A Systematic Process for Addressing Incomplete Information in an EIS

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INTRODUCTION

The issue of missing or incomplete information arises in many National Environmental Policy Act (NEPA) processes. Council on Environmental Quality (CEQ) regulations provide some guidance on how to address incomplete information at 40 C.F.R.§1502.22, but this provision can be difficult to interpret and is frequently misapplied. Departmental and agency implementing regulations tend to provide little instructions regarding missing or incomplete information, and there is scant applicable case law. Federal agencies and NEPA practitioners are left with inadequate guidance on this difficult and often controversial issue. Uncertainty about how to address missing or incomplete information can weaken NEPA analyses, obfuscate important environmental issues and also undermine the legal defensibility of NEPA documents and the agency decisions they support.

This paper proposes a systematic process for addressing incomplete information in Environmental Impact Statements developed pursuant to NEPA. This solution flows from careful interpretation of relevant provisions of NEPA and CEQ regulations, in particular CEQ regulations at 40 C.F.R.§1502.22. The product of this effort is a sequential process that is simple enough to illustrate in the form a flow chart, yet expansive enough to contemplate the full spectrum of missing or incomplete information that may be encountered in an EIS process. This approach was recently utilized in a high-profile EIS and received strong praise from the U.S. Environmental Protection Agency (EPA).

REGULATORY BACKGROUND

NEPA is a federal statute which establishes a national policy for the environment [42 U.S.C.§4331] which, in part, requires the Federal Government to "utilize a systematic, interdisciplinary approach [to] ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment" [42 U.S.C.§4332(A)]. A simple, yet effective, procedural requirement furthers these lofty goals: Before taking actions significantly affecting the quality of the human environment, Federal agencies must prepare "a detailed statement" analyzing "the environmental impact of the proposed action" [42 U.S.C.§442(C)].

NEPA also establishes a Council on Environmental Quality (CEQ), which issues binding regulation directing agencies on the fundamental requirement necessary to fulfill their NEPA obligations. The CEQ has also issued several guidance documents addressing particular issues of concern. Federal agencies are also encouraged to develop (and many have developed) their own regulations to further guide their implementation of NEPA.

Despite the abundance of regulation, interpretation and guidance, relatively little direction is provided on how to conduct NEPA analysis where information or data is missing or incomplete. The most useful articulation is provided by CEQ regulations at 40 C.F.R.§1502.22, excerpted below. However, the structure and language of this provision is convoluted and subject to misapplication. A NEPA practitioner confronted with a data gap is left to ponder: "Do I need to *acknowledge* that we don't have all the information? Do I need to *discuss* it, and if so, in what context? All scientific information is important – what makes information *essential* here? How much does the decisionmaker really need to know? Can we release the EIS without the missing information, or will we get sued? What if we can't get it in time?"

> 1502.22 - Incomplete or unavailable information.
>
> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
>
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic

> consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.
>
> (c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

CASE LAW

NEPA compliance has been a frequent point of litigation, and a voluminous body of case law has developed concerning the requirements imposed by NEPA and the CEQ's implementing regulations. Some case law interpreting the modern version of 40 C.F.R.§1502.22 does exist, but the holdings are narrow, regarding particular regulatory provisions in very specific factual contexts. No case offers or validates a more general approach under which Federal agency may discharge their responsibilities concerning missing information. The lack of a broad and holistic judicial interpretation is unsurprising given doctrines of judicial restraint that limit the scope of a court's review to the discrete issues presently before them. To fill this void, the most reasonable interpretation of40 C.F.R. §1502.22, based on a complete reading of the regulatory provision, is offered here.

DECONSTRUCTING 40 C.F.R.§1502.22

Step 1 – Relevance

The first sentence of 40 C.F.R.§1502.22 establishes the scope of its applicability – instances where an agency preparing an EIS encounters "incomplete or unavailable information" when "evaluating *reasonably foreseeable significant adverse effects* on the human environment" [emphasis added]. In order to fully understand and comply with this regulation, one must give effect to all of its wording. Of particular note here is the use of the terms "reasonably foreseeable" and "significant," adjectives that the CEQ deemed important enough to repeat in subsections (a) and (b). For the subsequent requirements of 40 C.F.R.§1502.22 to apply, the incomplete information at issue must pertain to adverse impacts that are "reasonably foreseeable" as well as "significant".

The first sentence of 40 C.F.R.§1502.22 also sets up an "if/then" requirement. If an agency preparing an EIS encounters incomplete missing information meeting the criteria outlined above, then "the agency shall always make clear that such information is lacking." Simply put, agencies must always *disclose* the lack of this type of information. The inverse is also true: no disclosure obligation attaches to items of incomplete information that do not pertain to "reasonably foreseeable" and/or "significant" adverse effects on the human environment.

