THE CONFLICT OF INTEREST PROBLEM IN EIS PREPARATION

Roger P. Hansen, J.D., Hansen Environmental Consultants, Englewood, Colorado; Theodore A. Wolff, Ph.D., Sandia National Laboratories, Albuquerque, New Mexico; and Lance N. McCold, Oak Ridge National Laboratory, Oak Ridge, Tennessee[1]

ABSTRACT

The National Environmental Policy Act (NEPA) requires that federal agencies prepare environmental impact statements (EISs) on proposals for "major Federal action significantly affecting the quality of the human environment." The Council on Environmental Quality (CEQ) regulations require that EISs be prepared directly by the "lead agency" or a contractor it selects. EIS contractors must execute a disclosure statement specifying that they have "no financial or other interest" in the outcome of the project. The intent of the "conflict of interest" prohibition is to ensure that the EIS is defensible, free of self-serving bias, and credible to the public. Those coming to the federal government for money, permits, or project approvals must not be placed in the position of analyzing the environmental consequences of their own proposals.

Although the conflict of interest proscription may seem clear and unequivocal, it has generated confusion and controversy as evidenced by litigation of the issue in the federal courts. In fact, the CEQ has twice provided conflict of interest guidance and some critics feel that the provision should be completely eliminated from the regulations.

This paper analyzes the conflict of interest problem faced by government contractors who maintain and operate government-owned or -controlled facilities for which EISs are required. In the U.S. Department of Energy (DOE) system, these are referred to as "M&O" contractors. It also examines organizational conflicts presented by current or prospective government contractors who have a financial or other interest in the outcome of a project or program for which an EIS is prepared. The paper addresses several key questions: What constitutes a conflict within the meaning of the CEQ regulations? Are contractor personnel more likely to experience conflicts of interests than agency personnel who are responsible for the project or program? If a conflict exists, is an M&O or other contractor disqualified from *participating* in the NEPA process (e.g., by providing background papers and technical data)? What type of "participation" might be permitted without presenting a conflict risk?

In responding to these and related questions, the paper discusses and interprets the CEQ regulations and guidance on EIS preparation conflict of interest as well as leading federal court opinions. It also distinguishes "preparers" from "participants" in the EIS preparation process. While the focus is on discussion and interpretation of the CEQ requirements, brief attention is also given to conflict provisions in Federal Acquisition Requirements (FAR) which go beyond the CEQ conflict provisions. Conclusions drawn are intended to provide guidance as to the kind of conflict disclosures and NEPA process roles appropriate for EIS preparers and participants.

INTRODUCTION

EISs, environmental assessments (EAs), and other NEPA documents should contain impartial and objective analyses, free of biases introduced by conflicts of

[1]This work was supported by the United States Department of Energy (DOE) under contract DE-AC04-94AL85000 and DE-AC05-960R22464.

DISCLAIMER

interest. While this seems like a worthy objective, no organization or individual is totally free of biases, or actual or perceived conflicts of interest associated with past, present, or anticipated work for a federal agency. Conflicts of interest can arise because one has specialized knowledge and expertise, "inside" information, or even holds a particular political or organizational philosophy. Thus, while zero conflict is impossible to achieve, CEQ regulations and the FAR attempt to minimize bias by requiring disclosure of contractor conflicts that might otherwise be *unrevealed*.

The regulations and guidance governing conflict of interest for EIS contractors, and court opinions interpreting them, are discussed in detail in this paper. However, the conflict of interest issue is closely interrelated with two other issues: (1) delegation of EIS preparation by a federal agency; and (2) the need for independent evaluation of an EIS and related studies or research by the agency whenever there is a "delegation" of EIS preparation responsibility. Thus, these issues are discussed in parallel with the conflict issue as appropriate. In addition, selected FAR conflict provisions are discussed.

There are, of course, other types of NEPA compliance documentation prepared by federal agencies or their contractors. The most common of these is the environmental assessment (EA) and, when applicable, the finding of no significant impact (FONSI). Many agencies prepare NEPA compliance checklists, internal memoranda, and other types of internal documents (e.g., the DOE Action Description Memorandum).

