

Federal Highway Administration
Every Day Counts
Innovation Initiative



Avoiding Common Trouble Spots with Environmental Documents

Every Day Counts: Legal Sufficiency Enhancement Initiative

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Introduction

Quality environmental documents are critical to successful development of a project subject to the National Environmental Policy Act (NEPA) or Section 4(f) of the USDOT Act. By avoiding common pitfalls in preparing environmental documents, the Federal Highway Administration (FHWA) can reduce the time required to produce a legally sufficient Environmental Impact Statement (EIS) and Section 4(f) Evaluation. The resulting documents will be more useful and understandable to agency decision-makers, key stakeholders, and the public. Better documents will help decrease controversy and litigation risk, thereby reducing the total time needed to complete the environmental review process.

The Legal Sufficiency Enhancement Initiative (LSEI) focuses on expediting project delivery through early identification and resolution of legal issues. The LSEI promotes the up-front investment of time and resources to improve environmental document quality. Experience shows that failure to invest adequate resources early in the process is likely to cause later delays when legal sufficiency reviews identify problems that must be resolved before FHWA can approve the final document. The level of oversight, involvement, and coordination by FHWA and its grantees is critical to success.

This brochure provides an overview of several trouble spots commonly encountered with NEPA documents, along with some recommendations for avoiding or curing the problems. Many of the recommendations also apply in the context of Section 4(f) Evaluations. A list of more detailed resources appears at the end and on the LSEI web site at <http://www.fhwa.dot.gov/everydaycounts/projects/toolkit/enhancements.cfm/>

Nothing in this document creates additional legal requirements, provides new interpretations of the regulations, or supersedes existing agency guidance.

Common Problems in NEPA Documents and Recommended Solutions

Purpose and need (P&N) statement

The P&N statement defines the transportation problem(s) the proposed project is intended to address. The P&N statement dictates the range of reasonable alternatives for analysis in the NEPA document.

Problems: The P&N statement is poorly crafted. For example, the statement is hard to understand, or is so narrow that it eliminates consideration of a reasonable range of alternatives. Too broad a P&N statement is also a problem because it is impossible to use the statement to narrow down the range of reasonable alternatives to a manageable number. Other examples of problem P&N statements include statements that are inconsistent with the policy goals established in relevant transportation, land use, and other planning studies; and P&N statements that mistakenly describe an economic development need (which itself would induce growth) rather than the need to service growth caused by other projects or conditions.

Recommendations: A number of legal cases have found an EIS inadequate based on a flawed P&N statement. This makes it very important to think carefully about the real transportation need that the project proposes to fix and then describe that clearly in the P&N statement. Established policy objectives may provide an important foundation for the P&N statement and should be explicitly considered when defining a project's purpose. Consider how the proposed statement will expand or contract the number and types of alternatives that could satisfy its requirements. What would other interested parties say about the P&N statement? Is there a legitimate basis for criticizing the P&N statement?

Think critically and validate (for both accuracy and applicability) the data or facts that establish the basis for the project's need. Explain inconsistencies, if any.

Ask the FHWA Office of the Chief Counsel to do a quick review of the proposed P&N statement for all EIS projects and, at a minimum, any controversial projects where the Division plans to prepare an environmental assessment (EA). This consultation is most effective if completed prior to initiation of NEPA (i.e., publication of the notice of intent for EISs). This review can help ensure there is the necessary logical connection between the P&N statement and the development and selection of alternatives for detailed analysis.



