

# APPLIED ECOSYSTEM SERVICES, INC.

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Dr. Vijai N. Rai, Team Leader  
Natural Resources Management  
Environmental Policy and Compliance Office  
1849 C Street, NW  
Washington, DC 20240

## **Comments on RIN 1090AA95 Implementation of NEPA**

Dear Dr. Rai:

These comments address specific concerns within the proposed regulations. There are other portions of the conversion from ESMs to formal regulations that suffer the same lack of specificity and detail as those discussed below. Because Environmental Statement Memoranda “provide information and guidance,” bureau staff who do not know how to comply can ignore the guidance without repercussion. However, once they are formalized as regulation they can be legally challenged by interested parties whose interpretation differs from that of the lead agency. The delays and associated additional costs of these challenges are the antithesis of the streamlining you want to accomplish within the Department’s Bureaus.

My qualifications for making comments include the detailed discussion of the way NEPA compliance has traditionally be conducted, and the rationale for adopting a modern, quantitative approach detailed in my book, *Quantifying Environmental Impact Assessments Using Fuzzy Logic*, published by Springer-Verlag in 2005.<sup>1</sup>

### **Consensus-Based Management.**

This subject is first presented under the heading of ESM 037 (Procedures for Implementing Consensus-Based Management in Agency Planning and Operations), where we read:

“Under this proposed rule, when feasible and practicable, the community alternative should be designated as the bureau’s preferred alternative in the

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<sup>1</sup>ISBN: 0-389-24398-4

NEPA process, so long as a consensus exists within the community for support of that alternative. This designation is also subject to statutory, regulatory, and policy constraints. As a practical consideration, 'consensus' is ultimately determined by the Responsible Official."

This leads to the question of how the RO will define "community?" Suppose that the project's opponents are agreed that the project should not be allowed, but the local population and county government want the project (with appropriate consideration of constraints)? What constitutes the community here? Gaining the values and beliefs of the broadest possible spectrum of "communities" should always be a goal, but it is no basis for making a management decision. Someone must be responsible for that decision, and be able to objectively justify it. Passing the buck by saying "that's the community consensus" is a recipe for disaster after disaster. It is guaranteed to fail.

However, it is very interesting—and important—that there are differences in the statements (and implications) of ESM 037 and the proposed language of §46.110. The later reads,

"(a) For the purposes of this Part, consensus-based management is the inclusion of interested parties with an assurance for the participants that the results of their work will be given consideration by the Responsible Official in selecting a course of action.

"(b) In practicing consensus-based management, bureaus should give full consideration to any reasonable alternative(s) put forth by participating interested parties. While there can be no guarantee that a community's proposed alternative will be taken as the agency proposed action, bureaus must be able to show that a community's work is reflected in the evaluation of the proposed action and the final decision. To be considered, the community's alternative must be fully consistent with NEPA, the CEQ Regulations, and all applicable Departmental and bureau written policies and guidance."

Inviting the broadest possible participation, and giving serious consideration to their values and beliefs, is critical to successful compliance with NEPA that is technically sound and legally defensible. However, directing the Responsible Official to make the decision even if it is not the preferred one by the community needs to be retained in the language of the regulation.

In the proposed CFR, the community's views are solicited, and potentially adopted, but these views are not the Bureau's decision, by default. The name is quite misleading and may lead to law suits when some group decides to push for a literal definition of "consensus management." Giving full consideration to values and beliefs in a decision-making process is not the same as managing by consensus.

Recommendation: Change the wording from “consensus-based management” to something like “open and transparent community involvement and input.” And, fold this direction into §46.113, Scope of the Analysis, because it is the community’s values and beliefs that suggest components of the assessment and additional alternatives to be considered.

#### **46.113 Scope of the Analysis**

This section covers connected, cumulative, direct, and indirect activities that may (or may not) be germane to the action being assessed. The language is that bureaus “shall consider whether, to what extent, and how they will analyze connected, cumulative, and similar actions.” It also directs the bureaus as to what must be included. These two directives appears contradictory.

Recommendation: Change the language to direct bureaus to include other projects, provide specific language that allows their staff to determine which direct and indirect projects need to be included, while allowing them to determine how they will evaluate cumulative effects. In other words, clearly define “connected,” “cumulative,” “direct,” and “indirect” objectively so bureau staff—and the regulated public—can quickly and easily determine how to proceed. Such clarity will provide uniformity to the regulations and provide the consistency and predictability to the NEPA process that is so highly desired by the regulated industries.