The CEQ and FAR regulations do not distinguish between the various types of government contractors to which the conflict prohibitions apply. However, there are basically three types of contractors which may be vulnerable to NEPA-related conflicts of interest:

- Environmental consulting firms which implement various environmental projects (e.g., hazardous waste cleanup, biological surveys, air quality monitoring, etc.) for federal agencies and/or their contractors or subcontractors.

- "Prime" or "management and operating" (M&O) contractors which operate government facilities or installations that are often multi-functional. Examples are contractors who manage Department of Energy (DOE) national laboratories such as Sandia National Laboratories and Oak Ridge National Laboratory.

- Subcontractors who perform project-specific design, construction, operations, or service functions, often for M&O contractors.

Agency personnel may also be subject to conflicts of interest. For example, agency personnel who must design and implement a proposed action as part of an agency mission are also responsible for preparing the required NEPA documentation. Consequently, they may be faced with pressures to accomplish the project regardless of the resulting potential environmental effects.

NEPA AND THE CEQ REGULATIONS AND GUIDANCE

This section briefly addresses NEPA requirements as they pertain to EIS preparation. Pertinent CEQ regulations and guidance are discussed in detail.

NEPA

NEPA requires that all federal agencies "[i]nclude in every recommendation or report on proposals for ... major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on, among other things, the environmental impact of the proposed

action.[2] The only provision for delegation of preparation of the "detailed statement" (i.e., EIS) relates to EIS preparation by state agencies with "statewide jurisdiction" so long as "the responsible Federal official" supplies guidance and "independently evaluates" the statement prior to its approval to assure that it has the proper scope, objectivity, and content.[3]

The Act itself is silent on delegating EIS preparation to agency contractors although it is clear that the duty to prepare an EIS rests with the federal agency proposing the project or granting a permit or some other approval to some other public or private entity. However, the courts have generally allowed federal agencies to delegate EIS preparation to consultants when the agency retains adequate oversight of the work product.[4] As a matter of policy, some agencies place strict limitations on how much NEPA compliance responsibility can be delegated to a contractor.

CEQ REGULATIONS

The CEQ regulations address agency responsibility in three contexts: (1) where an "applicant" submits information for an EIS; (2) where an "applicant" prepares an EA; and (3) where an EIS is prepared by the agency or delegated to a contractor.

Applicants Who Prepare NEPA Documentation

Although the regulations do not define the term "applicant," the common meaning within the NEPA context includes a non-federal (private or state) applicant for a federal permit, license, certification, or other type of federal approval that could trigger an EIS. Information submitted by applicants must be independently evaluated and "verified" by the agency.[5] It is not uncommon for applicants not only to submit information for inclusion in an EIS (or EA) but to prepare "environmental impact reports" for review and adoption by the agency as a *de facto* EIS or EA.

Where the applicant prepares an EA, the agency is required to makes its own independent evaluation and take responsibility for the EA's scope and content.[6] Although this provision is aimed at applicants who submit EIS or EA information, it also applies to where the agency contracts document preparation. The CEQ regulations also provide that agencies responsible for a proposed action can involve environmental agencies, applicants, and the public to the "extent practicable" in preparing EAs.[7] Thus, the CEQ regulations treat applicants who are involved in the NEPA process differently than EIS contractors.

EIS Contractors

The operative language in the CEQ regulations pertaining to contractor conflict of interest is quoted below in its entirety:[8]

> (c) *Environmental impact statements.* Except as provided in §§1506.2 [elimination of duplication of effort] and 1506.3 [adoption of EISs] any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under §1501.6(b), a cooperating agency. It is

---

[2]NEPA §101(2)(C); 42 U.S.C. 4332(2)(C)

[3]NEPA §102(2)(D); 42 U.S.C. 4332(2)(D)

[4]Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cr. 1975)

[5]40 C.F.R. 1506.5(a)

[6]40 C.F.R. 1506.5(b)

[7]40 C.F.R. 1502.4(b)

[8]40 C.F.R. 1506.5(c)

> the intent of these regulations that the *contractor be chosen* solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency *to avoid any conflict of interest*. Contractors shall execute a *disclosure statement* prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have *no financial or other interest* in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and shall *independently evaluate* the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency. (Emphasis added.)

