

# Streamlining NEPA: Improving When As Well As How\*

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## Abstract

There are two parts involved in streamlining NEPA compliance: improving how the process is conducted and modifying the sequence of tasks to be completed. Improving compliance by quantifying subjectivity inherent in the process has been covered in books, articles, and presentations over the past several years. However, the sequence of tasks required to comply with NEPA, CEQ guidelines, and agency regulations has not been objectively considered by an independent reviewer. While the focus of this third-party evaluation is on the Nevada State Office of the Bureau of Land Management (BLM), other offices and agencies may well use a similar approach. Altering the sequence of tasks can reduce the time required to fully comply with all relevant statutes and regulations as well as potentially increasing participation by tribal interests, cooperating agencies, environmental groups, and the general public. This increased participation might reduce decision appeals and legal challenges; at least, it increases the legal defensibility of decisions. This article places the recommended task sequence changes in the context of overall NEPA compliance streamlining that is tightly coordinated in how the process is conducted.

## Introduction

NEPA compliance, particularly for mining projects in Nevada, take too long, cost too much, and are too loaded with uncertainties. Neither regulators nor the regulated industries are happy with the way the process has been conducted. The BLM (as the primary federal lands manager in Nevada) has limited staff with increased responsibilities and smaller budgets than in the past. This makes it important to decrease the time required to fully comply with NEPA, CEQ guidelines, and the Agency's own H-1790-1 regulatory guidance handbook. Mining companies are very unhappy with the process because metal prices are very high, the timing of financing greatly affects costs and profitability, and there is still about one-and-one-half years from regulatory approval to the revenue stream of an operational mine. Time is money for both regulator and operator, and each wants to decrease the time involved with the compliance process.

The "how" of improving the NEPA compliance process is fully explained in my book, *Quantifying Environmental Impact Assessments Using Fuzzy Logic*<sup>1</sup>, and in white papers, articles, and presentations to industry and government. This article is devoted to the "when;" the sequence of tasks from an operating company's decision to mine an identified ore body to the publication and defense (when necessary) of the regulator's Record of Decision regarding the project's Environmental Impact Statement (EIS).

The basis for these recommended changes is the generic Gantt chart used by the Nevada BLM which

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also was the focus of the Agency's *NEPA Streamlining Task Force*. It is not at all important how this particular sequence came to be; there is no "fault" associated with it. Our purpose is to examine how and why it can be improved so that the sequence of steps works with the modern paradigm of performing those steps generate results that are technically sound, legally defensible, timely, and cost effective to both the operator and the regulator.

## The Existing Task Sequence

The task list and sequence is extracted from the project planning Gantt chart currently used by BLM staff.

- Informal Pre-Plan of Operations
  - Coordination Meeting - Provide BLM/State Info to Operator
  - NDEP Notified/Sent Copy of Meeting Notes
  - Operator Begins Collecting Baseline Information
- Plan of Operations
  - Plan of Operations Submitted to BLM & NDEP
  - BLM/NDEP notifies each other of POO submission<sup>4</sup>
  - BLM Reviews POO for Completeness<sup>4</sup>
  - BLM notifies operator plan of operation is complete
- Third Party Contractor Selection Process
  - Develop MOU with proponent regarding third party preparation
  - Develop Data Adequacy Standards. (DAS)
  - Develop, Mail RFP
- Public Scoping
  - Receive & Review NEPA Contract Proposals
  - Select NEPA contractor
  - NDEP/BLM/Operator "Kick-off" Meeting (can be Teleconference)
- FO preparation of NOI
  - Send FR Notice of Intent To Prepare an EIS to WO for Review
  - Publish NOI in FR (Start of NEPA Process)
  - Prepare & Issue News Release
  - Distribute Scoping Document (30-Day Public Comment Period)
  - Begin Consultations (Native Americans, FWS, SHPO, NDEP)
  - Designate BLM ID Team & BLM Project Manager
  - Hold public Meetings/Agency Briefings
  - Identify Cooperating Agencies & Develop MOU
  - Contractor Develops EIS Preparation Plan
  - FO review & comment on EIS Preparation Plan
  - Compile/Evaluate Comments/issues, Prepare Scoping Report
  - FO determines baseline data is adequate
  - Prepare Alternatives
- Preliminary DRAFT EIS
  - Prepare Preliminary Draft
  - Distribute PDEIS (to Operator, BLM ID Team, Coop Agencies)
  - Hold PDEIS Reviewers meeting
  - Revise PDEIS
  - Revise Plan of Operations (POO), if necessary
  - Review Revised PDEIS & POO and Provide Final Edits to Contractor

