SLIDES: NEPA and Adaptive Management

Denise A. Dragoo

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NEPA And Adaptive Management
University of Colorado School of Law

Denise A. Dragoo
Snell & Wilmer L.L.P.
Salt Lake City, Utah
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Denise A. Dragoo, Snell & Wilmer LLP

☐ 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
  - Section102(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)
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
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
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
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
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
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
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”
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)
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
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
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
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
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.