “analysis”.

Who writes the EIS/EA?

- The agency assembles a team from its own staff of specialists. This is called the Interdisciplinary Team (also known as the “ID Team”, or IDT).
- The membership of the ID Team should reflect the “resource” issues that will be analyzed.
- Each alternative is analyzed by the ID Team to see how it would affect each of the resources. This includes natural resources (wildlife, water, vegetation, etc.) and other resources like recreation and roads. Other human parameters like social and economic impacts are supposed to be considered also.
- Each specialist writes an individual report with their analysis of the alternatives and recommendations. The recommendations are combined into the summary and conclusions of the whole EIS.

Who makes the Decision?

- The decision maker is ONE PERSON identified at the beginning of the process.
- Usually it is the Forest Supervisor for the Forest Service and the Office Manager for the BLM.
- The ID Team (or some other committee or group) does NOT make the decision, no matter what any of them tell you.
- For a Forest Plan revision, the Decision Maker = the Forest Supervisor!

What can the Decision Maker choose?



- The decision maker must choose only from the alternatives presented in the EIS.
- The decision maker CAN select parts of different alternatives and combine them into the decision (mix and match).
- The decision maker cannot make up a new alternative or introduce new information or analysis. EVERYTHING must be in the EIS. The EIS is *supposed* to include all necessary information.
- That is why the ID Team IS so powerful. It controls what is in, or not in, the EIS. The ID Team doesn't make the decision, but it can limit the choices the decision maker is given by including or excluding information in the analysis of the alternatives.
- It is also why having the CORRECT INFORMATION in the EIS is so IMPORTANT! And that is where **YOU** and your comments come in!

BREAK TIME!

Where Does the Public Fit into the NEPA Process?

- CEQ say the public must be allowed to participate in the NEPA process.
- But the process goes forward even if the public doesn't (chooses not to) participate.
- CEQ regulations describe exactly when and how the public can participate.
- The public has rights but only specific ones that have to be exercised at certain times in the process.
- If we don't participate, we forfeit our right to object/protest to the decision...including our right to challenge the decision in court!

What Do We Want?

AKA What are We Trying to Do?

- The best “quick” explanation is something we found in Army Corp of Engineer’s website:
“NEPA controls the PROCESS used to make the decision, but not the decision itself.”
- The assumption is that a high-quality, accurate EIS will lead the decision maker to a “good” decision.
- Our goal is get the agency to produce an accurate, professional, and CEQ-compliant analysis.

This is the only thing we can influence in the NEPA process!

The **BIG** Stumbling Block

The single biggest concept we are teaching here today is:

- The only way to successfully challenge a NEPA document is to show the agency has broken (not complied with) NEPA law. **That means they haven't done the process right.**
- **Our comments DO NOT try to argue against the decision.** The object of our comments is to show the agency EIS does not comply with NEPA, because it does not follow CEQ regulations for a complete, honest and accurate document.



Once Again!



This is the most important single concept in the training so we will repeat it:

- **Our comments DO NOT try to argue against the decision (in this case – the revised Forest Plan). The object of our comments is to show the EIS does not comply with NEPA, because it does not follow CEQ regulations for a complete, honest and accurate document.**

<p style="text-align: center;"><u>CONTENT</u></p> <p style="text-align: center;">This is where we have our “beef” with the EIS:</p>	<p style="text-align: center;"><u>PROCESS</u></p> <p style="text-align: center;">The steps they must complete correctly to get to a Decision:</p>
<p>It's what they say: the description of the area, the things they plan to do in the revised Plan, the reasons, the specialists' write-ups, the evidence they present in support of their “proposed action.”</p> <p>In other words, it's the agencies “story” and how they tell it in:</p> <ul style="list-style-type: none"> •The Executive Summary •The Purpose & Need •The Alternatives •The Affected Environment •The Environmental Consequences •Appendices •And, ultimately, the Record of Decision. 	<p>1-Notice of Intent (NOI)</p> <p>2-SCOPING PERIOD</p> <p>3-THE ANALYSIS:</p> <ol style="list-style-type: none"> 1) The logic and flow of the DEIS 2) The methods & data they used to arrive at their conclusions 3) The connection between the evidence and the conclusion. <p>4-DRAFT IS PUBLISHED</p> <p>5-PUBLIC COMMENT PERIOD</p> <p>6-FEIS IS PUBLISHED</p> <p>7-RECORD OF DECISION (ROD) (OR FONSI)</p>
<p>CHALLENGES BASED ON “CONTENT” <u>NEVER</u> SUCCEED.</p>	<p><u>EVERY</u> SUCCESSFUL CHALLENGE IS BASED ON A PROCESS ERROR</p>

