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## SLIDES: NEPA and Adaptive Management

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# NEPA And Adaptive Management

## University of Colorado School of Law

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- Introduction
  - Traditional NEPA Analysis
  - Adaptive Environmental Management
  - How Has AEM Worked?
  - Obstacles to AEM in NEPA Process
  - Conclusion
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## □ Introduction

- NEPA enacted January 1, 1970
  - Section 102(2)(C) environmental analysis
  - “The National Environmental Policy Act: A Study of its Effectiveness after Twenty Five Years”
    - “One time EIS” to “Continuous Monitoring”
    - AEM alters “traditional” approach
    - Subjects environmental analysis to legal challenge
    - If fully analyzed, allows project to proceed despite scientific uncertainty
  - Modernizing NEPA Implementation (CEQ, 2003)
-

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## What is adaptive management?

- Process for monitoring and adapting to impacts
  - Applied to long term monitoring on federal lands
    - HCP
    - Forest Plan
    - RMP
  - Adaptive management and NEPA
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- History of adaptive management
    - Ecosystem management – C.S. Holling
    - Northwest Forest Plan (AMAs)
    - USFS planning rules
    - CEQ – 1997 study
    - CEQ – modernizing NEPA
    - Streamlining Task Force
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- Application to oil & gas development
    - Continental Divide/Wamsutter II Project
      - “changed mitigation actions”
    - Pinedale anticline
      - Collaborative/citizen AM teams
    - Jack Morrow Hill’s CAP
      - Nyberg definition of AM
    - Powder River Basin RMPs
      - Intra-agency monitoring team
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## □ Definition of AM

- Nyberg, “systematic process for continually improving management practices by learning from the outcome of actions over time”
  - USFS planning rules, “an approach to natural resource management wherein the effects of policies, plans and actions are monitored for the purpose of learning and adjusting future management actions”
  - American Petroleum Institute, “a science – based approach to natural resource management wherein the effects of policies, plans and practices are monitored for the purpose of evaluating and adjusting management actions”
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## Monitoring team

- Science/technical
- Collaborative
- Citizen group

## Funding

- Government
- Industry
- Allocation formula

## Compliance with NEPA, FACA & APA

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## □ Traditional NEPA Analysis

- Procedural Statute
  - No private cause of action (APA)
  - CEQ role in implementing NEPA
  - One Time Event – Single Decision
  - Mitigation Measures in ROD
    - 40 CFR 1505.2(c)
    - Permit conditions, lease stipulations
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## Adaptive Environmental Management

- Problem Identified in CEQ Report

- CEQ Solution – AEM

- Accept uncertainty in environmental analysis

- Post ROD development of monitoring plan

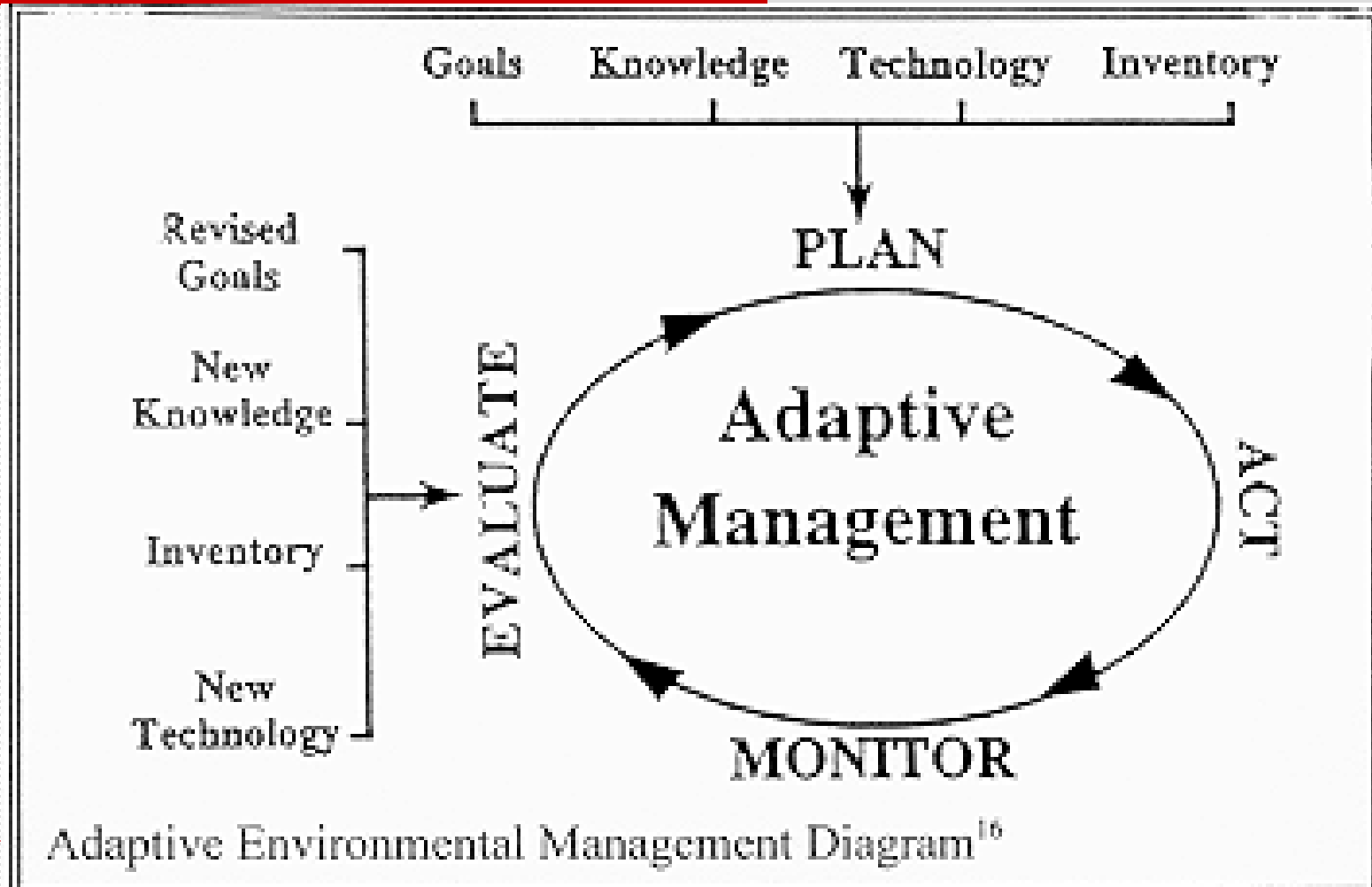
- Develop responsive mitigation as action is implemented

