

# Legal Issues and Adaptive Management

## Chapter 10

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**Session Objectives:**      **By the end of this session,  
participants will be able to:**

- Discuss the legal issues that need to be considered in Adaptive Management (AM).
- Describe how AM should be considered when navigating the National Environmental Policy Act and Endangered Species Act
- Discuss how courts have evaluated AM approaches in terms of an agency's statutory requirements

### Adaptive Management is...

- “A decision process that promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from mgt. actions and other events become better understood....”
- Discretionary management approach

### Adaptive Management is not...

- **A replacement for meeting mandatory statutory requirements.**
- As a structured decision making process, managers struggle with its relationship with laws, regulations, and polices.

**Legal Issues & Adaptive Management**  
***Adaptive Management: Structured Decision Making for Recurrent Decisions***

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**Federal Authority for Adaptive Management**

- CEQ NEPA regulations and guidance
- DOI NEPA regulations
- Case law
- Agency guidance (DOI, EPA, etc.)

**Navigating the Law**

- |                       |        |
|-----------------------|--------|
| • Organic Legislation | • MMPA |
| • APA                 | • MBTA |
| • NEPA                | • WSRA |
| • ESA                 | • FWCA |
| • FACA                | • MSA  |
| • CWA                 | • CZMA |
| • NHPA                | • FOIA |
| • CAA                 | • DQA  |

*To name a few . . .*

**Do These Laws Apply to Me?**

- Typically apply to all federal actions.
- May apply to state and local actions if there is a federal nexus such as:
  - Federal funding
  - Required federal permit
  - Certain level of federal involvement

### Importance of Understanding the Legal Framework

- Laws were passed for a reason
  
- Failure in understanding and navigating the law could result in:
  - Bar to implementing necessary management actions
  - Timely and expensive remands to reconsider impacts of proposed actions
  - Paying plaintiff's attorney's fees
  
- Our society is litigious: the plaintiffs know the law

### AM Misperceptions

- Undermines existing conservation laws
  
- Authorizes risky, experimental management
  
- Marginalizes the public
  
- Federal action blank check
  
- End-run on accountability

### Clear Message

- Days of "trust us" management are over
  
- Laws, courts, and public require more certainty, accountability, and input

### Overcoming the Perceptions

- Increasing accountability and trust through Adaptive Management
- Articulate the process as defined in the technical guide and...

*Follow it.*

### Administrative Procedures Act and NEPA

- Two laws to consider together:
  - Administrative Procedures Act (APA)
  - National Environmental Policy Act (NEPA)

### Administrative Procedures Act

- Allows a private citizen to challenge agency actions in Federal court.
- Action or order is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."
- The only mechanism to bring a NEPA challenge.
- Often used for ESA.

### Why It's Important To Do It Right

- Statue of limitations for agencies under the APA is 6 years.
- Challenges can come any time during that period

### National Environmental Policy Act

- Section 102(2)(c) requires that an environmental impact statement be prepared for major federal actions that may significantly affect the quality of the human environment.
  
- However, some level of NEPA is required whenever an Agency proposes an action. These actions may be covered by Categorical Exclusions to NEPA or analyzed in an EA or EIS.

### Similarities Between AM and NEPA

- Informed decision making
  
- Interdisciplinary approaches
  
- Public and Stakeholder Involvement
  
- Consideration of models and alternatives
  
- Understanding resource impacts and responses
  
- Monitoring

### NEPA Considerations

- Analyzing the impacts
  
- Need to supplement
  
- Engaging the public

### Analyzing the Impacts

- Direct Impacts
  
- Indirect Impacts
  
- Cumulative Impacts

### Supplemental NEPA Documents

- The CEQ NEPA regulations state that a supplemental environmental impact statement must be prepared under two conditions:
  1. \_\_\_\_\_  
\_\_\_\_\_
  
  2. \_\_\_\_\_  
\_\_\_\_\_

### Programmatic NEPA and Tiering

- NEPA allows/requires consideration of impacts of implementing a program of actions.
  
