

Fatal NEPA Flaws?

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What agency NEPA compliance actions constitute fatal flaws? Shipley consultants routinely discuss different answers to this question with workshop participants. **Test yourself with the 10 NEPA project summaries given below.** Which ones are clear instances of fatal NEPA flaws?

A fatal NEPA flaw is one that is serious enough and obvious enough that a judge (or an agency legal counsel) would deem an EA or EIS unacceptable as written. Useful reviews of an EIS or EA should always identify fatal flaws because such flaws must be fixed if the EIS or EA is to go forward successfully. In contrast, not all minor NEPA errors need to be fixed. Remember that the majority of NEPA documents are not challenged in federal courts. Affected groups or individuals just aren't interested enough to spend money and time on legal challenges.

So some fatal flaws turn out not to be fatal--if an agency's NEPA compliance is not challenged! In the following list, I summarize ten NEPA analyses, ones based on actual agency compliance actions. I have made the details generic in order to protect the original sources.

Try to decide if each summary describe a fatal NEPA flaw. Then, what would be your rationale for deciding for or against the fatal flaw designation? After the following ten summaries, I discuss rationales for different answers.

1. An EA for an upgraded visitor center has zeros as ratings for the impacts of the No Action alternative. Text in the EA states that zeros are the impact projections because the proposed upgrade of the existing park facilities would not occur. The Affected Environment in this EA is thin, with only summary details about the existing conditions.
2. A project-specific EA is tiered to a programmatic DEIS (one still in preparation). The agency's position is that the ROD for the DEIS/FEIS will be signed shortly and that the projected DEIS has more up-to-date resource information than an existing FEIS and signed ROD. The agency's preferred alternative is the one that depends on decisions still being analyzed in the DEIS.
3. A project proponent for an exploratory oil/gas well pays for a consultant to prepare an EA. The consultant defines the No Action alternative as the proponent's plan of operation. Then, action alternatives are the proponent's plan with various mitigations.
4. Congress is considering additional agency training requirements. Even before Congress passes legislation, the agency decides to prepare an EA for an upgrade in facilities to allow for 1500 additional trainee days annually at an existing training facility. The resulting EA analyzes one action alternative that includes upgrades to accommodate 1500 additional days (one current proposal before Congress). A second action alternative analyzes upgrades to accommodate up to 2500 additional trainee days. The likelihood of Congress approving the 2500 additional days is viewed as unlikely from news accounts and from statements by members of Congress. The EA says that the 2500-day alternative is a "reasonable alternative."
5. An EA discloses several unmitigated adverse impacts. The agency decision maker decides to sign a FONSI without committing to any mitigations to lessen the adverse impacts. Note: as the EA discloses, the impacts, while adverse and undesirable, are not illegal, as in an illegal discharge of heated or contaminated water into a stream.

6. An EA discloses that a projected action will adversely affect some 10 acres of prairie grassland. The impacts are viewed as short term because they will likely last for only a single season. The impacts are also “minor because much of the surrounding land has grasslands of the same character, so wildlife will have sufficient habitat nearby.” The EA does not profile these surrounding grasslands as to their extent (context) and their value to wildlife (intensity). The EA states that no cumulative effects will occur, but offers no rationale for this conclusion.
7. An agency is tiering a grazing EA to a state-financed research report on grasslands, with an emphasis on sage grouse habitat. According to the EA, the report’s management recommendations are the basis, under tiering, for the main action alternative in the EA.
8. An EA studying a recreation proposal determines that impacts on antelope would occur. But antelope in the project area have not been studied in depth. The EA proposes as a key mitigation for possible impacts that ongoing monitoring of the antelope be funded. If monitoring discovers adverse impacts on antelope, then the recreation proposal will be adjusted.
9. A supplemental EA discusses changes to a stream improvement project under implementation. The original project, including upgrades of dikes and dredging of the channel, is being implemented under a signed ROD and FEIS. However, the agency has made enough adjustments to the project (as described in the ROD and FEIS) that the agency’s managers decided that additional NEPA compliance was necessary. The supplemental EA, relying on the EIS, concludes that all impacts are minor (and thus support a FONSI) because they do not exceed impacts already disclosed in the prior FEIS.
10. A programmatic EIS devoted to planning guidance for an established recreation facility refers to several prior planning documents, including an earlier EIS. The agency preparing the current EIS streamlines the compliance and documentation process by using incorporation by references to the prior planning documents and tiering to the earlier EIS. So readers of the current EIS must have the prior documents in front of them in order to see what the current planning guidance will include. Several of the referenced planning documents appear to be contradictory.

