Public Land and Resources Law Review

Volume 12

Establishing a Standard for the Mitigated Environmental Assessment under NEPA

Mollie A. Maffer

ESTABLISHING A STANDARD FOR THE MITIGATED ENVIRONMENTAL ASSESSMENT UNDER NEPA

Mollie A. Maffei

INTRODUCTION

The National Environmental Policy Act (NEPA) created two avenues for federal agency action when the projects or proposals before it might potentially effect the environment. The agency can issue a Finding of No Significant Impact (FONSI) after preparing an Environmental Assessment (EA) on the project or prepare the far more substantial Environmental Impact Statement (EIS). The EIS is a lengthy document detailing the effects of the proposed plan on the environment and presenting alternative plans for each project.

Since 1969 significant litigation over costly preparation of the EIS has occurred. As a result, the federal courts, predominantly in the D C. and 9th circuits, have fashioned a common law process which they refer to as the "Mitigated" or "Super" Environmental Assessment. The courts see the mitigated EA as a document which in at least two respects is superior to the EIS.

First, the mitigated EA is less time consuming and less expensive to prepare than the EIS. Second, mitigation measures, lessening the impact of the project on the environment, could be made mandatory by the agencies involved, and court action or legislation and should be. This commentary will review the case law which sets out the proper criteria for a legally sound and accurate mitigated EA.

BASIC STATUTORY REQUIREMENTS UNDER NEPA

Congress enacted the National Environmental Policy Act of 1969 (NEPA)[1] as a procedural mandate in an effort to protect the environment. The purpose of NEPA is to insure that federal agencies are fully aware of the impact of their decision on the environment.[2] Under the Act, federal agencies must prepare a detailed statement when taking actions that significantly effect the quality of the human evnironment. The detailed statement known as the Environmental Impact Statement (EIS) insures the agency will carefully consider the various impacts upon the environment as well as providing pertinent information to the larger audience

1. 42 U.S.C. § 4331 (1988).
2. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985).

involved in the decision making process.[3] "NEPA itself does not mandate particular results, but simply prescribes the necessary process."[4] Thus NEPA guarantees that federal agencies make informed decisions; however, it does not demand what the decisions should be.

Under the regulatory guidelines, a federal agency prepares an Environmental Assessment (EA), in order to determine whether or not, it must prepare an Environmental Impact Statement.[5] The agency will issue a Finding of No Significant Impact (FONSI) if, through the preparation of the EA, the agency determines its anticipated action will not significantly effect the quality of the human environment.[6]

The NEPA legislation established the Council on Environmental Quality (CEQ)[7] which reviews and evaluates various programs of the Federal Government in light of the Act.[8] The CEQ has promulgated regulations which command an agency to prepare an EA (unless an EIS is already prepared) for determining whether or not an EIS is truly needed.[9] An EA, by definition, is a brief document for determining whether to prepare an EIS or a FONSI.[10] Under the regulations, an EA "shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."[11]

The above language refers to the NEPA requirement that alternatives to the proposal, be included in a detailed statement, the EIS.[12] Additionally, the regulations state that to determine the scope of the EIS, agencies shall consider three types of alternatives, including mitigation measures.[13] As a general rule, an agency should not rely on the possibility of mitigation measures as an excuse to avoid the EIS requirement.[14] *Robertson v Methow Valley Citizens Council*, a recent United States Supreme Court decision held that a discussion of mitigation measures in the EIS is an important ingredient and should be reasonably complete. It held, however, that NEPA does not require that the mitigation measures be fully developed.[15] Therefore, no statutory basis or case law exists for the

3. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).
4. *Id.* at 351.
5. 40 C.F.R. § 1508.3 (1991).
6. Foundation on Economic Trends v. Weinberger, 610 F.Supp 829, 837 (D.C.D.C. 1985).
7. 42 U.S.C. § 4321 (1988).
8. 42 U.S.C. § 4344(3) (1988).
9. 40 C.F.R. § 1508.9 (1991).
10. 40 C.F.R. § 1508.9(a) (1991).
11. 40 C.F.R. § 1508.9(3)(b) (1991).
12. 42 U.S.C. § 4332(2)(C)(iii)(E) (1988).
13. 40 C.F.R. § 1508.25(b)(3) (1991).
14. 46 Fed. Reg. 18.026 (1981), citing 40 C.F.R. 1508.8 and 1508.27 (1990).
15. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989).

proposition that mitigation measures may negate the need for an EIS, nor that the measures be implemented.