Range of Alternatives

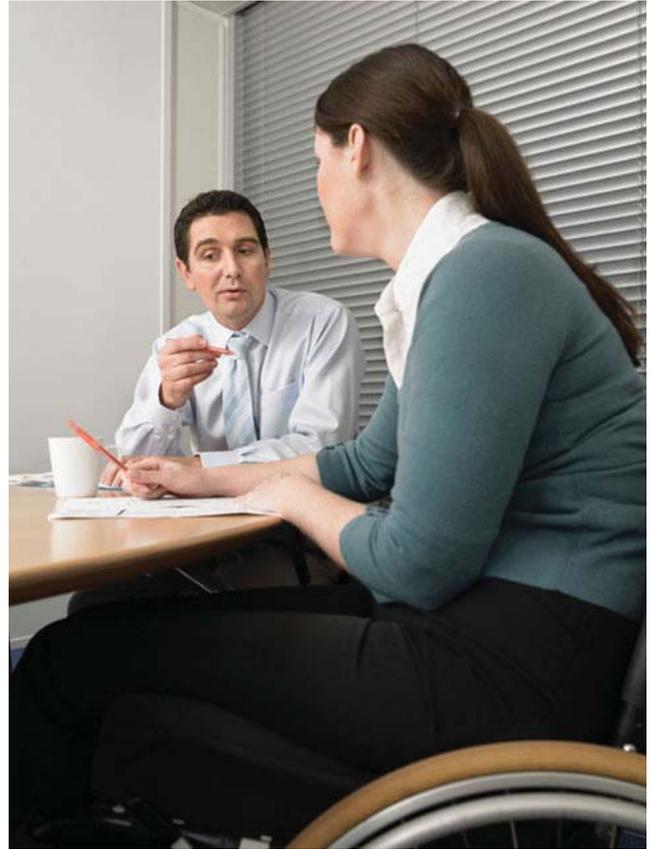
An EIS must discuss all reasonable alternatives or if there are too many variations, a reasonable range of alternatives. The alternatives analysis requirement for an EA is more limited, but there must be a reasonable basis for deciding which alternatives to analyze in detail.

Problems: Detailed alternatives analysis does not include all reasonable alternatives that would address the project P&N, or includes alternatives not supported by the P&N. For example, the P&N states that the proposed project will reduce high speed injury and fatality crashes, especially at night. But the range of alternatives only addresses weekday peak period congestion when few severe accidents occur. Another common problem is when the detailed alternatives analysis does not cover an alternative strongly advocated by a stakeholder group.

Recommendations: Provide a clear explanation in the NEPA document for dismissing any alternative from detailed analysis, and for any decisions that serve to limit the range of alternatives analyzed. If the document uses factors to screen and eliminate alternatives, the factors must be carefully defined and, if weighted, the weighting system should be described.

Consider including among the alternatives analyzed in detail any alternative strongly supported by stakeholders or the public. This investment will pay off by reducing the risk of successful challenges based on the exclusion of the stakeholder alternative from analysis. In certain situations, such as an alternative advocated by a stakeholder group, an alternative that is not deemed “reasonable” can be carried forward for baseline purposes.

If new relevant information becomes available during the environmental review process, revisit alternatives dismissed from further analysis as appropriate.



Scope of alternatives evaluation

Reasonable alternatives must be rigorously explored and objectively evaluated.

Problems: Document fails to describe in sufficient detail why a particular alternative is being dismissed from further consideration, or the document fails to provide an “apples-to-apples” comparison of alternatives because it limits the level of analysis for certain alternatives (or provides a much higher level of information for the sponsor’s locally preferred alternative).

Recommendations: Review all discussions of alternatives to make sure the alternatives are adequately described. For alternatives dismissed from detailed analysis, make certain the document discusses the reasons the alternative is dismissed. Make sure the facts underlying the stated reasons are described in the document and have been verified.

When an alternative is developed at a higher level of design detail ¹, particular care is required to ensure that the NEPA evaluation of alternatives reflects the required rigorous and objective analysis. Each alternative must be explored at a sufficient level of detail to support a reasoned choice. The detailed analysis of alternatives should make “apples-to-apples” comparisons of the alternatives. If there are substantial differences in the levels of information available for the reasonable alternatives, it may be necessary to apply assumptions about impacts or mitigation to make the comparisons fair.

For example, if mitigation is designed only for the preferred alternative, then assumptions that comparable measures can be taken to mitigate the impacts of the other alternatives should be included in the comparative analysis of the alternatives even though those other alternatives are not designed to the same level of detail. This comparison of mitigation across alternatives will ensure that a particular alternative is not presented in an artificially positive manner as a result of its greater design detail.

