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An Introduction

Training for Writing Substantive Comments on NEPA Documents

Over the years, the Forest Service and BLM have locked Americans off more and more of our public lands. We've felt helpless, watching roads and trails get closed, and mining, grazing and timbering being squeezed out. We've attended meetings and participated in collaboration groups. We've written letters and signed petitions. We have sent comments on the proposed decisions. But the closure decisions always went through. We would read how environmental groups filed appeals or lawsuits that forced the Forest Service to close roads or stop a timber sale. Is there something the environmentalists know, that we don't know?

A lot of people blame NEPA. NEPA is the National Environmental Policy Act passed in 1969. We believed NEPA favors the extreme environmentalist viewpoints and the closures they want. We believed NEPA was designed to block the access and uses of the public lands. We were wrong.

The truth is that NEPA is our only weapon for saving our public lands from closure. You won't learn this from the Forest Service or BLM. Knowledge is power and they definitely don't want us to have this knowledge. We want you to learn what we have learned about NEPA, and how to use it to protect access and legitimate uses.

Despite how things sometime appear, the Forest Service and BLM cannot just do anything they want. They must follow the NEPA process steps in order to make decisions. The agencies are also bound by their own internal regulations and by the limits on their authority set by Congress.

The NEPA process imposes certain quality standards. It requires the agencies to make logical decisions supported by science and facts. NEPA requires the agencies to disclose everything; they are not allowed to hide information. The agencies must not make things up, guess, or make statements they can't justify. If they do, they have violated NEPA and that is against the law.

The NEPA process gives the public exactly and only three opportunities to criticize and oppose what the agencies want to do. These opportunities are allowed only at precise times and have strict deadlines. The burden is on the public to know how to use these opportunities properly. The most critical step is the second one; writing comments on the Draft Environmental Assessment (EA) or the Draft Environmental Impact Statement (EIS). It's critical because comments establish your right to appeal. The only comments that can win an appeal or lawsuit identify where the agency has violated NEPA or its own regulations, or exceeded its authority. The training will teach you how to review the

environmental documents to find the violations, and how to properly write the comments which identify them. These comments must be submitted to establish your right to appeal. Your comments will later become the basis of a lawsuit, if it becomes necessary to sue.

Lesson 1 - What is all this 'NEPA' Stuff?

Why Do We Need to Use NEPA to Keep Our Roads and Trails Open?



This is **THE** important question, and deserves a serious answer. You came to the training because you have heard that the Forest Service intends to ban motor vehicles from using some of the roads, trails and areas in our National Forests. These closures are happening because of something called the Travel Management Rule. If you want to oppose these closures, you have **ONE** choice. You must learn the rules the Forest Service has to follow when it makes the closure decisions. You must learn what your rights are and you use them. The goal of the training is to explain these rules and rights and, most importantly, how to use them effectively.

The good news is that there **ARE** rules the Forest Service must follow, and we **DO** have rights.

The 'bad news' is your rights are defined and limited by federal regulations with the force of law.

Objection #1: *"I'm going to be very clever and think up an easier way to do this."*

Answer: You cannot invent some other strategy to oppose the closures. It is all defined by laws and regulations which strictly limit how and when the public can oppose what the Forest Service does. If the public doesn't use their rights properly, the Forest Service can completely **AND LEGALLY** ignore us and make any decision it wants. The public cannot invent a new system or strategy and it cannot stop the decisions by simply refusing to exercise its rights.

Objection #2: *"If the National Forest tries to lock us out, I'll write to my senators and the newspapers. We'll start a petition on the internet and get a million signatures. We'll vote them out of office."*

Answer: The decision making process is defined by law and has nothing to do with the U.S. Congress or pressure from the media or the public. Petitions are useless. The Forest Service people making these decisions are not elected officials. You can't threaten to vote them out.

Objection #3: *"I don't want to bother with all this. It's too much work. We'll just file a lawsuit."*

Answer: It doesn't work that way. The Forest Service must do the analysis and make the decision during a defined period called the 'administrative process'. There are only THREE times in this process when the public is allowed to have any say at all in this: Scoping Comments, Comments on the Draft, and the Appeal. The last two are the critical ones. If you haven't exercised those two rights (submitted comments, then filed an appeal) the court can, and typically will, throw out your lawsuit without even listening to it. The legal precedent is that if you refused to use your rights in the administrative process, you have waived your right to sue. This precedent is so strong that the Forest Service actually warns the public about this in the EIS.



THESE STARS MARK THE MOST CRITICAL POINTS!

Lesson 2 - Introduction to the Alphabet Soup

What are NEPA and CEQ?

NEPA and **CEQ** control how the Forest Service will make the Travel Management decisions. The **National Environmental Policy Act (NEPA)** was passed by Congress in 1969. It says every federal agency must consider environmental effects when it makes decisions. NEPA itself doesn't say exactly how to do that, it left the details to the **Council for Environmental Quality (CEQ)**, a permanent council in Washington that was established as part of the NEPA law. The CEQ defines the way the **NEPA process works**. Obeying NEPA means the Forest Service has to follow CEQ regulations. CEQ regulations say the Forest Service has to do Environmental Impact Statements to make decisions. Those 'decisions' include closing roads and trails to any part of the public.

How is the Travel Management Rule related to NEPA?

The US Forest Service issued the **Travel Management Rule (TMR)** in 2005. The **TMR** says each National Forest must designate which roads, trails and areas are open for motorized use. To make those decisions, all the individual National Forests must obey NEPA. This means they must follow the NEPA process, which means doing an Environmental Impact Statement (or Environmental Assessment).

NEPA is the LAW of the Land

The Travel Management Rule itself is not any sort of law. It is only a rule that the US Forest Service made up for itself. People argue over whether or not the TMR is even legal. We are not going to get into that issue here. Just remember that CEQ regulations trump the TMR.

How does the National Forest comply with NEPA to make its TMR decisions?

Each National Forest must complete the NEPA process. It must choose which of the two NEPA documents it will do; an Environmental Impact Statement (EIS) or the shorter version called an Environmental Assessment (EA). The rules for the EIS are more specific than for an EA. In the descriptions below, when we say 'EIS' it also generally applies to the EA. (We say 'generally' because the rules for EA are not as specific as for an EIS.)