The first circuit stressed the very different roles of the EIS and the EA.[16] The role of the EA is to identify the potential impacts on the environment.[17] The EIS describes and evaluates the potential impacts which allow the agency to balance the effects against the proposed project.[18] In *Sierra Club v Marsh*, 769 F.2d 868 (1st Cir. 1985) the court determined that under 42 U.S.C. § 4332(2)(C)(v), an agency, in deciding whether an EIS is necessary, must consider the degree to which an action may establish a precedent for future actions with significant effects.[19] In *Marsh* the agency involved prepared fairly lengthy EA's. Mitigation measures were mentioned by the agencies, but specific measures were not listed.[20] The court concluded an EIS was necessary in this case, not merely as a technical requirement but because NEPA'S underlying purpose requires agencies to determine and assess environmental effects in a "systematic way"; decision makers must focus on the environmental effects of the proposed action at the time they make their decision.[21] This becomes important because if an agency issues a permit, thus committing to a project without the benefit of knowledge received from the preparation of an EIS, significant impacts could occur in the future over which the agency would have no control.

Despite the statutory criteria, considerable case law exists upholding agency preparation of an EA when detailed mitigation measures are proposed and implemented. Under the case law, an EA is not the brief document described in the regulations, but a lengthy document with requirements for mitigation measures used to justify a FONSI. This document through common law has become known as the "mitigated" or "super" EA.[22]

THE COMMON LAW MITIGATED EA

Under case law, stringent requirements have been developed to satisfy the mitigated EA necessary to justify a FONSI. Since the mitigation measures outlined in a common law mitigated EA are separate from NEPA'S procedural formula, the measures can be mandatory as opposed

16. Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985).
17. *Id.* at 875.
18. *Id.* at 875.
19. *Id.* at 879.
20. *Id.* at 880.
21. *Id.* at 882.
22. Steven E. Daniels and Christine M. Kelly, *Deciding Between an EA and an EIS May BE a Question of Mitigation*, Western Journal of Applied Forestry, (WJAF) 5(4), 111 (1990).

to the nonmandatory EIS alternatives to the proposal required by NEPA.[23] Under a Mitigated EA, an agency can compel the measures to be implemented by including them as conditions or stipulations in permits, licenses, or contracts.[24] This is particularly important because under NEPA, once the EIS is complete, the mitigation measures need not be implemented.[25] As seen in *Preservation Coalition Inc. v Pierce*, it was a contract, not an EIS which obligated the companies involved to modify construction activities to reduce the noise level of the project and thus lessen the impact on the environment.[26]

Significant case law exists, setting out the proper criteria for the mitigated EA. Daniels and Kelly suggest six criteria from the case law[27]:

> 1) do the mitigation measures adequately reduce the impacts of the project; 2) are the measures demonstratably effective; 3) is the effectiveness of the measures free from controversy; 4) do the mitigation measures address and respond to cumulative impacts from other activities; 5) were the mitigation measures developed as part of the original proposal; and 6) are means developed to insure the mitigation measures are developed and implemented.

Perhaps the most well known precedent for the mitigated EA came from the D C. circuit in a 1982 case involving a drilling permit in the Cabinet Mountain Wilderness area in northwestern Montana. A small population of grizzly bears inhabit the area and biologists consider the area potentially favorable habitat for grizzly bear management.[28] The D C. circuit held that mitigation measures outlined in the EA prepared by the Forest Service in conjunction with Asarco and the Fish and Wildlife Service obviated the need for an EIS.[29] The EA proposed fourteen specific recommendations designed to reduce potential adverse environmental effects to a minimum.[30] In upholding the Forest Service decision not to prepare an EIS the *Cabinet* court looked at four criteria:[31] "1) whether the agency took a 'hard look' at the problem; 2) whether the agency identified the relevant area of environmental concern; 3) whether the agency made a convincing case that the impact was insignificant (as to problems identified); and 4) whether the agency convincingly established that changes in

---

23. Daniels, supra, note 22.
24. *Id.*
25. *Robertson*, 490 U.S. at 332.
26. Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 861 (9th cir. 1982).
27 Daniels, supra, note 22.
28. *Id* at 649
29. Cabinet Mountain Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).
30. *Id.* at 680.
31. *Id.* at 682. (citing Maryland-National Capital Park and Planning Commission v. United States Postal Service, 487 F.2d 1029, 1040 (D.C. Cir. 1973)).

the project sufficiently reduced its impact to a minimum (if the impact was of true significance)."[32] The fourth criteria supports the courts decision to allow the use of mitigation measures to forego preparation of an EIS. Thus, according to *Cabinet*, the mitigation measures must adequately reduce the impacts of the project. The specificity of the mitigation measures outlined in *Cabinet* convinced the court that the impacts would be significantly reduced.

