

Application of NEPA – Common Misconceptions and Recurring Shortcomings

Craig Juckniess – Office of Counsel, Seattle District¹

1. NEPA - brief background:
 - a. One of the first generation of modern environmental laws.
 - i. Designed to achieve environmental goals through information collection and dissemination, but NEPA does not actually mandate protection of the environment:
 1. As compared with the next generation of laws that relies on direct regulation/permitting, and which generally apply in a single medium (e.g., Clean Water Act, Clean Air Act, RCRA);
 2. As compared with environmental regimes that rely on litigation for their execution (e.g., CERCLA);
 3. As compared with hybrid programs that have elements of both planning/information and regulation (e.g., ESA).
 - b. A very influential environmental regime
 - i. By far, NEPA is the U.S. environmental regime that is most widely copied around the world.
 - ii. Many commentators feel that NEPA (and state mini-NEPAs) have had a profound effect on the way the public agencies conduct their business (although the full effect is too intangible to accurately measure).
 - c. For all that influence, there are not that many formal NEPA documents.
 - i. In 1970s, over 2,000 EISs were conducted per year
 1. Many agencies were catching up by evaluating existing programs following NEPA's enactment in 1969.

¹ The viewpoints expressed in this outline reflect the perspective of the author, and not necessarily the official position of the Corps of Engineers or the United States government.

- a. Early EISs were minor documents measured against the increasingly sophisticated standards of today.
 - ii. The latest estimate is that all Federal agencies conduct only 500 EISs per year.
 - 1. and about 50,000 EAs;
 - 2. over 80% of NEPA documents are prepared by only 5 Federal agencies – ACOE, USFS, BLM, HUD, and FHWA.
- d. NEPA is procedural (Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)).
 - i. Courts will not substitute their judgment for that of the agency as to the significance of the environmental impacts. (Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Circuit, 1980)).
 - ii. As long as the process is followed carefully and environmental impacts are taken into full consideration, NEPA actually places few direct limits on the discretion of agencies to make substantive decisions.
 - 1. Environmental concerns need not be elevated above other appropriate considerations. (Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980)).
 - 2. On the other hand, NEPA has probably sparked more litigation than any other environmental program.
 - a. Court challenges are occasionally intended to stop a project completely, but more often the goal is to exact concessions, such as:
 - i. The consideration of new alternatives;
 - ii. Modifications to the manner of implementation; or
 - iii. New elements of mitigation.

2. Misconception #1: NEPA applies only to a major Federal actions significantly affecting the quality of the human environment.

- a. That is the standard for determining *when to prepare an EIS*, but the range of activities to which NEPA applies is much greater.
 - i. NEPA applies to *any* proposed Federal action (40 CFR § 1501.4).

1. an “action” includes (40 CFR § 1508.18):
 - a. policies, rules;
 - b. most relevant to Civil Works Program: plans, programs;
 - c. most relevant to Regulatory Program: approvals of projects.
- b. Individual agency regulations are the key to determining what actions must be evaluated:
 - i. Corps regulations implementing NEPA: found principally at 33 CFR Part 230.
 1. for the Regulatory Program are found principally at 33 CFR §§ 320; 325, Appendix B.
 - ii. If the proposal qualifies as an “action,” it must be addressed under one of the following three options:
 1. It is categorically excluded from the requirement to prepare an EIS;
 - a. The Corps’ list of CATEXes is found at 33 CFR § 230.9.
 - b. CATEXes are further discussed below.
 2. It “normally” requires an EIS; or
 - a. The Corps’ list of activities that normally require an EIS is found at 33 CFR § 230.6.
 3. If the proposal falls into neither of the above two categories, then an EA must be completed.
 - a. As a counterpart to the list of activities normally requiring an EIS, the Corps also has a list of activities normally requiring only an EA, found at 33 CFR § 230.7

3. Misconception #2: An EIS need only be prepared for a big, or “major,” Federal action.

- a. The term “major” has effectively no meaning in limiting the range of Federal actions that must comply with NEPA (40 CFR § 1508.18; Andrus v. Sierra Club, 442 U.S. 347 (1978)).
- b. If the proposed action is a:
 - i. Federal
 - ii. action
 - iii. of significant environmental impact:
 1. then an EIS must be prepared.

