

MESSAGE FROM PHILADELPHIA

Background: The Clark Group was retained to convene and facilitate four roundtable meetings of experts in the National Environmental Policy Act to (1) inform the public and the panelists about the work of the NEPA Task Force and the recommendations emanating from their report to CEQ; and (2) to seek the panelists individual opinion about which of the recommendations are the most important to implement and how to implement them. These experts were drawn from academia, business and industry, non-governmental organizations, tribes, lawyers, practitioners, and federal decision makers. The second of these roundtables took place on 13 - 14 November in Conshohocken, Pennsylvania, near Philadelphia. It was co-hosted by the Surface Transportation Policy Project and the American Association of State Highway Transportation Officials. This report synthesizes the views presented by the experts and the public at the second roundtable.

NEPA Works, But The Process Needs To Be Improved. The panelists believe that NEPA is the foundation of environmental protection and public involvement in the federal agency decisionmaking process. CEQ is viewed as responsible for ensuring the viability and vitality of the statute. The panelists further thought that NEPA is working but building on years of implementation experience can and must be made to work even better. There was a consensus that permittees, applicants and the public should not be left in a proverbial limbo for years while what appears to be an unending analysis is undertaken. Further panelists believed that agencies should be recognized for their successes in making NEPA work well and that such recognition will provide Congress with valuable information regarding how the NEPA process does work. One panelist expressed surprise at the amount of consensus about the value of the NEPA process given that there was a broad cross section of experts representing diverse, and often competing, perspectives at the roundtable.

Several panelists felt the Task Force and their report did not do enough to protect NEPA. While the report does not undermine the NEPA statute or process, several panelists concluded that the Task Force missed an opportunity to effectively defend NEPA from current legislative actions they viewed as weakening or undermining NEPA. Several pieces of legislation, including Healthy Forest, Energy, and defense exemptions were characterized by several panelists as allowing agencies to bypass the NEPA process or cut the process to a minimum time that curtailed public interactions. Concerns that this trend increases the amount of decision making that takes place without full environmental and community consideration were raised. Some suggested that CEQ is the last line of defense for the statute and has the essential leadership role to play to ensure NEPA's critical role in the federal decisionmaking process.

Other panelists addressed the issue of broad Task Force recommendations that without more definition could be used to undermine the NEPA process. For example, the broad recommendation to expand the use of categorical exclusions can be problematic without parameters to guide the various agencies with their NEPA responsibilities. They suggest

that the context of the recommendations be fully developed to reduce or prevent ambiguity before implementation.

There was also a discussion and strong support for ensuring that all agencies have adequate resources (people and budget) and training to carry out their NEPA responsibilities.

It's Time to Re-Educate People on What NEPA Can Do for Agencies. Many practitioners have been working with the NEPA process since its inception, using the statute and guidance documents to develop many of the practical standards for our current methods of NEPA implementation and documentation. However, several panelists agreed that the amount and level of training have not evolved in conjunction with the changing atmosphere in which practitioners work. One panelist suggested that practitioners be re-educated about the positive role that the NEPA process can play in agency planning, stating that the NEPA process provides a way for agencies with different agendas to engage in a collaborative process.

The Philadelphia panelists thought there is much misunderstanding about how and when to participate in the NEPA process. There was a consensus that training is needed for agency leadership as well as others engaged in the NEPA process, including non-governmental organizations, to create a common understanding of the expectations of the statute – some ask too much of the process while others use it too little. NEPA can't force consensus, but it is seen as providing an open forum in which agencies and other stakeholders can voice their opinions in a timely manner to provide adequate time to consider those opinions and to provide the necessary information for decision makers.

Collaboration is Important; but a FACA is Not the Way. Several panelists noted that in their experience collaboration can be successful. Most panelists suggested a “best practices” handbook on collaboration would be valuable, but no panelist thought a formal committee chartered pursuant to the Federal Advisory Committee Act (FACA) would help. One panelist said that collaboration doesn't work if the actors don't know their roles. Several suggested that agencies must design different ways to collaborate due to the diversity in agency mission- some federal projects are implemented by an agency, while some agencies give permits to undertake a private action.

One panelist expressed the view that collaboration took too much time, that “turf battles” get in the way of collaboration, and that a “best practices” handbook might help overcome these obstacles. Another panelist highlighted the value of detailing staff between agencies to increase the understanding about agency missions and methods of practice. Indeed, another panelist felt that “procedural justice” is a benefit of the NEPA process- when a group has faith and trust in the collaborative process used to make a decision, they can generally live with the outcome. One NGO commented that beyond the need for procedural justice is the need for a collaborative alternatives development process. They believe this type of early collaboration in the process will make the NEPA process more efficient and reduce the likelihood of litigation once a decision is made.