To further illustrate this point, *Sierra Club v Peterson* held that stipulations attached to oil and gas leases were not adequate because while the Department of the Interior could impose conditions, they could not preclude the proposed activity [33] Thus, leases could be obtained without evaluation of the environmental impact of the activity,[34] and there would be no guarantee that the impacts would be significantly reduced.

When considering the problem, the *Peterson* court reasoned that evaluation of the impacts are necessary at an early stage when alternative courses of action by the Forest Service are still possible,[35] and before an irretrievable commitment of resources is made which will effect the environment.[36] The court held that the Department must either prepare an EIS or retain authority to preclude surface disturbing activities until an environmental analysis is complete.[37]

In 1985, the Federal District Court for the District of Columbia, determined that an EA prepared by the Forest Service did not pass the four part *Cabinet* test because the agency failed to supply convincing reasons why the potential impacts were truly insignificant.[38] "The EA'S in question only contained a cursory and perfunctory discussion of the wilderness problem."[39] Thus, according to *Sierra Club v Block*, the EA must outline how the mitigation measures will reduce the impact of the proposed project, satisfying the first criteria outlined by Daniels and Kelly [40] Conclusory or cursory statements will not be permitted to satisfy mitigated EA requirements.

The second criteria suggested by Daniels and Kelly,[41] is whether the measures are demonstratably effective. This can be illustrated by the specificity and comprehensiveness of the evaluation as illustrated by

---

32. *Id.* at 682.
33. Sierra Club v. Peterson, 717 F.2d 1409, 1411 (D.C. Cir. 1983).
34. *Id.* at 1414.
35. *Id.* (citing *Scientists Inst. for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1094 (D.C. Cir. 1973).
36. *Id.* (citing *Mobile Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)).
37. *Id.* at 1415.
38. Sierra Club v. Block, 614 F.Supp 488, 491 (D.D.C. 1985).
39. *Id.*
40. Daniels, supra, note 22.
41. Daniels, supra, note 22.

Cabinet.[42] In preparing the EA, the Forest Service incorporated comments from the United States Fish and Wildlife Service.[43] The mitigation measures outlined were specific and recommendations for more than one measure for each area of concern were contemplated.[44]

In contrast to the specificity of the mitigated EA outlined in *Cabinet*, the court in *Foundation For North American Wild Sheep v United States*, overturned an agency decision to forego preparation of an EIS.[45] In *Foundation*, the Forest Service issued a permit to reopen and widen a road near an area occupied by Desert Bighorn Sheep.[46] The sheep are extremely sensitive to environmental change especially during the lambing season.[47] The Forest Service decided to reopen the road without carefully evaluating the effect the road would have on the sheep.[48]

Third, the controversy surrounding the effectiveness of the mitigation measures must be at a minimum.[49] In *Foundation* various parties raised serious questions and criticisms attacking the mitigation measures proposed by the Forest Service.[50] The court noted that "40 C.F.R. § 1508.27(b)(4) provides that one consideration in determining whether a proposed action will significantly effect the quality of the human environment is the degree to which the effects on the quality of the human environment are likely to be highly controversial."[51] In fact, "controversial" refers to the effect of the major federal action.[52] This is a tipoff to the agency that an EIS should be prepared.

Four, the mitigation measures must respond to cumulative impacts from other activities. In *Sierra Club v Marsh*, although the EA'S were lengthy and complex, the court found them too narrow and the agency neglected to include the effects of the related projects.[53] Another court overturned the EA prepared by the Forest Service on timber sales in the Siuslaw National Forest.[54] The court found that the EA failed to consider the cumulative impact of the timber sales or of other harvests in the area.[55]

---

42. *Cabinet*, 685 F.2d at 678, 680.
43. *Id.*
44. *Id.* at 680.
45. Foundation For North American Wild Sheep v. United States, 681 F.2d 1172 (9th Cir. 1982).
46. *Id.* at 1175.
47. *Id.* at 1176.
48. *Id.* at 1178.
49. *Id.* 681 F.2d at 1172.
50. *Id.* at 1179-1181.
51. *Id.* at 1182.
52. *Id.*
53. 769 F.2d 868, 873.
54. *National Wildlife Federation v. USFS*, 592 F.Supp 931, 942 (D.Or. 1984).
55. *Id.* at 941-942.