- c. The key is not the size of the Federal action, but the nature of its effects.

4. **Misconception #3: There are no exemptions from NEPA.**

- a. NEPA exempts a number of categories of activities, both explicitly and implicitly.
 - i. CATEXes: types of activities that, individually and collectively, do not have significant impacts on the human environment (40 CFR § 1501.4(a)(2); 33 CFR § 230.9).
 - 1. Technically, these are not exemptions from NEPA, but exclusions from the EIS requirement, based on a categorical evaluation that the group of activities generally has minimal impact.
 - 2. Civil Works Program examples:
 - a. Many O&M activities;
 - b. Maintenance dredging with disposal at existing sites;
 - c. Routine real property transactions;
 - d. Planning and technical studies that don't result in specific recommendations.
 - 3. Regulatory Program examples:
 - a. Small marine facilities;
 - b. Minor maintenance dredging;
 - c. Minor utility lines;
 - d. Applications under Section 404 that involve minor impacts and are addressed with a Letter of Permission.
 - 4. **Shortcoming #1: Failure to fully evaluate an action that is contained in a CATEX listing.**
 - a. A CATEXed activity must still be assessed to determine if the specific project under consideration has unusual effects (“extraordinary circumstances”) that remove it from the ambit of the CATEX (33 CFR § 230.9).
 - ii. Express statutory exemptions:
 - 1. E.g., actions under the BRAC program.
 - iii. Implicit Statutory exemptions:

1. E.g., an action is exempt if a legislatively mandated deadline gives an impossibly short time for NEPA compliance (essentially, the later legislation has superseded NEPA in this instance) (Flint Ridge Development Corp. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976)).
2. E.g., an action is exempt if the manner in which a civil works project is directed effectively forecloses consideration of environmental concerns (League of Women Voters v. Corps, 730 F.2d 579, (10th Circuit, 1984)).

5. Misconception # 4: The Corps is never responsible for NEPA evaluation of matters that are beyond its responsibility or jurisdiction.

- a. Although generally the Corps is responsible for evaluating only its own activities, there are two instances where the scope of responsibility expands to other matters:
 - i. If the Corps is the lead agency on a project that includes non-Corps activities: the Corps would be responsible for at least coordinating, if not actually conducting, the environmental impacts analysis of the non-Corps facets of the activity. (40 CFR § 1501.5(a); 33 CFR § 230.16).
 - ii. Even though the Corps has oversight over only a “small handle” of an entire project, it may sometimes have to grab responsibility for the entire package:
 1. The “small handle” concept usually arises in the regulatory context, but may also come up in technical assistance authorities under the Civil Works Program.
 2. E.g., in the SPN case of a recycled wastewater pipeline supplying a geothermal plant with injection water, 25 miles of pipeline included only a single 100-foot stream crossing under Corps jurisdiction.
 - a. The Corps’ review responsibility was limited to the small area of Federal jurisdiction, and the Corps thus needs only to conduct the EA that is usually applicable to permit matters (Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Circuit, 1980)).
 3. But if it is possible to argue that but for the Corps approval, the entire project could not be built, then the Corps’ approval of even just the “small

handle” may be viewed as “causing” the significant impacts of the entire project.

- a. Even if the construction process of a water-dependent facility, such as a marina, has no unusual or significant impacts, the long-term operation may trigger an EIS, or the cumulative or indirect (e.g., growth-inducing) impacts may do so.

