

## MESSAGE FROM THE ROCKY MOUNTAIN WEST

**Background:** The Clark Group was retained to convene and facilitate four roundtable meetings of experts in the National Environmental Policy Act (1) to 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 opinions 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 (NGO), tribes, lawyers, practitioners, and federal decision makers who use the NEPA process. The fourth roundtable was held January 8 and 9, 2004, in Copper Mountain, Colorado. It was co-hosted by the National Ski Areas Association and the Greater Yellowstone Coalition.

**There is Potential to Undermine NEPA.** There was consensus among the panelists that the Task Force Report is encouraging and it provides significant recommendations that will help modernize the NEPA process. However, many of these panelists also agreed that there is potential for these recommendations to be implemented in a manner that would undermine the intent of NEPA. The panelists focused on the lack of enforceable monitoring needed to properly implement mitigated FONSI, categorical exclusions, and adaptive management. Several panelists also suggested that while the report addresses the procedural issues of NEPA, it does not address integrating sections 101 with 102 to fulfill the intent of the statute.

**Collaboration is Necessary to Build Trust and Confidence.** All agreed generally that collaboration between all the agencies, parties, and individuals affected by the NEPA process is the key to improving NEPA. Involving the public as early as possible is important for successful collaboration. One agency panelist, noting the priority placed on improved collaboration in the Task Force report, said for that improvement to be achieved, CEQ must also address the resource inequities between agencies. Also requiring attention, the agency panelist commented, is the turnover of personnel without regard to the stage of NEPA process. An industry panelist agreed with that assessment and added that even when the early process is done correctly with plenty of public input, subsequent agency turnover can stall action.

Two of the panelists were members of the National Environmental Conflict Resolution Advisory Committee. This advisory committee, created by the U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation, was formed to provide advice regarding future program directions for the Institute and the field of environmental conflict resolution. The committee is focusing on identifying the Institute's role in implementing NEPA Section 101; identifying critical environmental, natural resources, and public lands issues; and identifying opportunities for use of collaborative processes and areas where conflict resolution services are needed. They have established work groups for bringing awareness of NEPA Section 101 into public policy discourse, improving implementation of NEPA Section 102, and putting tools in place to improve the use of NEPA analyses in decision making. Several panelists agreed

that there is much synergism between the Task Force Report and this FACA, and efforts should not be redundant but rather dovetail current actions.

Central to the discussion of collaboration was the need to increase trust- both between the public and agencies, and among agencies. One panelist emphasized the need for early public participation to foster better decision making. Several panelists agreed and also addressed the need for agencies to fully consider project proposals rather than beginning the NEPA process with a pre-determined outcome. Panelists recommended several ways to increase collaboration:

- Increase third party facilitation
- Public participation should include dialogue, not just monologue—have people listen as well as comment
- Agencies should pay more attention to untimely turnover of personnel
- Training must be timely and appropriate—public training should be different from agency training; virtual (web based) and on-site training are both needed
- CEQ and agencies should “enable” as well as encourage greater collaboration, by providing information -reports and databases- to involve interested parties in the development of analyses

One NGO panelist offered, as an example, the practice of some National Forests of conducting public participation by meeting with anyone who wants to discuss the issue instead of bringing everyone into the same room. This process is less contentious and engenders the feeling that the agency devotes enough time to hearing stakeholders’ perspective.

**Use Memoranda of Agreement to Improve Collaboration, Trust, and Confidence.** In reading the report, an industry panelist observed that the views expressed were very government centric. He felt the report should speak more to how project applicants and the public can be involved early in the process. Further, he asserted that applicants want the NEPA process to be clear and predictable, rather than fast and cheap. In his experience he has found success in creating a Memoranda of Agreement (MOA) between an applicant and the agencies early in the process to promote collaboration. His industry attempts to enter into MOAs one to two years before making a formal application in the NEPA process. The MOA includes:

- A brief description of the idea of the project
- The roles and responsibilities of all parties
- Language that states the applicant seeks a seat at the table and does not seek control of the decision
- A public involvement plan
- An outline of regular meetings
- An outline of schedule
- An estimated budget
- A dispute resolution process

Such an MOA process avoids surprise, ensures open public involvement from the proposal’s inception, and gives participants a chance to build trust and confidence before the actual NEPA process begins.