Why Comments are Such a BIG DEAL

- There are only THREE times in the NEPA process when we have specific legal rights to participate; rights that the agencies must respect by law:
 - Comments made during “Scoping”
 - Comments made when the draft EIS comes out for public comment
 - Filing an Objection (FS) or Protest (BLM) to the decision. This is an administrative (not a legal) process.

Comments are the Only Weapon

- The only way we can influence the EIS is to provide comments.
- If our comments show that the agency did not follow the prescribed process, EIS can be changed or “remanded”. Remanded means the EIS or parts of it, need to be done over.
- Our comments are the only tools we have to oppose a poorly done EIS. This is why we will be learning to look at the EIS to find the errors, and to write the effective comments which identify them.



What Can We Accomplish?

- Our goal is get the agency to produce an accurate, professional, and CEQ-compliant analysis.
- Our comments cannot force the agency to make a decision for a plan of action which is not already offered in the EIS as an alternative.
- If an acceptable alternative is in the EIS, but was not chosen, we can present evidence that it is the one which should be chosen.
- If no alternative is acceptable, we can present evidence and make the argument that the EIS is incomplete because it wrongly restricted the alternatives.
- CEQ regulations describe the range of alternatives which must be considered and analyzed.

NEPA puts the Public in the role of Guard Dog

It's OUR JOB to make the land management agencies **OBEY** the laws and regulations for writing a proper EIS.

No other agency or Congress makes the agency tell the truth, checks that the EIS is complete and accurate, makes them obey the laws, or forces them to fix the documents if they are wrong.

There is no other legal method or authority for challenging an EIS except the NEPA process.*

If we refuse to be the Guard Dog in the NEPA process, the Forest Service and BLM can (and will!) do whatever they want.

If the PUBLIC doesn't challenge them, the agency gets away with whatever it wants, including breaking the law!

* Editorial: We're not saying we like this, it gives the agencies way too much power. But this is how it is, unless Congress changes it.





Substantive Comments

So just what is a Substantive Comment?

Substantive comments are (in the words of a government agency) comments that:

- *“(a) question, with reasonable basis, the accuracy of information in the EIS;*
- *(b) question, with reasonable basis, the adequacy of environmental analysis;*
- *(c) present reasonable alternatives other than those presented in the EIS; [or]*
- *(d) cause changes or revisions in the proposal.”*

What Does a Substantive Comment Look Like?

- The EIS **does not properly analyze** grazing **because** _____. The analysis does not include important and readily available data. We are providing this data. The FEIS should include it and the conclusions should be corrected to reflect the new information.
- The EIS **understates the economic value** of agricultural activity **because it doesn't show** _____.
- The EIS makes **contradictory statements** about the quality of water resources, and make statements contradicted by the data from the State of New Mexico. (insert pages and quotes)
- The EIS says _____ which is **not supported by data, studies or citations of science**.
- The EIS uses the **wrong methodology** for analyzing the economic impact of reducing grazing. It is wrong **because** _____. The proper method is _____ and would produce the following results.

How to check yourself: If the comment does not identify a violation, error in logic, unsubstantiated statement, missing information, etc. , it is NOT 'substantive'.

What Do Non-Substantive Comments Look Like?