6. Shortcoming #2: Inadequate Scoping.

- a. Scoping is the point where careful overlap between the planning process and the NEPA compliance process is crucial.
 - i. The NEPA process steps must be identified and addressed *early* in the planning process.
- b. If you follow the NEPA process carefully by doing the following, you are generally safe in assuming you have complied with NEPA:
 - i. fully disclose and discuss the alternatives and impacts;
 - ii. articulate the basis for the decision made; and
 - iii. build in mitigation as feasible and appropriate.
- c. However, there are at least two surefire ways of losing against a NEPA challenge:
 - i. Take premature action in planning (or, in an extreme example, prematurely implement a facet of a project) that forecloses/restricts alternatives or limits mitigation opportunities.
 - ii. Have a decision already in mind and then justify this predisposed conclusion after-the-fact in the NEPA document.
 - iii. Often, a predisposition deficiency cannot be readily repaired later.
 1. The solution is often to go back and repeat the NEPA analysis and decision making steps – at significant cost in time and expense.
- d. Early attention to NEPA’s requirements is essential.
 - i. NEPA is not just a plug-in component of the planning process, that is accomplished somewhere near the end just prior to formal decision.
- e. Scoping is the first step in the NEPA procedure.
 - i. A public process that: (40 CFR § 1501.7; 33 CFR § 230.12)

1. Identifies the objective of the project;
 - a. Scoping separates the activities into those elements that can legitimately be independently evaluated through distinct NEPA documents.
 - b. If projects are separated into components that are too small, there is a risk of a challenge for “piecemealing,” or fragmenting an insular project improperly into smaller pieces, each of which have impacts that are not significant enough to justify an EIS.
 2. Identifies alternatives and winnows the list of alternatives down to a manageable few for fullest evaluation; and
 3. Clarifies the environmental impacts that will be given the greatest consideration.
- f. Scoping must be conducted at the time the agency is “developing” a proposal (40 CFR § 1502.5).
- i. As a Civil Works project transitions from the reconnaissance stage to the feasibility stage, for example, and the project purpose is being articulated so the feasibility study can be initiated -
 1. Concerned agencies and the public should *already* be involved before the study’s general direction is determined.
 2. This stage of the planning process corresponds to the NEPA scoping stage.
- g. **Shortcoming #3: Misuse of the “tiering” process to either piecemeal an action into impermissibly small components, or to justify a proposal with insufficiently detailed analysis.**
- i. “Tiering” refers to starting with a generalized analysis of a broad area (a programmatic EIS) and subsequently proceeding to one or more project-specific NEPA documents to address each of the program’s component element(s). (40 CFR § 1502.20; 33 CFR § 230.13(c)).
 - ii. A programmatic EIS can never support a specific action, because of its generalized outlook.
 1. It must always be followed by one or more project-specific EISs or EAs.

7. Shortcoming #4: The range of alternatives considered at the scoping stage, and addressed in the NEPA document, is inadequate.

- a. The alternatives analysis is the “heart” of an EIS. (40 CFR § 1502.14).
 - i. The no-action alternative must always be assessed. (40 CFR § 1502.14(d)).
- b. All “reasonable” alternatives need be assessed. (Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Circuit, 1980)).
 - i. The term “reasonable” has both a limiting and enlarging meaning:
 1. Outlandish alternatives are unreasonable and need not be considered.
 2. On the other hand, the range of “reasonable” alternatives must include those that are practical or feasible from a technical, economic, and common sense standpoint, as opposed to just those that are “desirable” in the eyes of the agency. (CEQ Frequently Asked Question #2a.).
 - ii. Even alternatives that are *outside the agency’s authority* must be identified and evaluated, if they are otherwise “reasonable.” (Robertson v. Methow Valley Citizens Council, 490 U.S. 322 (1989)).
 1. If that reasonable alternative falls under another agency’s responsibility, the Corps must nevertheless evaluate it. (CEQ Frequently Asked Question #2b).
 - a. A purpose of NEPA is to inform other agencies of activities that may impact their operations, and to foster inter-agency coordination.
 2. If that reasonable alternative would require legislative authorization, it must still be evaluated. (NRDC v. Morton, 458 F.2d 827 (D.C. Circuit, 1972)).
 - a. A purpose of NEPA is to carry recommendations for program and project authorization to Congress.
 3. Even a conflict with local or Federal law does not render an alternative unreasonable. (CEQ Frequently Asked Question #2b).