Since this portion of the regulation both establishes a filter and directs agencies to take certain action with respect to all information passing though that filter, it is appropriate that NEPA practitioners encountering incomplete information first ask *"Is the missing information 'relevant to reasonably foreseeable significant adverse effects on the human environment'?"* Items that pass through this filter (i.e. generate a "Yes" answer to the question posed above) must be disclosed. No requirements are attached to items of incomplete information that fail this threshold relevance test.

Step 2 – Essentialness

Subsection (a) of the regulation creates another "if/then" dynamic as well as another potential layer of accompanying procedural requirements. This subsection reads "If the incomplete information relevant to reasonably foreseeable significant adverse impacts is *essential to a reasoned choice among alternatives* and *the overall costs of obtaining it are not exorbitant*, the agency shall include the information in the [EIS]" [emphasis added]. Subpart (a) thus creates two additional standards to be applied before the next procedural obligation can attach, each italicized in the text above. The first standard – "essential to a reasoned choice among alternatives" – is addressed here. The second standard –"the overall costs of obtaining it are not exorbitant" – is a separate consideration that entails wholly different procedural ramifications and thus warrants a separate step in this analysis.

Merely asking whether information is "essential", without further definition of that term, would invite an unfocused and overly subjective inquiry. To pinpoint what is truly required, it is again necessary to give effect to each word in the regulation. By including the phrase "to a reasoned choice among alternatives", the regulation directs agencies assess information within the unique context of each particular EIS. This approach seems wise in creating a more focused inquiry

tailored to the specific question posed within a particular EIS and its finite suite of reasonable alternatives. This approach also allows for greater application of agency and subject matter expertise and engenders more useful analysis for the public and decision maker.

By directing agencies to ask "Is the missing information 'essential to a reasoned choice among alternatives'?", the regulation again creates a discrete filter for agencies to apply. In the interests of transparency and legal defensibility, agencies should develop and apply objective criteria to their analysis. If the answer to this "Essentialness" question is no, then the agency need only abide by the disclosure requirement of subsection (a) and "include the information in the [EIS]". Meanwhile, if the answer to the Step 2 inquiry is positive, further obligations beyond disclosure may apply, as will be determined in the next step of the inquiry.

Step 3 - Obtainability

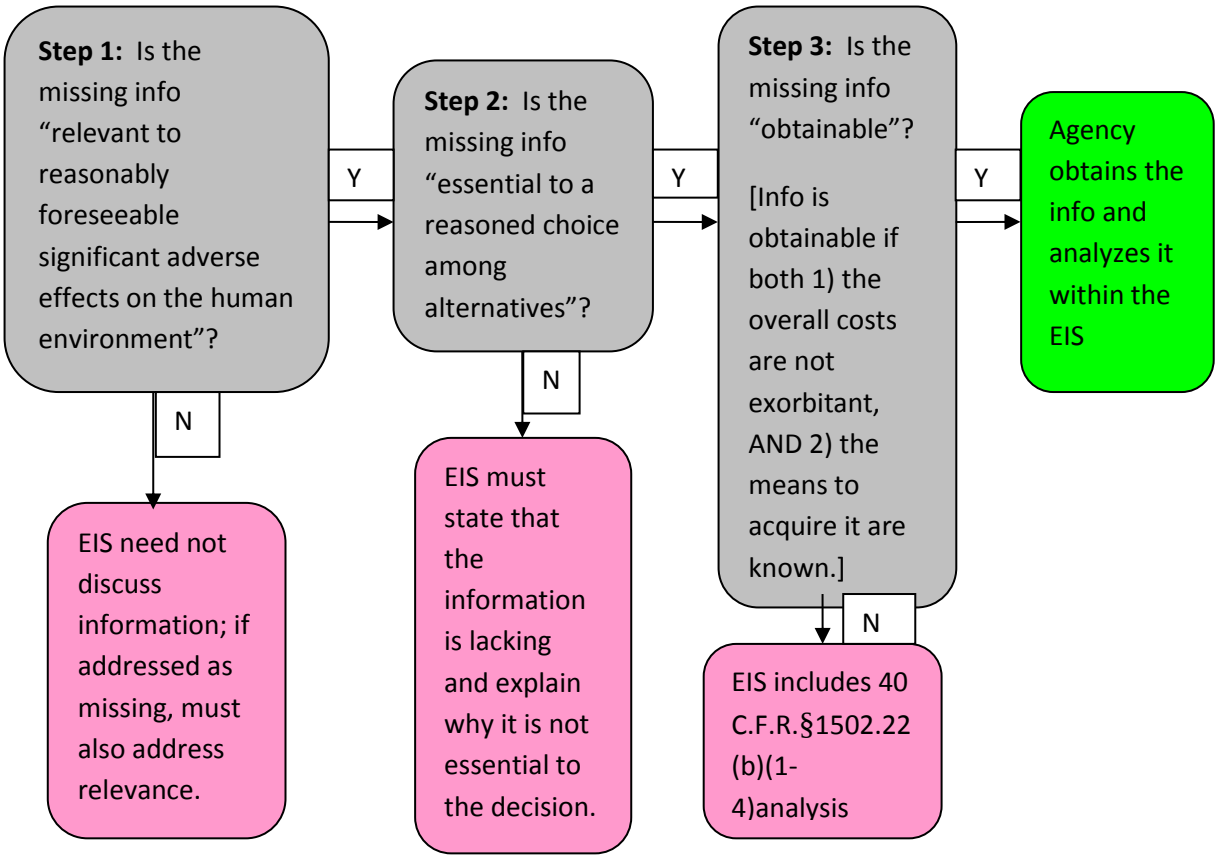
An agency must apply the second standard mentioned, yet briefly tabled, above to the remaining items of incomplete information. The question of whether the incomplete information can be "obtained" is incorporated into both 40 C.F.R.§1502.22(a) and (b). Because each of these subsections prescribe certain procedural obligations, and the applicability of these obligations hinges in part on whether particular items of incomplete information are obtainable, "obtainability" is the focus of Step 3 of this 40 C.F.R.§1502.22 process.