- Express opinions, beliefs or values (*"I believe your plan is bad"*)
- Ask questions or demand answers (*"Why are you going to ___?"*)
- Beg, plead, negotiate, ask for compromises or concessions (*"Please don't ___"*)
- Threatening or angry or sarcastic or "snotty" (venting is therapeutic, but it is not substantive)
- Accuse the agency of being unfair (no law requires them to be fair.)
- Make non-specific, generalized arguments (*"The agency shouldn't _____"*)
- Make statements not supported with facts
- Raise unrelated issues (alien invasions, international conspiracies etc.)
- Make emotional appeals (*'my grandfather homesteaded here in 1876'*)
- Tell personal stories (*'we are good stewards of the land'*)
- Make claims, warnings or predictions

Examples

The agency can legally ignore comments which are merely statements of opinion about the decision. These two examples illustrate the difference:

- **Substantive Comment:** The analysis presents no evidence or data to support the statement at page 135 that the decline in owl population is caused by the presence of ATVs on the trails. The analysis omits the research studies which conclude that the decline in owl population over the past decade has been caused by a respiratory virus.
- **Non-substantive Comment:** The Forest Service should not close the ATV trails because we've been using them for 20 years, we don't hurt anything, and we help maintain them.

Agency Requirements Regarding Substantive Comments

*Substantive formal comments. Written comments submitted to, or oral comments recorded by, the [responsible official](#) or his designee during an opportunity for public participation provided during the planning process ([§§ 219.4](#) and 219.16), and attributed to the individual or entity providing them. **Comments are considered substantive when they are within the [scope](#) of the proposal, are specific to the proposal, have a direct relationship to the proposal, and include supporting reasons for the [responsible official](#) to consider.** - 36 CFR 219.62*

*Individuals and entities who have submitted substantive formal comments related to a plan, plan amendment, or plan revision during the opportunities for public comment as provided in subpart A during the planning process for that decision **may file an objection. Objections must be based on previously submitted substantive formal comments attributed to the objector** unless the objection concerns an issue that arose after the opportunities for formal comment. The burden is on the objector to demonstrate compliance with requirements for objection. Objections that do not meet the requirements of this paragraph may not be accepted; however, objections not accepted must be documented in the planning record. - 36 CFR 219.53(a)*

***“The Reviewing Official makes the final determination of whether the objection issues are based on previously submitted substantive formal comments. The Responsible Official supports this determination by evaluating whether the planning record substantiates that the issue(s) raised by each objector is based on substantive formal comments submitted by the objector during the planning process, or concerns an issue that arose after the opportunity for formal comment.** - 36 CFR 219.53(a).*

The Result

From the Code of Federal Regulations, 40 CFR 1503.4 (from the NEPA section of the CFR)

Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, **and shall respond by one or more of the means listed below**, stating its response in the final statement. Possible responses are to:

- a. **Modifying alternatives**, including the proposed plan;*
- b. **developing and evaluating alternatives** not previously given serious consideration;*
- c. **supplementing, improving, or modifying analysis**;*
- d. **making factual corrections**; and*
- e. **explaining why comments do not warrant further response**, citing the sources, authorities, or reasons that support the agency's position, and, if appropriate, indicate those circumstances that would trigger reappraisal or further response.*

Remember: If we can make the agency do an honest EIS, it should drive an appropriate decision utilizing appropriate management action and methods.

Remember the Corp of Engineer's quote?

Here it is again:

“NEPA controls the PROCESS used to make the decision, but not the decision itself.”

- The purpose of the EIS is to analyze various courses of action the agency could take to “answer the question”. In this case, the question is:

“What management practices will be employed to manage the resource?”

Or

“Which activities will be allowed in the area?”

- The EIS will present various plans of action (the alternatives). The EIS analysis is supposed to show what would happen to the environment (both natural and human) depending on which alternative is chosen.
- The Decision Maker is NOT ALLOWED to consider any alternative or information which is not in the EIS.

Do you see why the content of the EIS is so important?

- Here is the process chain we are following:
 - 1. Bad information leads to bad alternatives.
 - 2. Bad alternatives lead to bad or incomplete analysis.
 - 3. Bad analysis leads to bad decisions.
- If the EIS analysis has serious mistakes, flaws and omissions, the decision has relied on an improper analysis.
- NEPA gives us the right to comment on the EIS.
- But the **ONLY** comments that have any power are “substantive” ones – Comments show that the EIS is an improper analysis because it did not follow the NEPA process and/or agency regulations.
- The agency is required to respond to substantive comments which point out flaws in the process.

