

MESSAGE FROM SQUAXIN ISLAND

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 recommendation emanating from their report to CEQ; and (2) 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 who use the NEPA process. The first of these roundtables was held on 30-31 October in Squaxin Island, Washington co-hosted by the Northwest Indian Fisheries Commission and the Squaxin Island Tribe.

NEPA Should Not Be Amended; It's Not the Act it's the Actors. If there is any clear, overarching message from Squaxin Island, it is that NEPA is an eloquent law that was perhaps ahead of its time. Although we were not trying to reach consensus on any of the issues, there was a clear consensus that the National Environmental Policy Act had served the nation well and needs no amendment. As one panelist noted, "NEPA is old, but so is the U.S. Constitution." It was also clear that there are many stakeholders who still believe that the NEPA process is worth improving so that NEPA can better serve the public and decision makers.

Likewise, the CEQ regulations received high marks for their flexibility that gives agencies latitude and encourages creative approaches to NEPA compliance. However, most panelists weren't as set that the CEQ regulations should not be amended. In fact, one of the panelists has petitioned CEQ to either clarify or change its regulations to show that tribes can be a cooperating agency when the actions are off-reservation and affect tribal resources.

CEQ was commended for undertaking the review. The essential opening question of the session was whether there was anything in the Task Force Report that undermined NEPA. One panelist suggested that an increasing reliance on programmatic environmental impact analyses would undermine NEPA. After much discussion, the panelist concluded that was not the emphasis in the report and that the management of programmatic analyses was the real issue. There was no other suggestion that anything in the report or recommendations undermined either NEPA or CEQ regulations.

Educate and Train the Agencies, Public, and Decisionmakers. There is a consensus that NEPA is an often still misunderstood law and process. Agencies interpret the regulations differently; citizens often don't know what is required of the agencies; and many decision makers using the analysis do not know and may not fully appreciate what is required. Additionally, the panelists felt that agencies were getting training of varying quality and there is a general view that CEQ has the responsibility to lead an effort to educate the American public and agencies. One panelist from business and industry thought that we ought to find ways to involve many more people, those supportive of projects as well as those opposed, in the NEPA process.

The panelists noted that agencies are making decisions affecting tribal treaty rights and often have little training on how to consult or to assess effects on tribal resources. Most agreed that Tribes and federal agencies should train together. One panelist thought that training for tribes was needed so that tribes could work more effectively with the federal government.

One academician panelist urged CEQ not to try and invent a new NEPA training program, but to look at what federal agencies and universities currently have available and adapt or adopt the best of those programs. Another panelist noted that even though a number of agencies have NEPA training, they are not consistent and that CEQ should review the various training courses. One academician panelist suggested that CEQ should think about the difference between training and education and how to incorporate education into training. He distinguished the two as training being focused on practice, while education is focused on teaching about the premise for that practice. He suggested there is a real need for education on tribal sovereignty issues, but training currently focuses on the actual on the ground practice. A suggestion from another academician panelist was to bring a number of educational institutions into collaboration to provide training.

A Citizens Guide to NEPA is Job One and Can be Done Quickly and Inexpensively.

No other recommendation received as much universal acclaim as the recommendation to develop a “Citizens Guide to NEPA”. An urgent “demystification” of NEPA was on everyone’s list as job number one. Inasmuch as citizens, NGO panelists and business panelists believed they needed more education and training about the requirements of NEPA, they also strongly believed the agencies misinterpret NEPA as well. One community NGO panelist suggested CEQ look at the National Wildlife Federation’s Citizen Guide to NEPA and adopt or modify that, rather than start anew. Numerous participants were aware of this guide and echoed the sentiment, although one panelist who supported the idea also said the guide should be “government-sanctioned”. This panelist works with federal agencies in 11 states and deals with agencies that interpret NEPA differently in various regions or offices.

One NGO panelist stated an awareness that federal agencies get frustrated with NGOs who don’t understand the NEPA process and what ground rules exist. An industry panelist stated that he too believed that NGOs who understood the process better would be more positively engaged.

Many panelists remarked that the effectiveness of NEPA will not be improved until CEQ leads the nation in training decision makers, agency personnel, tribal governmental personnel, and citizens about the requirements of NEPA and NEPA implementation. Many thought that quality training could lead to better collaboration. Many times disputes are generated due to a lack of understanding about the requirements of NEPA. A citizen’s guide to the NEPA process should help clarify the requirements of agencies to include the public in the NEPA process, and it can explain the context in which the NEPA process takes place.