- DRAFT EIS (DEIS)

- Prepare & Print DEIS
- Send FR Notice of Availability of the EIS to WO for Review
- File DEIS with EPA, Publish Notice of Availability in FR, Distribute
- Hold Public Meeting/Agency Briefings
- Issue news release
- Revise DEIS (Respond to Comments)
- Revise POO, Update Reclamation Plan and Reclamation Cost
- Review of Revised DEIS & POO and Provides Final Edits to Contractor
- Review Reclamation Cost Estimate

- FINAL EIS (FEIS)

- Prepare & Print FEIS
- Send FR Notice of Availability of the EIS to WO for Review
- File FEIS with EPA, Publish Notice of Availability in FR, Distribute

- NEPA Record of Decision (ROD)

- Prepare & Issue NEPA Record of Decision (ROD)
- Operator prepares final POO
- 30-Day Appeal Period for ROD

- POO & Reclamation Bond

- Decision Approving POO & Reclamation Bond Determination
- 30-Day Appeal Period for POO Approval
- Perfected Reclamation Bond & BLM Bond Form Submitted to BMRR
- Bond Adjudication & Acceptance Decision Issued From Perfect

- Water Pollution Control Permit

- Reclamation Permit

The durations and starting dates have been removed to save space, but the anticipated time spans several years.

The first change is to remove the last two tasks because those are state permits and not part of the federal NEPA process.

The out-of-sequence tasks begin at the first major heading, where the operator is directed to begin collecting baseline data before any input is available or any project decisions made. The second major heading has the Plan of Operations (POO) submitted to the BLM, but the POO is then modified several times at different stages of the permitting process. This is costly and highly inefficient, and well expressed by Jerry Hepworth<sup>2</sup> during the Nevada Mineral Conference on March 21, 2006 in Sparks.

## Recommended Task Sequence

### Rationale

The contexts for changing the sequence of tasks in the NEPA process are the statute and guidelines. The underlying reason for conducting an environmental impact assessment is to determine whether a major federal action (in this case, permitting a mining operation on public lands) will have *significant negative impacts* on the existing environments. As part of this assessment alternative ways of conducting the mining and ore processing operations are to be evaluated using the same criteria. Also, the public (in the broadest definition to include cooperating agencies, Native American Tribes, local governments, environmental NGOs, and everyone else) is to participate so the agency makes an informed decision based on many values and beliefs.

A frequently expressed frustration is the difficulties in gaining early and useful participation by

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other agencies, Tribes, and special interest groups. In our experience, this attitude has developed from the separation of mine planning, assessment scoping, and public participation. In the past interested parties have been presented with a plan at the first public meeting and feel that their views are not sufficiently accommodated. After several such experiences like this, they just give up and turn to the appeal process or legal system at the end of a long and costly assessment process. They know that this hurts both the project proponent and the regulatory agency while it ensures that someone listens carefully to their opinions. Changing the NEPA compliance task sequence can address all these issues.

## What To Do

Think of what happens when an operating company makes a decision about mining an ore body. The first thing they do is ask their geologists, engineers, metallurgists, and bean counters how to go about making money from rocks in the ground. After thinking of alternative approaches, and the technical and economic implications of each, they pick the one they like the best and call it their Plan of Operations (POO). This POO is then delivered to the agency's local Field Office, and the permitting/assessment process begins. Notice that the thinking and consideration of various ways to mine, locate facilities, and plan the mine's life look just like project alternatives required under NEPA. Therefore, why not use them as the alternatives in the assessment instead of creating them piecemeal during the review process? This makes a lot of sense to the project proponents as well as to the regulators. Look at the existing task list (page 2) and count how many times the POO is revised under the current sequence. It is at least three times. Each revision consumes time and money. The State Office's Gantt chart for this schedule allocates 143 days (almost 5 months) for revisions and reconsideration. All this time is after the internal company considerations that produced the initial POO.