The key requirements in this provision are:

1. Selection of the EIS contractor by the federal agency.

2. Federal agency guidance and participation in EIS preparation.

3. Disclosure by contractors of "financial or other interest" in the project for which the EIS is being prepared.

CEQ's fundamental premise that conflicts can be "avoided" through agency contractor selection and disclosure statements is of questionable validity. May (1994) argues correctly that conflicts of interest are unavoidable because everyone has multiple interests—organizational and personal. Environmental professionals are no more likely to act contrary to their own interests than are doctors, lawyers, or candlestick makers. Thus, the best the CEQ conflict of interest strategy can hope to accomplish is the avoidance of *unrevealed* conflicts of interest.

With respect to the proper role of federal agency M&O contractors or "prime" contractors in EIS preparation, it should be noted that the responsible agency can request information from *any person or organization* whether or not such sources have a conflict of interest that would disqualify them as EIS preparers.[9] Further, *anybody* can submit information to "any agency" for use in EIS preparation. The fact that an EIS information source might have a conflict of interest should not prohibit their being asked (or contracted) to "submit information" so long as they cannot be construed to be a party who "prepared" the document. (The distinction between "preparer" and "participant" is discussed below.) Obviously, any information submitted that is related to EIS preparation or content should be independently reviewed and evaluated by the "responsible Federal official."

Again, the 1506.5 conflict provision applies only to EIS preparation. It does not apply to checklists, EAs, FONSIs, records of decision (RODs), or other NEPA-related documents. Perhaps because of the FAR, most agencies require conflict of interest disclosure when contracting for the preparation of any type of document. Considering the fact that about 50,000 EAs and FONSIs are prepared each year (Blaug 1993), and that an EA/FONSI allows an agency to avoid the much higher cost and visibility that comes with preparation of an EIS, the CEQ should require the same level of protection for the objectivity and integrity of the EA/FONSI process as is required for the EIS process.

CEQ GUIDANCE

On March 23, 1981, CEQ published its answers to the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (40 Questions).[10] In responding to Question 17a on the meaning of a "financial or other interest in the outcome of the project" which would result in a

---

[9]See §1506.5(c).

[10]46 Fed. Reg. 18026 (March 23, 1981)

contractor conflict of interest, the CEQ stated:

> The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). ... If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from *preparing* the EIS, to preserve the objectivity and integrity of the NEPA process. (Emphasis added.)

Although the CEQ response is directed primarily at environmental consulting firms, it also applies to prime or M&O contractors who are responsible for maintaining and operating federal installations or are otherwise active proponents of an agency's particular mission. Such contractors cannot be assumed to be unbiased, objective, and disinterested observers. Because they often initiate, design, and construct projects and other "proposed actions" for which EIS documentation is required, they are as likely as the agency they serve to be project proponents or sponsors. In such cases, M&O contractors may be as vulnerable to conflicts of interest as the agency personnel they support.

Owing in part to the "confusion and criticism" surrounding the §1506.5(c) conflict provision, the CEQ supplemented its 40 Questions guidance.[11] Some contractors felt that the conflict of interest provision should be totally eliminated because they cast "undue and unwarranted suspicion" on EIS contractors. Expressing confidence in the professionalism of most contractors, the Council emphasized that the conflict prohibition applies only when a federal "lead" agency determines that it needs contractor assistance in preparing an EIS. It does not apply to a "private applicant" (for a permit, license, approval, etc.) or its contractors—provided that the agency makes its own independent evaluation. Rather, the purpose of the conflict provision is to "assure the public that the analysis in the (EIS) has been prepared free of subjective, self-serving research and analysis" that might be introduced by a contractor with an interest in the outcome of the proposal.

