

WHOSE GOALS AND WHOSE ALTERNATIVES?
HOW BAD CAN A PRIVATE GOAL BE AND STILL
DEFINE THE EIS UNDER NEPA?

Prepared for Presentation to the

National Park & Public Land Symposium
Snowbird, Utah
April 6-9, 1995

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April 1995

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I. INTRODUCTION

The purpose of this paper is to review certain recent problems in the conceptualization of the choice of alternatives in an EIS under NEPA. Specifically, there has been a recent trend on the part of federal agencies, supported by some courts, to throw up their hands when confronted with the development of alternatives, and simply accept the proposal put forward by the private applicant if it is defined with specificity to the exclusion of the range of alternatives contemplated by NEPA. This sluggish approach relegates alternatives to those aspects of the proposal left undefined by the applicant, thereby defeating the whole purpose of NEPA and reducing the EIS process to triviality.

The purpose of NEPA is to require that federal agencies embarked on major actions which will have a significant impact on the environment take a "hard look" at the environmental impacts of the proposed action and compare those impacts with the impacts of alternative courses of action.¹ The EIS is to inform decisionmakers about ways to use or protect resources in which we as a nation have an interest. These resources may be tangible, like Yellowstone, or less tangible, like "navigation."

The "heart of the EIS" is the requirement for the development and comparison of

¹ If the proposed action would not consume or damage a public resource (including resources the public has an interest in, e.g. wetlands, but may not own outright), then generally there is no need for an elaborate EIS.

alternatives to the applicant's proposal.

"1502.14 Alternatives including the proposed action

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 CFR §1502.14.

The polestar of the "alternatives" analysis is federal policy with respect to the resources at issue. The alternatives analysis is mandated in order to give federal decisionmakers good information on the environmental benefits and costs of using federal resources in alternative ways. Though this is not a hard idea, and this process should be reasonably straightforward, at least conceptually, four simple examples are presented as illustrations.

Illustration #1

Ski Resort in a National Park

Consider the easy case where there is a federal policy to favor the creation of a ski resort somewhere in a federal park. A private corporation submits a proposal for a resort at point A in the park. The EIS on the proposal should clearly consider resort locations at other reasonable sites which may have fewer environmental problems.² It would hardly be reasonable to do an EIS without considering any alternatives but the one proposed.

The scope of alternatives should be determined by the federal policies controlling

² As well, perhaps, as other configurations of the proposal at the first site.

the supervision of the resources in question, here the assets of the Park. Limiting the choice of alternatives to one site may well result in a bad decision through a lack of information on better sites.

Illustration #2

Gas Station and Sign

The managers of a National Forest have found that there is a need for a gas station at a certain point in the Forest. Federal policy is against large rotating neon signs in National Forests. If a private proposal included such a sign, the EIS should certainly include alternatives without such a sign.

Illustration #3

Meatpacking Plant on an Iowa River

A company proposes to build a large meatpacking plant on a lake in back of a federal dam. Alternatives might include locating a meatpacking plant on a nearby and more environmentally suitable river.

Illustration #4

Power Plant in a Non-Attainment Area

Consider a proposal to build a large coal-fired power plant in a non-attainment area with serious air quality problems. It may be reasonable to consider cleaner gas-fired turbines as an alternative, so as to present federal decisionmakers with a range of alternatives that may be more in accord with federal environmental policy objectives.

In sum, the choice of alternatives to study depends on the scope of the federal

policies in question.³ This is the entire point of NEPA; the EIS is to help sort out the best choice given federal policy concerning the resources in question.

What follows is divided into three parts. The first paints a picture of the problem as it has arisen over the last ten years, culminating in the project definition and scope of alternatives presented in the now withdrawn Appendix A--Development of Alternatives in the New World Mine draft EIS. The second presents a critical analysis of the problem. The final section presents conclusions.