What are the National Forests in New Mexico doing about Travel Management?

The Santa Fe and Gila National Forests have each chosen to do a forest-wide EIS. The Cibola and Carson National Forests decided to do the documents and decisions by ranger district. They are doing a separate EA for each ranger district. (Carson is combining some districts under one EA). The Lincoln NF already had designated trails

and roads. Under the TMR it can continue to use those previous decisions without going through a new planning/analysis process.

How does the NEPA Process work?

The NEPA process is an analysis process used to arrive at a decision. The analysis is done in a document, either an EIS or an EA. The process is (supposed to be) a logical series of steps used to study an issue. The first step is to describe the subject of the EIS. This is the 'issue' the Forest Service wants to make a decision about. The issue can be:

- a problem (how to reduce wildfires or improve elk habitat),
- a project (whether or not to build a bridge), or
- a decision (allow a timber harvest, renew a grazing permit, decide which roads and trails should be open to motor vehicles).

Then the process looks at a variety of possible solutions for the issue. These solutions are called 'alternatives'. The alternatives are compared to each other. The objective is to figure out which alternative is the best solution for the problem.

No alternative is ever perfect, they always include trade-offs. Example: A bridge or road large enough to serve the public could have negative effects on a stream. The EIS is supposed to compare the needs of the public with the need to protect the stream.

Who writes the Environmental Impact Statement?

Each National Forest assembles a team from its own staff of specialists. This is called the Interdisciplinary Team, also known as the 'ID Team', or IDT. The membership of the ID Team reflects the 'resource' issues that will be analyzed. Usually the ID Team will include the forest's recreation planner, wildlife biologist, hydrologist, soils expert, botanist, and archaeologist. (Most members of the public don't even know these people exist. They are not the staff the public encounters.)

Each alternative is analyzed by the ID Team to see how it would affect each of the resources. Recreation is a 'resource' and other human parameters like social and economic impacts are supposed to be considered too. Each specialist writes an individual report with their analysis of the alternatives and recommendations. The recommendations are combined into the summary and conclusions of the whole EIS.

Who Makes the Decision?

The decision maker is ONE PERSON, who is identified at the beginning of the process. Usually it is the Forest Supervisor. The Forest Supervisor may allow a District Ranger to be the decision maker for a Ranger District specific EA. IMPORTANT NOTE: No one higher than the Forest Supervisor makes the decision. The Regional Forest office does not make decisions. The ID Team also does NOT make the decision, no matter what any of them tell you.



What can the Decision Maker choose? (Why the content of the EIS is such a big deal)

The decision maker must choose only from the alternatives presented in the EIS. The decision maker CAN select parts of different alternatives and combine them into the decision. But the decision maker is NOT allowed to choose anything that was not shown in the EIS. The decision maker cannot make up a new alternative or introduce new information or analysis. EVERYTHING must be in the EIS. This is why the NEPA process is called a 'process of disclosure'. The EIS is *supposed* to include all necessary information.

Here you see why the ID Team IS so powerful. It controls what is in, or not in, the EIS. The ID Team doesn't make the decision, but it can limit the choices the decision maker is given by including or excluding information in the analysis of the alternatives.

Lesson 3 - Where Does the Public Fit Into This NEPA Process?

CEQ says that the public must be allowed to participate in the NEPA process. But the public only has to be offered the opportunity. The process goes forward and the decisions are made even if the public chooses not to participate. CEQ regulations describe exactly how and when the public can participate. This means we have rights, but only certain ones at certain times in the process. If we don't participate, we forfeit our right to object to the decisions; including forfeiting our right to file a lawsuit against the decision.

Why are we learning about making Comments? Why are Comments such a big deal?

The ONLY way the CEQ allows the public to object to the EIS is by making comments. If our comments show that the EIS was not done properly, the decision based on the EIS can be changed or the EIS can be 'remanded'. Remanded means parts or even the whole EIS has to be done over. The only time we can make those comments is during the formal comment period. Our comments are the only tools we have to oppose a poorly done EIS. This is why we are learning to look at the EIS to find the errors, and to write the effective comments which identify them.

What will our Comments say?

The best 'quick' explanation is something we found in Army Corp of Engineer's website:

"NEPA controls the PROCESS used to make the decision, but not the decision itself."

The only way to say the Forest Service has broken any law is to show they have broken (not complied with) NEPA law. That means they haven't done the process right. Our comments DO NOT try to argue against the decision. The object of our comments is to show the Forest Service EIS does not comply with NEPA, because it does not follow CEQ regulations for a complete, honest and accurate document.

This is the most important single concept in the training so we will repeat it:



Our comments DO NOT try to argue against the decision. The object of our comments is to show the Forest Service EIS does not comply with NEPA, because it does not follow CEQ regulations for a complete, honest and accurate document.

How can our Comments change anything?

We have found, without exception, that the Forest Service does not have any data or research that proves OHV use is causing significant damage. The EIS's are made up of assumptions and misapplied research from other places. They include hundreds of pages cataloging all sorts of plants, animals, soil measurements, water quality statistics, etc. But there is nothing showing any link between actual OHV use and any actual negative impacts ('resource damage'). In short, the EIS is NOT good science, it is prejudice made up of smoke and mirrors.

If we can make the Forest Service do an honest EIS, it will show that motorized use of roads and trails is not causing significant impacts. In the few places where there are negative impacts, those roads and trails should either be fixed, re-routed, or closed. As responsible forest users, we want to protect the environment, too. We accept that motorized use is not the right thing in every place. But we oppose a fraudulent EIS, which masquerades as science, being used to implement a closure agenda based on prejudice.

What is possible for us to accomplish?

Our comments cannot force the Forest to make a decision for a plan of action which is not already offered in the EIS as an alternative. If an acceptable alternative is in the EIS, but was not chosen, we can present evidence that it is the one which should be chosen. If no alternative is acceptable, we can present evidence and make the argument that the EIS is incomplete because it wrongly restricted the alternatives. CEQ regulations describe the range of alternatives which must be considered and analyzed.

Doesn't the Forest Service make sure it's own EIS is done right?

In one word: NO! There is NO Quality Control.