My interpretation is that summaries 1, 2, 3, 6, 7, 8, 9, and 10 are those that include fatal NEPA flaws. Summaries 4 and 5 are those without fatal flaws. See my rationales below for details supporting these judgments. As a convenience, I repeat the summaries so that you can easily refer to the summary details as you review the individual rationales.

1. An EA for an upgraded visitor center has zeros as ratings for the impacts of the No Action alternative. Text in the EA states that zeros are the impact projections because the proposed upgrade of the existing park facilities would not occur. The Affected Environment in this EA is thin, with only summary details about the existing conditions.

Discussion: The zeros are the fatal flaw. The No Action alternative routinely has effects; that is, the recreational features, sanitation provisions, and the appearance of the facility are in good condition, poor condition, or excellent condition. Such conditions should be recorded in the EA. Then the effects of the action alternatives are the differences (at a set future date) between the effects of the action alternatives and the baseline effects under the No Action alternative. Recording zeros forces readers to review the Affected Environment in an effort to profile baseline conditions at the chosen future date. As noted above, the existing conditions of the visitor center are poorly described in the Affected Environment. Clear negative effects of No Action would be a good argument for the proposed upgrade, so again, zeros don’t help either project clarity or legal compliance.

2. A project-specific EA is tiered to a programmatic DEIS (one still in preparation). The agency's position is that the ROD for the DEIS/FEIS will be signed shortly and that the projected DEIS has more up-to-date resource information than an existing FEIS and signed ROD. The agency's preferred alternative is the one that depends on decisions still being analyzed in the DEIS.

Discussion: The fatal flaw is inappropriate tiering. Tiering uses a signed NEPA document. Until work on the projected DEIS/FEIS is finished and a ROD is signed, tiering to the new NEPA analysis is not possible. In cases where a new NEPA decision is projected (as in the upcoming DEIS/FEIS), the EA would usually have two action alternatives, one without the projected compliance decisions in place and one that uses assumptions that may eventually be in place. In such cases, an agency might sign a double FONSI. The agency assumption is that if the new ROD is final by implementation, the alternative that uses the new ROD information would be implemented. Otherwise, the alternative with the existing guidance in place would be implemented.

3. A project proponent for an exploratory oil/gas well pays for a consultant to prepare an EA. The consultant defines the No Action alternative as the proponent's plan of operation. Then, action alternatives are the proponent's plan with various mitigations.

Discussion: The fatal flaw is the incorrect definition of the No Action alternative. The effects of No Action are supposed to be the baseline against which the action alternatives are measured. Based on the situation in the summary, the action alternatives would all have lesser impacts than the No Action alternative, so the baseline would have the most adverse impacts. The analysis is turned upside down from the usual NEPA situation.

4. Congress is considering additional agency training requirements. Even before Congress passes legislation, the agency decides to prepare an EA for an upgrade in facilities to allow for 1500 additional trainee days annually at an existing training facility. The resulting EA analyzes one action alternative that includes upgrades to accommodate 1500 additional days (one current proposal before Congress). A second action alternative analyzes upgrades to accommodate up to 2500 additional trainee days. The likelihood of Congress approving the 2500 additional days is viewed as unlikely from news accounts and from statements by members of Congress. The EA says that the 2500-day alternative is a "reasonable alternative."

Discussion: No fatal flaw exists. The agency is within its discretion and perhaps even wise to develop alternatives that cover a range of possible congressional actions. A high-level alternative, such as the one using 2500 additional days, would be a prudent way to have such an option already analyzed before Congress finally makes its decision.

5. An EA discloses several unmitigated adverse impacts. The agency decision maker decides to sign a FONSI without committing to any mitigations to lessen the adverse impacts. Note: as the EA discloses, the impacts, while adverse and undesirable, are not illegal, as in an illegal discharge of heated or contaminated water into a stream.