II. DOES THE PRIVATE APPLICANT'S PROPOSAL DEFINE THE SCOPE OF ALTERNATIVES?

Some agencies and some courts have held that a corporate applicant's proposal defines the scope of the alternatives that are to be investigated. William H. Rodgers, Jr., the author of the leading hornbook on environmental law, gives us the following characterization:

"One extraordinary development in NEPA alternatives law . . . is the rule, widely embraced, that the agency need evaluate only those alternatives that achieve the project purpose or planning objective, however extravagant these may be. [Citations omitted]. Read literally, of course, this rule would sweep aside the case law requiring consideration of the alternatives of no action, of mitigated action, of lesser action, of delay. And it is read literally--in some truly ridiculous decisions holding that no alternatives at all need be considered in a highway or airport project because the agency's purpose was to do one thing and one thing only."⁴

³ Clearly, if there are no federal policies in question, there could be no major federal action and no need for an EIS at all.

⁴ William H. Rodgers, Jr., *Environmental Law* Second Edition (West Pub., St. Paul, 1994), p.960-

One of these cases is *Citizens v. Busey*, which is worth reviewing in some detail.

A. *Citizens v. Busey*

In his decision in the leading case in this set of cases, then circuit judge Clarence Thomas wrote:

"Having thought hard about these appropriate factors, the FAA defined the goal for its action as helping to launch a new cargo hub *in Toledo* and thereby helping to fuel the Toledo economy. The agency then eliminated from detailed discussion the alternatives that would not accomplish this goal." *Citizens Against Burlington v. Busey*, 938 F2d 190, 198 (DC Cir 1990).

Having seen the corporate applicant's request to build in Toledo, the agency determined that it need not look to any alternate site, since that would not accord with the stated desires of the corporate applicant.

The difficulty with this decision is that the FAA's marching orders from Congress were only, "to facilitate the encouragement of air cargo hubs"; Congress did not mandate any specific locations, and yet the FAA determined to give absolute preference to the choice of the airline in question, without considering *any* alternatives, regardless of potential environmental superiority.

The outcome of this decision is especially surprising and contrary given the language in *Citizens* setting forth the federal agency's obligation to consider first its congressional mandate and only then the desires of the private corporate applicant.

1.

" . . . [A]gencies must look hard at the factors relevant to the definition of purpose. When an agency is asked to sanction a specific plan * * * the *agency should take into account the needs and goals of the parties involved in the application.*" (Emphasis added).

But,

"Perhaps more importantly, an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." id @ 196.

Moreover, the same decision notes with favor language from *Issac Walton League of American v. Marsh*, 655 F.2d 346 (DC Cir 1981):

When Congress has enacted legislation approving a specific project, the implementing agency's obligation to discuss alternatives in its [EIS] is relatively narrow." Id @ 372 as quoted in *Citizens @ 196.*

Which appears to tell us that a "relative narrowing" of alternatives would be allowed if (but only if) there had been explicit congressional approval for the specific project in question and that no narrowing at all is allowed if there is no specific Congressional authorization.

In *Citizens* there was no such congressional approval and the agency was paradoxically allowed to eliminate *all* alternatives. Even more peculiarly, Judge Thomas set forth an outer limit of compression for alternatives,

"Yet an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." [Cites omitted] *Citizens @ 196.*

yet then approves the FAA's EIS, even though it's based only on the applicant's proposal and the no project alternative. The conclusion has to be that the holding in *Citizens* is fundamentally at odds with its own legal/logical foundation.

B. Crown Butte: Appendix A-- Development of Alternatives

In the case of the recently withdrawn draft EIS for the Crown Butte New World Mine (located just outside Yellowstone) the agency position was even more at odds with NEPA's alternatives requirement.

Crown Butte is the corporate subsidiary of a Canadian mining conglomerate which has acquired, through a variety of legal arrangements, various interests in property overlooking Yellowstone on which it proposes to construct a gold mine, a mill, tailings impoundment, and other associated facilities. The company proposes to locate some of these facilities on U.S. Forest Service lands. The project would effect to greater or lesser degree, Yellowstone, water quality in various streams, rivers and groundwater aquifers, one or more wilderness areas, one or more significant wetlands areas, and one or more endangered species.