The July 1983 guidance contended that some federal agencies were interpreting the conflict of interest regulations in "an overly burdensome manner," resulting in the elimination of qualified contractors from the EIS bidding process. The guidance pointed particularly to multi-functional firms which have both EIS preparation and design/construction capabilities. The CEQ attempted to clarify the confusion by stating:

> Section 1506.5(c) prohibits a person or entity entering into a contract with a federal agency to prepare an EIS when that party has *at that time and during the life of the contract* pecuniary or other interests in the outcome of the proposal. Thus, a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no separate interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of future work on the project, it is doubtful that an inherent conflict of interest will exist. (Emphasis added.)

Apparently, this means that a contractor with no financial or other interest in the outcome of the project *at the time it prepared the EIS* would not be barred from later design or construction contracts if the project were approved.[12] For example, a contractor who prepared an EIS on a DOE testing facility could seemingly also design and construct the same facility so long

---

[11] 48 *Fed. Reg.* 146, July 28, 1983

[12] See the CEQ answer to Question 17b in the "Answers to 40 Questions."

as the design/construct "interest" was not concurrent with EIS preparation. However, separating present and future interests in project outcome requires considerable legal and intellectual juggling.

Regardless of the 1983 CEQ guidance, some agencies have been more conservative in interpreting conflicts inherent in the work of multi-functional consulting firms than has CEQ. For example, a 1996 DOE request for proposal for contractor assistance in preparing EAs and EISs bars the winning contractor for five years from performing contacts which "stem directly from the contractor's performance of work under this (NEPA support) contract."[13] Thus, if an EA or EIS prepared by a multi-functional consulting firm resulted in adoption of a specific alternative to accomplish hazardous waste cleanup operations, the firm could conceivably be barred from performing the cleanup using that alternative. (In fact, this type of provision has effectively discouraged some large hazardous waste consulting firms from entering into NEPA compliance contracts.)

None of the CEQ guidance adequately interprets what kind of "other interest" in the outcome of the project would result in a conflict of interest although "general enhancement of professional reputation" would be excluded. Thus, other than being able to include EIS project experience in a consulting firm's statement of qualifications (which itself could lead to later financial reward), it is difficult to conceive of an "interest in the outcome of the project" that is not pecuniary.

LEADING COURT CASES

The conflict of interest issue is closely related to two other issues: improper delegation of EIS preparation by the "responsible" federal agency official and the duty of federal agencies to independently evaluate EISs, or portions thereof, prepared by others. The courts frequently discuss conflict of interest, delegation and independent evaluation in the same opinion.

DELEGATION OF EIS PREPARATION

One of the earliest cases dealing with the delegation problem is *Greene County Planning Board v. Federal Power Commission* which was decided in 1972.[14] In this case, the Power Authority of the State of New York (PASNY) filed an EIS on a proposed electric transmission line which required federal authorization. The Federal Power Commission (FPC) reviewed the statement for sufficiency and circulated it to six other agencies which had "jurisdiction by law or special expertise" in accordance with NEPA §102(2)(C). The FPC's position was that it was not required to prepare its own EIS until it made a final decision on the power line. In holding that the FPC could not substitute the PASNY EIS for its own, the court stated:

> The Federal Power Commission had abdicated a significant part of its responsibility.... The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and ... to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.

---

[13]Contract Clause 1.13(b)(1)(i) of Part II, Section 1 of DOE Request for Proposal No. DE-RP04-97AL77611 for "Preparation of Environmental Impact Statements, Environmental Assessments, Environmental Reports, and Supporting Environmental Documentation for the DOE," issued March 5, 1997, states: "The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited or unsolicited) which stem directly from the contractor's performance of work under this contract for a period of five years after completion of this contract."

[14]412 F.2d 412 (2nd Cir. 1972).

A Montana federal district court arrived at the opposite conclusion in *National Forest Preservation Group v. Volpe*[15] by permitting the Federal Highway Administration (FHWA) to delegate responsibility for EIS preparation to the Montana State Highway Commission. However, a determining factor was that the CEQ had approved the delegation procedures submitted to it by the U.S. Department of Transportation (DOT).

NEPA was amended in 1975 by adding a new paragraph on delegation to state agencies in §101(2)(D). Under this provision, delegation of EIS preparation to a state agency with "statewide jurisdiction" is permissible providing that the responsible federal agency "furnishes guidance and participates" in the preparation, "independently evaluates" the statement prior to its approval, and complies with certain other procedures.

