

Message from Memphis

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 recommendations of the NEPA Task Force 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, tribes, lawyers, practitioners, and federal decisionmakers who use the NEPA process. The third roundtable was held December 11-12, 2003, in Memphis, Tennessee. It was co-hosted by Jacksonville State University's Environmental Policy and Information Center, the Southern Environmental Law Center, and Duke University's Environmental Leadership Program in the Nicholas School of the Environment and Earth Sciences.

The Potential to Undermine NEPA Exists. Panelists cited a lack of resources as one issue currently undermining the NEPA process that was not addressed by the Task Force. The issue of resources goes beyond inadequate funding for NEPA programs or analyses; it limits the amount of training practitioners receive thereby decreasing their expertise in NEPA implementation. Furthermore, few agency decisionmakers take part in training and many don't fully understand the capability of the NEPA process to contribute to their decisionmaking.

Several panelists agreed that recommendations in the report do not specifically undermine NEPA per se, but the way in which they are implemented could be cause for concern. The main concern centered on recommended guidance to "clarify and promote consistent practices for categorical exclusion." Several panelists said categorical exclusions (CEs) have often been abused; however, one panelist believed that agencies are hesitant to use CEs for fear of litigation.

Another issue raised by panelists and the public was the apparent increase in legislative mandates that exclude the NEPA process from decisionmaking. When projects and funding are predetermined through legislation, agencies often implement those projects without considering alternatives. These situations limit the ability of agencies to consider potentially more beneficial approaches or alternatives through the NEPA process and plan appropriately. While panelists agreed that formal committees established under the Federal Advisory Committee Act (FACA) were not appropriate for a majority of the recommendations, they believe CEQ lacks the ability to address this issue and therefore suggested the use of a FACA as a way to explore this "serious" problem.

Federal and Intergovernmental Collaboration Must Be Taught and Practiced.

There was full agreement from panelists that successful collaboration is dependant on early efforts for collaboration in the NEPA process, and several advocated the need for collaboration as early as the development of the purpose and needs statement. It was acknowledged that this is rarely the case and that the forces working against collaboration

are strong, including different- potentially conflicting- agency missions. Several panelists echoed these concerns and posited that congressionally mandated projects, where decisions are already made, can also be very detrimental to collaboration.

A frequent lament in the proceedings was agency “segmentation” – when one agency or a component of an agency focuses on taking a specific action and is at odds with those starting to prepare a NEPA analysis that takes a holistic approach considering the proposed action. One agency panelist said their success in collaboration depends on regularly scheduled meetings with other agencies to address NEPA-related problems before they balloon into serious issues.

Lack of money, lack of incentive, and lack of support from leadership came up several times as “drivers” of a less than ideal NEPA process. One participant expressed the view that the most powerful component of NEPA was its interdisciplinary approach, which calls for an interdisciplinary team that collaboratively conducts the NEPA process to support decisionmaking. In the opinion of several panelists, resource shortfalls and short-sighted management often thwarted this all-important interdisciplinary approach.

Among the keys to successful collaboration deemed most important by panelists was agency leadership. According to one recently retired agency decisionmaker, a majority of agency leadership do not embrace NEPA as the planning tool that it is. They see it as equivalent to other mandates they have, therefore its potential is never fully realized and collaboration is too often replaced with forced cooperation. In addition to the Task Force recommendations, it was suggested that training for decisionmakers (especially political appointees) was a critical need. These people need to know, a panelist stated, how to use NEPA as a planning tool and as a tool that will help them do their jobs.

There was a robust discussion of methods to increase coordination. Intergovernmental personnel agreements were noted as useful. Several panelists suggested developing an incentive or reward system to encourage collaboration among agencies. No panelist thought formation of a FACA committee would be beneficial; rather, several suggested CEQ develop guidance that provides a clear articulated process for effective collaboration.

Opportunities for the public to gain information and receive training were strongly endorsed by the panelists and the public, with an emphasis on making public sessions convenient (i.e. weekends and weeknights). There was broad support for developing a Citizen’s Guide to inform the public of how they can expect to be involved in the NEPA process and it was viewed as a recommendation that should be pursued and could be accomplished in a relatively short period of time.