The EIS gets only two internal reviews. First, each National Forest has its own internal NEPA review, either a team or an individual. The second review is the Forest Service Region 3 NEPA Review Team. Neither team reviews the 'quality' of the EIS. All they do is check that the required parts of the EIS are included.

Think of the EIS as a car. The Review Teams check that the car has all its parts (body, brakes, electrics, an engine and a transmission, etc). They don't check that the components themselves work at all or that they are the right ones for that model car. They don't check that the transmission is matched to the engine. They don't check that the components are assembled properly. They never even try to start the car. Would you buy that car?

No one in the Forest Services reviews the EIS for accuracy, completeness, consistency; logic, scientific integrity etc. even though the CEQ requires the document meet all of these criteria. It is up to the public to identify those flaws in our comments. The public is the only watchdog which can force the Forest Service to produce an honest EIS. If we let a bad EIS go through, we have to live with the decisions based on it.

Lesson 4 – Connecting the Dots

Why the Training Teaches Us How to Write 'Substantive Comments'

What is a substantive comment?



Substantive comments are (in the words of a government agency) comments that: *“(a) question, with reasonable basis, the accuracy of information in the EIS; (b) question, with reasonable basis, the adequacy of environmental analysis; (c) present reasonable alternatives other than those presented in the EIS; [or] (d) cause changes or revisions in the proposal.”*

Remember the Corps of Engineers quote from Lesson 3? Here it is again:

“NEPA controls the PROCESS used to make the decision, but not the decision itself.”

The purpose of the EIS is to analyze various courses of action the Forest Service could take to 'answer the question'. In this case, the question is:

“Which roads, trails, and areas will be open for motorized use?”

The EIS will present various plans of action (the alternatives). The analysis is supposed to show what would happen to the environment, depending on which alternative is chosen. The Decision Maker is NOT ALLOWED to consider any alternative or information which is not in the EIS.

Here is the process chain we are following:

1. Wrong analysis leads to wrong choices (alternatives)
2. Wrong alternatives lead to a wrong decision.

If the EIS analysis has serious mistakes, flaws and omission, the decision has relied on an improper analysis.

NEPA gives us the right to comment on the EIS. But the **ONLY** comments that have any power are ones that show the Forest Service that the EIS is an improper analysis because it did not follow the NEPA process and/or Forest Service regulations. The Forest Service is required to respond to comments which point out flaws in the process.

The Forest Service can legally just ignore comments which are merely statements of opinion about the decision. These two examples illustrate the difference:

Substantive Comment: The analysis presents no evidence or data to support the statement at page 135 that the decline in owl population is caused by the presence of ATVs on the trails. The analysis omits the research studies which conclude that the decline in owl population over the past decade has been caused by a respiratory virus.

Non-substantive Comment: The Forest Service should not close the ATV trails because we've been using them for 20 years, we don't hurt anything, and we help maintain them.

The Substantive Comment shows the process (in this case, the EIS analysis) was not done correctly. The Substantive Comment is the ONLY tool NEPA gives to the public. We use it to oppose the EIS used to justify the decisions. We oppose the Decision to close roads and trails by showing the decision is based on a faulty, flawed, or incomplete EIS analysis. Your comments must attack the process (the flawed EIS), NOT the decision.

The Forest Service Has to Follow the Rules in the CEQ

CEQ regulations dictate what must be in the EIS, including;

- The chapters and sequence of material in the EIS
- What material in the EIS must be included and considered
- How the alternatives are analyzed and compared
- The science and logic that must support all statements and conclusions
- The conclusions must 'flow' from the analysis, meaning there is logical connection

The CEQ regulations ALSO address what the EIS is NOT allowed to include or say. The EIS can't include opinions, unverified 'facts', or conjecture. The EIS must be 'in compliance' with NEPA regulations. When the EIS 'breaks' these rules, it is 'non-compliant'. The mistake is called a 'process error' because it violates the NEPA process.

We are looking for the process errors. We write our comments to point out the process errors and show why they cause the EIS analysis to be faulty.

How Do the ‘Anti’s’ Do It?



The ‘anti’s’ are people who are anti-OHV, anti-ranching, anti-logging, anti-anything that they themselves don’t do or enjoy. You can also call them CAVE people (Citizens Against Virtually Everything). Over the last thirty years, the ‘anti’s’ have won hundreds of lawsuits and have influenced or forced the various Forests to change thousands of NEPA process documents (both EIS’s and EA’s). How do they do it?

The anti’s don’t win by claiming they were harmed by bad decisions. They don’t win by telling the Forest Service they made the wrong decision. They win only when they make a successful case that the Forest Service broke the rules. They get the Forest to change their decisions when they prove the Forest didn’t follow the required NEPA process when they wrote the EIS on which they based their decision.

If the Forest Service’s work is so sloppy that the ‘anti’s’ have been successful literally thousands of times, why can’t we be just as successful at getting the Forest Service to change their Travel Management documents to be more favorable to us and motorized recreation?

The simply truth is WE CAN DO THIS! We HAVE DONE THIS! And now you have the knowledge to do this too. All we have to do is show that the Forest Service isn’t following the NEPA process properly when they put together the EIS.

Lesson 5 – How To ‘Take Apart’ the EIS

Darn, that is a BIG Book

How to ‘Read’ the EIS

EIS’s can be big documents. Let’s face it...they can be REALLY big documents, sometimes running over 1000 pages. How in the HECK are we going to get through all those pages to find the process errors? The EIS is darn intimidating at first. That is no accident. Less people are willing to read a BIG SCARY document and the Forest Service likes that. The BIG secret is that you don’t have to read the whole document if you know what you are doing.

The Phone Book is Big, Too



Think about the Albuquerque phone book. If you want to look up your friend’s telephone number or you want to order a pizza, you don’t read the whole book, do you? Please think about that for a moment. A phone book for a big city can easily run a thousand pages or more but you don’t think twice about picking it up and finding what you are looking for, do you? Why not?

The answer is that you know how to ‘read’ a phone book. You know how to find your way around in it. You know how to look up someone’s number. You know how the yellow pages work. You know how the white pages are arranged. You know to ignore what you don’t need.

The EIS is just like a phone book! You just need to know how it works and how it is organized and it starts to look a whole lot less scary.