8. Misconception #5: All actions having significant effects on the human environment require an EIS.

- a. Actions with significant effects, where those effects are nevertheless *mitigated to a level of insignificance*, can be addressed in an EA. (Sylvester v. Corps, 882 F.2d 394 (9th Circuit, 1989); CEQ Frequently Asked Questions 39 and 40).
 - i. This is referred to as a “mitigated FONSI.”
 - ii. Apparent limitations on use of a mitigated FONSI:
 1. CEQ guidance suggests that a project can only be evaluated with an EA by mitigating significant impacts into insignificance if:
 - a. The agency is obligated under law to undertake the mitigation measure;
 - b. The mitigation measure is fully integrated into the manner in which the project will be implemented; or
 - c. The mitigation measure is made a part of a permit applicant’s proposal. (CEQ Frequently Asked Questions 39, 40; see Foundation for North American Wild Sheep v. Department of Agriculture, 681 F.2d 1172 (9th Circuit, 1982)).
 - iii. In theory, a proposal mitigated to a level of insignificance will no longer have any significant impacts.
 1. However, there is a gap in NEPA that does not actually require implementation of any mitigative action.
 - a. Failure to accomplish mitigation does not render an EA invalid.
 - b. However, a change in the agency’s planned action may prompt a Supplemental EIS.
 - c. NEPA does not require that adverse environmental effects be ameliorated at all. Robertson v. Methow Valley Citizens Council, 490 U.S. 322 (1989).
 - d. NEPA merely requires consideration and discussion of appropriate mitigation in an EIS. (40 CFR §§ 1502.14(f), 1502.16).
 - iv. For an EIS, there is greater latitude given the agency to rely on mitigation measures as ameliorating the effects.
 1. Mitigation need not be obligatory in order for the agency to cite the measures in an EIS and claim the ameliorative effect.

- a. The rationale for the different standards for an EA vice an EIS is that when an agency prepares an EA, it must effectively justify its decision not to prepare a full EIS; when an agency completes an EIS, its full discussion of impacts and mitigation meets the NEPA standards, because NEPA does not control the substantive results.
- v. There is conflicting direction as to whether an agency is obligated to follow through and accomplish mitigation, or even whether it must monitor for progress toward mitigation and keep the public updated.
 1. Through the Record of Decision, an agency is required to affirmatively adopt any mitigation measures it has selected, and to assert that they will be undertaken.
 - a. The ROD is required to indicate whether all practicable means of avoiding or minimizing environmental harm have been adopted, and if not, why not. (40 CFR § 1505.2(c)).
 - b. CEQ regulations ostensibly require an agency to establish a monitoring plan and to follow through on mitigation. (40 CFR § 1505.3).
 - c. Corps implementing regulations require establishment of a monitoring plan and public reports of adherence to that plan. (33 CFR § 230.15).
 - d. Arguably, failure to follow Federal government-wide and Corps regulations regarding accomplishing mitigation could lead to a successful court challenge against arbitrary and capricious agency action.
 2. Case law apparently contradicts the requirement to accomplish mitigation:
 - a. The description of mitigation measures need not be detailed, as long as it is not perfunctory. (National Parks & Conservation Ass'n v. DOT, 222 F.3d 677 (9th Circuit, 2000)).
 - b. The mitigation plan that is described in the EIS and in the ROD need not be final, funded, or enforceable, because NEPA does not

mandate mitigation. (Robertson v. Methow Valley Citizens Council, 490 U.S. 322 (1989)).

3. The lesson in this unsettled area is to tread warily if the full mitigation plan is not subsequently implemented, and consider promulgating supplementary NEPA documentation explaining this decision, because there is a risk of the Corps' initial EIS being found deficient for having misinformed the public of the parameters of the project, or a risk that the Corps will be found to have acted arbitrarily by not following through on the project under the terms that were before the decision maker at the time the ROD was signed.

9. **Misconception #6: If a project has significant socio-economic effects, an EIS is required.**

- a. NEPA is principally concerned with effects on the *physical* environment.
 - i. So an EIS is triggered only if there are significant impacts on the natural environment. (Metropolitan Edison Co. v. PANE, 460 U.S. 766 (1983)).
 - ii. If the project has *only* economic, social, cultural, historic, and/or aesthetic impacts, no EIS is triggered.
- b. However, if an EIS is triggered because of significant effects on the natural environment, then *all* those social, economic, etc. effects must also be fully assessed.