While the regulation does not offer a specific definition of the term "obtainable", it does, however, highlight two instances where an item of incomplete information is not considered obtainable. Subparts (a) and (b) establish that information is not obtainable if "the overall costs of obtaining it are exorbitant". Subsection (b) also establishes that information is not obtainable if "the means to obtain it are unknown". Presumably, if neither of these two situations apply, then the item of incomplete information at issue should be considered "obtainable" for the purposes of 40 C.F.R.§1502.22.Agencies do remain free to further elaborate on the meaning of this term; for instance, DOI explains that "[i]n circumstances where the provisions of 40 CFR 1502.22 apply, bureaus must consider all costs to obtain information. These costs include monetary costs as well as non-monetized costs when appropriate, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandate" (43 C.F.R.§46.125).

If the answer to the "obtainability" question is "Yes', then the agency must obtain the missing information and analyze it within the EIS, per the prescriptive language at 40 C.F.R.§1502.22(a). If "No", then the agency is required by 40 C.F.R.§1502.22(b) to include within the EIS the four-part analysis provided for in 40 C.F.R.§1502.22(b)(1)-(4).

The Process

Connecting Step 1-3, agencies are provided with a systematic process to analyzing incomplete information within an EIS. The utility and efficacy of this process – illustrated in the flow chart below – has been born out in practice, praised by the EPA, and validated by a U.S. District Court.



CASE STUDY

The issue of incomplete information recently arose in litigation over a controversial agency action – the Department of the Interior's (DOI) decision to lease acreage in the Chukchi Sea for potential oil and gas exploration and development and production. In the wake of Lease Sale 193, the Minerals Management Service (MMS) accepted high bids of approximately $2.6 billion and issued 487 leases for approximately 2.8 million acres. As a result of a lawsuit challenging the sale, the U.S. District Court for the District of Alaska remanded Sale 193 for further NEPA analysis of three concerns, two of which concerned the Agency's handling of incomplete information. Specifically, the District Court found that the Agency failed to:

- Determine whether missing information identified by the agency was relevant or essential under 40 CFR 1502.22, and
- Determine whether the cost of obtaining the missing information was exorbitant, or the means of doing so unknown.

Most specifically at issue here were the hundreds of statements concerning a lack of information that were included within the EIS and later catalogued by plaintiffs within a court exhibit. Some of these statements bore little relation to any environmental impacts associated with a lease sale. Others pointed to small, inconsequential gaps in otherwise data-rich environments. Other data gaps appeared significant, but their importance was not addressed in the EIS. While some EIS sections were replete with references to missing information, others contained none. Clearly, MMS lacked a coherent approach grounded in NEPA regulations.

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE; a successor agency to MMS) addressed the District Court remand by undertaking a Supplemental EIS (SEIS). Appendix A of the SEIS addressed the portions of the District Court remand focusing on incomplete information. There, BOEMRE catalogued each statement within the prior EIS that acknowledged incomplete or unavailable information, and provided a structured analysis of each statement using the approach set out above. Because 40 C.F.R.§1502.22, as interpreted above, entails both scientific and managerial considerations, BOEMRE enlisted environmental resource analysts as well as managers to make the various findings required under each Step of the 40

C.F.R.§1502.22 analytical framework. This analysis determined that many statements of incomplete or unavailable information referenced in the original EIS were relevant to reasonably foreseeable significant adverse effects. However, while many of the items passing through Step 1 of the analysis were broadly relevant to the important issues at hand, none were essential for a reasoned choice among lease sale alternatives. Therefore, no items of incomplete information identified in the original EIS progressed beyond Step 2 of an appropriate 40 C.F.R.§1502.22 analysis.