The court held that the Forest Service must analyze the cumulative impacts in order to comply with NEPA.[56] Because of the specificity, cooperation, and comprehensive nature of the mitigation measures proposed in *Cabinet Mountains* it remains an example of cumulative impact analysis necessary for an EA to be effective.[57]

Fifth, the mitigation measures should be developed as part of the original proposal. As stated above, *Sierra Club v Peterson* illustrates the problem of committing to a project before it has been evaluated for environmental impacts.[58] Additionally the *Sierra Club v Marsh* court noted, " .the underlying purpose in requiring agencies to determine and assess environmental effects in a systematic way-namely, have the decision makers focus on these effects when they make their decisions. That is to say, the requirement flows not only from the letter, but from the spirit, of NEPA."[59]

Moreover, on March 17, 1981 the CEQ published guidelines in the Federal Register to answer the forty most asked questions on NEPA regulations.[60] The CEQ compiled the answers as part of its implementation of NEPA. Answer number 40 specifically mandates that mitigation measures may only be relied upon if they are imposed by statute, regulation, or submitted *as part of the original proposal.*[61] (emphasis added)

Six, is perhaps the most important; it is the key to the success of the mitigated EA, and assures that the mitigation measures are developed and implemented: An agency must have some kind of guarantee that proposed mitigation measures will be utilized, otherwise the mitigated EA will not be a viable alternative to the EIS. Daniels and Kelly[62] suggest the implementation requirement can be accomplished by contract, by permit conditions, by government entities being held responsible, or by statutory requirements. The effectiveness of the measures depend on how they are applied and enforced.[63]

So long as significant measures are undertaken to "mitigate the project's effects they need not completely compensate for adverse environmental impacts."[64] In *Robertson v Methow Valley Citizen's Council*, the

---

56. *Id.* at 942.
57. *Cabinet*, 685 F.2d at 678.
58. *Peterson*, 717 F.2d at 1409.
59. *Marsh*, 769 F.2d at 882.
60. 46 Fed. Reg. 18,026 (1981).
61. *Id.*
62. Daniels, supra, note 23.
63. The Steamboaters v. F.E.R.C, 759 F.2d 1382, 1394 (9th Cir. 1985).
64. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985). (relying on Preservation Coalition v. Pierce 667 F.2d 851, 861 (9th Cir. 1982)).

Regional Forester directed the Supervisor of the Okanogan National Forest to identify and implement certain mitigation measures relating to air quality [65] Even though the Supreme Court held NEPA did not mandate particular results through an EIS[66] the foregoing points to the need for agency control over mitigation measures under the mitigated EA. As seen in *Sierra Club v Peterson*, stipulations can be attached to the permit, and if the stipulations are violated the permit can be revoked.

In *Preservation Coalition, Inc. v Pierce*, the court pointed out that mitigation measures proposed by the agency were not project related, and were outside the control of the agency However, the court noted that the agency has the option of contracting with the entities to implement the proposed measures.[67]

Another important aspect of the mitigated EA, in addition to the comprehensiveness and specificity of the measures, is the amount of cooperation between the various parties involved. Cooperation during a project may lead to more effective means of protecting the environment. A ninth circuit decision in 1985 concerned a residential development on San Mateo Mountain in California, home of the Mission Blue Butterfly an endangered species. The agency prepared an EA with a FONSI. The court found significant the extensive cooperation and agreement among local, state, and federal officials, private parties, and local environmentalists in developing the EA.[68]

CONCLUSION

The mitigated EA can be an effective tool in not only protecting the environment by mandating mitigation measures but also in encouraging cooperation between the various parties involved in the project. Binding contracts and permit conditions can insure the environment will be protected. Federal agency control over the mitigation measures can provide the various parties a measure of security about the project. Further, negotiation and mediation between the parties can avoid the expense and lenth of litigation.

If litigation should go forward, courts should carefully consider the criteria suggested in this note to insure the federal agency took the proper course of action. Additionally, legislation should be amended to codify the criteria developed by the courts since NEPA was enacted. If so, satutory requirements, along with contracts and permit conditions can better protect the environment within the spirit of NEPA.

---

65. *Robertson*, 490 U.S. at 345.
66. *Id.* at 332.
67. *Preservation*, 667 F.2d at 860.
68. *Friends*, 760 F.2d at 986.