**Coordinating (or Integrating) Federal Compliance Issues May Require Changes in Laws as Well as Attitudes.** There was consensus among the panelists that NEPA should act as an umbrella law and create an opportunity for coordinating compliance with other laws. One panelist described this as one stop shopping for regulatory compliance. One NGO panelist commented that several agencies were already trying to harmonize their NEPA procedures to account for other legal requirements. Another panelist suggested that a change in regulations that increased the coordination between NEPA and Section 106 regulations on historic preservation has worked well and could act as a model. Other panelists agreed that because there is nothing in the law to require the integration of federal environmental compliance laws, to effect change in practice will require amending existing regulations to mandate such integration for all permitting and required approvals. However, several panelists disagreed that changes in the regulations are necessary, stating that efforts should be placed on increasing efficiencies among agencies.

One panelist suggested that the Administration could issue a statement of policy calling for harmonizing the environmental laws. Another panelist responded that CEQ has tried for years to integrate various statutes, and some progress has been made. The panelist said that progress in coordinating compliance will rely on a greater commitment of resources to agencies and greater political will to accomplish integration.

The problem, one panelist pointed out, is that there is no government group currently working on this issue. There was consensus that a FACA committee was not the right course of action due to the various FACA requirements that often bog down the process. Some suggested that it could be done outside of government, in the form of a private Task Force. Several panelists agreed that there was a value in using the roundtable format to sit down to discuss the issues.

**Fix a Broken Tribal Process and Amend 1508.5 Regulations on Tribal Cooperating Agency Status.** The Rocky Mountain West roundtable echoed many comments on tribal issues made at the Squaxin Island Roundtable. One panelist pointed out that the Bureau of Indian Affairs is seriously understaffed and under trained in NEPA, so BIA training and additional resources are urgent needs. Also needed is better understanding by the federal agencies of the special needs and circumstances of tribes—e.g. their decision making processes that often occurs before NEPA, and the issue of trust resources. Conditions have improved somewhat recently, she said, with tribes being invited to be cooperating agencies, but there is a long way to go to reduce suspicion lead agencies will attempt to co-opt tribes. Specifically, section 1508.5 of the CEQ regulations should be changed to emphasize that tribes can enter into cooperating agency agreements on projects that affect tribal resources wherever they are located. All tribal representatives commented that there is a very serious lack of resources for many tribes to effectively be involved in the NEPA process, and especially to become a cooperating agency or co-lead.

**Make Database Creation and Data Sharing a High Priority.** The consensus among panelists was that data sharing through the creation of a searchable database should be a high priority, despite obstacles including cost, privacy issues, cultural sensitivities and

proprietary business interests. A panelist suggested there is a demand for the creation of a Lexis Nexis type of database to house NEPA documents and their data. This type of system would reduce the duplication of information in subsequent analyses that agencies and project proponents typically pay consultants to repetitively produce. While clients may be required to pay for the service to recoup the cost of assembly, the long term costs would be less. There was substantial support for this idea and panelists suggested CEQ put out a Request for Proposals to the “data assembly world” to see how the database could be created.

**Guidance is Needed for Environmental Assessments (EAs).** Several panelists voiced concern over the excessive length of EAs and the increasing focus on developing documents to avoid litigation, rather than improve decision making. Several industry panelists stated their preference to conduct EISs rather than EAs as a means to avoid litigation and the costs associated with first conducting an EA and subsequently discovering the need for an EIS. Another panelist suggested that this undermines the intent of NEPA. He claimed that agencies or industry conducting EAs bargain mitigation against the risk of finding a significant impact. EAs and FONSIIs have created an undeclared negotiating process and if you turn away from EAs you may remove a market for environmental performance. Several NGO panelists stated their indifference to the type of documentation as long as it promoted better decision making through public involvement and careful consideration of alternatives.

There was clear consensus from the Roundtable panelists that guidance for EAs would be helpful. They expressed interest in guidance addressing methods to conduct alternatives development and public involvement processes. In addition several panelists called for CEQ to enforce the mitigation measures that are stipulated in mitigated FONSIIs. They felt that without a mechanism to enforce mitigation measures NEPA is being undermined.

One panelist also called for an improved process to address cumulative impacts in EAs as well as in EISs. Currently, agencies will approve several projects without considering cumulative impacts until the third or fourth project takes place in an ecosystem. This later project bears the burden for addressing the cumulative impacts of those before. They called for better leadership from agencies to address cumulative impacts in all projects they review for permitting.

**The Process to Develop and Use Categorical Exclusions (CEs) Requires Review.**

One panelist disagreed with the specific recommendation of the Task Force for agencies to develop CEs based on broadly defined criteria to create flexibility in their application. The panelists stated that CEs should be narrow and well defined because vague CEs attract litigation as well as create a burden for NGOs to prove negative effects of the action. Another panelist suggested a need for agencies to begin standardizing CEs, particularly when involved in regional projects where several agencies are cooperating. With different processes and CEs available, there is confusion and even suspicion among the public as to which agency CEs are used.