These and other cases stand for several legal principles:

1. An EIS must be prepared by the "responsible" federal official or agency which cannot abdicate this responsibility through delegation.

2. Parties with a financial interest may *contribute* to EIS preparation so long as they are not given the ultimate preparation responsibility.

3. If collection of information, conduct of studies, or other EIS preparation assistance is delegated to contractors or applicants, or information supplied by them is used in the statement, the resulting data must be independently evaluated and approved by the agency.

CONFLICT OF INTEREST CASES

The federal court decisions on improper delegation preceded the CEQ regulations on NEPA implementation, including the conflict of interest provisions, which were issued on November 28, 1978.[16] Although there have been a number of federal court cases decided on the §1506.5(b) regulations quoted above, three leading cases on conflict of interest are addressed in this section: *Sierra Club v. Sigler*,[17] *Sierra Club v. Marsh*,[18] and *Northern Crawfish Frog v. Federal Highway Administration*.[19]

Sierra Club v. Sigler

In *Sierra Club v. Sigler*, the U.S. Army Corps of Engineers (COE) contracted with a private consulting firm to design and deepen the channel for a deep water port in Galveston, Texas *and* to prepare an environmental assessment report for use by the COE in preparing an EIS. According to the court's findings, the consulting firm did more than provide the Corps with the relevant environmental information. The firm essentially prepared the EIS with only "brief opportunities" for COE review. Even though the COE designated an individual as the EIS "study manager," the court found that "his role was one of coordinating and overseeing work actually done primarily, if not exclusively, by the consultant hired by the applicants and by various other consultants hired as subcontractors."

The Sigler court found the private consulting firm's EIS preparation role "particularly troubling" in light of the consultant's stake in the project since the firm was involved in the port's design, engineering, and permitting. Although the court did not determine whether or not the CEQ conflict regulation in §1506.5(c) had been violated (the plaintiffs in the case had not

---

[15]352 F.Supp.123 (D. Montana 1972).

[16]43 *Fed. Reg.* 55990

[17]659 F.2d 963 (5th Cir. 1983).

[18]714 F.Supp. 539 (D.Me. 1989).

[19]858 F. Supp. 1503 (D. Kan. 1994).

asked for a review of the conflict issue), it stated that the regulation "is designed ... to minimize the conflict of interest inherent in the situation of those outside the government coming to the government for money, leases or permits while attempting impartially to analyze the environmental consequences of their getting it."

Sierra Club v. Marsh

In *Sierra Club v. Marsh*, an EIS for a cargo terminal facility was prepared by contractors to the Maine Department of Transportation (MDOT). Certain studies and reports prepared by three consulting firms were listed in the "literature cited" portion of the final EIS (FEIS) although only one firm was listed as a preparer. One of the firms prepared five reports, including an analysis of the impacts of the no action alternative. A second firm prepared four reports on design, plans, and cargo volume estimates. A third firm had engineering design responsibilities and was alleged by the plaintiff to have an "interest" in the outcome of the project. The Sierra Club argued that the FHWA violated NEPA by (1) failing to make an independent evaluation of the material prepared by MDOT's consultants and (2) failing to obtain conflict of interest disclosure statements from the MDOT contractors involved in the EIS preparation process.

The court held that the FHWA was *not* required to obtain conflict of interest statements from the firms that wrote "significant portions" of the EIS. The court's rationale was that EIS "preparers" can be distinguished from EIS "participants" because the CEQ conflict prohibition pertains only to the former. Absent any guidance in the CEQ regulations, the CEQ guidance documents, or court decisions as to the meaning of the term "preparer," the *Sierra Club* court relied on *Webster's Third New International Dictionary* (Unabridged at p. 1790, 1976) which defines "preparer" as one who puts a communication in written form or draws up a document.