Making the original, internal planning alternative options the NEPA document alternatives shortens the process by those 143 days. And the NEPA pro-

cess becomes more compliant because several potential POOs are the alternatives, rather than a Preferred Action alternative, a No Action Alternative, and others that are dismissed without further consideration. Using the initial mine planning alternatives in the NEPA document also provides other benefits described below.

NEPA scoping is a formal process to identify issues and alternatives for analysis in the NEPA document, either the EA or the EIS. In the existing task sequence, a "scoping document" is distributed for a 30-day comment period *before* consultations with Native American Tribes, other federal and state agencies, and the public. Any issues or alternatives identified during these consultations require redoing work already done, including the determination of data adequacy standards before the data to be collected have been determined, and the appropriate data analyses identified which produce results that allow a sound decision to be made.

Use public participation (in the broadest sense to include Tribes, other agencies, environmental NGOs, and anyone with an opinion) to assist in scoping the project. When the notice is sent to all potential participants, make it clear that nothing has yet been decided and that both the operator and the lead agency want everyone to share their concerns and ideas on the project. New alternatives may be identified, no one feels excluded or ignored, and the "how" process of quantifying individual values in the three broad categories of the economic, natural, and societal environments gives every participant an equal voice in the scope of the project environmental impact assessment. It might take more than one project for the word to spread that everyone really is encouraged to participate in scoping the assessment, but soon there will be enthusiastic participation.

Time will be saved by identifying issues and concerns before work has been completed and must be redone. Think of it this way: if there is not the time to scope the assessment comprehensively and completely the first time, when will everyone have the time to do it over again?

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## Revised Sequence

Some tasks, such as having notices approved and published in the Federal Register, are beyond the control of the Field or State Office within the BLM. Regardless, time, effort, and expense can be saved by re-arranging the sequence of tasks involved in the development of a NEPA document. Devoting more time to scoping and defining the assessment at the beginning reduces the need to revise the POO and re-evaluate the impacts later. Also, increased participation of a broad spectrum of interest groups makes the final document more robust and defensible. This revised sequence also provides answers to questions of what constitutes a desirable or acceptable environment, where the existing environments are in that range of goodness, and how the alternative POOs compare to it. All of this adds confidence to the decision and is explained in the final Record of Decision.

When a project proponent brings alternative POOs to the regulator, the permitting assessment process begins. This is a good time to start selecting a third-party contractor; the needs of the process and the desired contractor qualifications are well known from prior projects.

Once this selection process is underway, initiate the scoping/public participation activities by sending announcements using the appropriate methods to federal and state agencies, Native American tribal councils, local governments, known interest groups, and other stakeholders. Invite them to participate by sharing their values and concerns and expressing their opinions on what constitutes desirable economic, natural, and societal environments. As part of this notification, consider reminding recipients that:

- NEPA does not mandate protection of the environment. Instead, it requires agencies to follow a particular process in making decisions and to disclose the information/data that was used to support those decisions.
- The CEQ guidelines remind us that EISs "are used to inform decisions, not to justify already-made decisions."

- "Significantly affect the quality of the human environment" is subjective.
- "Human environment" is more than the natural one. It also includes the economic and societal environments of the project and its location.

Extensive public participation in the scoping—with understanding of the process's purpose and constraints—allows you to conduct the NEPA process correctly, quickly, and with confidence in your decision.

When you have identified the important components in each environmental category, and the technical experts have defined the mechanisms by which each component affects the environments, the third-party contractor can start collecting baseline data on the existing environments and alternatives can be described in terms of relative changes to those environments.

While these data are being collected, a draft EA or EIS can be prepared that describes the purpose and need, how the components were identified during the public scoping process, what components are important to all stakeholders, and the alternative POOs to developing, operating, and remediating the project. When all data are in and analyzed, the draft report can be completed and distributed for comments. The usual steps of evaluating and responding to appropriate comments, preparation of a final EA or EIS, and writing the Record of Decision follow.

## Summary

Making these changes in the sequence of tasks required to develop a NEPA document take away nothing except additional time and revisions to the POO and draft document. Encouraging public participation in scoping the assessment and incorporating all stakeholder values and beliefs strengthen the quality and legal defensibility of the finished document.

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