There was some discussion of the massive public distrust in the way CEs are developed and used. One panelist suggested that two administrative records be used to increase transparency in the process, and provide support for both establishing a CE and using it. They suggested that when originally developing a CE, an administrative record be provided that document EAs and FONSI's which show how the action does not have the potential for significant environmental effect. This administrative record would be in addition to the record of consideration (REC) that is typically developed when a CE is used for a particular agency action. Another panelist suggested that a public involvement period be instituted during both the development and implementation processes, to increase trust in the agencies' actions. While some agencies have a public involvement period, it is neither consistent nor required.

A tribal panelist stated that the Task Force report does not go far enough with respect to CEs. There is no accounting for actions or monitoring. This affects the ability to know if cumulative effects are being addressed when CEs are used. He concluded that an environmental management system must be required to track actions, mitigation measures, and their cumulative effects within ecosystems. Several other panelists supported the need for environmental management systems to monitor and track the effects of agency actions.

**Panelists Agree that Monitoring and Enforcement are Fundamental to Making Adaptive Management (AM) Work.** Several panelists called for CEQ to define AM because there is still confusion about what can be considered AM in the NEPA process. One agency panelist asked that CEQ focus on the principles of AM rather than a specific definition, so that there would be flexibility in implementing AM. Several fundamental aspects mentioned by the panelists were: research to establish parameters for taking adaptive measures as well as establishing the measures themselves; methods to adjust the decision; enforceable monitoring; and collaboration throughout the NEPA process and subsequent AM implementation. Another panelist agreed, stressing that courts are now making decisions in support of using AM in agencies and therefore more efforts are needed to understand and improve AM practices.

Among all the views shared in the discussion on AM, the need for enforceable monitoring was the most stressed by panelists. Without a mechanism to constantly increase understanding about the effects of a project on the environment, the decisions made in an AM framework will not be fully informed.

Many of the panelists had personal experience working on projects utilizing AM. One panelist discussed the importance of integrating collaboration into the AM process so that the public has trust in the process and does not see AM as a way to shirk responsibility for significant environmental effects. Several panelists agreed and one described a project that has used adaptive management for over 16 years without significant community issues. He cited collaborative process used to make AM decisions as the basis for their success. When effective collaboration takes place, the interested parties sit at the table and become fully informed and take part in the process. As a result, the

project has avoided litigation on a potentially controversial endangered species recovery program.

Several panelists suggested that agencies must understand when AM will not be effective, such as in the case of potentially devastating effects to the environment. Additionally, one panelist suggested that with the uncertainty inherent in AM, there must be a way for a project to be stopped if it becomes known that there will be significant environmental effects. However, one panelist highlighted that once resources are invested in a project, particularly private resources, there could be significant effects to communities when those projects are abandoned. Several other panelists argued that success in AM is highly dependant on the scale of the project and its goals. Specifically, they gave examples of successful large scale habitat restoration projects using an AM framework; where as, a large scale development project was not as successful. There was consensus that methods to share information on lessons learned in the AM process would greatly benefit the field of professionals and the panelists urged CEQ to develop a handbook providing case studies and lessons learned.

**The Priority Should Be on Case Studies and a Database, Not Handbooks.** A discussion on developing handbooks to address some of the report's recommendations yielded a consensus that they have their uses, but have a limited shelf life and rarely get updated in a timely manner. Though some merits to handbooks were noted, especially methods to performing a thorough local and tribal socio-economic impact analysis, it was pointed out that electronic media are a better medium for material in need of regular updating.

Several panelists agreed that communicating case studies, lessons learned, and success stories is needed more than handbook development. The Task Force was to develop a compendium of best, or "useful", practices, but that it is a work in progress. An NGO panelist commented that FHWA found that regional conferences and workshops on useful practices were helpful after they issued their handbook on integrating NEPA and Clean Water Act environmental compliance, called the Redbook.

One panelist said the first step should be to make information available in an electronic database that utilizes the ability to georeference documents and projects. An academic suggested that universities and grad students could be tapped for this type of research.

**Socioeconomic Analyses and the Local Connection.** Several panelists agreed that socioeconomic analyses are important in the NEPA decision making process; however, they are difficult and can often be expensive. Several panelists agreed that local governments are much more equipped to understand socioeconomic impacts of a project and need to be provided the status of cooperating agency and the funding to carry out such analyses.