Discussion: No fatal flaw exists. Agencies routinely sign FONSIs on projects that have adverse impacts. NEPA does not mandate that all adverse impacts be mitigated. Instead, mitigation is necessary when impacts are likely to violate a substantive law, like the Clean Water Act. Many adverse impacts, such as a minor ground disturbance, are an expected adverse impact from many projects.

6. An EA discloses that a projected action will adversely affect some 10 acres of prairie grassland. The impacts are viewed as short term because they will likely last for only a single season. The impacts are also "minor because much of the surrounding land has grasslands of the same character, so wildlife will have sufficient habitat nearby." The EA

does not profile these surrounding grasslands as to their extent (context) and their value to wildlife (intensity). The EA states that no cumulative effects will occur, but offers no proof.

Discussion: The fatal flaw is the failure of the EA to profile the grasslands surrounding the project area to be affected. So the projected impacts on the 10 acres and on associated wildlife are not clearly described as to their context and intensity. Also, the EA fails to address cumulative impacts adequately. The statement that no cumulative impacts are present is not adequate unless it is explained.

7. An agency is tiering a grazing EA to a state-financed research report on grasslands, with an emphasis on sage grouse habitat. According to the EA, the report's management recommendations are the basis, under tiering, for the main action alternative in the EA.

Discussion: The fatal flaw is the tiering to a non-NEPA document. Tiering presumes a signed NEPA decision document, which is then binding on the agency. A report from a state agency is perhaps useful information, which can be incorporated by reference, but its guidance is not legally binding, as implied in the above summary.

8. An EA studying a recreation proposal determines that impacts on antelope would occur. But antelope in the project area have not been studied in depth. The EA proposes as a key mitigation for possible impacts that ongoing monitoring of the antelope be funded. If monitoring discovers adverse impacts on antelope, then the recreation proposal will be adjusted.

Discussion: The fatal flaw is that monitoring is not a mitigation. The antelope population might crash before monitoring discovered the impacts. One purpose of a NEPA document is to disclose possible impacts in cases where an agency is unsure exactly what will happen.

9. A supplemental EA discusses changes to a stream improvement project under implementation. The original project, including upgrades of dikes and dredging of the channel, is being implemented under a signed ROD and FEIS. However, the agency has made enough adjustments to the project (as described in the ROD and FEIS) that the agency's managers decided that additional NEPA compliance was necessary. The supplemental EA, relying on the EIS, concludes that all impacts are minor (and thus support a FONSI) because they do not exceed impacts already disclosed in the prior FEIS.

Discussion: The fatal flaw is relying on impact information from an EIS in arriving at a FONSI decisions. An EA cannot automatically rely on the impacts discussed in an EIS as the grounds for its FONSI. Often discussions in an EIS are not sufficiently detailed to support a FONSI. Also, some or many impacts identified in an EIS might be major and, thus, significant. Just discussing them in an EIS does not make them minor and does not support a later FONSI. Also, the agency made a risky decision when it decided to use a supplemental EA rather than a supplemental EIS. Usually, agencies choose to supplement using the same level of NEPA document as was used in the earlier decision.

10. A programmatic EIS devoted to planning guidance for an established recreation facility refers to several prior planning documents, including an earlier EIS. The agency preparing the current EIS streamlines the compliance and documentation process by using incorporation by references to the prior planning documents and tiering to the earlier EIS. So readers of the current EIS must have the prior documents in front of them in order to see what the current planning guidance will include. Several of the referenced planning documents appear to be contradictory.

Discussion: The fatal flaw is the unclear presentation of confusing, even contradictory, planning information. A federal court properly decides if information in an EIS or EA is sufficiently clear that

a lay person can understand what is being disclosed. In this case, the unclear planning guidance would make disclosed impacts also unclear, even incomprehensible. The earliest NEPA court cases in the 1970's established the NEPA standard that impacts disclosed must be clear to lay readers despite including enough information to be technically adequate.

Recommendation: Use the fatal flaw strategy when you want to provide comprehensive comments on a NEPA document. If you find yourself listing, for example, some 30, 300, or even more review comments, screen your comments for fatal flaws. You will likely find a short list of essential flaws for the writers to correct. Highlight your identified fatal flaws either by asterisks or, preferably, by listing them on the opening page/screen of your review comments. This strategy will help your review comments be useful to writers, who will instantly know what corrections are essential for them to make.