Rules the Agency has to Follow

CEQ regulations dictate both the structure and the content of the EIS including:

- The chapters and sequence of material in the EIS
- What material in the EIS must be included for consideration
- How the alternatives are analyzed and compared
- The science and logic that must support all statements and conclusions
- The conclusions must “flow” from the analysis, meaning there is logical connection between the facts presented in the EIS and the decision.

The CEQ regulations ALSO address what the EIS is NOT allowed to include or say. The EIS can't include opinions, unverified “facts”, or conjecture.

The EIS must be in compliance with NEPA/CEQ regulations. When the EIS violates these rules, it is non-compliant. The mistakes are called a “process errors” because they violate the NEPA-required process.

Pulling it All Together

- NEPA gives the public the right (and duty) to ensure that the agency uses a NEPA-compliant EIS.
- A substantive comment shows the EIS process was not done correctly by identifying process errors.
- We use process errors to successfully oppose a decision by showing that the decision is based on a faulty, flawed, or incomplete EIS analysis.
- Our comments must attack the process (the process errors and the flawed EIS), not the decision itself.

Break Time!

After the break, we will learn:

- How to read an EIS
- How to find process errors in an EIS

How Do the Organizations Do It?

- Some “environmental” NGO’s have been incredibly successful over the years in winning legal challenges to the Forest Service decisions. They don’t win by claiming they were harmed by bad decisions. They don’t win by telling the agency they made the wrong decision. They win only when they make a successful case that the agency broke the rules. They get the agency to change their decisions when they prove the feds didn’t follow the required NEPA process when they wrote the EIS on which they based their decision.
- **If the Forest Service and BLM’s work is so sloppy that their decisions have been successful literally thousands of times, why can’t we be just as successful at getting the agencies to change their EIS documents (and ultimately their decisions)?**
- **The simply truth is WE CAN DO THIS! We HAVE DONE THIS!** And now you have the knowledge to do this, too. All we have to do is show that the agency isn’t following the NEPA process properly when they put together the EIS.



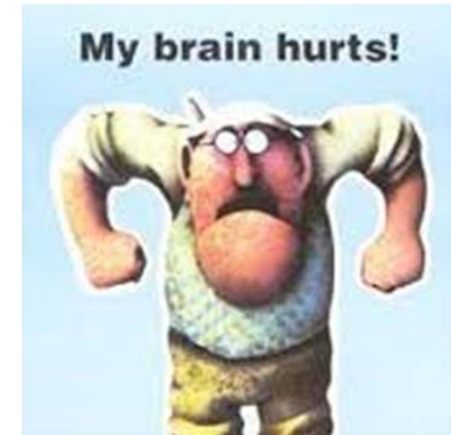
A Quick Review

Let's review what we know:

- The NEPA process is the only tool we have in federal land management decisions.
- NEPA gives us very specific rights at certain times to influence EIS's.
- We have to attack the PROCESS, not the decision if we want to successfully “blow up” an EIS.
- We use substantive comments to document the process errors we find in an EIS.

Whoa! The EIS is a BIG Document

Let's face it, an EIS can be a REALLY big document. It can be hundreds or even a thousand pages. That can really be intimidating!



And the agency LIKES it that way! But the EIS isn't intimidating if we understand it.

Consider a phone book...



The EIS Made Simple

Like any good reference book, the EIS has a Table of Contents. The Table of Contents lists the major sections of the EIS and the page number for each section. Every EIS has the same four major sections that we care about:

- The Purpose and Need for Action
- The Alternatives
- The Affected Environment
- The Environmental Consequences

The Purpose and Need for Action

This section is supposed to briefly explain the underlying purpose and need to which the agency is responding to with the EIS. In other words, this section is supposed to explain the “problem” that the agency is trying to solve.

The Alternatives

This section is the heart of the EIS. It should compare the environmental impacts of all of the alternative courses of action the agency can take (to meet the “Need for Action”) in a clear manner. It is supposed to “*sharply define the issue*” and provide a clear choice among the options for the decision maker to choose.

The Alternatives are supposed to contain a “No Action” alternative. Many times this alternative isn’t being considered (often the No Action Alternative can’t meet the Need for Action by definition). It is supposed to be included to provide a baseline condition to which the other alternatives are compared.