Several panelists went so far as to suggest the kinds of training that CEQ should ensure is implemented. Specifically, there is a need to clarify for the agencies the roles and responsibilities for consulting with tribes. Training should be developed that addresses:

- Tribal relations
- Role of the public
- Successful case studies of collaboration
- Scoping
- When to address collaborating agencies
- Dispute resolution

The ability to make the process efficient and effective depends on the level and quality of knowledge of the NEPA practitioners and managers who implement the process. No one doubted that investing in their education will provide a return on improving NEPA implementation.

Reform of the Categorical Exclusion Process is Essential and Urgent. The current process of developing categorical exclusions is leading to confusion and more paperwork for the agencies and less accountability for the public. Categorical exclusions shouldn't have copious paperwork associated with them; rather they should have a better administrative record developed before they are ever included in the agency NEPA procedures. The reform of the categorical exclusion process would be a win-win for all concerned.

A panelist from industry suggested that there were many actions he sees in the forest industry where there are areas that were severely burned and an elongated NEPA process will ensure that the logs will never be used because they will deteriorate. He suggested that agencies should have mechanisms to use a categorical exclusion to handle these areas and he expressed that categorical exclusion reform is a high priority for his industry. He further acknowledged that the agencies should not abuse categorical exclusions or they will lose them.

Agencies often do not have an administrative record for the categorical exclusions they are requesting when developing their implementing procedures. Further, there is a poor system of tracking project and mitigation commitments in EAs and FONSI's to develop an administrative record for developing future categorical exclusions. One lawyer panelist suggested agencies should have a system for tracking FONSI's to provide the documentation for amending their agency procedures and to provide the public an opportunity to review amendments to the agency implementing procedures.

One lawyer panelist said that CEQ's guidance on categorical exclusions is very clear but that agency application is a problem because of the failure to support expansive categories and suggested that documentation when the categorical exclusion is used is essential to clarify the decision makers thinking and provide the basis for the decision if challenged.

Guidance on EAs is a Top Priority for Some. Criticism was the general nature of the discussion on the current state of EA documents. Most panelists felt that the line between an EA and EIS has become blurred in recent years and there is a clear need to draw distinctions by swiftly issuing guidance. Both panelists from environmental NGOs and industries agreed that the guidance should address mitigated FONSI's and the role of mitigation in the EA process. One industry panelist encouraged guidance on the reasonable expectations for mitigation, including information on the appropriate timing, and clarification on the role of in-kind versus compensatory mitigation. Environmental NGO panelists suggested that many agencies have promised mitigation in their FONSI's, but they rarely follow through with the mitigation measures. They believe that CEQ should develop the means to legally enforce mitigation measures to close this loophole.

Several agency panelists suggested that EA guidance address scoping to improve the ability of project managers to properly expand the scope of their consideration to account for important issues, as well as focus information to that which truly affects the decision at hand. Lastly, the varying degree of public involvement among agencies led several panelists to the conclusion that there should be a minimum requirement for public involvement in the EA process for all agencies.

Adaptive Management Can Help Transform the NEPA Process. Adaptive management was generally viewed as inherent in the nature of the National Environmental Policy Act. However, it is still a very misunderstood concept. As one panelist said, "I'm scared of adaptive management, but I'm still a fan." Part of the reason for concern is a distrust of the federal government and its commitment to post-NEPA project monitoring. With funding an issue for most agencies, monitoring is often the first thing cut. When monitoring does take place, the reports are rarely available to the public. Some panelists believe the Northwest Forest Plan, which incorporated Adaptive Management strategies, is not working because managers are making new decisions without monitoring. Other panelists echoed this suggesting that there were additional examples, but those examples were not identified. Panelists further agreed that monitoring is an important component of all project management, independent of incorporating adaptive management into the NEPA process. Unfortunately, monitoring is not valued for being the real investment that it is. The return being a wealth of data that can be used in future decision making to refine predictive methodologies and avoid spending time and money to once again gather necessary environmental data and trends.

The panelists discussed several ways to incorporate adaptive management and monitoring into the NEPA process. Using a modified tiering system, agencies would be able to conduct an Adaptive Management EIS that will flesh out the potential effects of an action and provide a better understanding of the probability for each situation. The supplemental EIS or EA could be used to address any unanticipated effect from the action. Likewise, adaptive management holds a promise to move decision making along without having the EIS become stale while waiting for issues to become resolved. If there is substantial delay between an environmental impact assessment and the action taken, the NEPA work can simply be amended with more current information.

The connection between adaptive management and Environmental Management Systems was strongly encouraged by panelists. EMS is a way to institutionalize the monitoring needed to improve the NEPA process within agencies and provide for better planning. An EIS can establish performance based outcomes for a project and integrate them into the agency's EMS. Since EMS is based on compliance; the consistent reporting, accountability, and monitoring will facilitate adaptation of actions to meet the established standards. The panelists from state government and industry cited the recommendation to conduct an adaptive management pilot study as their top priority.