- When taking future actions consider need to supplement.
  
- DOI NEPA regs. allow for an EA and Finding of No New Significant Impact (FONNSI)

### Effective Integration

- Development of Interdisciplinary Planning and Compliance teams
  
- Applying NEPA early in the process
  
- Committing to an AM approach early in the process

NO AFTER THOUGHTS

### Take-home Messages from NEPA Cases

- Develop a transparent process for how actions would be implemented and adjusted over time
- Project potential impacts as management actions change in the future
- Evaluate your NEPA document during the “Assessment” Phase and supplement if necessary
- NEPA can be an easy legal challenge, don’t avoid your NEPA requirements

### The Endangered Species Act

- Passed in 1973, the 3rd attempt at legislation to protect declining species
- The purposes of the ESA are threefold:
  1. to provide a means to conserve ecosystems upon which T&E species depend
  2. to provide a program for T&E species conservation
  3. to achieve the purposes of the treaties and conventions

### ESA Considerations

- Section 7 and Section 10
  - Biological Opinions and Habitat Conservation Plans
- Certainty
- Legal standards being applied

### Scientific Uncertainty v. Legal Certainty

- The adaptive management process is based on the concept of uncertainty
- The ESA requires a level of legal certainty to ensure that actions will not jeopardize listed species
- Striking a balance can be challenging, but is possible

### Adaptive Management as Mitigation

- For ESA issues mitigation needs to be
  - reasonably specific,
  - certain to occur,
  - capable of implementation,
  - enforceable, and
  - able to address threats

### What Didn't Work—Delta Smelt

- 2005 BiOp issued by USFWS on the operations of the Long-Term Central Valley Project and State Water Project Operations Criteria and Plan
- “[a]daptive management is within the agency’s discretion to choose to employ, however, the absence of any definite, certain, or enforceable criteria or standards makes its use arbitrary and capricious under the totality of the circumstances.”

Natural Resource Defense Council v. Kempthorne, 506 F.Supp.2d 322 (E.D. Cal. 2007).

### What Worked—Salmon

- The adaptive management process addressing listed salmon species was being challenged.
- The plaintiffs claimed that the BiOp “improperly relie[d] on a promise of adaptive management without identifying concrete actions to ensure” protection to the listed salmon and steelhead.
- Court concluded that measures were enforceable and sufficiently certain to occur.

Pacific Coast Federation of Fishermen’s Assoc. v. Gutierrez, 2008 WL 2223070  
(E.D.Cal. 2008).

### Take-home Messages from ESA Cases

- The protection and conservation of listed species is paramount.
- The use of an AM process should reduce “take” of listed species.
- The AM process must meet the same standards as mitigation

### Federal Advisory Committee Act

- Governs committees “established or utilized by one or more federal agencies in the interest of obtaining advice or recommendations.”

### Stakeholders v. The Public

- Stakeholders actively engage and commit time and resources.
- Public may be more driven by self-interest and value-based requirements. Their objectivity may be limited. Involvement may be inconsistent.
- Stakeholder involvement may trigger FACA.

### FACA Exceptions

- Group comprised of federal, state, tribal and local government employees.
- Group established to perform an operational rather than advisory function.
- Group that provides technical rather than policy advice.
- Group that provides individual advice versus group consensus.

### FACA Requirements

- Committee charter developed and filed
- Renew charter every 2 years
- Maintain detailed minutes
- Meetings open to the public

### Take-home Messages for FACA

- Understand the differences between stakeholders and the public.
- Charter a committee if necessary for your planning process.
- If time is critical, explore using possible FACA exceptions.
- Work with your attorneys to avoid issues.

### **Legal Considerations—Recap**

- Analyzing the impacts
- Need to supplement
- Legal Certainty
- Public v. Stakeholders

## **Take-home Messages**

- The concept of Adaptive Management enjoys legal support.
  
- Do not avoid your legal responsibilities, understand them and fulfill them.
  
- Develop a transparent framework/process.
  
- If you commit to the process, follow through.