Session 7: NEPA LAW AND STRATEGY

Peter J. Kirsch
Kaplan Kirsch Rockwell
This is *not* NEPA
My biases

- Proprietor control
- Projects delayed are projects killed
- Politics abhors secrecy
- No excuse for poor planning
- Law/ lawyers are OK, really
NEPA IN CONTEXT

- Everyone thinks they understand NEPA law
- Process vs. substance
- Relationship to other laws
  - Federal environmental laws
  - State environmental laws
  - Little NEPAs
  - Other federal (FAA) approvals
  - State and local approvals
NEPA PROCESS

- State Laws
- Local Approvals
- Participation & Politics
- MPO Review
- Economics
- Engineering
- Federal Env’t’l Laws
“It is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action”
- CEQ Regulations §1500.1(b)

Really?
KEY ELEMENTS OF NEPA

Alternatives

Purpose & Need

Process

Documentation
BASIC LAW: KEY PRINCIPLES

- NEPA review ≠ planning ≠ design
- It’s all about alternatives
- It’s all about documentation
- It’s all about process
BASIC LEGAL PRINCIPLES: KEY FAA NEPA CASES

- Citizens Against Burlington (Toledo)
- Grapevine (D/FW)
- Allison (Denver)
- Grand Canyon Trust (St. George)
- Alliance for Legal Action (Piedmont Triad)
- Los Angeles (Burbank)
- CARE (Boston Logan)
WHY DOES NEPA MATTER

➤ Documentation
  • Reveal substantive environmental issues

➤ Process
  • Government in the sunshine

➤ Legal challenges
  • Cat Exes
  • EAs
  • EISs
ROLES: FEDERAL AGENCIES

- Lead agencies
- Joint lead agencies
- Cooperating agencies
  - Expertise
  - Approval authority
- Dep’t of Justice
ROLES: EVERYONE ELSE

- Sponsor
- Local agencies
- State agencies
- NGOs
- Users, industry
- Community, activists
Which is correct?
Somehow, it's not quite the same.
HOW OPPONENTS USE NEPA: PROJECT STOPPING STRATEGIES

- Substantive environmental hurdles
- Delay
- Political leverage
  - Press
  - Elected officials / elections
  - Special interest groups
- Supplemental EIS
EMERGING AND UNRESOLVED LEGAL ISSUES - I

- **Noise**
  - Metrics
  - Natural quiet
  - Thresholds of significance

- **Air quality**
  - SIPs
  - GSEs
  - Hot spots
EMERGING AND UNRESOLVED LEGAL ISSUES - II

- Environmental Justice
- Induced and secondary impacts
- Connected and cumulative actions
- Streamlining
- FOIA (and state counterparts)
The lawyer’s guide to preparing really good NEPA documents
WHO PREPARES THE DOCUMENT
(This actually matters)

 ➢ Environmental Assessment
  ● Sponsor role
  ● FAA role

 ➢ EIS
  ● Sponsor role
  ● Consultant/contractor
  ● FAA role
PREPARING AN EIS: BEST LEGAL PRACTICES - I

- Communications
  - FAA ↔ Sponsor
  - Public ↔ Sponsor
  - Other Agencies ↔ Sponsor ↔ FAA
  - FOIA/open records statutes

- Public Administrative Record
- Internal Administrative Record
- Drafting the Record of Decision or FONSI
PREPARING AN EIS: BEST LEGAL PRACTICES - II

- Documented Categorical Exclusion
  - New and valuable tool
- Supplemental EIS
- Bigger ≠ better
- One and only one environmental document
BEST PRACTICES: STRUCTURE FOR EIS TEAM

Airport Proprietor

FAA Project Manager

Cooperating Agencies

Prime Contractor

Airport’s EIS Team

Subcontractors

Subcontractors

Subcontractors
A WELL OILED MACHINE

AIRPORT’S EIS TEAM

CONSULTANT

EIS
PREPARING AN EIS: COMMON ERRORS

- FAA will take care of it...
- Purpose & Need ≠ alternatives
- Purpose & Need doesn’t reflect sponsor’s goals, objectives
- Process, consultation errors
- EIS drives planning
- Failure to integrate other environmental requirements (e.g. ESA, 404, 4(f))
5 KEY POINTS TO PREPARING A DEFENSIBLE EIS

1. Purpose and need statement
2. Reasonable alternatives
3. Independence of preparer (contractor)
4. Thorough documentation
5. Rigid adherence to process
LITIGATION ISSUES

- DOJ vs. FAA role
- Assembling administrative record
- Intervention
- Amicus
CHALLENGES TO NEPA COMPLIANCE

- Record of Decision
- U.S. Court of Appeals (ROD+60 days)
  - D.C. or Circuit
  - ROD/FONSI
- Supreme Court
- U.S. District Court
  - No NEPA document
  - No FAA Record of Decision/ FONSI
IN CONCLUSION . . .

MOST IMPORTANT POINTS

➢ Process is important
➢ Purpose and need
➢ Alternatives
➢ Sponsor vs. FAA role
➢ It’s the record, it’s the record, it’s the record
➢ ROD

Remember These!
Questions

Peter J Kirsch
Kaplan Kirsch Rockwell