The EIS Made Simple

Like any good reference book, the EIS has a Table of Contents. The Table of Contents lists the major sections of the EIS and the page number for each section. The EIS has FOUR major sections that we care about:

- The Purpose and Need for Action
- The Alternatives
- The Affected Environment
- The Environmental Consequences

Here is a short explanation of each of them. The explanations come straight from the CEQ regulations. In a later Lesson, we will explain what type of process errors can be found in each of the four sections.

The Purpose and Need for Action

This section is supposed to briefly explain the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action. In other words, this section is supposed to explain the 'problem' that the Forest Service is trying to solve.

The Alternatives

This section is the heart of the EIS. It should compare the environmental impacts of all of the alternative courses of action the Forest Service can take (to meet the above 'Need for Action') in a clear manner. It is supposed to *"sharply define the issue"* and provide a clear choice among the options for the decision maker to choose.

This section is also supposed to *"rigorously and objectively evaluate all reasonable alternatives"* and provide brief explanations of all alternatives that were considered but eliminated from detailed study. The Alternatives are supposed to contain a 'No Action' alternative. Many times this alternative isn't being considered (No Action won't meet the Need for Action by definition) but is supposed to be included to provide a baseline condition to which the other alternatives are compared.

This section is also supposed to include, although we rarely see it, the appropriate ways to mitigate the impacts of the alternatives

The Affected Environment

The 'Affected Environment' section is supposed to concisely describe the environment of the areas affected by each alternative under consideration. These are usually broken into the following categories:

- Vegetation
- Wildlife
- Soils
- Water Quality
- Recreation
- Air Quality
- Cumulative Impacts
- Social and Economic Environment

The EIS may also include other categories like noise, cultural resources, tribal impacts, law enforcement, etc.

Environmental Consequences

This section is supposed to be the scientific and analytic basis for the comparisons included in the 'Alternatives' section. The Forest Service typically goes through the impacts of each alternative for each of the 'Affected Environments'. It is supposed to include an analysis of both the direct and indirect effects of each alternative for each 'environment' and their significance (or insignificance). Many times, the 'conclusions' from these analysis are presented in long tables so the decision maker (and the public) can easily compare the specific impact to each environment resulting from each alternative.

And that's it. The EIS is often a VERY large document but you now what it contains (the four major sections) and how it is arranged. Even now, it might still sound scary but as you start to review the document, you will very quickly catch on to how it is arranged and will be zipping back and forth between sections in no time.

Tips and Tricks

Here are a few simple 'tips and tricks' that we have learned:

- A hard copy is very useful as it is far easier to flip back and forth between sections than scrolling through hundreds of pages.
- A simple 'loose leaf' printed copy is better than a bound version because the pages will stay open without holding it down.
- An electronic version is also useful if you are handy with a computer. The documents are in an Adobe Acrobat (.pdf) format which means you can search for key words. We have found that to be VERY useful. For instance, you can search for the word 'motorized' or 'OHV' and see where in the EIS those words appear. You might be able to ignore the other sections.

Lesson 6 – Putting It All Together

How to Get Started Writing Substantive Comments

Let's examine what we have reviewed so far:

1. We know NEPA is the **ONLY** way to change what the Forest Service wants to do (Lesson 1).
2. We know what NEPA is and how it works. We know about the Council for Environmental Quality (CEQ) and the Travel Management Rule (TMR) (Lesson 2).
3. We understand the rules that the Forest Service has to follow under NEPA and the rights we have under NEPA (Lesson 3).
4. We know what a Substantive Comment is, how they work, and why we must use them (Lesson 4).
5. And finally, we have reviewed the content and structure of the EIS document itself (Lesson 5).

We are now ready to write substantive comments. Let's get to it.

Where to Start?

The bad news is there is no single 'best' way to review an EIS and write substantive comments. The good news is no 'wrong' way to do it, either. The goal is finding what works best for you. We have generally found that the biggest problem isn't finding process errors to attack; the larger issue is generally that there are so many process errors that it is hard to know which one to pursue. The typical EIS is a 'target-rich' environment!

With that in mind, in Lesson Eight we will review each of the four major sections of the EIS (The Purpose and Need for Action, The Alternatives, The Affected Environment, and The Environmental Consequences) and talk about what kind of process errors are generally found in each section.

We want to stay focused on process errors. This is the **KEY** to Nora's training and our success!

Key Concepts from Nora's Training


Stay focused on process errors. Process errors are 'How' and 'What' questions: How is the analysis done? How are project goals described? How was data selected? What methodology was used?

Process errors always have verbs. The errors are in HOW the process is done: Formulating, Selecting, Including, Eliminating, Listing, Identifying, Comparing, Connecting, Analyzing, etc. You are straying into 'Content' when you are arguing with results; the recommendation or conclusion itself. Your job is to find the errors that LEAD to the conclusion or recommendation. We use the errors in process to discredit the content (the results of the process). NEPA and CEQ define 'Right and Wrong' ONLY for the Process. There is no 'Right and Wrong' for the Content (the results).

Content: The 'results' of the EIS Process are the 'content'. It is the conclusions and recommendations reached in the EIS. Under NEPA, the conclusions must logically flow from a properly done process. But remember, NEPA doesn't give us anything to judge the conclusions themselves are right or wrong.

Process: The 'process' is the how the EIS does its required steps: HOW it formulates the statement of purpose, HOW it selects alternatives to be analyzed, HOW it performs analysis and comparison of alternatives, etc. The Contents are the results of the Process. CEQ defines how the process must be done and sets criteria for accuracy, honesty and completeness. This means there IS a right and wrong way to complete the process. Wrong process violates CEQ regulations, and THAT is against the law. This is why appeals and lawsuits must be based on Process errors. Process errors are the only things that can be illegal because they are the ONLY thing that NEPA defines.

Decision: The EIS itself is NOT the Decision, but it strictly limits the choices for the Decision. The EIS comes first, then the 'decision maker' chooses from the alternatives ('actions') analyzed in the EIS.



