Therefore, your successful comment is really an evidence-gathering mission, for the purpose of showing that the agency broke the rules.

BUT…You never frame your comment as a legal question.

You are the witness. You are not the lawyer and not the judge.

The legal goal is to "identify the agency action that affects him or her and must show he or she has suffered a legal wrong because of the agency action or is adversely affected by that action within the meaning of a relevant statute. To be "adversely affected within the meaning of a statute," a plaintiff must be within the "zone of interests" sought to be protected by the statutory provision that forms the basis of a complaint."

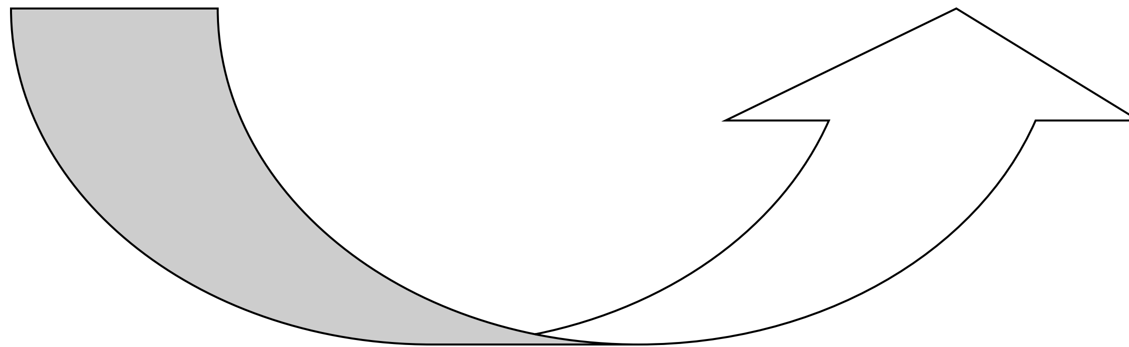
Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S. Ct. 3177 (1990).

When the agency sees this distinction in a comment, they will change the FEIS & ROD.

4. The Single Most Important Thing To Know About every NEPA Document

From the standpoint of how we can have an effect on it, THE DOCUMENT has two "aspects:"

CONTENT This is where we have our beef with the document:	PROCESS The steps they must complete correctly to get to a Decision:
It's what they say: the description of the area, the trails they plan to keep or close, the reasons, the specialists' write-ups, the evidence they present in support of their “proposed action.” In other words, it's their “story.” •Executive Summary •Purpose & Need •The Alternatives •Affected Environment •Environmental Consequences •Appendices	1-NOI 2-SCOPING PERIOD 3-THE ANALYSIS: 1) The logic and flow of the DEIS, 2) The methods & data they used to arrive at their conclusions, 3) The connection between the evidence and the conclusion. 4-DRAFT IS PUBLISHED 5-PUBLIC COMMENT PERIOD this is the 9th inning--most legal clout 6-FEIS IS PUBLISHED 7-RECORD OF DECISION (OR FONSI)
APPEALS BASED ON “CONTENT” NEVER SUCCEED.	**EVERY SUCCESSFUL APPEAL IS BASED ON A PROCESS ERROR**



CONTENT PROCESS

HOW DO YOU MOVE YOUR BEEF WITH THE CONTENT, INTO THE PROCESS COLUMN?

YOU SET THE ERROR UP YOURSELF.

5. The Four Rules For Writing A Comment That Will Affect The Decision

RULE # ONE:

- NEVER ASK WHY.
- NEVER ASK HOW.
- NEVER ASK THEM TO "PLEASE PROVIDE…"
- **NEVER ASK, PERIOD.**

RULE # TWO: Do this exercise:

1. Ask yourself your question --- Why? How? Explain? (the reactions you have when you read their reasons and assumptions). Write your question down.

2. Change your *question* into a *statement*.

RULE # THREE: Change the word “criticism” to “evidence.”
Examples of Your Evidence (used-to-be-criticisms):

-You can't figure out what standards they used to keep or to close roads

-Conflicting specialist’s write-ups.

-They are revisiting an issue already decided by law.

-Conflicting data tables, or, so many tables that they are not comparable.

-Misinterpreted regulation or law.