If the environmental impacts identified at the higher level of design detail are substantially different than other alternatives under consideration, the level of analysis conducted for other alternatives should be reviewed to determine whether additional work on other alternatives is warranted. Additional information developed on a particular alternative also should be evaluated to identify and address any new or different information that might affect the ultimate choice among the alternatives.

It is particularly important to use sound project cost estimation methods when screening alternatives for economic feasibility. Similarly, cost estimates should be updated as NEPA progresses. The NEPA lead agencies cannot make a determination about an alternative’s economic feasibility without supporting cost estimates and an analysis of likely revenue (funding) sources. Economic feasibility issues very frequently cause delays in the environmental review process. If alternatives must be built over several years in multiple phases due to funding limitations, the impact of such long project construction times and financing costs should be considered and disclosed in the alternatives screening process.



¹ This document addresses only how to achieve an adequate NEPA document where different levels of design work provide different levels of impact or mitigation information. The question whether a higher level of design can be performed for one or more alternatives is a separate Division determination.

Indirect and cumulative impacts analyses

An EA or EIS must include analyses of not only the immediate impacts caused directly by the proposed action, but also of the impacts the action would cause later in time (indirect effects) and the incremental impacts of the action taken together with other past, present, and reasonably foreseeable actions (cumulative effects).

Problems: The NEPA analyses do not identify relevant indirect or cumulative impacts, or the evaluations of the impacts are inadequate in scope or unclear to the reader.

Recommendations: Identify impacts for analysis for each relevant resource type. Make certain the geographic area and time frame selected for analysis for each resource are reasonable and supportable. Make certain the cumulative impacts analysis for each resource of concern addresses past, ongoing, and reasonably foreseeable projects within the relevant geographic area. Different resources can have different physical areas of concern. Make certain the indirect and cumulative impacts analyses provide sufficient detail to meet legal requirements. For cumulative impacts, include consideration of both direct and indirect impacts of the proposed action. Consider using separate sections in the NEPA document for each of these types of impacts, to reduce the potential for confusing readers.



Issues meaningful to agency decisions

The EA or EIS must discuss the issues the agency considered in reaching its decision.

Problems: Document does not discuss all issues that may be relevant, or omits discussion of issues raised by an opponent. Problems also occur when a document fails to adequately respond to issues raised by agency, public, or other stakeholder comments.

Recommendations: Discuss the issue and the agency's analysis of it, even if it is just a short paragraph explaining why the issue will not be relevant to the decision. The key is to show in the document that FHWA was aware of the issue and considered it.

Remember that it is helpful when potential litigants provide detailed comments because it gives the agency the opportunity to fully consider those comments before making a decision, and the agency can document its consideration for future court review. If the agency has missed an important issue or prepared a flawed analysis, the comments give the agency a chance to correct the problem.

In addition, the NEPA joint lead agencies can consider whether there are ways to be more responsive to agency and community concerns, and can document that full consideration.

If possible, get a letter from public agencies that commented, confirming that their concerns have been addressed. If a letter is not available, a memo to the file is helpful.



Complicated or Emerging Issues

The science surrounding many environmental resources constantly evolves, sometimes rapidly. NEPA requires Federal agencies to address impacts to resources, even if the available information is incomplete or the science is in dispute.

Problem: Document fails to adequately analyze complicated or emerging issues such as greenhouse gas emissions or mobile source air toxics.

Recommendations: Even if the subject area is unsettled or complicated, the document should address the issue consistent with applicable FHWA policy. The NEPA document should explain the reasons for how the issue is treated in the document. If there is no discussion in the document, then there is nothing to which a judge can defer. If there is no scientific consensus or data are incomplete, show that relevant information was compiled and considered, including consultations with experts in other agencies, academia, and the private sector, as appropriate. In such cases, as required by 40 CFR 1502.22, the document should affirmatively state there is incomplete or unavailable information and provide the information required by the regulation.



Reasons for key findings or determinations

One key purpose of a NEPA document is to provide information readers can use to evaluate the potential environmental consequences of the proposed action.

Problem: Document does not adequately describe the reasons for a factual conclusion or for a decision on a particular issue. This is an especially important issue for technical areas like air quality and traffic modeling.