10. **Misconception #7: Only adverse effects on the environment are of interest under NEPA.**

- a. The continuum of adverse/neutral/beneficial impacts is relevant to triggering Endangered Species Act requirements, for example.
- b. However, there is no NEPA limitation that only adverse environmental effects need be addressed.
 - i. All actions that significantly affect the quality of the human environment require an EIS. (NEPA section 102(2)(C)).
- c. Actions that have purely beneficial impacts are rare to find.
 - i. E.g., actions that preserve the precise natural environment involve no alteration in the physical environment, so NEPA is not triggered in the first place. (Douglas County v. Babbitt, 48 F.3d 1495 (9th Circuit 1995)).

- d. Most actions will, at best, have a mix of beneficial and adverse impacts.
 - i. Even if the net effect is undeniably beneficial, an EIS is still required.
 - ii. E.g., an SPN project restored an ex-military installation, remediated contamination, and established habitat for endangered species.
 - 1. Detractors found little to object to.
 - a. However, there are always differing environmental values that must be balanced, choices and priorities to be drawn, and decisions about how much is enough; furthermore, there were construction-phase impacts.
 - 2. So, an EIS was required.
- e. Even where the process of NEPA compliance will delay implementation of a net beneficial project, NEPA compliance will likely be required.

11. Misconception #8: NEPA requires an agency to implement the environmentally “best” decision.

- a. NEPA requires consideration of every significant aspect of the environmental impact of a proposed action. (NEPA section 102(2)(A)).
 - i. The agency must take a “hard look” at impacts. (Robertson v. Methow Valley Citizens Council, 490 U.S. 322 (1989)).
- b. NEPA establishes no standards or obligations for what the decision must be, or should be.
 - i. Courts will not substitute their judgment for that of the agency as to the environmental consequences of their actions. (Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Circuit, 1980)).
 - ii. The fact that a court, or the plaintiff, would have chosen a different alternative does not invalidate an EIS. (Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)).
 - 1. The fact that technical experts disagree about the impacts of a proposal does not invalidate an EIS’s analysis. (Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)).
 - iii. Competing environmental considerations ensure that the “best” decision is always in the eye of the beholder, anyway.

- c. NEPA is procedural, not substantive. (Robertson v. Methow Valley Citizens Council, 490 U.S. 322 (1989)).
 - i. NEPA only requires informed and well-considered decisions. (Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)).
 - 1. The NEPA process requires that (40 CFR § 1500.1(b)(c)):
 - a. Agency decisionmakers be informed of impacts.
 - b. The public be informed of effects prior to decisions being made, and be given a mechanism to participate.
- d. The ultimate enforcement of NEPA is in the courts, so the ultimate standard to which an agency decision is held is that used by the courts.
 - i. There is not full agreement as to the label applied to the standard of review:
 - 1. Supreme Court: looks at whether the action is arbitrary or capricious due to lack of full consideration under NEPA.
 - 2. 9th Circuit: looks at whether an agency's decision is "reasonable."
 - 3. They each effectively reach a similar result: whether a reasonable decision maker could conceivably have reached the conclusion that this was an appropriate course of action, based on the information presented in the agency's administrative record.
- e. How do you demonstrate non-arbitrary, or reasonable, analysis if challenged?
 - 1. Follow procedure assiduously.
 - 2. Document your conclusions carefully.
 - ii. Even the most unobjectionable of decisions, such as creation of new endangered species habitat, is subject to challenge for failure to comply with NEPA's procedure if you fail to document.
- f. The concept of an environmentally preferable alternative often misleads the public into believing that this "best" option must be selected.
 - i. The NEPA document need not specify the environmentally preferable alternative.
 - 1. For an EA, there is no requirement to identify it.
 - 2. Following an EIS, the ROD must identify this alternative. (40 CFR § 1505.2).

- i. “Environmentally preferable”: the option least damaging to the biological and physical environment.
- b. There is no obligation to actually select or implement this alternative. (CEQ Frequently Asked Question #6a).
 - i. The identification of the environmentally preferable alternative appears to merely provide a degree of emphasis for the benefit of the agency decisionmakers.
- c. The ROD must identify and discuss all the factors that led instead to the selection of the *preferred* alternative. (40 CFR § 1505.2).