-Unsupported beliefs, opinions, or position statements in Chapter I , the P&N statement, and/or the Significant Issues.

-Elaborate discussions but no connection to motor access.

-All or most of the Effects Analyses reveal "no effect" for any alternative including the no-action alternative.

-Corrupted research.

-The absence or omission of key information.

-The absence of any evidence indicating a need to make the proposed changes.

-Unable to see the difference between the proposed action, the no-action, and the other alternatives.

-There appear to be multiple standards applied, to keep or to close trails.

RULE # FOUR:

1. Summarize your evidence according to your questions. Then you will be able to see if the evidence does lawfully support the proposed action.

2. If it does not, you will see a pattern. The pattern will reveal that the evidence either doesn't have any rational connection to the proposed action, won't answer the P&N, or, the agency is proposing to take action that it doesn't have the authority to do.

3. You can also sort your evidence according to subject, or even better, according to the CEQ regulations and the laws they are using to give themselves the authority to make these proposed changes.

11. WHAT IS A FLAWED ANALYSIS?

A flawed analysis is one in which there is no rational connection between the facts before the agency and the Proposed Action, which will in turn produce a Decision that has no rational connection to the facts before the agency.

The building blocks of a flawed analysis:

Omissions cause flaws

Violations of CEQ cause flaws

Untruthful statements cause flaws

Misinterpreted laws and/or agency over-reach cause flaws

They interrupt the *logic flow* from the evidence

to the conclusion and thereby, destroy or prevent a rational connection between the evidence before the agency and the ROD.

WHAT IS A "PROCESS ERROR and What Do They Mean By The "Scope" Of The EIS

This is what the Issues section is all about. (DEIS "Issues" in Chapter 1)

The agency identifies the significant issues based on the scoping, the P&N for the DEIS, and the authorities assigned to the agency by Congress. This is an important part of the process in which we do not participate.

How do the Significant Issues tilt the alternatives?

The Alternatives in the DEIS must be constructed such that these Issues and only these Issues are addressed by the analysis.

Once the Significant Issues are selected, everything else then becomes "outside the scope of the analysis." It's off the table. Can't even talk about it.

Examine the Issues in this DEIS

Is it within the authority of the agency to act on them via this plan?

Are they actually within the scope of the analysis?

Do they flow from what the agency itself wants, and not from the P&N or from the scoping?

Has the agency "morphed" an original issue such as, loss of public access, or not enough access, into something like, "providing a diversity of experiences" --to cover for the massive amounts of closures proposed?

Is the proposed action creating new issues that do not presently exist?

Are any of them based on conjecture or opinion?

Have any of the Issues already been settled by law or other regulation?

If you think any of the answers to the above do not support the existence of that particular Issue, you must provide the on-the-record evidence--go to the appropriate references and identify why, specifically, it is not a lawful Issue.

For Example, if its outside the scope of the agency authority, your evidence would come from NFMA, MUSY, FLPMA, and so forth.

If it does not accurately reflect scoping, your evidence comes from scoping.

But, in the agency scoping summaries, the agency very often summarizes only that which it wants to do, and very little of what the public wants to do.

This is how they can create Significant Issues that tilt the analysis the way they want.

Are the Significant Issues accurately selected?

40CFR 1501.7 Scoping

For example, the Affected Environment, and/or the "effects analyses" in the DEIS probably can't show that there are any effects (nothing is wrong). So your evidence would come from those chapters. Maybe the original Biological Evaluation says no effect, but the "Summary" we get in this DEIS finds a way to say that the proposed action is better. The truth is, there's no difference between the proposed action and doing nothing.

This raises the question of, what is there to analyze?

The agency must show evidence that an analysis occurred. (1500.2(b) and 1502.1)

What is an analysis? It is the examination of the relationships between man's activities and their effects on the forest: **we have a human action or activity; we have a change in the environment over time (a negative change); and we have a statistically reliable causative connection between the two.**

CEQ provides guidelines for analyzing direct, indirect, and cumulative effects, and "cause and effect" are frequently found in those guidelines. The cumulative effects analysis is generally considered the most important.