Relying on this definition, the court emphasized that "not every *participant* in the EIS process need be listed as a preparer" (original emphasis). The court stated:

> An important distinction between the *preparer* of a document, and someone who participates in gathering information used in preparing it, is the *discretion* possessed by the *preparer*, to accept, reject or modify the information submitted for consideration by subordinate participants in the EIS process. (Original emphasis)

In other words, unless the party preparing background papers and other information (e.g., responses to comments on the DEIS) has the authority to determine EIS content, they should be construed as a *participant* in the EIS preparation process but not as the EIS preparer. This line of reasoning puts an interesting light on the conflict of interest issue. If an agency has fulfilled its responsibility for independent review of contractor prepared material, the agency, not the contractor, should be considered the "preparer."

In arriving at its decision, the court distinguished not only between participants and preparers but also between those who prepare EISs and those who prepare "significant background papers." The CEQ regulations governing the list of preparers to be included in an EIS require a listing of persons who are "primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement".[20] Thus, the MDOT consulting firms who contracted to prepare "significant background papers" should be included in the List of Preparers *even if they did not have to execute a conflict of interest disclosure statement.*

Because the CEQ regulations require only that an EIS be prepared "directly by or by a contractor selected by the lead agency," those preparing *significant*

---

[20] 40 C.F.R. §1502.17

background papers must be included in the list of preparers.[21] Again, a contractor which prepares background papers does not automatically become a "preparer" of the EIS. Such a contractor becomes a "preparer" only if it has the authority to determine the content of the DEIS or FEIS document. (Again, only the *federal agency* has real "preparer" authority.)

The *Marsh* court rejected the Sierra Club's argument that the FHWA violated the CEQ regulations by not requiring conflict of interest disclosure statements from the consulting firms who prepared the background papers. The court stated:

> Considering the plain language of section 1506.5(c), and the CEQ's interpretation of it, *see CEQ Forty Questions*, 46 Fed. Reg. at 18031 ("a consulting firm preparing an EIS must execute a disclosure statement ... ."), the FHWA reasonably interprets section 1506.5(c) as requiring that a conflict of interest disclosure statement be filed only by a contractor engaged to *prepare the EIS*, not by a contractor engaged to prepare significant *background papers*. (Original emphasis.)

Having distinguished "preparers" and "participants," the *Marsh* court nevertheless held that two of the MDOT consultants who wrote most of the EIS sections crossed the line from merely preparing background papers to preparing the EIS. Thus, these consultants should have executed conflict of interest disclosure statements. The principal rationale for this part of the court's decision rested on the fact that the MDOT, with FHWA approval, contracted with the principal consulting firm to prepare the EIS and not merely background papers. Although the *Marsh* case provides useful guidance on distinguishing EIS "preparers" from "participants," the most easily defended approach is to require EIS preparation contractor "participants" to file a conflict disclosure statement.

Northern Crawfish Frog v. Federal Highway Administration

This is the most recent federal court decision on EIS contractor conflict of interest in the context of the CEQ regulations. In this case, again involving a federal aid highway project, an EIS was prepared by a Kansas Department of Transportation (KDOT) contractor (Contractor A). The FHWA was "intimately involved in the environmental process." Another consulting firm (Contractor B), was retained by Contractor A to collect data and given primary responsibility for providing information on utilities, land use and zoning, transportation, route studies, socioeconomic impacts, and other parameters. Contractor B owned land in the vicinity of the highway project and many of its clients were involved in projects that would benefit from construction of the highway. In fact, Contractor B had rendered professional services to clients with property interests near the highway project.

The parties bringing the lawsuit contended that the FEIS was defective because the highway project would benefit some of Contractor B's clients who had "financial or other interests in the outcome of the project" in violation of §1506.5(c) of the CEQ regulations. The FHWA took the position that Contractor B did not have a conflict of interest and, even if it did, the firm was not disqualified from participating in the EIS process.

After extensive discussion of the CEQ regulations and other court opinions (principally *Sierra Club v. Marsh*), the court ruled that Contractor B was "merely a participant." The court recognized that there may be a fine line between "preparer" and "participant." However, it felt that under the facts of the case, "it is difficult to unequivocally determine whether [Contractor B] is properly considered a mere participant."

The court concluded that even if Contractor B was more than a participant, the

---

[21] 40 C.F.R 1506.5(c)

contract between Contractor A and Contractor B did not contain incentive clauses or guarantees of future work for Contractor B. Further, there was no indication that Contractor B would receive a "windfall" if highway project was constructed. Therefore, the court felt that "the integrity of the environmental process was not compromised by any conflict of interest."