The Most Critical Recommendations Concern New Guidance on Categorical Exclusions (CEs) and Environmental Assessments (EAs). One panelist commented that the bulk of the CEQ regulations and guidance focus on the EIS process and that guidance for EAs and CEs is lacking. Panelists provided several suggestions specific to the content of that guidance. One panelist suggested that guidance for EAs should

encourage keeping documents in line with the issue, rather than having lengthy documents focusing on extraneous information that are generated for the sole purpose of averting litigation.

An academician commented that a vast majority of NEPA litigation concerns the need for an EA versus an EIS, but if the public were more involved in these projects, the litigation would drastically decrease. The panelists also felt that this guidance is a high priority and should include information on how to increase public involvement and how to properly document and monitor actions covered in EAs with a mitigated Finding of No Significant Impact (FONSI). Most panelists agreed, and suggested that CEQ should consider making mitigation enforceable to increase public trust in the NEPA process and resource agencies.

There was an extended discussion on whether or not additional EIS guidance was needed. Some felt that agencies are frightened of the EIS process and are avoiding doing them, or are doing them and calling them EAs. An industry panelist supported the recommendation for guidance to make EAs more efficient and stated that the NEPA process takes much too long due to statutory requirements for documentation. Several other panelists heartily disagreed suggesting the process has been lengthened as a consequence of court decisions, and that it was up to managers to rein it in as much as possible; however, those managers need guidance and leadership from CEQ.

NEPA Should Include Monitoring of Effects After a Categorical Exclusion (CE).

During a discussion on the Task Force's recommendations on CEs, an academician suggested that the greatest problem with CEs is that there is no understanding of the cumulative effects of these small projects within ecosystems. The panelist suggested a conservative strategy in the development of CEs- that agencies explore the worst case for each CE (ie. the most severe and adverse effects) and if a proposed action that seemingly warrants a CE could have individual or cumulative impacts, then the action should not be excluded from a more rigorous analysis. While the CEQ regulations already provide for this circumstance, other actions must be taken to ensure the decisionmakers understand the cumulative effects.

There was broad support from panelists for monitoring CEs within an ecosystem to better understand cumulative effects. One agency panelist said their office was exploring monitoring categorically excluded actions, but they found several obstacles; namely the issue of placing an unknown fiscal burden on the agencies and the risk inherent in making a significant promise to the public without certainty that the long term monitoring can/will be funded and accomplished. However, another panelist pointed out that much of the monitoring would not have to be overly technical. Regular simple observation could provide much more information than currently exists on most categorically excluded actions. One agency panelist highlighted their success in monitoring that uses an electronic check list to track monitoring commitments and provide status reports on the actions.

One industry panelist raised the point that CEs are good for some agencies and ecosystems, and not as effective for others. It will be up to resource agencies to determine how to best implement their CEs. As an example one agency panelist commented that if large public involvement is anticipated for a project that appears to qualify for a CE, then a CE should not be used. One panelist suggested that CEs initially be subject to a five year time limit, at which point the agency must re-assess their impacts. In conjunction with monitoring, this would provide the agency specific information on the actual cumulative impacts of a CE. Another agency panelist suggested that cumulative effects of CEs be assessed in an ecosystem approach at the end of each year.

The Need for Programmatic Analysis: Planning on the Large Scale and in Policy.

There was a general consensus that programmatic documents are beneficial and can provide efficiency in the NEPA process. One industry representative said that he thought programmatic analyses had a valuable role in the overall process and that many agencies would benefit from planning on a larger scale. This panelist noted that some agencies already have legislative mandates that address the issue such as the requirement for Forest Plans in the Forest Service. An academician countered this view by stating that while these large plans are similar in scope to most programmatics, they lack the public involvement that the NEPA process has institutionalized. Several agreed that the NEPA process is more than just planning: it's about public involvement and transparency. Furthermore, any guidance developed, one asserted, must reattach the NEPA process to agency planning.

Several panelists agreed that in order to tier, a broad analysis is necessary. Another panelist thought that CEQ should issue guidance that helps agencies focus programmatic analyses on the scope of the agency's program and helps to determine where to begin and end the analysis. Funding and budgeting for programmatics were raised as obstacles by two agency panelists. Another agency panelist said that the benefits of programmatic analyses needed to be emphasized as part of any new guidance, and suggested including success stories in some manner in either the guidance or a handbook.