12. Shortcoming #5: Inadequate assessment of all the indirect impacts of a proposed action.

- a. Indirect impacts are those *caused by* the action and foreseeable at the time of decision. (40 CFR § 1508.8(b)).
 - i. Indirect impacts may occur at a different time and in a different location than the agency action.
- b. The most common indirect effect of an agency proposal that must be articulated and assessed: its potential growth-inducing effects.
 - i. These effects are often overlooked completely, or at least inadequately evaluated.
 - ii. Regulatory example of a permit application commonly having growth-inducing effects: a marina development.
 - iii. Civil Works examples of water resources projects commonly having growth-inducing effects: flood control projects, navigation channel deepening projects.
- c. NEPA requires consideration and discussion of indirect effects, similar to direct effects. (40 CFR § 1502.16).
 - i. There is no mandate that indirect effects be fully or even partly ameliorated or mitigated.
 - 1. Any adverse environmental effects that cannot be avoided must merely be “discussed.” (40 CFR § 1502.16).
 - ii. Mitigation measures shall be identified and implemented as the agency finds “appropriate.” (40 CFR § 1502.14(f)).

13. Shortcoming #6: Inadequate assessment of all the cumulative impacts of a proposed action.

- a. Cumulative impacts differ from indirect impacts. (40 CFR § 1508.8(b)).
 - i. Cumulative impacts are caused by the incremental increase in total environmental effects, when the evaluated project is added to other past, present, and reasonably foreseeable future actions
 - ii. Cumulative impacts can thus arise from causes that are totally unrelated to the project being evaluated.
 - iii. A cumulative analysis looks at the life cycle of the *effects*, not of the project at issue.
- b. Objection to cumulative analyses is the challenge du jour under NEPA.
 - i. Agencies are vulnerable on their cumulative impacts analysis, precisely because the standards are vague, these assessments are extremely difficult and time-consuming to conduct, and the effects are imprecise to measure.
- c. The incremental impact of the proposal under evaluation must be added not just to existing (i.e., past and present) actions of others.
 - i. But to future proposed actions, as well.
 - 1. However, not all theoretically possible actions need be assessed.
 - 2. A rule of reason applies, establishing limits on how far the analysis must go. (Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Circuit, 1980)).
 - ii. Public and private actions, alike, are assessed in a cumulative analysis.
- d. Frequently, these cumulative effects will fall under the responsibilities of different entities
 - i. This potentially leads to finger-pointing as to which proposal “causes” the bulk of the impact.
 - ii. Coordination among agencies on possible synergistic, regional solutions is encouraged.
- e. NEPA requires consideration and discussion of cumulative effects, similar to indirect effects. (40 CFR § 1502.16).
 - i. There is no mandate that cumulative effects be fully or even partly ameliorated or mitigated.

14. Shortcoming #7: Adequately coping with incomplete or unavailable information on environmental effects.

- a. There is considerable confusion about assessing effects that are on the frontiers of knowledge.
 - i. A contributing confusion factor is the fact that the rules have changed.
 1. You may have heard that a worst-case analysis was required, if insufficient information was available to rule out a particular potential consequence.
 2. Worst-case analyses are no longer required. (Robertson v. Methow Valley Citizens Council, 490 U.S. 322 (1989)).
- b. Present rule: in a field of technical uncertainty:
 - i. Only reasonably foreseeable effects must be evaluated. (40 CFR § 1502.22).
 - ii. The agency must acquire the information to resolve the uncertainty, unless:
 1. There are no known means of acquiring the information, or
 2. The cost of acquiring it is exorbitant.
 - iii. If the information is still unavailable, the EIS must summarize the relevant existing credible scientific information
 1. And must still evaluate the impacts based upon theoretical approaches accepted within the scientific community
 2. But need not engage in conjecture over highly speculative and highly indefinite consequences. (Sierra Club v. Marsh, 769 F.2d 868 (1st Circuit, 1985)).