The court in this case seemed to stretch its "mere participant" reasoning as far as possible in order to uphold the opinion of the FHWA that Contractor B did not have a conflict. The CEQ regulations and guidance do not say that an EIS contractor (or subcontractor) must realize a "windfall" from the proposed project in order to be barred from participating because of a "financial or other interest." It is enough that the contractor have "pecuniary or other interest in the outcome of the proposal" during the life of the EIS contract.

FEDERAL ACQUISITION REQUIREMENTS

The Federal Acquisition Requirements (FAR) governing "Organizational and Consultant Conflicts of Interest" apply to all federal agencies.[22] Although the FAR is not directed at the CEQ regulations in 40 C.F.R. 1506.5(c), some of its provisions are useful in determining where conflicts exist. Under the FAR, "organizational conflict of interest" or OCI is defined as follows:[23]

> *Organizational conflict of interest* means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

The FAR requires contracting officers to (1) identify and evaluate potential organizational conflicts early in the acquisition process, and (2) "avoid, neutralize, or mitigate significant potential conflicts before contract award."[24] The following FAR provision is particularly relevant to EIS preparation conflicts:[25]

> Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. *The exercise of common sense, good judgment, and sound discretion is required* in both the decision on whether a significant potential conflict exists and, if it does, the development of appropriate means for resolving it. The *two underlying principles are*—(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and (b) Preventing unfair competitive advantage. (emphasis added)

The CEQ regulations, of course, do not address "unfair competitive advantage" which could disqualify an EIS contractor under the FAR. According to the FAR, a contractor has an unfair competitive advantage, when competing for a federal contract award, in two situations: (1) when it obtains proprietary information obtained from a federal official without "proper authorization" and (2) when it possesses source selection information not available to its competitors. "Proprietary information" and "source selection information" are defined elsewhere in the FAR. Using stock offerings as an analogy, those in possession of "inside information" on future prospects of a company listed on the New York Stock Exchange have an unfair advantage over other investors.

The DOE OCI regulations contain this admonishment:[26]

> Department (DOE) personnel must pay particular attention to proposed

---

[22] 48 C.F.R. Part 1, Subpart 9.5
[23] 48 C.F.R. 9.501
[24] 48 C.F.R. 9.504(a)
[25] 48 C.F.R. 9.505
[26] 48 C.F.R. 909.570-4(a)

> contractual requirements which call for the rendering of advice or consultation or evaluation services, or similar activities that are expected to play a part in the Department's decisions on future acquisitions; research, development, and demonstration programs; production activities; the formulation of departmental policy; and regulatory activities.

NEPA compliance and EIS preparation activities could influence, directly or indirectly, all of the types of DOE decisions listed.

When DOE finds that an organizational conflict exists, no award of a contract can be made until the OCI has been avoided. A OCI is "avoided" when "corrective actions" have been taken to assure that there is "little or no likelihood of an organizational conflict of interest."[27] Several examples of OCI are provided in the DOE regulations. In one example, a consulting firm which derives much of its income from the nuclear power industry is considered to have a conflict if it is selected to evaluate the environmental impacts of coal-fired power plants.

The FAR requirements provide insight and assistance in interpreting the CEQ regulations by:

- Defining organizational (or personal) conflict of interest to include bias, partiality, lack of objectivity, playing conflicting roles, and having an unfair competitive advantage.
- Allowing a prospective contractor to avoid, neutralize, or mitigate potential conflicts before a contract is awarded. (Although, how this is to be accomplished is not specified.)
- Emphasizing that OCI must be determined on a case-by-case basis using common sense and good business judgment. (In other words, conflicts of interest cannot be determined by some type of formula.)
- Adding, as in the case of DOE, past and future "interests" to present interests.
- Providing concrete examples of situations in which OCI may exist.

On the other hand, since the FAR addresses all the apparent concerns of the CEQ COI requirements and more, it is not apparent that 40 C.F.R. 1506.5(c) is needed.