Under NEPA there is no right or wrong content, and no right or wrong decision. That's why it's useless to argue against the content. **APPEALS BASED ON “CONTENT” NEVER SUCCEED. EVERY SUCCESSFUL APPEAL IS BASED ON A PROCESS ERROR because that is the only place where 'Right and Wrong' are defined by regulation and law (NEPA).**

When writing comments, it is easy to get tempted into attacking the 'content' of the EIS instead of the 'processes' of the EIS. We see the EIS is closing our favorite trails. We get so upset that we start arguing about the closure itself, instead of the REASONS the EIS gives for the closure. The GOAL of your comment is to make them correct the analysis (process) so that the Forest Service will come to the correct conclusion (content).

What do Process Errors look like?

The best way to start recognizing process errors is to actually see a few of them. Once we learn to recognize process errors, we will spot them everywhere. The typical EIS is full of them! Don't worry that some of us are new to this. New people bring valuable fresh perspectives. New people spot things (often the 'elusive obvious') that 'old hands' have overlooked.

While reviewing the EIS, constantly ask yourself, “Can they prove that?”, “Did they leave something out?” and “Is there something suspicious or illogical here?” Even if you don't know anything about Forest Service or CEQ regulations, you can find plenty of errors, such as illogical conclusions, contradictions, missing information, and unproven statements. These are all CEQ violations.

Errors tend to fall into a few basic categories:

- **There are errors in how the EIS describes the 'problem'**
- **There are errors in how the EIS sets up the alternatives it will study**
- **There are errors in how the EIS does the analysis**
- **There are errors of violating regulations**

Here are two quick examples of process errors types. We'll get to other types of errors in the Lesson 8.

An Error in 'Describing the Problem':

The Sandia Ranger District EA included these statements in its 'Purpose and Need'. It claimed they must:

1. Minimize travel and recreation impacts to the environment (e.g., water quality, wildlife, riparian and wetland areas, etc.);
2. Reduce recreation user conflicts;
3. Designate a road and motorized trail system that can be maintained to standard within anticipated budget constraints.

These three items are all errors.

1. Neither the TMR nor NEPA nor Forest Service regulations tell the agency to 'minimize impacts'. They tell the Forest Service to consider environmental impacts and balance resource protection with human uses and needs.
2. The Forest Service has no authority to 'consider' or 'reduce' user conflicts.. The Forest Service's mission and authority are defined by Congress. Considering or reducing 'user conflicts' is not in that legislation or in the TMR. The Forest Service IS told to consider conflicts among USES, not users.
3. The TMR does tell the Forest Service to designate roads, trails, and areas for motorized use. But the part about budget constraints is not accurate. . TMR says that budget is a 'consideration'. Budget is NOT a limiting factor. In the 'Responses to Comments' part of the TMR, the Forest Service specifically rebuts commenters who wanted trail designations limited to only what the Forest Service can afford to maintain.

Amazing isn't it? The Sandia Ranger District didn't get past page 1 without major errors. Now think of how the recommendations turn out if they have to satisfy these false goals. This is how process error leads to bad conclusions.

Why is this important? It is important because the CEQ regulations say that that there has to be a rational connection between the Proposed Action (the solution) and the Purpose and Need (the 'problem' that the Forest Service presents). If there is no rational connection, the Forest Service has broken the rules by not following the required NEPA process. We'll get back to this idea of the connection later.

Errors because of Unproven Statements

Watch out for opinions and assumptions presented as if they are facts. 'Train your brain' to be suspicious. Look for 'statements' which expose the anti-OHV prejudice. Here is the first paragraph of 'Existing Condition' in the Sandia Ranger District EA. How many false statements can you spot?

“Motor vehicle use on the Sandia Ranger District has increased in recent years as the Albuquerque and East Mountain communities’ population continues to grow. This increased use has led to the proliferation of unauthorized (user-created) routes; increased conflict between motorized and non-motorized recreationists; complaints about noise, trespass, and dust from adjacent landowners; and concerns about degraded soil, water, vegetation, and wildlife habitat conditions.”

Statements about growth in population are true. All of the rest of it is invented, just anti-OHV diatribe. These are what we call 'manufactured problems'.

- Statements about proliferation of unauthorized routes are NOT legitimate because there was no proof of unauthorized routes or who created them. The Forest Service offered no map, mileage, location, or description for even one alleged unauthorized route. No proof at all. If there really were unauthorized routes, that statement had to be backed up with facts.
- User conflict was both unsubstantiated (unproven) and outside Forest Service authority.
- Complaints about noise, trespass, dust etc were all undocumented, and merely 'anecdotal'. The EA presented no noise measurements, no air quality measurements, and no record of trespass complaints or citations.
- So-called 'concerns' were simply unproven 'worries' from the public or from the Forest Service itself. Again, they did not provide any proof that degradation was being caused specifically by motorized use.

As you can see, all of these so-called 'problems' described in the Existing Conditions were inventions. They are 'manufactured' issues, they were not real. It illustrates how quickly FALSE statements in the document can lead to BAD 'solutions' offered, and ultimately, lead to a BAD decision.

The Connection Between the 'Problem' and 'Solution' (the Proposed Action)

How can we get them to follow the rules that require rational connections between the problem and their Proposed Action that is supposed to fix the problem?

We tell the Forest Service to **DO the ONLY thing they can do**. We tell them exactly how to **FIX THE DOCUMENT! This is exactly what we cover next in Lesson Seven.**

Lesson 7 – Fixing the Problem

(Our Comments Fix the EIS for the Forest Service)

We know that the Forest Service makes many process errors. We want them to fix the errors that we find in the draft version of the EIS. If they take the process errors out, we will get better decisions by the decision maker. Why? Because solutions designed to fix phony problems are no longer logical. The EIS can't include them as possible choices for the decision maker. **To make them fix the errors, there is only ONE thing that they can do (because they have to follow the NEPA process):**



THEY CAN CHANGE WHAT IS IN THE FINAL VERSION OF THE EIS!

Finding process errors is only the first half of writing a substantive comment. The 2nd half of writing a successful substantive comment is amazingly easy. We simply tell them exactly what we want changed in the Final EIS so that the EIS is an accurate document.