Recommendations: Show your work. Provide analysis (including assumptions and methodology), not just conclusions. The EIS or EA can summarize the factual basis for a decision, but there must be enough information in the document (i.e., not just in the technical appendices) so that a reader can understand the issue, the FHWA decision, and the reasons for the decision. If the reader cannot follow the logic and conclude that the underlying facts support the decision, the document is not adequate. If summaries are used, be sure the summary refers to a more detailed analysis.

A Finding of No Significant Impact (FONSI) should state for each impacted resource why, given the context and impact intensity (including mitigation), the project's impacts are not significant.

Dated Data or Methodologies

Information in a NEPA document needs to be valid as of the time an agency makes a decision on the proposed action.

Problems: Document contains stale data or incorrect data, or fails to use current methodologies. Problems also arise if the document does not reflect compliance with new laws, regulations, policy, or guidance. This is an especially important issue for technical areas like air quality and traffic modeling.

Recommendations: As you proceed with document preparation, check and recheck whether there have been changes in data, methodologies, or applicable laws and policies. This includes checking on the status of transportation plans and programs. If there are changes, evaluate what those changes mean for the document, and either update the document or make a decision that a particular change does not affect document validity. Describe this decision and the underlying rationale in the document. If the project is “grandfathered” under a previous rule or methodology so the current one does not apply, explain the basis and reasons for using the previous version.



Unexplained or unsupported inconsistencies

NEPA documents should make sense to the non-technical reader. Agencies have an obligation to ensure the professional integrity of their NEPA documents, including scientific integrity, in accordance with 40 CFR 1502.24. Determinations about potential impacts or other issues should be clearly supported by underlying facts and analysis.

Problems: The environmental document uses conflicting or inconsistent data, reasoning, or assumptions on topics where a reader would expect those would be consistent. For example, it is inconsistent to state that the project purpose is to meet population growth but not to analyze the likely population growth in the NEPA document. Similarly, if an alternative is dismissed in the Section 4(f) Evaluation as not being a prudent avoidance alternative, it is illogical to treat the same alternative as a reasonable alternative in the NEPA alternatives chapter. This is an especially important issue for technical areas like air quality and traffic modeling.

Recommendations: A thorough front-to-back read of the entire document by knowledgeable staff is critical to catching and curing inconsistencies. Assumptions need to make sense and be consistent, or the document should contain a reasonable explanation for the inconsistency. Similarly, the entire document should be reviewed and edited by at least one qualified individual for consistency and flow. This “vetting” should occur before the draft or final document is sent to FHWA Counsel for legal sufficiency review.

Incomplete consultation processes or studies

FHWA EISs and EAs should identify environmental requirements applicable to the proposed action, and describe how those requirements have been or will be met.

Problem: Document does not have the final results of studies or consultation processes. For example, Section 106 or Endangered Species Act proceedings are still underway.

Recommendations: Ensure that the NEPA document explains the consultation process, identifies issues that have been raised, and describes the resulting conclusions or agreements. Append relevant correspondence to the NEPA document. Generally, all consultation should be completed before issuance of the Final EIS (FEIS) or FONSI. If that is not possible, the document should articulate the basis for reasonable assurance the requirements will be met. (See 23 CFR § 771.133)



Pre-decisional actions or writings

FHWA decision-makers must independently and objectively evaluate the potential environmental effects of a proposed action in making a decision whether to grant funding or other type of approval for the proposal.

Problem: Actions taken, statements made, or documents produced (including emails) by FHWA prior to the date of FHWA's decision on the proposed action suggest FHWA is biased or made a decision on the project before NEPA was completed.

Recommendations: Approach all meetings, conversations, and document preparation (including emails) with FHWA's independent oversight role in mind. Take special care with informal documents such as emails, and be aware that emails may be read (and perhaps misinterpreted) by outside parties in the event of a FOIA request or later litigation. Make sure that consultant contracts and other documents do not specify a particular FHWA decision will be the result of the NEPA process (e.g., issuance of a FONSI).

General document quality (editing)

NEPA documents do not serve their purpose if decision-makers, the public, other stakeholders, or a later reviewing court cannot understand the content.