The Affected Environment

The “Affected Environment” section is supposed to concisely describe the environment of the areas affected by each alternative under consideration. You can typically think of these environments as the resources impacted. These are usually broken into the following categories:

- Vegetation
- Wildlife
- Soils
- Water Quality
- Recreation
- Air Quality
- Cumulative Impacts
- Social and Economic Environment

The EIS may also include other categories like noise, cultural resources, tribal impacts, law enforcement, etc.

Environmental Consequences

This section is supposed to be the scientific and analytic basis for the comparisons included in the “Alternatives” section. The agency typically goes through the impacts of each alternative for each of the “Affected Environments”. It is supposed to include an analysis of both the direct and indirect effects of each alternative for each resource and their significance (or insignificance). Many times, the “conclusions” from these analysis are presented in long tables so the decision maker (and the public) can easily compare the specific impact to each resource resulting from each alternative.

Easy-Peasy

And that's it. The EIS is often a VERY large document but you now what it contains (the four major sections) and how it is arranged. Even now, it might still sound scary but as you start to review the document, you will very quickly catch on to how it is arranged and will be zipping back and forth between sections in no time.

So....an EIS is a big document but CEQ and agency regulations require it to be arranged in a very specific way. As we start learning how to write substantive comments, we will share some other tips and tricks that we have learned.

Finally – Let’s Learn How to Write Substantive Comments

Let’s again examine what we have learned so far:

1. We know NEPA is the ONLY way to change what the Forest Service wants to do.
2. We know what NEPA is and how it works. We know about the Council for Environmental Quality (CEQ) and agency regulations.
3. We understand the rules that the agency has to follow under NEPA and the rights we have under NEPA.
4. We know what a Substantive Comment is, how they work, and why we must use them.
5. We understand the difference between content and process and know we need to focus on the process errors.
6. And finally, we have reviewed the content and structure of the EIS document itself .

We are now ready to write substantive comments.

Let’s get to it!

Good News and Bad News

The bad news is there is no single “best” way to review an EIS and write substantive comments.

The good news is no “wrong” way to do it, either. The goal is finding what works best for you. And that takes a bit of practice.

Strangely enough, we have found the big problem isn't finding process errors, the larger issue is there are usually so many, it is hard to know which one to pursue!

In the case of a Forest Plan revision, there is another challenge – the “Plan” is, by design, a loose framework rather than a list of specific actions. This makes it even more of a challenge to effectively identify process errors and link them to the decision.

The Hard Part



Staying focused on the process errors!

- Process errors always have verbs. The errors are in HOW the process is done: Formulating, Selecting, Including, Eliminating, Listing, Identifying, Comparing, Connecting, Analyzing, etc.
- You are straying into “Content” when you are arguing with results; the recommendation or conclusion itself. Your job is to find the errors that LEAD to the conclusion or recommendation.
- We use the errors in process to discredit the content (the results of the process). **NEPA and CEQ define 'Right and Wrong' ONLY for the Process.** There is no 'Right and Wrong' for the Content (the results).

What Do Process Errors Look Like

The best way to start recognizing process errors is to actually see a few of them. Once we learn to recognize process errors, we will spot them everywhere. The typical EIS is full of them!

While reviewing the EIS, constantly ask yourself, “Can they prove that?”, “Did they leave something out?” and “Is there something suspicious or illogical here?” Even if you don’t know anything about agency or CEQ regulations, you can find plenty of errors, such as illogical conclusions, contradictions, missing information, and unproven statements. **These are all CEQ violations!**

Errors tend to fall into a few basic categories:

- **There are errors in how the EIS describes the “problem” (although this is much less likely with a Forest Plan revision)**
- **There are errors in how the EIS sets up the alternatives it will study**
- **There are errors in how the EIS does the analysis**
- **There are errors of violating other regulations**

An Example

An Error in “Describing the Problem”:

The Sandia Ranger District EA included these statements in its Travel Management 'Purpose and Need'. It claimed they must:

- Minimize travel and recreation impacts to the environment (e.g., water quality, wildlife, riparian and wetland areas, etc.);
- Reduce recreation user conflicts;
- Designate a road and motorized trail system that can be maintained to standard within anticipated budget constraints.