Here is a real world example using the Jicarillo District's recently released EA. In the EA's 'Purpose and Need for Action', we read:

*“There is a need for the Jicarilla Ranger District's designated transportation system to be consistent with the primary purpose and intent of the travel management rule. This includes designating NFS roads, trails and areas on NFS lands for motor vehicle use, **while considering effects on** natural and cultural resources, public safety, recreational opportunities, access needs, and **conflicts among the various users.**”*

The first sentence is correct; they do have to obey the Travel Management Rule. The second sentence lists effects they must consider. Most of those are also correct because they are included in the TMR. But 'considering effects of “*conflicts among various users*” is not right. That is NOT part of the Travel Management Rule.

Now we write the comment in three steps:

1. Present the statement. (The Purpose and Need includes considering ‘user conflict’)
2. Explain why this is a process error. (The Forest Service has no authority from the TMR to consider ‘user conflict’)
3. Tell them how to fix it. (Remove all mentions of ‘user conflict’ from the EIS, at pages x, y, and z).

The actual comment looks like this:

“The Carson National Forest’s Purpose and Need statement states that the Jicarilla District is considering the effects of conflicts among the various users. (Step 1)

NMOHVA must point out that considering the effects of “conflicts among various users” is a clear misinterpretation of the Travel Management Rule. The TMR does direct the Forest to consider “conflicts among uses”. It says, in part, in 36 CFR § 212.55 (a):

“...the responsible official shall consider effects on National Forest System natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of National Forest System lands,...”

“Conflicts among uses” is NOT the same thing as “conflicts among various users.” We absolutely cannot allow the Forest Service to expand its regulatory authority into a realm where the proposed management regulations are in support of, or conversely, criminalize any activity based on individual differences of cultural, philosophical, and personal values. (Step 2)

NMOHVA asks that the Carson National Forest remove all reference to “conflicts among various users” throughout the document in the Final EA.” (Step 3)

Please note that we have told them very specifically what it will take to make the document comply with NEPA (we want them to remove all reference to an improper element in the Purpose and Need). We didn’t tell them that their decision was wrong; we told them how to fix the analysis so that the decision maker can make the correct decision.



The key point is that we tell the Forest Service exactly what we want changed in the Final EIS that will remove the process error.

What good does it do to change the EIS?

Here's what that does. When we take ‘user conflict’ OUT of the Purpose and Need, we have cut the required rational connection between the Purpose and Need (consider ‘user conflict’) and the Proposed Solution (Close the trail to OHV use to ‘solve’ user conflict). There is now no rational reason to close a trail to ‘fix’ user conflict, when ‘fixing

user conflict' is not the goal (Purpose and Need) of the EA. . As we said earlier; If there is no problem, there is nothing to fix, and no logical reason to close roads and trails.

CEQ says there must be a rational connection between the Proposed Action (the solution: close trail) and the Purpose and Need (the problem: consider 'user conflict'). When 'consider user conflict' is removed from the Purpose and Need, User Conflict is no longer a legitimate reason to close anything.. They must not try to fix a 'problem' that doesn't exist (is not identified in the Purpose and Need). If they try to do that anyways, the solution (Proposed Action) conflicts with the problem statement (Purpose and Need). This is a serious CEQ violation.

What happens if we didn't catch this, and we let the Purpose include 'consider user conflict'? Then a trail closure based on user conflict (solution) WOULD serve the Purpose and Need (user conflict is a problem). We prevent that by getting the Forest Service remove the bogus 'problem'.

So...three simple steps to writing a substantive comment:

1. Find the process error
2. Explain the error
3. Tell the Forest Service exactly HOW to correct the error.

That's it! You now know everything you need to write a Substantive Comment that will actually impact the Forest Service's decision.

Lesson 8 – Finding Process Errors

Finding Process Errors in the EIS

Finding process errors in an EIS is actually easy. In fact, there are usually so many errors we find ourselves with more errors than we have time to correct.

Before we start ‘hunting’ for process errors, let’s review, one more time, the objective of our comments. Our goal is to get the agency to produce an accurate analysis. It is the only thing we can influence. We cannot directly influence the Decision but the law requires that the Decision come ONLY from information provided to the Decision Maker in the EIS. We need to (help the Forest Service) rewrite the document and remove the untruths and omissions to ensure that motorized recreation use is presented accurately.

We must make sure there's an accurate description of the physical effects of motorized recreation. Without this information, a specialist with no knowledge of our activities cannot produce an accurate ‘Environmental Effects’ analysis.

Just as importantly, we must make sure there's an accurate description of the benefits of motor access. Without this information, the Decision Maker cannot find the appropriate balance between the effects of the activity and the benefits to society. The greater the social benefit of the activity, the higher the tolerance for greater impacts and costlier mitigation.

If the Decision still goes against motor access, or is unreasonably hostile, in spite of an analysis that admits motor access isn’t bad for the Forest, we have more avenues of defense via appeals and litigation and we have laid the foundation for those next moves.

That is why we must do everything we can to get the correct information about motorized recreation into EIS. The Forest Service can legally throw us out of the Forest if all of the analysis says motorized recreation is bad. That is why it is so important that we FIND and FIX the process errors in the EIS document.

Okay, on to the process errors.

What do Process Errors Look Like?

To start, just use your head. We are trying to help the Forest Service produce an accurate document so we look for items that are true. Constantly ask yourself questions like, “Can they prove that? Did they leave something out? Is there something suspicious or illogical here?” Even if you don't know anything about Forest Service or CEQ regulations, you will find plenty of errors. Illogical conclusions, contradictions, missing information, and unproven statements are all process errors.

Errors tend to fall into a few basic categories: there are errors in how the EIS describes the 'problem', errors in how it sets up the alternatives it will study, and errors in how it does the analysis. There are also errors of violating regulations set forth by NEPA, CEQ, or Forest Service planning regulations.

- Still not convinced? Go back and look at the two example process errors from the Sandia Ranger District in Lesson 6.

In Lesson 9, we will talk about particular types of process errors commonly found in each of the major sections of the EIS.


Lesson 9 – Typical Errors in the Major EIS Sections

You may want to go back to Lesson Five and review the major parts of the EIS document and what each part is supposed to include. In this Lesson, we will go through all four of the major EIS sections again and describe some typical process errors that can almost always be found in each of them. Keep in mind that this is not a complete list. Don't be afraid to identify new and different types of errors in each section.