Thus, it is plain to see that there are a variety of federal policies implicated by the project. The development of the alternatives has to be focused primarily on the achievement of federal policy goals. Federal policies with respect to federally protected resources compose the first and mandatory consideration of the federal agencies involved.

Only secondarily, and to the degree, and not one degree further, that these corporate interests are consistent with public policy concerning publicly protected resources (and a fortiori, public lands), do the agencies need to "take into account" and give deference to the pecuniary interests of corporate applicants.⁵

"At the outset we note that the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals."⁶

The position taken by the agencies in their now withdrawn draft EIS, was to define--for the purpose of determining the scope of the alternatives to be considered--the goals of the project not in terms of the federal interests in the federally protected resources involved, but solely in terms of the private corporation's proposal. Remember that an EIS is required when there is a "major *federal action*."

"The purpose of the proposed *action* is development of Crown Butte's mineral rights. Crown Butte is exercising these rights in response to societal demand for gold, copper, and silver."⁷ (Emphasis added).

The agencies go on to draw the picture even more starkly:

"All reasonable alternatives must fulfill the project's purpose and need--development of Crown Butte's mineral rights--and address significant

⁵ Recall that this is not a project to which Congress has given specific authorization in legislation, and so the applicant is not entitled to any narrowing of the alternatives on that score.

⁶ *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir 1986). See also *Headwaters, Inc. v. BLM (Medford Dist)*, 914 F2d 1174 (9th Cir, 1990).

⁷ *New World Project: Pre-decisional draft document not subject to FOIA and not available for public review*, nd, np, Appendix A, p.2.

environmental issues."⁸

1. *Federal vs. Private Goals*

The agency's conceptualization involves certain serious difficulties. The federal action giving rise to the requirement to do an EIS is, in this case, the proposed issuance of permits to use or impinge upon federally protected resources. The agencies have misconceived and diminished the primacy of federal policy in their characterization.

"[T]here is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where . . . the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party--private or governmental--to take action affecting the environment."⁹

Compare the Council on Environmental Quality's response to questions on this point:

"Q. If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyse and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?

⁸ Id at p.2.

⁹ Lackey, "Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants," 60 *The George Washington Law Review*, 1232, 1270 (1992), quoting *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1245 (D.C. Cir 1980). See also, *Resources Ltd, Inc. v. Robertson*, 8 F3d 1394 (9th Cir, Mont 1993) and Fisch, "*Citizens Against Burlington, Inc. v. Busey*: Defining Reasonable Alternatives to Be Examined in a NEPA-Required Environmental Impact Statement," 22 *Real Estate Law Journal* 32, (1993).

- A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of the alternatives to be considered, the emphasis is on what is 'reasonable' rather than on *whether the proponent or applicant likes or is itself capable of carrying out a particular alternative*. (Emphasis added).

"Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant."¹⁰ (Emphasis in the original).

This tells us two things. The particular applicant is not in the driver's seat when it comes to the development of alternatives. Whether the particular applicant likes, or is capable of participating in, an alternative, is--let us not mistake the point--not very significant, if not altogether irrelevant, at least according to the CEQ's interpretation of its own longstanding rules.¹¹

The CEQ's response also tells us, once again, that it is federal policy goals that drive the choice of alternatives, not the applicant's wish list made into a proposal.

2. *Private Proposers and NEPA*

The other major problem is that the definition of the action's "purpose and need" locks the agencies into a scenario where there can be no alternative that does not provide Crown Butte with the opportunity of profitably mining, milling and effluing the ore body it has identified.

¹⁰ CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 FR 18026, 18027 (March 23, 1981).

¹¹ *Headwaters, Inc. v. BLM (Medford Dist)*, 914 F2d 1174 (9th Cir. 1990); *Resources Ltd, Inc. v. Robertson*, 8 F3d 1394 (9th Cir. Mont 1993).