15. Shortcoming #8: An improper amount of public participation is afforded (sometimes less participation than NEPA requires, sometimes more participation than is necessary).

- a. The degree of public participation is now the greatest difference between an EA and an EIS.
 - i. For a large project (as opposed to a project with significant environmental effects), the content, form and even the size of an EA can now rival an EIS.

- b. The EIS public engagement process is relatively well-known (40 CFR Part 1503; 33 CFR § 230.13(a)):
 - i. A Draft EIS is promulgated for public comment.
 - ii. The EIS's conclusions are reevaluated in light of the comments received.
 - iii. A Final EIS is promulgated, if necessary to revise the entire document (vice merely appending any new or modified material).
 - iv. The agency must delay implementation of the project until 30 days after the Final EIS is promulgated. (40 CFR § 1506.10(b)).
 - 1. Or until 90 days after the Draft EIS is promulgated, if that Draft EIS remains unchanged.
- c. Public notice requirements for an EA are less onerous:
 - i. Public notice and comment are required only if:
 - 1. The action would normally require an EIS, or
 - 2. The action is unprecedented.
 - 3. This public notice period extends for 30 days, before a FONSI may be issued (and before a final decision not to prepare an EIS may be made). (40 CFR § 1501.4(e)).
 - ii. When there is a draft engineering report already being distributed for public review:
 - a. such as a feasibility study, a CAP program feasibility analysis, or a planning/engineering report
 - 2. A Draft EA is also distributed for review by concerned agencies and interested members of the public. (33 CFR § 230.11).
 - a. For a 30-day minimum period.
 - iii. When a Public Notice announcing discharge of maintenance dredging material is being promulgated:
 - 1. The Public Notice will indicate the availability of the EA for public review. (33 CFR § 230.11).
 - 2. However, there is no requirement that public comment be solicited, or that any waiting period take place. (40 CFR § 1501.4(e)(1)).

iv. In all other cases, the Corps need only send a Notice of Availability of an EA/FONSI to concerned agencies and members of the public who have expressed interest. (33 CFR § 230.11).

1. Once again, there is no requirement that public comment be solicited, that any waiting period take place, or that a public response be made to any comments submitted. (40 CFR § 1501.4(e)(1)).

d. Shortcoming #8: Negative comments of other agencies are given inadequate emphasis.

i. Negative comments from other agencies don't, in and of themselves, bar an agency from proceeding with its proposal.

1. Concerned agencies are often involved in EIS review due to their technical expertise, and courts give official opinions within an agency's field of expertise substantial weight.

ii. Courts will often impose an increased obligation to explain clearly and in detail an agency's reasons for proceeding, contrary to the recommendations of an environmental agency.

16. Shortcoming #9: Not all timely comments received from concerned agencies and the public are addressed.

a. In cases of EAs where a comment period is prescribed, and for every EIS, every comment must be considered, although suggestions in comments need not be adopted.

b. The agency must specifically respond to every comment in some manner. (40 CFR § 1503.4).

i. Means of response available to the agency:

1. Modify the alternatives;
2. Develop and evaluate new alternatives and/or mitigation;
3. Supplement or modify the impacts analysis; or
4. Explain why none the above three responses is necessary.

c. A response must be provided, and distributed in the Final EA or EIS, for each comment received.

i. Similar comments may be grouped and responded to collectively.