Because the original EIS already disclosed incomplete information, and the SEIS explained in Appendix A why this information (some relevant to reasonably foreseeable significant adverse effects, some not) was not essential to the lease sale decision, the District Court agreed that BOEMRE's overall NEPA satisfied the requirements of 40 C.F.R.§1502.22 and the Court's remand order, and the case was dismissed. However, plaintiffs appealed the matter of Sale 193 to the U.S. Court of Appeals for the Ninth Circuit, and are pursuing arguments related to the agency's handling of incomplete information in the NEPA analyses that support the decision to hold Lease Sale 193.

SUPPORT & CRITICISM

This approach was first utilized in a Draft Supplemental EIS (SEIS) released for public review and comment in November 2010. This portion of the SEIS analysis solicited a host of comments both for and against its approach (and in many cases, its results). The U.S. Environmental Protection Agency, after reviewing the SEIS pursuant to its Clean Air Act Section 309 responsibilities, stated: "We are particularly pleased with the methodical and understandable analysis of incomplete or missing information in [the SEIS]. We also believe the process employed by [BOEMRE] fully meets the intent of the Council of Environmental Quality's requirements for such situations." Other entities generally supportive of the SEIS' proposed action – several corporations, industry groups, the State of Alaska – also praised the systematic nature of the approach and the results of the SEIS' analysis.

Other commenters who generally opposed the SEIS's proposed action – including environmental groups and many public citizens –were less impressed. These commenters generally stated that BOEMRE's analysis did not comply with the letter or spirit of applicable law, and offered

conclusions contrary to evidence in the record. BOEMRE's conclusion that none of the analyzed information was "essential" to a reasoned choice among alternatives was characterized as an across-the-board determination that ignored the obligation to collect missing science.

As mentioned above, these criticisms also found a voice in ensuing litigation at the District Court and, now, at the Court of Appeals levels. Oral arguments and a decision on the merits of the appeal were forthcoming at the time of writing.

RECOMMENDED USE & LIMITATIONS

The approach outlined above offers several key advantages. First, it is the best interpretation of agencies' responsibilities under a non-discretionary, prescriptive regulation. Second, it provides a clear, step-by-step process to guide agency scientific analysts and NEPA practitioners. Third, it demarcates a line between two separate (yet often conflated) issues – the amount of information necessary to support an adequate NEPA analysis, and the amount of information necessary to move forward policy decisions. Finally, it engenders an objective and transparent process that is easily understood by the varied audiences of NEPA documents, to include agency decision-makers and interested public citizens.

The implications of this approach are not all positive. Significantly, the strictly procedural nature of this approach does not answer philosophical questions regarding the level information that should be required to support decision-making. Nor does it institutionalize the precautionary principle, as many environmental advocates and other public citizens would prefer. Such issues, if they can be resolved at all, are best decided by experienced agency policy makers or elected officials, or addressed through legislation or rulemaking.

Digging deeper, the approach offered here also suffers from what some parties would consider negative procedural implications. As pointed out in recent litigation, this approach is not an effective tool for ensuring that sufficient information is available for, and used in, the formulation of EIS alternatives. This limitation is significant given the importance of the alternatives as the "heart" of the analytical process under NEPA. It is also conceivable that agencies may craft EIS alternatives so as to shirk their duty to identify, analyze, and/or collect missing information.

These are certainly valid concerns. However, it is reiterated that agencies are bound only by applicable regulations, and here, the only reasonable reading of 40 C.F.R.§1502.22 does not impose any obligation upon agencies to identify, evaluate, and/or collect missing information as it identifies and designs "reasonable" alternatives to the proposed action. Whether a potential alternative is reasonable is determined by its ability to satisfy the agency's stated Purpose and Need. The level of available scientific information associated with a given alternative simply does not enter into the equation at this preliminary juncture. This reality is reflected by 40 C.F.R.§1502.22's presupposition of a suite of alternatives. In fact, over-extending the reach of 40 C.F.R.§1502.22 to the formulation of alternatives could disincentivize agencies from carrying forward otherwise reasonable alternatives for full analysis in the EIS, thus producing a chilling effect on the very heart of the NEPA analysis – the alternatives.

CONCLUSION

The approach recommended above does nothing to answer inherently philosophical – or at least political – questions about the level of scientific information required to support sound and prudent decisionmaking. However, this approach does offer agencies and their NEPA practitioners a clear path forward for resolving the more practical question of "How do I address incomplete or missing information in my EIS?" in a manner that is efficient, thorough, transparent, and legally defensible.