Adopting the view that the applicant's proposal is determinative of the scope of the alternatives analysis provides an incentive to private applicants to specify their proposal in such detail on critical points that no alternatives are possible, no matter how reasonable from the perspective of federal policy or even in terms of profitability for the applicant.

Michael Lackey in his good article on this topic used the following illustration in his analysis of the *Citizens* decision:

"Consider the following hypothetical. Air carrier operates out of City with a new, fully developed hangar and runway facility. The mother of Air Carrier's President lives in and is the mayor of Town. Town has no airport. Mother wants her son to live close to home, so she asks him to relocate his business to Town. To accommodate Air Carrier, Mother dedicates public money for partial financing of an airport in Town. Town Airport Authority and Air Carrier approach the FAA for approval of the airport relocation to Town. Air Carrier tells the FAA it will only consider relocating to Town. Thus, there are no reasonable alternatives to building the airport in Town, even though City has a perfectly good facility already. Of course, the FAA cannot tell Air Carrier that Air Carrier must operate out of the facility in City; however, the agency is free to determine that the new facility in City is a reasonable alternative. As such, the City alternative should be considered by the decisionmakers when they determine whether to approve the application for the Town airport."¹²

The point being that there is no reason to suppose, a priori, in any particular case, that the applicant's proposal has any particular validity vis-a-vis either federal goals or even some abstract economic optimality. Choices get made in conglomerates for a great variety of reasons.¹³

¹² Lackey, "Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants," 60 *The George Washington Law Review*, 1232, 1265 note 314 (1992).

¹³ The courts in the NEPA context have repeatedly warned against taking the claims and assertions

If the applicant sets forth the goals of the proposal as to both general and specific location, as to output and tonnage, as to technology, and as to timing, and each alternative is bound to these exact project parameters, then each possible alternative will have identical environmental impacts, since variation is only allowed on trivial aspects of the proposal. This allows

"a non-federal party to sort out alternatives based entirely on economic considerations, and then to present its preferred alternative as a take-it-or-leave-it proposition. * * * The discussion of reasonable alternatives--'the heart of the environmental impact statement,' . . . becomes an empty exercise when the only alternatives addressed are the proposed project and inaction."¹⁴

And, of course, this is exactly the evil which the CEQ rules and *40 Questions* responses discussed above were meant to address¹⁵.

3. Economics and Profitability

Yet another problem found in the approach taken by some agencies in the selection of alternatives is the assertion that an alternative that would not be profitable for the corporate applicant is, ipso facto, unacceptable. Sometimes this relies on language found in CEQ's *Forty Questions*:

"Reasonable alternatives include those that are *practical or feasible* from

of corporate applicants at face value. See, inter alia, *Trinity Episcopal School v. Romney*, 523 F.2d 88, 94 (2d Cir, 1975); *Van Abbema v. Fronell*, 807 F.2d 633, 642 (7th Cir. 1986).

¹⁴ *Citizens v. Busey* at 210 (dissent).

¹⁵ 40 CFR 1502.14, 46 FR 18027 (March 21, 1981), and *Citizens v. Busey*, at 196.

the technical or economic standpoint . . ."16

The problem as we saw, *supra*, is that this is taken quite out of context. It is worthwhile to restate CEQ's question 2a.

"Q. If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyse and discuss alternatives that **are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?** (Emphasis added).

A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of the alternatives to be considered, the emphasis is on what is 'reasonable' rather than on *whether the proponent or applicant likes or is itself capable of carrying out a particular alternative*. (Emphasis added).

"Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant."¹⁷ (Emphasis in the original).

It is plain that the "practical and feasible" language relates independently to the alternatives and not whether the alternatives would be profitable just to the current applicant or at the current time. Profitability--even apart from the inherent difficulties of proof (especially in the context of a low level subsidiary of a multi-level conglomerate)--is, of course, in many ways applicant specific.