DO USE WORDS LIKE THIS INSTEAD:

- in error
- incorrect
- mistaken
- new information
- arbitrary
- capricious
- in conflict with
- this is why we say this
- missed a step
- skipped
- left out
- omitted
- the agency
- the Forest Service
- the Agency

Suggestions for opening your comment:

- “I have new information I want added to the FEIS”
- "I have identified a mistake”
- “The DEIS has not mentioned some very important information. ”

Tell them what to say, where to say it, where to put the supporting evidence, and what it should replace.

If you tell them to put a true statement into the document, you put them into a double bind, because:

If they cannot deny that what you want added is true and is relevant, but they leave it out, you have created the PROCESS ERROR. **In very simple terms, if they left out true and accurate information and you provide it in your comment (with supporting documentation), and tell them to add it and tell them where to add it, and give them the written words that you want them to add (make their job easier) and they do not add it, they have not fully complied with the NEPA process. (1502.9 (b))**

This will also alter the nature of the information that the Deciding Officer uses to make the Decision.

Remember your Goal: to correct inaccurate information, remove things that are not true, provide new, accurate information, and/or build your case proving their analysis is flawed. Use the same writing style as they do---you are a member of the ID Team members, helping them to write the document.

The Decision can come ONLY from information provided to the Deciding Officer in the FEIS.

It is in your comments that you speak directly to the Deciding Officer.

Because the Decision can come only from what's analyzed in the DEIS,

We must make sure there's an accurate description of the physical effects of the human activities.

Without this info, a specialist with no knowledge of the activity cannot produce an accurate "Effects Analysis."

We must make sure there's an accurate description of the benefits of motor access.

Without this info, the Deciding Officer cannot find the appropriate balance between the effects of the activity vs. the benefits to society. That is, the greater the social benefit of the activity, the higher the tolerance for greater impacts and costlier mitigation.

BTW: what critical data has, so far, been omitted from EVERY DEIS?

A DESCRIPTION OF THE HUMAN ACTIVITY UNDER ANALYSIS!

14. (Piles) The process the agency goes thru when they read the comments.

Piles—love motor access hate motor access, no new information, “my story”(unsupported beefs), wrong jurisdiction, wrong Forest, irrelevant (global warming, recycling, stuff like that), no proof of a significant omission, no evidence of why there's no rational connection between the Proposed Action and the evidence before the agency, no evidence that the agency broke the rules, and no clearly set forth, and documented case that the agency is committing some kind of fraud (using the NEPA process to do something not disclosed in the NEPA analysis).

Every letter is measured against only one standard:

will the agency lose in litigation if this commenter appeals.

If they think you would win, your letter goes into the substantive pile.

What is OUTSIDE THE SCOPE:

New proposals, not analyzed in this DEIS.

It is possible to introduce new proposals & have them considered, but if they are not very similar to, or "a slight variation" on an existing alternative, they will be discarded because you should have put the idea forth in scoping.

If you DID put the idea forth in scoping, and the agency is silent on it, you can develop a process error out of it. And what do we do when we have proven our case? We tell them what to do. What can they do? Change the document. What's our goal? To get accurate information into the document and misleading information out of the document.

The best way to stay within the scope of the analysis is to derive your statements and evidence from the document itself.

Other Observations

All the agency literature at the public open houses stressed “Alternative B”, to the extent that those were the only maps, flyers, etc. for the public to even view. Remember this statement?

“Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.”

Predetermination *occurs when the agency commits itself to a certain outcome before it has completed that environmental analysis.* ***Forest Guardians v. U.S. Fish & Wildlife Svc., 611 F.3d 692, 714 (10th Cir. 2010).***

APPEALS

After the FEIS and the ROD, there is a 30-day window to appeal.

15. What Your Comments Have To Do With Appeals: A Review Of The Most Common Mistakes Made In Appeals

1. The appeal is based on a comment that relied on language like "inadequate" or "incomplete," but does not present evidence specific enough to the methods in the analysis to prove that.

2. The appeal is not directly tied to the fact that the agency disregarded your comment, even though your comment presented enough specific and convincing evidence, that it would have affected the decision.

3. The comment that your appeal is based upon did not present convincing evidence that the process used by the agency to arrive at their decision was wrong or flawed. And I do mean convincing---the comment has to have been detailed, accurate, and well-supported

4. The appeal is based on "shotgun" style criticisms of the analysis, with little or no evidence. I've heard them called the "general" type of comment. This "general" type of comment is a guaranteed loser.