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## Obstacles to Use of AEM: NEPA

### Improper Use of AEM to defer decisions

- AEM process not contemplated by NEPA or CEQ rules
- Section 102(2)(C) requires environmental analysis prior to ROD
- AEM allows project to proceed subject to monitoring & responsive mitigation
- Avoids public review & comment
- Avoids due process review of ROD

## Solutions proposed by NEPA task force

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- Resolve uncertainty regarding significance of impacts
    - 40 CFR 1502.14: include AM measures in alternative analysis
    - e.g. Sierra Nevada Forest Plan
      - USFS planning rules define AM
      - Plan fully analyzes range of scenarios regarding mitigation monitoring
      - Contemplates supplemental EIS
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## □ Address incomplete data

- 40 CFR 1502.22(b): use AM when means to obtain data are unknown
  - Allow monitoring of impacts after decision to proceed with the project
  - Replaces theoretical models with actual monitoring results
  - Streamlining task force guidance to discourage use of AM to defer decision making
  - e.g. Glen Canyon Dam AM Program
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## □ Post Decision Enforcement

- 40 CFR 1505.2(c): use AM as a mitigation monitoring and enforcement program
  - By contrast, current rules base enforcement on ROD, permit conditions, lease stipulations, not NEPA
  - DOI NEPA guidance requires “use of AM to fully comply with 40 CFR 1505.2 which requires the monitoring enforcement program to be adopted for any mitigation activity” 516 DM 4.16
  - Gives NEPA substantive “teeth”
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## □ Mitigated FONSI

- EAs use mitigation plans to achieve “finding of no significant impact”
  - AM may currently be applied to EAs which use mitigation plans to avoid impacts
  - Mitigation measures may be enforced after issuance of agency decision, *Cabinet Mtn. Wilderness v. Peterson* (D.C. Cir. 1982)
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## □ Obstacles to Use of AEM: NEPA

### ■ Improper Delegation to AEM Team

- Lead agency (not AEM team) authorized to implement monitoring & mitigation
  - Contrast to activities of Pinedale AEM team
  - BLM may not abdicate to AEM team
  - Citizen participation on AEM team provides new method of citizen enforcement not authorized by NEPA
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## □ Obstacles to Use of AEM: FACA

- Federal Advisory Committee Act
  - AEM teams meet definition of Advisory Committee under FACA
  - General Services Administration requirements
  - Availability of injunctive relief
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## Obstacles to Use of AEM: Cost

- Monitoring scientific uncertainty is costly
  - Costs likely to be passed on to industry
  - Methods to contain costs
    - HCP “no surprise” rule
    - FACA budgetary analysis
    - APA rulemaking
    - Address costs “upfront”
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## □ Obstacles to Use of AEM: APA

- Need for APA Rulemaking
  - Application in a variety of contexts without definition or uniform standards
  - NEPA task force proposes to define AM in new CEQ rules
  - DOI has new definition 516 DM 4.16
  - USFS has defined AM in 2000 planning rules
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## □ Obstacles to Use of AEM: National Energy Plan

- Traditional NEPA process is streamlined
    - Page limits, clear format, scoping process
  - No similar limits on AEM process
  - May 18, 2001 executive order, White House streamlining task force to accelerate permit review of energy – related projects
  - Draft AM guidance document
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## □ Conclusion

- AEM clear departure from traditional NEPA analysis
  - Moves NEPA from procedural statute to substantive enforcement of mitigation
  - Rulemaking required to establish uniform standards and incorporation with NEPA process
  - AEM may undermine achievements recognized in CEQ report
  - Or, if carefully applied could expedite decisions to allow projects to proceed where limited resource information is available and there is scientific uncertainty as to project impacts.
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