Adaptive Management is the Best Mechanism to Move the NEPA Process Forward to More Efficient Science and Environmental Protection. An agency panelist provided a positive case study about how his agency integrates Adaptive Management with Environmental Management Systems (EMS) to provide a system that allows for adaptation to achieve specific performance measures. This is the second iteration of this process and the agency is finding success. The process includes an audit of NEPA program implementation and development of corrective actions for any discrepancies they find. A motivation for the agency to do this work is the increase in their confidence and the level of public trust that they are living up to their mitigation commitments. Each of the environmental aspects has a set of performance measures that relate to the overall environmental performance of the agency. The agency has gone as far as tying some of the performance measures to pay to provide employees with tangible financial incentives to make the EMS work better.

An academician responded that for adaptive management to be anything more than a way to dodge the requirements of NEPA, it will require the precision described in the previous case regarding audits and monitoring. Another possible adaptive management model is a Habitat Conservation Plan (HCP) that is part of mitigation developed during an Endangered Species Act (ESA) consultation. The HCP uses adaptive management in the event biological data are incomplete. In addition, the Safe Harbors Program puts a limit on the potential liability and costs for private landowners involved in implementing the HCP. The panelist insisted that the component of adaptive management missing from NEPA is the mechanism for enforcing monitoring agreements and commitments.

An industry panelist commented that adaptive management is also of concern to industry when it results in uncertainties regarding the future obligations of private parties, which can discourage investment. This panelist felt strongly that adaptive management should not be required for every NEPA review but should be available for agencies to use in appropriate cases. An NGO panelist stated his concern over moving towards adaptive management in the NEPA process when so much of the traditional NEPA processes are misunderstood by agency practitioners. However, an agency panelist stated that adaptive management has to be encouraged because it leads to much more successful decisions and brings honesty to the NEPA process. It leaves room for change as needed, which encourages the collaborative process, because people maintain hope that they can change parts of a plan if the actual effects are different from those predicted during the initial NEPA process and decisionmaking. The panelist suggested establishing criteria that incorporate uncertainty and provide bounds for a project.

Panelists agreed that funding will be a major limitation to adaptive management because it is inextricably linked to monitoring. They felt that adaptive programs will require an unknown funding level as decisions and actions change. This financial uncertainty makes planning for yearly budgets difficult and reduces the likelihood of funding requests being approved.

There were several panelists that supported developing guidance to address when adaptive management should be used and how to manage it in the NEPA process. There was also broad support for the development of a best practices handbook, or a forum for sharing success stories.

Technology Should Increase Transparency and Knowledge in the NEPA Process.

With the myriad of technological advances in the past 30 years, there are many ways in which they can be applied to enhance the NEPA process. One panelist suggested the creation of a database linked to the federal register that allows people to register to electronically receive Federal Register notices regarding NEPA actions in their area. They could define the scope of notices they wish to receive, based on a geographical area, state, agency or type of project. Another panelist suggested there be a way to share information that reduces the amount of basic information that agencies continually pay consultants to reproduce for every NEPA document.

Providing information on the location of projects, or georeferencing them, in the NEPA documentation was cited as essential by several panelists. They suggested that CEQ look to examples provided in agency GIS programs to fully understand the utility of these systems. One panelist discussed how the information may provide the basis for a cumulative effects study in an ecosystem. Another panelist felt GIS is a critical tool and it can reduce conflict because people have the ability to look at the same picture and data when commenting on, or discussing the proposal.

An NGO panelist inquired whether data standards should be developed as well as mandatory requirements for public disclosure for EAs as well as EISs. An agency panelist replied that placing more requirements on agencies, such as specific or mandatory public disclosure methods, may be inadvisable because of different security concerns among agencies. Some agencies have less ability to post documents online that concern their facilities. However, several panelists from different agencies agreed that a primary goal of information technology should be to increase sharing of information and transparency, with a bias towards disclosure of information.

One agency panelist felt that recommendations in this category should focus on providing a best practices handbook on how to successfully use technology to increase access to information. Another agency panelist said that guidance would be helpful on what type of sensitive information should and should not be disclosed; specifically with respect to nuclear and dam facilities.