#### **46.145 Using Adaptive Management**

There is nothing in this section that explains how adaptive management applies to NEPA decision-making. The text says that “Bureaus should use adaptive management as part of their decision making processes,” then goes on to suggest that such learning from experience applies to the management of the project *after* the NEPA decision has been made and monitoring data become available. This confuses project management to assure compliance with conditions upon which the permit was issued with consideration of the environmental impacts that are part of the NEPA decision whether to issue a permit.

Even if it’s assumed that the NEPA process is to select one of the proffered alternatives, not to decide whether to allow the project at all, explicitly adjusting operations or monitoring once the project is approved (that is, using “adaptive management” when striving to minimize undesired impacts) is not part of the NEPA decision-making process. At least, it shouldn’t be.

Recommendation: drop this section as it does not apply to the NEPA decision-making process.

#### **46.240 Establishing time limits for the NEPA process**

This is a rather puzzling requirement. Nowhere in the text of the proposed regulation does the Department explain why time limits should be established, what function(s) they serve, or how to establish compliant limits. How is a bureau to determine appropriate

time limits if they don't know why the limits are required? How is anyone to determine whether a bureau is in compliance with this regulation?

Recommendation: Both more specific guidance and direction must be provided to bureau staff so they can process NEPA documents with minimal delay. However, the problem is more fundamental and serious. As traditionally applied, NEPA decisions are based on subjective evaluations of various future affected environments. The existing conditions and alternatives are described in text, tables, and figures but without explanation of what this means relative to the human environment categories (economic, natural, and societal). And these categories need to be evaluated using the components that scoping determined are most important to all stakeholders and other interested parties. Without a mechanism and directions how to objectively determine the relative "significance" of alternatives on the existing environments, it is unrealistic to expect adherence to any time limit.

Until such time as all Department Bureaus have objective means to evaluate "significance" under NEPA, specific but flexible time limits should be recommended unless extenuating circumstances can be fully documented. For example: scoping should be completed with 60 days, data collection of baseline conditions in the existing environment no longer than 1 year, 45 days to prepare a Draft EIS, 30 days for public comment, 60 days to review comments and prepare a Final EIS, and 30 days to prepare and issue a Record of Decision.

#### **46.305 Public involvement in the EA process**

Paragraph (a)(1) directs bureaus to consider comments from the notice that are "timely" received, but does not define "timely." For both an EA and an EIS, 30 days is sufficient time to receive comments. The regulation should state that if no comments are received during this 30-day period, the decision is made using the content of the draft document. In the case of an EA this means that a FONSI is prepared; in the case of an EIS the Record of Decision is prepared. Being specific rather than vague will advance EA processing by bureau staff and provide the regulated public with consistency and predictability.

#### **46.400 Timing of EIS development**

What comprises the "human" environment? How does this differ from the "non-human" environment? Without explanation and definitions it leaves a huge hole through which a major lawsuit could be driven.

Recommendation: Define "environment" to consist of three categories: economic, natural, and societal. Within each category specific components are compared. This avoids the meaningless disputes of, for example, jobs versus wildlife. After comparisons are made within each category or the affected environments under each alternative, they should be combined to present a single, cohesive evaluation of that alternative's effects on the existing environments. This permits a measure of "significance" to be assigned and used to support the Responsible Official's decision.

**46.415 EIS format**

(b)(1.) "The effects of the no-action alternative may be documented by contrasting the current condition and expected future condition should the proposed action not be undertaken with the impacts of the proposed action and any reasonable alternatives." This statement is vague and too open to interpretation, discussion, or argument. It needs to be tightened by more explicit language.

Recommendation: Clarify by stating that the human environment change over time, regardless of the action being assessed under NEPA. This clarification should explicitly exclude the idea that nothing changes over time, so the no action alternative means no change. For example, an area that is currently overgrazed or being overtaken by crested wheat grass is going to degrade with time, not remain the same. A mine that is not allowed to expand to extract newly discovered ore may have negative impacts on the economic and societal environments in which it is located. The no action alternative needs to consider these changes to the same degree, and by the same process, as are the various action alternatives.

I certainly hope that the vagueness and imprecision of language and direction in the proposed regulation are removed before the regulation is adopted. This process is a valuable opportunity to increase the specificity of direction to bureau staff and give the regulated public the predictability and consistency it deserves.

Sincerely,

A handwritten signature in cursive script that reads "Richard B. Shepard". The signature is written in dark ink on a light-colored background.

Dr. Richard B. Shepard  
President