CONCLUSIONS

Conflict of interest is often a perception or an appearance of conflict. This is why it should be viewed using common sense and good judgment. Even if an organization or a person makes a sincere effort to be objective and unprejudiced ("pure" objectivity being impossible to achieve), past, present, or contemplated future activities or associations may color their efforts. In the DOE example, even if the consulting firm that has done a lot of nuclear work can be objective in preparing a NEPA document, their project experience is perceived as making them biased in favor of the nuclear power industry. However, CEQ's idea of "sound government practice" suggests that public perceptions be taken seriously.

On the other hand, taking actual or potential public perceptions too far could end up subverting the public interest. If a highly qualified and ethical contractor is passed up because of its extensive experience with nuclear power, the public will have lost the benefit of the contractor's experience. The public interest can be further compromised if an inexperienced or

---

[27] [48 C.F.R. 909.570-5(c)]

unprincipled contractor is hired who finds it expedient to reach the conclusions the agency wants or expects rather than the conclusions supported by the best available information. In addition, selecting a contractor based on public perceptions takes effort that could be applied with better effect to selecting a qualified and ethical contractor.

The following provides answers, or at least possible answers, to the questions posed in this paper:

- *What constitutes a conflict of interest within the meaning of the CEQ regulations?* Any promise or other indication of future financial benefits such as design and construction of the project for which the contractor in question is proposing to prepare an EIS presents conflict. This would include benefits that might accrue to the contractor's clients or even business associates who might "reward" the contractor at some future time. Any interests, financial or otherwise, that would prejudice the contractor toward a predisposed result (e.g., no "significant" environmental impact) so as to influence a "favorable" project outcome qualifies as a conflict. Even though a philosophical or political bias (e.g., a zealous environmentalist or economic development advocate) could distort an EIS, this is not within the penumbra of the regulations.

- *If a conflict of interest exists because of financial or other interest in the outcome of the project, is a contractor disqualified from "participating" in the EIS preparation process?* Generally not. Contractors with a conflict, including M&O contractors managing federal installations, could still prepare environmental "baseline" information and the "significant background papers" mentioned in the CEQ regulations.[28] Whether they should write "basic components" of the EIS (e.g., a description of the affected environment or a description of the proposed action and alternatives) is a closer question although they might prepare "drafts" for submittal to the EIS contractor and independent review by the agency. Even if they are disqualified from actually preparing the EIS document, M&O contractor personnel who contribute information or analyses should be listed as preparers and required to file a disclosure statement. If the most knowledgeable contractors are totally excluded from the EIS process because of overly conservative conflict interpretations, it only serves to increase the time and cost devoted to EIS preparation.

- *Are M&O or other contractors (including environmental consulting firms) more likely than federal agency personnel to have biases or prejudices as to the outcome of a project or program?* Of course not. In fact, agency personnel may influence an EIS contractor to arrive at predetermined conclusions. While relief from fraudulent representations or analyses is available in the courts, it is the agency and not the contractor that is ultimately responsible for the integrity of the NEPA process. Thus, in the NEPA context, the "responsible federal officials" must attempt to prepare unbiased environmental documents in spite of their own conflicts of interest.

Ultimately, the real issue is the integrity of the people who prepare NEPA documents, both agency personnel and contractors. While barring contractors with an apparent conflict of interest may protect the integrity of the NEPA process somewhat, it sometimes excludes qualified and ethical contractor personnel from the process unnecessarily. Further, it obscures the fact that the conflicts of interest faced by agency personnel may cause the most powerful distortions of the NEPA process. Direct attention to the integrity and proper behavior of all participants is the best way to assure that the purposes of NEPA are achieved.

REFERENCES

[28] 40 C.F.R. 1502.17 (on List of Preparers)

Blaug, Elisabeth A. 1993. Use of Environmental Assessments by Federal Agencies in NEPA Implementation. *The Environmental Professional*. Vol. 15:1, pp. 57-63.

May, Larry 1994. "Conflict of Interest," in *Professional Ethics and Social Responsibility*, edited by Daniel E. Wueste. Rowman and Littlefield Publishers. Lantham, Maryland.