

Abstract

Agency Staff, NEPA Contractors, and the Integrity of the NEPA Process

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In its *Forty Most Asked Questions* (51 *Fed. Reg.* 15618, April 25, 1986), the Council on Environmental Quality (CEQ) explains that its conflict of interest (COI) regulations are intended to “to preserve the objectivity and integrity of the NEPA process.” This paper argues that COI guidance in NEPA regulations is not sufficient to achieve CEQ’s purpose because it focuses on just one type of COI. The CEQ guidance completely ignores a more significant threat — agency staff pressure on EIS contractors to deliver biased NEPA documents that support agency preferences.

NEPA regulations address the case of an environmental consultant who may be tempted to provide biased analyses to promote a decision that would benefit the consultant’s firm or the firm’s other clients. The regulations require EIS contractors to execute a *disclosure statement* “specifying that they have no financial or other interest in the outcome of the project.” The regulations backstop the COI statement by requiring that the responsible federal official “furnish guidance and participate in the preparation and . . . independently evaluate the [environmental impact] statement prior to its approval and take responsibility for its scope and contents” [40 CFR 1506.5(c)].

Environmental professionals (EPs) have an obligation to provide their clients honest, accurate data and analyses — whether or not the results support the client’s preferred course of action. Agency staff may not have such clear obligations. When their supervisors believe the agency’s goals are more important than the objectivity of the NEPA process, agency staff sometimes pressure EIS consultants to provide analyses that support the agency’s preferred course of action. In such cases, EPs serving as EIS consultants face a conflict between their desire to please the client and their obligation to provide honest, unbiased data and analyses. Unfortunately, the NEPA regulations do not discourage agency staff from pressuring contractors to provide biased analyses.

The paper reviews the Council on Environmental Quality (CEQ) regulations and guidance relative to COI. Next, the paper reviews the “Standards of Ethical Conduct for Employees of the Executive Branch” and other guidance on the use of environmental contractors. The paper then discusses the conflicts faced by EIS consultants working for agency staff who are advocates for a particular outcome. The paper examines how these conflicts can affect the integrity of the NEPA process. Finally, the paper suggests a number of potential methods for mitigating these threats to the integrity of the NEPA process.