Problems: Poor writing, poor graphics, and poor organization and flow render the document difficult for a reader to understand. If the document is unintelligible, then the public and agencies cannot meaningfully comment and it is unlikely a judge will understand it upon review.

Recommendations: A good technical writer is a valuable asset to the project team. Use a single, qualified editor for the entire document, to achieve clarity, organization, and consistency. FHWA Counsel should not be the first reviewer of the full document. Prior review of the complete NEPA document should be carried out by the FHWA Division, technical specialists, and State personnel with an eye to technical quality and readability (flow, reasoning, plain language).



“Bad paper” or ‘no paper” in the project file

The content of the administrative record for the project will have a major impact on the ability of the project to successfully withstand legal challenge.

Problems: Documents that will be part of the administrative record (or are absent from the record) cause others to question the agency’s good faith and independent judgment, or the adequacy of FHWA review and evaluation. These problems create a bad foundation for litigation. An equally significant problem occurs if there are no project documents that support FHWA’s position or reasoning.



Recommendations: Bad paper. Show respect to project opponents not just in meetings, but also in project documents. Avoid creating documents of any kind that contain derogatory or dismissive references to opponents of the project as such remarks suggest that FHWA has not taken their concerns seriously. If there are concerns from outside parties, make sure to respond to those concerns in an appropriate manner.

Always document the resolution of concerns that are raised in writing, even if resolved verbally. Documentation of responses to comments helps demonstrate FHWA’s due diligence and oversight.

Avoid language that may suggest excessive closeness or informality with the state DOT, whether in emails or elsewhere, as this can raise doubts about FHWA’s independent review of NEPA documents prepared by the State.

Avoid actions and language that others may interpret as a sign that FHWA has made its decision before it has actually seen the data.

No Paper. Make sure that the project file contains documentation supporting FHWA’s decisions. Do not depend solely on the State or its consultants to document the entire project file. Make sure FHWA’s files have adequate documentation that demonstrates the required level of NEPA involvement and oversight.

When staff leaves FHWA employment, make sure their electronic or paper files are saved. Make certain that office “clean up” sessions do not eliminate documents used in the decision-making process.

Other Recommendations to Consider

FHWA Divisions may ask for early involvement of FHWA Counsel on projects requiring EISs, as well as for known controversial projects. This includes situations where the Division, or the State Department of Transportation, wants to do an EA or Categorical Exclusion for a proposed project that has a high potential for controversy or litigation. The need for early involvement should focus on the likelihood of controversy, not the class of NEPA action.

FHWA Divisions can engage FHWA Counsel to review administrative draft documents prior to the final draft of the Draft EIS (DEIS), FEIS, Section 4(f) Evaluation, or the EA (especially for a controversial project). The DEIS is an important document because it may be the public's first introduction to the potential environmental impacts of a project and it typically is the first formal opportunity for comment.



Other Resources

*Guidance for Preparing and Processing Environmental and Section 4(f) Documents.*² (Federal Highway Administration Technical Advisory, T6640.8A, October 30, 1987), <http://environment.fhwa.dot.gov/projdev/impTA6640.asp>

Improving the Quality of Environmental Documents (AASHTO, May 2006), http://environment.transportation.org/center/products_programs/improving_quality_nepa.aspx

NEPA and Transportation Decision-making: Development and Evaluation of Alternatives (FHWA), <http://www.environment.fhwa.dot.gov/projdev/tdmalts.asp>

AASHTO Practitioners Handbook 07: Defining Purpose and Need and Determining the Range of Alternatives for Transportation Projects (AASHTO, August 2007), http://environment.transportation.org/center/products_programs/practitioners_handbooks.aspx#6

CSS and the Project Development Process (Context Sensitive Solutions.org), <http://www.contextsensitivesolutions.org/content/topics/process/project-development/>

"Indirect and Cumulative Impacts Analysis" and resources cited therein (AASHTO Center For Environmental Excellence Web Site as of August 2010, http://environment.transportation.org/environmental_issues/indirect_effects/

2 The Section 4(f) material in this document has been superseded. Please refer to 23 CFR Part 774.



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