



Project risk and appeals in U.S. Forest Service planning



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ABSTRACT

The National Environmental Policy Act (NEPA) requires U.S. Forest Service planning processes to be conducted by interdisciplinary teams of resource specialists to analyze and disclose the likely environmental impacts of proposed natural resource management actions on Forest Service lands. Multiple challenges associated with these processes have been a source of frustration for the agency. One of these challenges involves administrative appeals through which public entities can challenge a Forest Service decision following a NEPA process. These appeals instigate an internal review process and can result in an affirmation of the Forest Service decision, a reversal of that decision, or additional work that re-initiates all or part of the NEPA process. We examine the best predictors of appeals and their outcomes on a representative sample of 489 Forest Service NEPA processes that were decided between 2007 and 2009. While certain factors associated with pre-existing social contexts (such as a history of controversy) or pre-determined elements of a proposed action (such as the extraction of forest products) predispose certain processes to a higher risk of appeals, other practices and process-related strategies within the control of the agency also appear to bear meaningful influence on the occurrence of appeals and their outcomes. Appeals and their outcomes were most strongly related to programmatic, structural (turnover of personnel in particular), and relationship risks (both internal and external) within the processes, suggesting the need for greater focus within the agency on cultivating positive internal and external relationships to manage the risk of appeals.

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1. Introduction

The National Environmental Policy Act (NEPA) of 1969 requires all federal agencies to analyze and disclose the likely environmental impacts of any major land management actions. While some projects are categorically excluded from detailed analyses, NEPA processes generally involve the development of a purpose and need and a proposed action, public scoping to define relevant issues associated with a proposed action, the development of alternative courses of action to achieve the purpose and need, analyses of the likely environmental and socioeconomic impacts of those alternatives, the development of a document that discloses those likely impacts, and an official document that discloses the final decision and its rationale. Public comment periods and other various forms of public involvement typically occur at multiple points throughout the process, especially during scoping and following the initial drafting of the disclosure document. In the

U.S. Forest Service, the process is conducted by an interdisciplinary team (ID team) of resource specialists and other agency staff, one of which is designated the ID team leader (IDTL). The final product of the ID team is a document, an Environmental Impact Statement (EIS) or Environmental Assessment (EA), which discloses all relevant analyses related to the likely impacts of each potential alternative action designed to meet the purpose and need. A line officer, typically a district ranger or forest supervisor, is tasked with making the decision on a course of action and documenting his or her rationale. The decision maker (DM) can be involved to varying degrees throughout the NEPA process (Stern and Mortimer, 2009; Stern et al., 2010a).

Regulations derived from the 1993 Appeals Reform Act (16 U.S.C. Section 1612) provide entities external to the agency the ability to challenge the resulting decisions of NEPA processes which lead to the development of an EA or EIS (36 CFR 215) through an administrative appeal. This ability protects “the right to object” to Forest Service actions for individuals and groups external to the agency, a right long supported by both the agency and those external to it (Coulombe, 2004). The U.S. Forest Service has averaged over 400 appeals per year over the past five years (USDA Forest Service, 2012). Appeals may relate to claims about insufficient analysis of effects, incomplete or improper public involvement, compliance with regulations or policies, or substantive arguments about the rationale leading to the

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responsible official's decision or the appropriateness of the decision itself, among other claims. Appeals can result in an affirmation of the Forest Service decision, a reversal of that decision, or additional work that re-initiates all or part of the NEPA process. As such, appeals can identify problems or mistakes that might be resolved prior to implementation of a project. They can also provide an avenue for conflict resolution prior to facing legal challenges. Alternatively, they can be viewed as merely another mechanism to challenge agency actions regardless of the quality of the process. Regardless of their outcomes, appeals require considerable time and effort on behalf of the agency to conduct a thorough review and issue a ruling. Moreover, appeals delay and can prevent proposed resource management implementation (Teich et al., 2004; USDA Forest Service, 2002).

While recent studies reveal the desire of the agency to avoid appeals (Mortimer et al., 2011; Stern et al., 2010a), Stern and Mortimer (2009) uncovered a sentiment within the Forest Service that appeals are often outside the control of the Forest Service. That is, certain individuals or groups may plan to appeal no matter how well a process is run (Selin and Chavez, 1995). Moreover, recent studies suggest that certain types of projects, such as those involving timber harvest, are more likely to be appealed regardless of other process characteristics (Jones and Taylor, 1995; Laband et al., 2006). This raises a question regarding whether the agency has the ability to influence the frequency with which projects are appealed or the outcomes of appeals through any of its own efforts within its NEPA processes. This research addresses that question. We first examine some of the ways ID teams appear to respond to perceptions of increased risk of appeals. We then examine the contextual variables and process characteristics that best predict the occurrence of appeals and their outcomes.