17. Misconception #9: A Final EIS and a ROD are the final stages of NEPA compliance.

- a. A Final EIS must be supplemented if (40 CFR § 1502.9(c)):
 - i. The project is substantially changed, causing relevant environmental concerns that rise to the level of significant effects and were not addressed in the original EIS. (City of South Pasadena v. Slater, 56 F. Supp. 1106 (Cent. Dist. Calif., 1999));
 1. The lesson here is to evaluate the effects of all the leading alternatives fully.
 - a. If, after the ROD is issued, a different alternative is selected, the Corps may need only to re-issue the ROD (and need not revisit the EIS) if the newly selected alternative was fully discussed.
 - ii. Noteworthy new circumstances or information, rising to the level of significant environmental effects, arise after the EIS is finalized.
 1. Examples of triggering circumstances:
 - a. New technical information regarding the nature or degree of impacts.
 - b. A new listing of endangered species, or a new designation of critical habitat.
 - i. If reinitiation of ESA consultation is required, it is very possible that a Supplemental EIS will also be required.
 - b. A Supplemental EIS is similar in process and content to a full-blown EIS, although it is focused on the narrow issue on which there has been a change. (40 CFR § 1502.9; 33 CFR § 230.13(b)).
 - i. The scoping stage is not revisited.
 - ii. A public review draft is promulgated; comments are responded to; and a Final Supplement to the EIS is issued accompanied by a ROD.
 - c. If substantial new information arises regarding implementation of the project, or regarding the nature of the project's environmental effects, but no new significant effects beyond those already addressed in the EIS are noted:
 - i. The new information should still be memorialized for the administrative record in a Supplemental Information Report. (33 CFR § 230.13(d)).

- ii. An SIR is made available to concerned agencies and the public, but is not distributed for public review and comment.

18. Shortcoming #10: Inadequate consideration of environmental justice issues.

- a. When evaluating environmental justice, an agency assesses whether a particular group (racial, ethnic, or socioeconomic) is bearing a disproportionate share of the negative environmental consequences.
 - i. Environmental justice is the most serious unresolved issue regarding environmental planning.
 - ii. Common examples of environmental inequity:
 - 1. Siting of undesirable facilities, such as sewage treatment plants, waste treatment facilities, jails, and freeways;
 - 2. Failure to distribute amenities such as parks;
 - 3. Failure to give balanced attention to all contaminated sites.
- b. NEPA does not specifically mandate consideration of environmental justice issues.
 - i. Executive Order 12,898 requires all Federal agencies to execute their programs so as not to exclude, deny benefits to, or discriminate against minority and low-income populations.
- c. Some aspects of the Corps' project planning process appear to institutionalize environmental justice concerns.
 - i. E.g., the selection of alternatives under an NED evaluation is often driven by the cost/benefit analysis, with a requirement to select the option that maximizes the net benefits.
 - 1. The benefits calculation often hinges on real estate values, or other factors that relate to a community's net wealth.
 - 2. This can skew the equities, so that a high-value region may be more likely to become the beneficiary of a water resource project.
- d. **Shortcoming #11: Imbalanced evaluation of the nature and degree of environmental impacts.**
 - i. Impact evaluation must consider both the relative and absolute effect of a proposal. (Hanly v. Kleindienst, 471 F.2d 823 (2d Circuit, 1972)).

- ii. Take the example of a civil works project involving the selection of a site for an undesirable facility:
 - 1. If environmental impacts are assessed using only a comparative analysis, one that measures the incremental impact of adding one more facility to those already located in an area:
 - a. Then the impacts of siting the undesirable facility will be less in a community that is already degraded and has similar facilities.
 - b. The tendency toward siting undesirable facilities in communities that are already marginalized contributes to environmental equity concerns.
 - 2. If environmental impacts are assessed by using only an absolute analysis, one that completely disregards the nature of the facilities already located in a region:
 - a. Then an undesirable facility is just as likely to be placed in the middle of a pristine forest as in an industrial-use city center.
 - b. Project planners will have little incentive to cluster undesirable facilities together in order to blunt their collective impact on the community as a whole.
 - c. An environmental impacts assessment must consider and articulate both relative and absolute impacts, and consider alternative project formulations and appropriate mitigation that address each type of impact.

19. Conclusion:

- a. The goal of NEPA compliance is not just litigation avoidance of course. By complying, the Corps upholds its role as a trustee of the nation's public resources, as reflected in our Environmental Operating Principles.
- b. NEPA's twin goals are:
 - i. Agency decision making that is fully informed as to environmental effects.

- ii. Affording the public access to information about environmental impacts of government actions, as well as an ability to participate in the planning process of significant activities.
- c. Initiate and follow the NEPA process from the very inception of the proposal, beginning with the scoping process.
- d. Ensure that all alternatives are identified and all relevant impacts are fully articulated in the administrative record.