Consensus vs. Alternatives Development. In the discussion on recommendations for alternatives development one panelist commented that interdisciplinary collaboration is vital but that NEPA as a process is meant only to assist decisionmaking, not a process that provides for negotiating a final decision. Collaboration should not strive for consensus in the decision, rather only in the process to consider environmental consequences- a process that could be strengthened by including collaboration in the alternatives development process. Because the responsibility for the action lies with the agency decisionmaker, so too should the authority to determine which alternatives are reasonable and merit detailed analysis.

An agency panelist concurred that it should be possible to encourage more collaboration in the alternatives development process, especially where there are competing public interests. He cited reservoir system management as a case in point. In bringing people together to discuss alternatives, you help them understand the difficulties encountered by agencies in managing the public resource while satisfying a wide range of interested parties.

No Consensus on a Handbook to Produce Coordinated Compliance. Several panelists pointed out that the Federal Highway Administration Red Book was a good start at coordinating compliance with NEPA section 102 and the Clean Water Act section 104, but it needs to go further to address NEPA section 101. One panelist found it important to ensure that agencies use NEPA as an umbrella statute to deal with coordinating compliance, but without understanding and internalizing section 101, there will be little

success. Several agreed that while a handbook might have some use, the real issue within agencies is not the lack of a protocol but rather the lack of the will necessary to make coordination work.

An industry panelist pointed out that the Endangered Species Act should be better coordinated with NEPA. Currently there is little coordination because an agency must decide on a preferred alternative before receiving a biological opinion from U.S. Fish and Wildlife Service. Another panelist suggested that agencies treat each species as a NEPA issue that can lead to alternatives, working with FWS early and making it easy for them to develop measures. This could provide a model for working through all the relevant environmental acts.

Consensus on the Value of a Legal Forum. It was generally agreed that a legal forum that translated case law into “practitioner speak” would be very valuable. One panelist recommended the forum be run by the American Bar Association instead of CEQ, but this view was not widely shared. There was agreement that the forum needed to include practitioners in order to put the legal views in context. An industry panelist suggested CEQ should create a document that discusses recent court decisions and how they might affect national policy generally and NEPA implementation specifically.

Public Comments. Three members of the public commented on the panelists’ discussion. One asserted that 1) GIS could introduce quantitative analysis into EAs; 2) the recommendation on alternatives development should be pursued; 3) trying to coordinate compliance with NEPA as the umbrella was less of a priority; 4) an economic analysis of NEPA should be conducted; 5) a lawyer outside of CEQ should review all documents created; and 6) he questioned where the responsibility of enforcing mitigated EAs would lie.

Another public speaker encouraged enumerating the benefits of NEPA. He cautioned against reducing NEPA’s flexibility and the ability of each agency and situation to require a different NEPA focus.

The last public speaker was an industry counsel who has worked on both sides of the NEPA issue. He urged a greater awareness of the needs of private companies and their reliance on agencies to do NEPA in a timely fashion so they can have more certainty and suggested that it is more important to have some predictability than to be assured that the application will be approved. An agency panelist commented that guidance on dealing with private applicants is not recommended anywhere in the Task Force report, and should be.

Closing Comments. The critical recommendation from the Memphis Roundtable is that leadership within agencies must embrace the fundamental values embodied within section 101 of NEPA. “Things don’t work until there is true leadership,” one panelist summed up. The panelist was critical of the report for emphasizing the “mechanical” side of the NEPA process instead of the stewardship aspects of the statute.

Panelists also agreed that the ability of legislative mandates to exclude the NEPA process from decisionmaking is of great concern. This issue was discussed throughout the Roundtable, and while panelists agreed FACAs are not appropriate for a majority of the recommendations, they did suggest the formation of a FACA to explore this specific issue.

The five most mentioned areas for immediate attention were (1) developing guidance or a best practices handbook for adaptive management; (2) developing guidance for Environmental Assessments and Categorical Exclusions; (3) developing the Citizens' Guide to NEPA; (4) implementing training for agency leadership; and (5) instituting enforceable monitoring requirements to increase public trust.

Finally, several panelists addressed the lack of funding that prevents agencies from investing in the various services that NEPA can provide during discussion of various recommendations. Failure to adequately fund the NEPA component of environmental programs will limit training for personnel resulting, over time, in less efficient implementation, and failing to fund monitoring of agency actions and adaptive management programs will miss an opportunity to rebuild trust in agency activities while providing them needed flexibility.