On the topic of collaboration there was a good discussion about the misunderstanding that many agencies and the public have about the goal of a collaborative NEPA process. One panelist cautioned we must not begin to think that collaboration requires consensus. Another panelist characterized the attitude of many agencies as a Zero sum game- for example if the Army Corps approves a permit for a project that affects a wilderness area, the FWS is seen as losing. One panelist suggested that either a working group or the best practices guide clarify that a collaborative scoping process does not ensure consensus among actors, but rather provides for a transparent process in which all can provide their views early for agencies to address.

One panelist addressed the fundamental gap between agency NEPA practitioners and the decision makers. All of the panelists agreed that effective collaboration will require a real commitment from agency leadership to support the NEPA process and that CEQ should develop a decision model for senior leadership on how to work with and use the NEPA process to effectively assist and support their decision making.

Citizens Guide to NEPA Must be Elevated to High Priority. One panelist commented that many citizens view the public participation component of the NEPA process as a way to cast their vote on the decision before the agency. This brought a robust discussion of the different views of what NEPA can and should do. One panelist said that a Citizens Guide to NEPA would help citizens as well as agencies and interested parties to understand their respective roles in the process. There was consensus among panelists that a Citizens Guide is an important high priority task. Everyone believed it could be accomplished quickly and with few resources.

CEQ Must Issue Guidance on EAs. Agencies often think that environmental assessments are less work, but one panelist argued that the requirement to demonstrate no significant impact in an EA is more strenuous than producing an EIS which recognizes that there may be a significant effect. There was some discussion about whether EAs are more efficient than EISs and there was clearly varying experiences on the topic. One practitioner said that EAs are as much work as EISs and that some agencies are spending equal time and money on to prepare each document. Another panelist suggested that CEQ should try to make it easier to do EISs and harder to do EAs. A State highway official said that his agency seeks public involvement for transportation projects, whether it is EA or an EIS. According to a different panelist, developing lengthy EAs that act in a similar capacity to EISs undermines the NEPA process and guidance documents are needed to define the role and use of EAs. There was much consensus on this point. One panelist suggested that page limits should be enforced while another panelist said that preparers of EAs should realize that the development of a strong analysis is where time and effort are spent, and that writing 20 or 200 pages should not take much more time.

Cumulative effects, enforceable mitigation and public involvement are the most pressing issues that need clarification in EAs. Other issues to be clarified are the content of purpose and need statements, use of scoping, and guidelines on document length. Panelists fully agreed that EAs have the potential to reduce costs and time while still meeting the intent of the statute. However, several panelists noted that agencies have a

spotty record of opening up the EA process to the public. Furthermore they noted that the parties responsible for monitoring the effects of the actions and the mitigation measures are rarely identified or easily held accountable. A lack of monitoring also impacts the agency's ability to properly address the cumulative effects of their EA actions. While a majority of panelists agreed that CEQ should issue guidance, some panelists argued that guidance documents would be of limited utility for agencies in the face of litigation and suggested CEQ develop additional regulations.

The Process to Review Categorical Exclusions (CEs) Must be Addressed. NGO and academic panelists voiced concern about the increasing reliance on CEs to comply with NEPA, or even to bypass appropriate NEPA analysis. Several panelists were concerned about the perceived emphasis on increasing the number and use of CEs. If this is the case, CEQ must make extra efforts to ensure that they are legitimate and not misused by the agencies. Several panelists stated that a lack of coordination within an ecosystem and the lack of monitoring cause the cumulative effects of actions to be ignored. One panelist suggested that agencies within ecosystems coordinate to log categorically excluded actions in a database to better understand the cumulative effects.

Several academicians and NGO panelists stressed the importance of post-project monitoring to build trust within communities regarding agencies use of categorical CEs. They addressed the need for agencies to understand the cumulative effects of using their CEs, and only with disclosure of monitoring results would the public fully trust agency discretion in implementing CEs. They went further to say that agency practitioners should receive training on how to implement CEs and that agency CEs should differ based on the ecosystem in which they are applied. For example, forest practices vary throughout the nation and by ecosystem and therefore CEs should be tailored to take the ecosystems and the effects of varied practices into account.