5. The appeal raises issue(s) that were not raised in comment.

6. The appeal relies solely upon the recitation of NEPA case law.

7. The appeal argues an issue that is outside the scope of the analysis.

8. The appeal is based on issues unrelated to the analysis, or outside the jurisdiction of the agency that did the analysis.

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

10. The appeal itself would not have any effect on the outcome.

Standards of Judicial Review

Neither the Appeal Deciding Officer OR the judiciary can reverse a bad decision, unless the Decision was not arrived at within the legal process, i.e. it must meet the standards for properly following the NEPA process as set forth in CEQ regulations, and comply with the controlling law for the agency.

APA (Title 5 USC) is the law which gives citizens the right to a judicial review of agency decisions, after you've exhausted all the available administrative remedies.

This is when you need the lawyer.

The most common enforcement requested is a "Preliminary Injunction."

APA Title 5 § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Our draft EIS comments will generally be aimed to set up situations covered by (A) first and foremost, and, secondarily, (C) (D) (E) or (F).

A judicial review of an agency determination (its final administrative appeal decision) as to whether the appellant was likely to prevail on the merits of its NEPA and NFMA claims will necessarily incorporate the APA's arbitrary and capricious standard—because the APA is how we enter the judicial system.

We must establish our standing to sue. The first big step is that we have exhausted all our administrative remedies (comment and appeal). Then we "identify the agency action that affects him or her and shows that he or she has suffered a legal wrong because of the agency action or is adversely affected by that action within the meaning of a relevant statute. To be "adversely affected within the meaning of a statute," a plaintiff must be within the "zone of interests" sought to be protected by the statutory provision that forms the basis of a complaint."

Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S. Ct. 3177 (1990).

This is where the case law helps us.

It keeps us from wasting time on stuff that's already settled, and it bolsters the counts against the government which we develop out of the FEIS and the ROD.

About the "arbitrary and capricious" standard:

“Agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be attributed to agency expertise.” *SEC v. Chenery Corp.,* 332 U. S. 194, 332 U. S. 196 (1947).

The Supreme Court has explained:

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

This standard has been cited in *Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 371 U. S. 168 (1962).

and cited again in Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 No. 82-354 (1983)

and cited again in AMERICAN TRUCKING ASSOCIATIONS INC v. ENVIRONMENTAL PROTECTION AGENCY No. 09-1090. Argued Oct. 2, 2009. -- April 02, 2010

A preliminary injunction is appropriate

when a plaintiff demonstrates either:

(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor.' " *LandsCouncil v. Martin* (*Lands Council II*), 479 F.3d 636, 639 (9th Cir. 2007) (quoting *Clear Channel Outdoor Inc. v. City of LosAngeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

These two options represent extremes on a single continuum: " 'the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.' " (quoting *Sw. Voter Registration Educ. Project*, 344 F.3d at 918).

<u>What is Success On The Merits?</u>

--"meriting a legal victory; the elements of a claim; the substantive considerations to be taken into account; a judgment based on the evidence." ***From Black's Law Dictionary 9th ed.***

Review under the <u>arbitrary and capricious standard</u> "**is narrow, and [we do] not substitute [our] judgment for that of the agency."** ***Earth Island Inst. II*****, 442 F.3d at 1156 (citing** ***U.S.Postal Serv. v. Gregory*****, 534 U.S. 1, 6-7 (2001)). Rather, we will reverse a decision as arbitrary and capricious (as noted above) only if the agency relied on factors Congress did not intend it to consider, "entirely failed to consider an important aspect of the problem," or offered an explanation "that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (citing** ***Sierra Club v. U.S. Envtl. Prot. Agency*****, 346 F.3d 955, 961 (9th Cir. 2003),** ***amended by*** **352 F.3d 1186 (9th Cir. 2003)).**

Since Congress' early regulation of the national forests,

the Supreme Court has stated that " it has never been the case that "the national forests were . . . to be 'set aside for nonuse.'

<u>United States v. New Mexico</u>, 438 U.S. 696, 716 n.23