Some corporations, for example, are more credit worthy than others and so are

¹⁶ *Forty Questions*, @ 18027.

¹⁷ CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 FR 18026, 18027 (March 23, 1981).

able to borrow at lower rates, which may mean the difference between being able to profitably exploit an orebody at current market rates, or not.

Similarly, what might not be a profitable alternative today, may be a profitable alternative tomorrow, given the volatility of prices in the world and changing demands for products.

Likewise, a particular corporation may have paid too much for its options from landowners, and so might find certain alternatives involving additional environmental constraints unprofitable, whereas another applicant with a better business sense or negotiating skill might be able to make a profit on the same alternative.¹⁸

Finally, it is worthwhile saying a little more about the practicality of trying to prove up whether or not certain alternatives are profitable to a particular corporate applicant. In a multi-level holding company, especially a multi-national, multi-level holding company, determining profitability of subsidiaries in any objective sense is generally going to be very difficult if not impossible, especially when the applicant has a vested interest in defeating the alternative.¹⁹

¹⁸ There is a good deal of case law in the public utility area holding that if a utility pays more than the original cost less depreciation for a capital asset it will not be able to roll the additional amount into rates. This rule arose out of a history of abuse before the passage of the Public Utility Holding Company Act of 1935 when electric operating companies controlled by the same holding company would swap capital assets back and forth for higher and higher prices just to increase the paper value of the assets in order to inflate rates. Cf. Edwin Sutherland, *White Collar Crime* (Yale UP, New Haven, 1983) chapter 13, for a description of this and related problems.

¹⁹ See, inter alia, Sheehan, "Corporate Control and the Decapitalization of Subsidiary Corporations: The Looting of the Bangor and Aroostook Railroad," 22 *Journal of Economic Issues* 729 (1988); and White and Sheehan, "Monopoly, the Holding Company, and Asset Stripping: The Case of Yellow Pages," 26 *Journal of Economic Issues* 159 (1992).

In sum, profitability to the current applicant should clearly not be an allowed test criterion for the inclusion of an alternative. Alternatives should be chosen on the basis of their relationship to federal policy, and whether they are "practical and feasible" in the general sense.

4. Alternatives

While it is not the task of this paper to provide a review either of the details of federal policies and statutes which should govern the choice of alternatives, or to develop actual alternatives, a few words of a general nature might be ventured.

Some of the land involved in the New World Mine is Forest Service land. There may be other, higher, uses for this land in terms of what best fits with Forest Service policy goals.

An alternative may involve postponing the project until certain conditions related to well established federal environmental goals can be met, for instance until the grizzlys are off the endangered species list or other habitat is developed; or perhaps until metals prices rise to the point that certain necessary mitigation measures become cost effective for the applicant, and the project looks better in terms of environmental feasibility.

III. CONCLUSION

There are four major conclusions.

First, the details of the applicant's proposal should not be viewed as constraints on the set of alternatives that the agency should consider.

Second, if an alternative is "practical and feasible" in a general engineering sense,

the fact that it would not be profitable for a particular applicant to undertake is irrelevant.

Third, building on these first two conclusions, alternatives involving reasonable delay of the project until certain conditions are met, downsizing, and mitigation measures, are all free of the artificial "private goals" and "profitability" constraints, and need only be reasonably related to federal policy goals and be "practical and feasible" to be adopted.

Finally, the case law is clear that the courts accord agencies producing an EIS in good faith a good deal of deference and will not lightly set aside a reasonably done EIS.

"Just as NEPA is not a green Magna Charta, federal judges are not the barons at Runnymede."

* * *

"As the phrase 'rule of reason' suggests, we review an agency's compliance with NEPA's requirements deferentially. We uphold an agency's definition of objectives so long as the objectives the agency chooses are reasonable, and we uphold its discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail."²⁰

This gives agencies out to protect the public interest in accord with their enabling legislation a firm basis for developing a strong set of alternatives to guide their final determination.

²⁰ *Citizens v. Busey* at 196.