The discussion of the cumulative effects of CEs was followed by a discussion of how to address the review process for establishing CEs. Several panelists agreed that a programmatic EIS provides an opportunity to address the development and use of CEs. Specifically the programmatic document would be a forum for the public to comment on proposed CEs. The CEs would then be developed based on the programmatic analysis which takes cumulative effects into account, and the agency would then refer to that analysis when using the CE. There was widespread support from NGOs, academicians, industry, and practitioners that CEQ should explore this. An alternate suggestion made by a panelist on how to review CEs was derived from recent case law which suggests developing an administrative record of past actions that were found to have no significant effect through an EA, and using that record to support a proposed CE.

In whatever guidance is prepared, several panelists from varied backgrounds stated that guidance should contain a strong recommendation from CEQ for agencies to review their list of CEs to determine whether any CEs should be taken off or added to the agency's list.

Coordinating compliance with other laws promotes efficiency and environmental protection. The 1997 CEQ report on making the NEPA process effective and efficient highlighted the benefits of interagency coordination of planning responsibilities. As one panelist noted, *Modernizing NEPA Implementation* has little discussion of the difference between regulatory agency versus lead agency roles in the NEPA process. Some panelists from industry urged CEQ to take the leadership in requiring better coordination from the resource agencies such as FWS and NMFS. Several representatives from the NGO community said that while NMFS and FWS shouldn't wait till the analysis of alternatives is complete to engage in the NEPA process, the agencies don't have the resources to be fully involved in thoroughly evaluating all reasonable alternatives and are not making NEPA a priority. They suggested that FWS and NMFS be given more resources to be involved in the process, rather than remain silent and be criticized for their late decisions. One industry association panelist suggested that NEPA is the best tool to integrate all the other laws aimed at environmental protection.

Another panelist stated that cooperating agencies is a good idea, but practitioners need to know how to coordinate or integrate the various environmental requirements with the NEPA process, and that CEQ guidance should provide a flow chart.

More than a willingness to enter into cooperative agreements is necessary to address the coordination and integration of various environmental requirements. They suggested that agencies must know about the natural resources for which they are responsible, and that agencies often don't have the necessary data and information. This is compounded when agencies are asked to evaluate several alternatives, each of which would require collection and analysis of data. In fact, one panelist said that in many cases a biological opinion couldn't be written until the preferred alternative is identified because they often have to begin collecting data on resources that may be affected. Agency scientists will have a difficult time planning and making assumptions when little information about the relevant resources and science is available. One NGO panelist made the observation that it is not just resources and manpower that keeps the resources agencies from better collaboration, but that they view themselves as regulatory agencies rather than part of the planning process and that it will be very difficult to address this because it requires a paradigm shift.

A former senior official with a permitting agency thought this recommendation to integrate the differing requirements should receive higher priority from the Task Force. He believed that it is a problem to have the permitting processes begin so late in the NEPA process and posited that closer collaboration by permittees must start earlier. Further he agreed that while resources are a problem, his experience is when something is made a priority, there are ways that agencies can shuffle resources.

A practitioner, who works with many private firms seeking permits, said that there is an issue about knowing when to stop data collection to consider the detailed analysis sufficient. He said that he relies on the agencies to let him know which resources are important and what data are needed. An NGO panelist suggested that permitting

agencies share best practices on the level of analysis needed for specific projects and this would help everyone.

A panelist who works with regulated industries agreed with the idea of CEQ creating a handbook and praised the “Redbook” that was created by the FHWA. Many panelists praised the Redbook and suggested it be used as a model to address other environmental requirements. This panelist wouldn’t change the Task Force’s priority of this recommendation and is afraid that CEQ would start this project and find that it is a large undertaking and they will not be able to do other things. An additional caution to CEQ came from an attorney familiar with both NEPA and other environmental statutes. Several panelists agreed that NEPA doesn’t and shouldn’t change the statutory missions of the regulatory agencies, and that CEQ shouldn’t constrain the regulatory agencies and what they are required to consider under their statutory authority, which is typically a mandate to promote the broader public interest.

Accessing Information Has Always Been Difficult. One of the principle components of the NEPA process is making information on the proposed action available to the public, specifically to the communities that may be affected by the action. One panelist made the point that it has always been difficult to get information from agencies and it is more difficult since the terrorist acts of 9/11. Several panelists made suggestions on actions by agencies or CEQ that would increase access to information. One suggestion was for agencies to provide a web based calendar of information on key dates for public involvement in the NEPA process. Another panelist suggested that documents be posted on secure websites where interested parties are required to sign in to view documents. This would take into account security issues, while increasing access to these important public documents.