There was agreement that CEQ should look to successful implementation of adaptive management, such as in the wind energy industry, to examine its use and provide detailed guidance on how to use it, when to use it, and how to enforce mitigation and monitoring.

Public Participation is Costly (But Perhaps Not as Costly as Not Participating). To participate in the NEPA process costs everyone. Local governments, tribes and NGOs have a limited amount of resources to participate in the NEPA process. Yet the decisions agencies are making can affect the long-term sustainability of their communities.

One NGO panelist said her organization gets EAs every week and it is really a triage system to determine which ones will be addressed.

When governments, citizen groups, and NGOs forgo early participation and later find unacceptable environmental effects, the agencies often are wedded to a course of action and the most viable remaining available tactic is litigation, which has enormous costs for the participants and the economy. A government practitioner said that getting other agencies and governments involved earlier would reduce conflicts, as well as improving decisions.

One panelist said that tribes would be more likely to be involved if they could be helped to build expertise and allowed to help move projects forward.

Making Technology and Information Management Work for All the Actors: A Cross Cutting Issue. The discussion on technology and information management focused on how important it is to use technology to increase communication among agencies, as well as with the public. At present, agencies each have a different amount of information electronically available to the public. This creates confusion about the federal requirement of agencies to make information available, thus fostering distrust for agencies within communities. The panelists agreed that Federal and intergovernmental collaboration is essential and technology can play a major role in making it happen, and happen more effectively.

There was also a word of caution to agencies about their use of technology. One industry panelist stated that using technology to increase communication and accept comment letters would allow interest groups to more easily create controversy and hold up the

NEPA process. Additionally, some panelists felt that the ability of staff to handle and respond to a massive amount of comment letters is limited due to staff time and funding.

The discussion of data management integrated the issue of monitoring as well as the issue of public access to information. Several panelists encouraged CEQ to create a centralized database that provides access to proposed agency actions, EAs, and EISs. The first step of this process would be for EPA to require electronic filing of documents, so that there is an electronic version available for the future. In addition, several panelists felt CEQ should encourage agencies to create a database of their baseline monitoring information and increase their efforts to collaborate on data management and sharing.

Several panelists pointed out that traditional knowledge is an essential component to environmental management in many regions of the US. It provides the historical ecology of a landscape and a vision for the recovery of degraded ecosystems. Agencies must to be encouraged by CEQ to include an exploration of traditional knowledge to ensure all appropriate data are gathered. Traditional knowledge is of great concern to tribes and the panelist from a local tribe urged CEQ to expand their notion of tribal relations.

The traditional knowledge of native communities can also protect areas that hold significant cultural resources. In our discussion of sensitive information management, several of the participants who are involved with cultural resource management urged CEQ to recognize that areas holding archeological sites are to be treated as sensitive information in some cases because they may be at risk of looting.

The Readability of Documents Continues to Decline. There was an overwhelming consensus that environmental documents are too long, too confusing, and include irrelevant information to the decision. One panelist suggested that CEQ enforce the page limits included in their regulations; however, others noted that length can be an issue due to coordinating compliance with other environmental legislation. They also argued that it's not the length that makes a document unreadable, but the poor quality. One panelist familiar with the EPA review process suggested that CEQ and EPA develop a method to review the readability of the analyses.

One role for the EA or EIS document is to communicate the environmental issues considered by the agency in their effort to ensure environmental health and quality for the community. If a document is confusing to the general public because it is overly scientific or written at a PhD level, this avenue of communication is lost and distrust will grow within the affected community. One panelist noted the old adage, "A picture is worth a thousand words," and suggested that site photos and Geographic Information Systems (GIS) maps and analyses be more fully incorporated into environmental documents to provide more context for citizens in an easily interpreted manner. Panelists concluded that CEQ should address this issue and encourage agencies to make a concerted effort to improve the quality of their documents.

If We Only Understood What a Programmatic Analysis Is. It seemed to many of the panelists that there was much confusion about what a Programmatic NEPA analysis

really is and thus the opinions about their worthiness was very mixed. It is even unclear how many programmatic EISs are accomplished in any given year. EPA figures show that only 75 have been written since 1987. However, that number is disputable because not every programmatic EIS such as EISs for forest plans and land resource management plans is labeled “programmatic.”