Finding Process Errors in the Purpose and Need for Action

In Lesson Five, we said that the Purpose and Need for Action (we will just call it the Purpose and Need) is supposed to explain the 'problem' that the Forest Service is trying to solve. Guess what? It often doesn't do a very good job of it! And that leads to process errors.

The Purpose and Need for all of the Travel Management Rule EIS's (or EA's) should read pretty much the same. After all, the 'problem' that the Forest Service is trying to 'fix' is that most of the Forests did not have a designated system of trails and roads for motorized use. **Remember, the Purpose and Need is supposed to 'flow' from the TMR and how it applies to the specific Forest.**



Hint: Since the Purpose and Need is supposed to flow from the TMR, it is really useful for us to know what is actually in the TMR. Are you going to believe the Forest Service? We strongly suggest you read the TMR yourself:
(<http://www.fs.fed.us/recreation/programs/ohv/final.pdf>)

But the Forest Service, in all their irrational 'wisdom', usually cannot help themselves. They just can't resist adding more 'problems' that they are trying to solve to the Purpose and Need. They also can't seem to keep their anti-motorized prejudice out of the Purpose and Need.

Since the Purpose and Need is the 'problem statement' for the entire EIS, a lot of process errors have their start in the Purpose and Need. Here is a quick list of common process errors we have seen in the Purpose and Need:

- Extra 'problems' in the Purpose and Need that are over and above the 'problem' that the TMR is supposed to fix (no designated travel system).
- The statement of Existing Condition blames 'problems' on OHV use but offers no proof in the EIS.
- Does the Purpose and Need show that the Forest Service has already made a 'pre-analysis' decision? The Purpose and Need by itself may not prove this illegal process but it may give us clues where to find the evidence throughout the document.

- False statements masquerading as ‘fact’ are often found in the Purpose and Need. Read everything carefully and think about what it would take to really prove each ‘fact’. Does the Forest Service provide those facts in the EIS?
- Unsupported beliefs, opinions, or position statements included in the Purpose and Need. Remember, the EIS is supposed to be a document supported by science.
- Adding words about ‘user conflict’ (as opposed to the conflicts in uses that the TMR describes) is a common error. Trying to solve problems that were not identified in the TMR means the Purpose and Need won’t ‘flow’ from the TMR.
- The Purpose and Need not matching what was published in the Notice of Intent (NOI). The NOI is the ‘official’ notice that the Forest Service is doing an EIS and starts the NEPA process with a Scoping period. Often times the Purpose and Need will completely ignore the issues the motorized recreationists brought up during the Scoping Period.

There may be other errors in the Purpose and Need but that should be plenty to get us started.

Finding Process Errors in the Alternatives

Since the Alternatives are the ‘meat’ of the comparison in the EIS, it stands to reason that process errors in the Alternatives section really messes up the rest of the EIS. Here are the two biggest (and most common) issues we see in the Alternatives section of the EIS:

Big Error #1. The No Action Alternative is missing or incomplete. For this one to make sense, it is very important to understand three things:

- The No Action Alternative requirement is SPECIFICALLY called for in the CEQ as required for EIS’s. It is supposed to be the BASELINE that is used to compare (the problem) to the other alternatives (the potential solutions). Having an accurate baseline is required so that each alternative shows the REAL IMPACT of what would change if the Forest Service selects it.
- Since the No Action Alternative is supposed to serve as the baseline for comparison to the other alternatives, it is highly critical that it reflect the ACTUAL current condition on the Forest. If you think about this for a moment that means the No Action Alternative must include ALL of the roads and trails that currently exist on the ground in the Forest. It makes no difference if the roads and trails are part of the Forest Service system or not. We have not yet seen the Forest Service include everything in the No Action Alternative!
- Since the decision maker using this EIS to make the final decision can ONLY choose from alternatives or portions of alternatives within the EIS, it is absolutely critical that ALL of the roads and trails we want be included is in at least one of the alternatives. If the Forest Service refuses to put them in one of the Alternatives being considered, they should AT LEAST be included in the No Action Alternative (for baseline comparison purposes)..

Big Error #2. The Forest Service is required by CEQ to “*Rigorously explore and objectively evaluate all reasonable alternatives*”. Many times the range of alternatives provided by the Forest Service is very limited. The alternatives usually range from some closures to closing everything. Where is the alternative that maximizes motorized use or provides a plan to accommodate future growth? Why would that alternative not be considered ‘reasonable’? Why would designating ALL of the existing roads and trails not be considered reasonable? Yet, we rarely see these evaluated as an alternative.

There is another thing to keep in mind while reviewing the alternatives. If everything we want is not included in at least one of the alternatives (or in the pieces of several alternatives), we cannot get what we want no matter how well we write our comments. Why is this? Remember, at this point in the process, the decision maker can only pick and choose from the items that are in the draft EIS. Everything else is already ‘out of scope’, that is, they cannot consider it. If we review the EIS and it does not include adequate roads and trails in at least one of the alternatives, we need to find so many errors or such big errors in the EIS that the Forest Service will have to withdraw it and start over. It is our only choice if what we need is not included in the alternatives.

Finding Process Errors in the Affected Environment

The ‘Affected Environment’ section is supposed to concisely describe the environment of the areas affected by each alternative under consideration. It is supposed to describe each of these areas (wildlife, soils, water, social/economic) under each of the alternatives.

The typical process error in this section is missing information. Process errors of omission seem to be the preferred way to get rid of motor access. Often times, the Forest Service will not adequately describe the effects (hugely negative) the closure of roads and trails will have on users in the recreation ‘affected environment’. They are required to provide that information but have a hard time doing it because they don’t usually have any idea what the actual impact will be.

The other type of error found in this section are unsubstantiated facts. Often the conclusions listed here won’t match the detailed analysis contained in the Environmental Consequences section. Remember, the conclusions must flow rationally and logically from the analysis/facts.