Most panelists agreed that increasing the role for electronic publication of documents is important in this digital age, whether on CDs or on the internet. Additionally, panelists discussed the importance of finding methods to share data among agencies performing NEPA analyses in order to reduce the reproduction of similar data and to increase the ability of agencies to build studies upon previous data collected. There was a general consensus that information sharing would facilitate interagency collaboration. One suggestion that was echoed by several panelists was to require filers to geo-reference their analyses and NEPA documents. This could enable agencies to make use of data generated within their ecosystem to help with cumulative effects analysis as well as with coordination among the agencies and other interested parties.

NEPA Must Evolve. Several panelists voiced the concern that the weakest part of the NEPA process is the lack of post decision follow-up by agencies. They agreed with the notion that NEPA must evolve from a prediction tool into an adaptive tool and that only through systematic monitoring can the natural disturbance regimes of ecosystems be considered and adaptive decisions made. Panelists cautioned that adaptive management and its associated monitoring should in no way replace the initial analysis done in the NEPA process. The predictive capabilities of NEPA and the requirements to consider the effects of actions and alternatives should be left intact.

One panelist suggested that Environmental Management Systems (EMS) be integrated into the NEPA process to provide agencies with a structure for adaptive management. This is a timely issue since an executive order requires agencies to implement EMS by 2005. Another industry panelist echoed this view and suggested that there be an acceptance of different EMS models rather than only ISO 14000. Finally, it was noted that there are numerous responsibilities that attach to using adaptive management. In addition to monitoring and adapting, there is the responsibility to describe when goals or conditions are such that those ongoing responsibilities should end.

We Are Getting Better at Producing Programmatic Documents. Several panelists suggested that programmatic EISs are inefficient and that a more effective way to spend resources is to monitor actions. Another panelist countered stating that they are not entirely ineffective, yet there is room for improvement. Several panelists felt that programmatic EISs are a good tool, but there should be guidance on what kind of decisions should be made with a programmatic EIS or EA. Several panelists echoed this view and further stated that FACA committee is not the best method to address programmatic EISs, and called for guidance from CEQ.

Social cultural and economic impact analysis requires better definition. While this area was not heavily discussed, several considered it to be an essential recommendation. It was particularly discussed by panelists who are practitioners. A long-time practitioner in NEPA said that professionals in the field don't know how to analyze or document the social and economic effects in the area of action. Another panelist stated that there is no substitute for coordination with the local community and suggested that the only useful guidance CEQ could provide would be to give deference to the local area by requiring analysts to coordinate with the local planning departments to assess local cultural and economic issues.

Public Comments. The public echoed several of the panelists' views regarding the Task Force recommendations. The need for CEQ to address legislative actions that undermine the NEPA process as well as the need for post-project monitoring were addressed. Several comments focused on the need for better agency collaboration and public outreach. They stress the point that keeping the public involved in the NEPA process makes the process more efficient and leads to better decision making.

One state agency worker stated that the public is done a disservice when large projects are delayed for years due to the NEPA process. Several members of the public focused on the issue of coordinating other environmental compliance issues into the NEPA process. They found current practice to be very inefficient and recommended that CEQ develop guidance to address this issue.

Training was highlighted by several of the public comments. One person reminded the panelists that the knowledge level of NEPA issues for the average practitioner is significantly less than those sitting at the table, and suggested that more training be made available to agency practitioners as well as senior decision makers and the public.

Closing Comments. The central message from Philadelphia is that CEQ should take a leadership role in making NEPA work better now. While there was much consensus for making it work better, there were many cautionary comments about “streamlining” NEPA and CEQ was urged by several panelists to protect NEPA from being legislatively curtailed, especially when legislative changes would hinder public participation.

The five most mentioned areas for immediate attention were (1) developing guidance for environmental assessments; (2) implementing training for agency decision makers; (3) developing the Citizens’ Guide to NEPA; (4) developing a handbook on how to better coordinate compliance for other statutes with NEPA and (5) developing a “best practices” manual on collaboration in the NEPA process.

With regard to implementing any recommendations there was no heart for FACAs and there is no substitute for CEQ’s leadership. FACAs require enormous resources for staff, travel, and coordination of public involvement and CEQ can best serve NEPA by using those resources to implement recommendations that strengthen the process.

It was noted in the Task Force Report that distrust of government and distrust among the agencies is hampering many improvements in the NEPA process. That sentiment was echoed loudly, often, and in the discussion of almost all the recommendations. In order for the public to trust the process, citizens and NGOs need to be part of a collaborative process in scoping and the development of alternatives. Finally, agency efforts to implement post project monitoring were seen as a major way in which agencies could increase public trust in both the NEPA process and in their commitments to environmental stewardship.