Do you see the errors?

The Answers

These three items were ALL errors.

1. Neither the Travel Management Rule (TMR) nor NEPA nor Forest Service regulations tell the agency to “minimize impacts”. They tell the Forest Service to consider environmental impacts and balance resource protection with human uses and needs.
2. The Forest Service has no authority to “consider” or “reduce” user conflicts. The Forest Service's mission and authority are defined by Congress. Considering or reducing “user conflicts” is not in that legislation or in the TMR. The Forest Service IS told to consider conflicts among USES, not users.
3. The TMR does tell the Forest Service to designate roads, trails, and areas for motorized use. But the part about budget constraints is not accurate. TMR says that budget is a “consideration”. Budget is NOT a limiting factor. In the “Responses to Comments” part of the TMR, the Forest Service specifically rebuts commenters who wanted trail designations limited to only what the Forest Service can afford to maintain.

Another Example

Here was the first paragraph of “Existing Condition” in the Sandia Ranger District Travel Management EA. How many false statements can you spot?

“Motor vehicle use on the Sandia Ranger District has increased in recent years as the Albuquerque and East Mountain communities’ population continues to grow. This increased use has led to the proliferation of unauthorized (user-created) routes; increased conflict between motorized and non-motorized recreationists; complaints about noise, trespass, and dust from adjacent landowners; and concerns about degraded soil, water, vegetation, and wildlife habitat conditions.”

The Answers

Statements about growth in population were true. All of the rest of it is invented, what we call “manufactured problems”:

- Statements about proliferation of unauthorized routes are NOT legitimate because there was no proof of unauthorized routes or who created them. The Forest Service offered no map, mileage, location, or description for even one alleged unauthorized route. No proof at all. If there really were unauthorized routes, that statement is required (by NEPA) to be backed up with presented facts.
- User conflict was both unsubstantiated (unproven) and outside Forest Service authority.
- Complaints about noise, trespass, dust etc were all undocumented, and merely “anecdotal”. The EA presented no noise measurements, no air quality measurements, and no record of trespass complaints or citations.
- So-called “concerns” were simply unproven “worries” from the public or from the Forest Service itself. Again, they did not provide any proof that degradation was being caused specifically by motorized use.

The Real Problem

- As you can see, all of these so-called “problems” described in the Existing Conditions were inventions. They are “manufactured” issues, they were not real. It illustrates how quickly FALSE statements in the document can lead to BAD “solutions” (alternatives) offered, and ultimately, lead to a BAD decision.

Fixing the Problem

We know that the agencies makes many process errors. We want them to fix the errors that we find in the draft version of the EIS. If they take the process errors out, we will get better decisions by the decision maker. Why? Because solutions designed to fix phony problems are no longer logical. The EIS can't include them as possible choices for the decision maker. **To make them fix the errors, there is only ONE thing that they can do (because they have to follow the NEPA process):**

THEY CAN CHANGE WHAT IS IN THE FINAL VERSION OF THE EIS!



Substantive Comments

Finding process errors is only the **first half** of writing a substantive comment.

The **second half** of writing a successful substantive comment is amazingly easy. We simply tell the agency exactly **what we want changed** in the Final EIS so that the EIS is an accurate document.

Learning by Example

- *“There is a need for the Jicarilla Ranger District’s designated transportation system to be consistent with the primary purpose and intent of the travel management rule. This includes designating NFS roads, trails and areas on NFS lands for motor vehicle use, **while considering effects on** natural and cultural resources, public safety, recreational opportunities, access needs, and **conflicts among the various users.**”*

The first sentence is correct; they do have to obey the Travel Management Rule. The second sentence lists effects they must consider. Most of those are also correct because they were included in the TMR. But considering effects of “*conflicts among various users*” is not right. That is NOT part of the Travel Management Rule.

Now we write the comment in three steps:

1. Present the statement. (The Purpose and Need includes considering “user conflict”)
2. Explain why this is a process error. (The Forest Service has no authority from the TMR to consider “user conflict”)
3. Tell them how to fix it. (Remove all mentions of “user conflict” from the EIS, at pages x, y, and z).