**NEPA is a Statute of Enormous Unrealized Potential.** One panelist acknowledged what she had heard from the panelists on greater cooperation between agencies, coordinating compliance of environmental laws, and the importance of including

socioeconomic analyses in the NEPA process. She also acknowledged that several of the Task Force recommendations, such as those on coordinating compliance and information technology, will require more funds to implement and that lack of resources is a great problem. Several other panelists agreed and highlighted other areas of the NEPA process that are limited by being under-funded such as adaptive management, monitoring, technology initiatives, and tribal programs. Creativity in generating resources would be required to fund agencies adequately in implementing NEPA more efficiently.

**Public Comment:** There was a significant amount of public comment at the Roundtable that echoed what the panelists discussed and concluded. One member of the public has been involved in NEPA since its inception and actually contributed to writing the CEQ guidelines. He believes that the value of section 101 has been lost in the NEPA process, and he commended several panelists for bringing this to the attention of CEQ. He also focused on the need to increase public involvement in the NEPA process, a point made by all members of the public who commented.

On the topic of adaptive management (AM), an oil industry employee commented that AM can be useful if done right but a miserable failure if done wrong. He stated that the ground rules must be clear and definitive with respect to public participation and particularly with respect to permit stipulations that address mitigation. Without that clarity, mitigation commitments will not be enforceable. A lawyer stated that regulations were needed on adaptive management so that courts can give deference to agencies in their application of AM. One member of the public stated that AM should be embraced by agencies. To ignore it, is to ignore the obvious limit of human knowledge and understanding about the environment. Uncertainty can be reduced, but only through implementing an effective monitoring regime as a means to trigger new decisions. A long-time agency employee pointed out the large cost of doing adaptive management for landscape scale restoration projects. He had managed a programmatic environmental impact statement (PEIS) that cost \$20 million, took 10 years and involved 250 stakeholders who met quarterly. The level of participation was the key to their eventual success. All subsequent EAs and EISs were tiered from the PEIS, so they were prepared and approved quickly and effectively. A Fish and Wildlife employee urged CEQ to focus on getting NEPA case studies, especially the success stories compendium, out to the agencies and public as soon as possible.

An NGO employee commented that agencies are often blamed for being inefficient when they are in reality understaffed and insufficiently funded to meet their NEPA responsibilities. CEQ's role, she said, should be to defend the NEPA process within the Administration and Congress and to advocate for more agency resources. Another member of the public commented that CEQ should help obtain funding to create a public database to house environmental documents. Resources were of concern to another member of the public who works with tribes and federal agencies. They urged additional considerations for alleviating the resource inequities that exist between tribes and agencies.

A County commissioner said guidance was needed to establish a dispute resolution process at the start of EAs and EISs and that a consultant should be provided to work with the local governments and the public during the NEPA process. She related that her county of 9,000 people with a mining economy, little NEPA expertise, and limited resources, has had to be involved in six EISs in seven years, and that the county was treated the same as any member of the general public. They were denied cooperative agency status even though the county will bear 90% of the impacts and any subsequent mitigation expenses. The commissioner asked that local governments be given additional consideration in the NEPA process.

Several other members of the public agreed that dispute resolution in the NEPA process should be given more attention and several people echoed concerns of the panelists that it was important for CEQ to issue guidance on Programmatic EISs, EAs, and CXs.

**Closing Comments.** The central message from Colorado is that focusing on the goal of increasing collaboration in the NEPA process will improve and modernize many aspects of the NEPA process. Successful collaboration will rely on several factors including the ability to share data among all parties and the need to increase public trust in how agencies conduct the NEPA process. In order for the public to trust the process, citizens and NGOs need to be part of a collaborative process in scoping and developing alternatives; agencies must implement post project monitoring; and there needs to be a means to enforce the mitigation recorded in RODs or FONSI. The benefits of increasing collaboration will spill over and provide for better coordination of agencies and different environmental compliance regulations.

The five most mentioned areas for immediate attention were (1) increasing collaboration; (2) developing EA and CE guidance; (3) developing a means to enforce agency commitments to monitoring and mitigation; (4) addressing tribal NEPA processes and (5) developing a means to share “successful practices” on adaptive management.

Most panelists felt that these areas for action will never all be fully addressed in light of funding constraints. Several panelists raised this concern as did members of the public.

Throughout this Roundtable, panelists and members of the public returned to the theme that the values of section 101 need to be integrated into the process that is implemented under section 102. It is not the statute that generates problems; problems arise when NEPA implementation takes place in the absence of section 101 values.

Note: NEPA Section 101 directs the federal government to use all practicable means to improve and coordinate federal plans, functions, programs and resources. NEPA Section 102 directs the federal agencies to cooperate with others, make information available, use a systematic and interdisciplinary approach to decision making, and coordinate efforts.