Finding Process Errors in the Environmental Consequences

The Environmental Consequences section is supposed to contain the analysis that is the heart of the EIS. And it WILL be full of analysis. But our observation is that often times the analysis is FULL of process errors. Don't equate quantity with quality. The bigger the analysis, the more errors to find! Here are the most common process errors in this section:

- The first and biggest process error is also the most surprising. The analysis is not tied to the roads and trails. That right! The analysis may be 500 pages long but there is never any rational connection made between the 'problems' and motorized recreation. There is no 'cause and effect' (we also call this 'causality') shown or proven in the analysis. A common example is that the Forest Service will identify how many miles of roads and trails are in a watershed and give a calculation of how many tons of sediment a year are washing down the gullies, arroyos, and streams. But where is the causality? Have they shown or proven that the motorized recreation is causing the sedimentation? Have they shown a logical connection between how much motorized use is causing how much of the sedimentation? Other activities will continue in the watershed and it will continue to rain. All of it causes sedimentation. How much is attributed to OHV use? The requirement is that there is a logical/rational connection between the cause (action) and the effect (result). The Forest Service usually does a lousy job of tying together any cause and effect.
- The EIS often does not admit there are major gaps in data. CEQ regulations specifically require the Forest Service to identify 'Missing Information' but they never do. For instance, they have no idea how many OHV users are in the Forest. Do you think that information is a vital piece of data when you are trying to logically link OHV use with resource damage? We think so! If they don't know, they have to say in the EIS, "We don't know."
- Another common process error is the Forest Service will use a long, complicated, and very technical narrative to say that there really is no problem. A variation to this same type of process error is the specialist will conclude that motorized recreation causes no significant impact but the 'story' changes between the underlying specialist's report and the conclusion that is listed in the Environmental Consequences. Remember, the Forest Service must show a rational connection between the facts found and the conclusions reached.
- Another type of process error is 'corrupted research'. The environmental consequences and the underlying specialist's reports will be full of citations referencing scientific documents. WE STRONGLY URGE YOU TO READ THE CITED DOCUMENTS. Numerous times the documents cited will have little or nothing to do with the affected environment or the conclusion drawn from the

citation will not match the conclusion of the original researcher in the paper. That sounds pretty amazing for a 'science based paper' like an EIS but it is often true.


- There are conflicting statements in various chapters of the EIS. Different individuals write different parts and no one checks for consistency. This is especially true of the Environmental Consequences and the Affected Environment.
- The reports on the individual Resources (wildlife, plants, soils etc,) are based on assumptions, conjectures, imagined problems, and irrelevant research. Sometimes they just make things up. Again, the requirement is that there are logical conclusions drawn from facts.
- Playing Games with Numbers: Summaries may create numerical values (ratings) with no explanation of what the numbers mean. The numbers go into tables for summarizing the effects of the Alternatives. Each alternative has a 'damage' rating (such as 1 to 5). There is no 'zero' rating for 'no effect' even if the specialist said there is no problem
- There is no 'scaling' of impacts. All 'effects' or 'impacts' are assumed to be serious even when they may be insignificant in the overall scale of the forest, a watershed, the length of a trail, etc.
- NEPA says to balance environmental impacts with human needs. But there is never any discussion of what level of impact is acceptable. Obviously the Forest Service accepts negative impacts from other recreational users. But any impact from OHV is implicitly treated as unacceptable
- There is no logical connection shown between resource damage and OHV use. The EIS blames all impacts on OHV user. It ignores other sources of impacts, such as fires, other recreational users, grazing, timber cuts, controlled burns etc. (example: monitoring data for stream sediment is presented, and it is implied that OHV use caused all of it. There will be no acknowledgement that much of it is natural, and that only some small percentage of sediment is caused by OHV use.)

Again, this is just a small sampling of process errors that can be found. The BEST way is to wade in and start making a list of the errors found. You will soon spots 'themes'. You can then look for the connections that support these themes in other sections. Once you identify the process errors, prioritize them (not all process errors have an equal impact on the accuracy of the document or the selection of the decision). Think about the fundamental errors, errors that the major conclusions rest on, and attack those first!

Lesson 10 – The Appeal

How are Comments Connected to the Appeals?

If the Forest Service ignores all of our substantive comments and issues a Final EIS that is full of process errors, the next step is the administrative appeal process. After the Forest Service issues the Final EIS, the public has at least 30 days to appeal the document.



The only people that can appeal the document are those who have made substantive comments and their appeals are limited to the topics that they covered in the substantive comments.

The appeals are reviewed and decided by an 'Appeal Deciding Officer' at the next administrative level of the Forest Service. For TMR EIS's, the Decision Maker is the Forest Supervisor so the Appeal Deciding Officer will be someone on the Region 3 Staff.

Let's quickly review the material from the training that speaks to the most common mistakes made in the appeals:

1. The appeal was based on content and no process error is identified ("I disagree...", or "I don't like it...")
2. The appeal was based on "shotgun" style criticisms of the analysis with little or no evidence given.
3. The comment that the appeal was based upon did not present convincing evidence that the process used by the agency to arrive at their decision was wrong or flawed. This is obvious enough; if the comment isn't very good, the appeal won't be very good either. The evidence needs to be really convincing; it needs to be good enough to win in court.
4. The appeal was based on a comment that relied on language like "inadequate" or "incomplete," but did not present evidence specific enough to the methods in the analysis to prove the process error. In other words, if the substantive comment isn't effective, an appeal on that same substantive comment won't win.
5. The appeal was not directly tied to the fact that the agency disregarded the comment even though the comment presented enough specific and convincing evidence that it would have affected the decision.
6. The appeal raised issue(s) that were not raised in a substantive comment.
7. The appeal relied on the recitation of NEPA case law.
8. The appeal argues an issue (trail) that was outside the scope of the analysis. Remember, if the issue (trail) isn't in the EIS, it is outside the scope of the analysis.
9. The appeal was based on issues unrelated to the analysis or outside the jurisdiction of the agency that did the analysis.

10. The comment that the appeal is based upon would not have any effect (or substantial effect) on the outcome, regardless of the accuracy or substantial nature of the comment.

Remember, neither the Appeal Deciding Officer (in the Forest Service Appeal process) OR the judge (in a court challenge) can reverse a bad decision unless the Decision was not arrived at within the legal process. In other words, the appeal can only be successful if it shows and proves that the EIS had flaws, we identified those flaws and how to fix them, that the Forest Service ignored our corrections, AND that the process error was important to the decision reached by the Deciding Officer.