2. Conceptual framework

Previous research on administrative appeals has focused on the characteristics of appellants (e.g., Jones and Taylor, 1995; Teich et al., 2004), upon appellants' perceptions of equity in the public involvement process (Germain et al., 2001), and upon the subject matter of the project and its context (Laband et al., 2006). We conceptualize appeals as a form of project risk. This conceptualization provides for a view of the potential precursors of appeals to emerge from sources both within and outside the control of the agency.

Project risk can be defined as the probability of the occurrence of an undesirable event and the significance of that occurrence (Pritchard, 1999). In our cases, we focus on appeals as the undesirable event and their outcomes as a measure of their significance. Most of the literature associated with project risk resides within the fields of management and information technology. Within that literature, numerous sources of risks and risk management strategies are identified. We focus on those that translate most directly to Forest Service NEPA processes.

2.1. Risk sources

We concentrate on what we call *programmatic*, *structural*, *technical*, and *relationship* risk sources. Numerous authors (Datta and Mukherjee, 2001; Ward, 1999) stress the importance of understanding the project environment to initiate any assessment of risk. In NEPA processes, that environment is influenced by multiple factors, some of which are determined at the outset of the process as the project is initially defined. We use the term *programmatic risk* to refer to sources of risk that emerge as a result of the initial project design and location. These risk sources include the complexity and scale of the project and the social and political environment in which the process is to take place. Each of these factors may be directly related to the specific nature of the proposed action, not only in terms of scope, but also in terms of purpose. For example, larger projects or those involving the extraction of timber may generate greater public interest

than smaller projects associated with restoration (Laband et al., 2006; Mortimer et al., 2011). Programmatic elements influence each of the other sources of risk, as they set the baseline conditions in which a project takes place.

The availability of necessary resources to successfully complete the process also poses risk to a project's effective completion (Moynihan, 1997; Perminova et al., 2008; Reed and Knight, 2010; Royer, 2000; Tesch et al., 2007). These resources may include staff time, materials, and sufficient budgets to complete tasks. We refer to these as *structural risk sources*, involving such elements as team size and prioritization of staff time.

Technical risk emerges from challenges related directly to competence and performance. In particular, decisions regarding technology selection, methodology selection, scientific analyses, and project revision can impact outcomes through enhancing or curtailing performance and problem solving (Dey, 2001; Pritchard, 1999). Within the NEPA context, technical risks may be inherent within project design, impact analyses, procedural compliance, and disclosure elements of the process. The competence of individuals performing these tasks may be based upon their pre-existing knowledge, training, experience level, and general abilities.

Relationship risk includes risk that can emerge from both internal and external relationships (Datta and Mukherjee, 2001; Hillson, 2003; Tesch et al., 2007). External relationships have been well-studied in natural resource management, with multiple studies focusing on public involvement, conflict, collaboration, and their outcomes (Innes and Booher, 2004; Leach, 2006; Lewicki et al., 2002; McCool and Guthrie, 2001; Predmore et al., 2011a; Wondollock and Yaffee, 2000). Internal relationships have been less frequently studied in the natural resources literature. Stern and Predmore (2012), however, have demonstrated the importance of relationships internal to the agency in Forest Service NEPA processes, including those within the ID team and between the ID team and the DM. Elements of team harmony, intra-team collaboration, IDTLs' leadership styles, and communications with the DM were each predictive of process outcomes.

2.2. Risk management

Risk management strategies generally involve three common steps, regardless of the specific framework being followed: risk identification, analysis, and response (Dey, 2001; Pritchard, 1999; Project Management Institute, 2004; Reed and Knight, 2010; Ward, 1999). This study does not directly address risk identification and analysis. Rather we focus upon actions that might best be considered potential responses to emergent risks. Responses to perceived risk may occur implicitly or explicitly. Our data do not speak to whether responses to risk within the NEPA processes surveyed are deliberate or not. We explore which practices seem to be more common when greater external controversy, a proxy for the risk of appeals, is expected. We then examine the influence of these and other practices upon the occurrence of appeals and their outcomes.

We posit that higher levels of expected controversy are related to heightened concerns about potential appeals. In response to these concerns, ID teams and DMs may alter certain aspects of their processes to minimize the risk of appeals (MacGregor and Seesholtz, 2008). We hypothesize that ID teams work more collaboratively, legal counsel is more often consulted, external contractors are more often used, the DMs become more involved in the process, and public involvement techniques may be altered on processes with higher levels of expected controversy. Freeman et al. (2011) suggest that projects that generate greater levels of external interest drive team members to collaborate more to mitigate perceived risk that emerges from additional public scrutiny. Related research by Stern and Predmore (2012) suggests that effective DM engagement is particularly important in more challenging processes. DMs may also perceive

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