On the value of programmatic NEPA analysis, there were sharp divisions about their worth and intent. One tribal panelist said they were being used for a “political game” and another community NGO panelist agreed they were a “shell game.” Too often, issues are deferred to the subsequent tiered analysis only to hear “we did that in the programmatic.” Several panelists pointed to the Northwest Forest Plan as an example of programmatic EIS. A business panelist said he valued the programmatic approach to get at cumulative effects. He and others felt that the NW Forest Plan was not a good way to use the programmatic EIS because it was not flexible, did not work as intended, and 10 years later continues to be amended to include new information and management.

Federal practitioner panelists said they had saved a lot of money and resources by preparing programmatic analyses, then tiering from that analysis. One NGO panelist said the first programmatic he had seen was in 1975 and it had been prepared by BPA. He said it was a good plan even then and incorporated conservation into the market. BPA’s latest Business Plan EIS is called programmatic by the agency, yet its analysis is at a policy level. However, BPA said the EIS took only 2.5 years, cost under \$1million, and almost the entire analysis was done by in-house staff. BPA believes they saved millions of dollars without this programmatic analysis they would have had to prepare an EIS covering these same issues for every individual project.

A community NGO panelist thought forest planning is being gutted by “super plans” and that some NGOs were using the programmatic approach to kill all commercial cutting in the forest. He said that the programmatic analysis has eliminated some industry and torn apart some communities.

One government practitioner panelist thought that the programmatic helped citizens get involved before decisions are made and that this is useful to communities. A lawyer panelist that was a former government decision maker said that if you don’t telescope up and down the temporal and spatial scale to make the risk decisions at the appropriate scale for that resource, you will lose all the effectiveness of the programmatic analysis.

This much is clear from this session: everyone needs to go back to the drawing board and rethink what a programmatic is and how it should be best used in the NEPA process. This includes the CEQ Task Force.

No One Thinks a FACA Committee is the Best Way to Move Forward. There was a resounding consensus that there are many more ways to address the recommendations in the report. Different panelists offered different ways to implement the recommendations, such as issuing guidance documents or creating working groups that reach out to all interested parties, but not one of the panelists supported the creation of a FACA.

Public Input: Approximately, 10 members of the public spoke at the roundtable and virtually everyone mentioned that NEPA is valuable. All were complimentary of CEQ hosting the roundtables and of the panelists' level of commitment and knowledge. One person said that NEPA works well when done right, which reinforced numerous comments through out the two-day session that it is the actors that make NEPA work well.

One person said that the public consistently becomes involved in the NEPA process too late and she complimented the Washington State Department of Transportation for their efforts to make environmental impact analyses more readable.

A tribal member said that agencies often try to deal with cultural resources using the Section 106 process (National Historic Preservation Act), but this is not an effective way to mitigate project impacts. He said that cultural resources need to be considered earlier in the NEPA process. He is opposed to integrating NEPA and Historic Preservation because it will have the effect of opening Section 106 to the same type of litigation that faces NEPA. He suggested if agencies take extra steps to include tribes earlier in the process, both parties will benefit.

A staff person from the Northwest Indian Fisheries Commission said he opposed the integration of NEPA with ESA because ESA permitting becomes awkward and cumbersome.

Another member of the public who said she had reservations about what was being done to NEPA through this Task Force said she was relieved to know that the Task Force was really trying to make the process work better, not to undermine it. She did say that she still has concerns about the Administration and its environmental policies.

A natural resources officer from a Tribe said that she felt as though some parties are marginalized and feel they have to use litigation to get the federal agencies attention. She said she thought that better efforts at public involvement would demonstrate that the agencies are really listening to the public. She thought it would be helpful if agency leadership got more involved in the NEPA process.

The last person to speak during the public commenting session said that more attention needed to be given the post project stage of NEPA. She said that because so many EAs are being done in particular watersheds, it is important for the agencies to involve the public in their Environmental Assessments.

Conclusion: The panelists at the Squaxin Island roundtable commended CEQ and its Task Force and stated that the Task Force did a good job of recommending improvements. The four most mentioned areas for immediate attention were (1) Citizens Guide to NEPA; (2) better guidance on environmental assessments; and (3) more clarity

on what constitutes a programmatic analysis and (4) how to use adaptive management and environmental management systems in programmatic analyses. It is clear that all the players in the NEPA process look to CEQ for guidance and leadership. Whether in an extractive industry, a tribal government, or an environmental advocacy group, there is a strong belief that the process needs to work better, but that the law should remain intact and that CEQ should take the leadership for improving the process administratively. Those who are discouraged about the NEPA process came to the table thinking that there was a problem with NEPA or the CEQ regulations; but they found that it's the actors- those that implement the process and use the NEPA documents to make decisions- who need additional training and guidance.

At the end of an intense two-day session, it all came to one point: NEPA is really about the quality of the environment and local communities, not the documents. The process should strive to fulfill that purpose.