The actual comment looks like this:

“The Carson National Forest’s Purpose and Need statement states that the Jicarilla District is considering the effects of conflicts among the various users. (Step 1)

NMOHVA must point out that considering the effects of “conflicts among various users” is a clear misinterpretation of the Travel Management Rule. The TMR does direct the Forest to consider “conflicts among uses”. It says, in part, in 36 CFR § 212.55 (a):

“...the responsible official shall consider effects on National Forest System natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of National Forest System lands...”

“Conflicts among uses” is NOT the same thing as “conflicts among various users.” We absolutely cannot allow the Forest Service to expand its regulatory authority into a realm where the proposed management regulations are in support of, or conversely, criminalize any activity based on individual differences of cultural, philosophical, and personal values. (Step 2)

NMOHVA asks that the Carson National Forest remove all reference to “conflicts among various users” throughout the document in the Final EA.” (Step 3)

What Good Does it Do to Change the EIS?

Here's what it does. When we take “user conflict” OUT of the Purpose and Need, we have cut the required rational connection between the Purpose and Need (consider “user conflict”) and the Proposed Solution (Close the trail to OHV use to “solve” user conflict). There is now no rational reason to close a trail to “fix” user conflict because “fixing user conflict” is no longer the goal (Purpose and Need) of the EA.

Now You Know!

So...three simple steps to writing a substantive comment:

1. Find the process error
2. Explain the error
3. Tell the agency exactly HOW to correct the error.

That's it! You now know everything you need to write a Substantive Comment that will actually impact the agency's decision.

Tips and Tricks

Here are a few simple “tips and tricks” that we have learned:

- An electronic version is EXTREMELY useful if you are handy with a computer. The documents are in an Adobe Acrobat (.pdf) format which means you can search for key words. We have found that to be VERY useful. For instance, you can search for specific words associated with the topic of interest and see where in the EIS those words appear. You might be able to ignore the other sections. At the very least, you know which sections/pages on which to concentrate your efforts.
- A hard copy is also very useful as it is far easier to flip back and forth between sections than scrolling through hundreds of pages.
- A simple “loose leaf” printed copy is better than a bound version because the pages will stay open without holding it down.

What's Next?

Writing substantive comments really is easy. But it takes time and practice to get to that point.



When you start reading an actual EIS and start writing comments, you will probably need to review these materials and refer back to them often.

No Silver Bullet – Hard Work!

- So while writing substantive comments is easy, successfully getting an EIS changed (and the Decision influenced) is still hard work. There is no “silver bullet”.
- But the process we described here today is EXACTLY the only way to do it. THERE IS NO OTHER WAY!

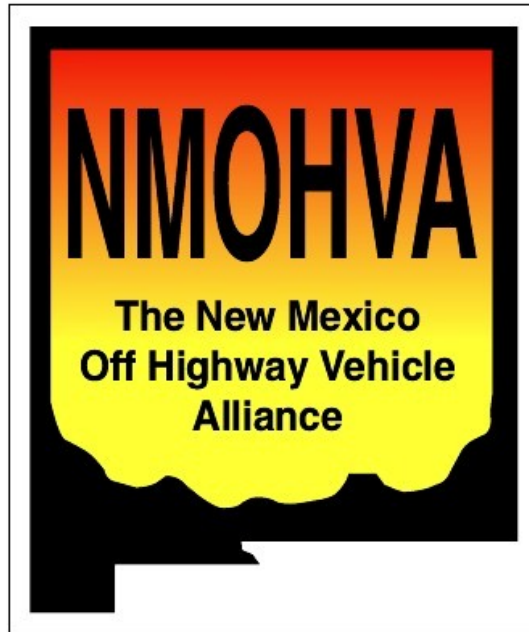


Writing Comments is Hard Work But Fun and Rewarding



- Knowledge is Power! Learning things can be hard work. It takes persistence and practice.
- READ! You will be amazed how much more you will know than the average agency worker if you simply read the regulations and the EIS.
- Agency personnel present themselves as experts but very few know even the basics of NEPA.
- Just knowing the material from this class gives you a big leg up on the agency you are trying to influence.

Thank You!



NMOHVA Website: nmohva.org