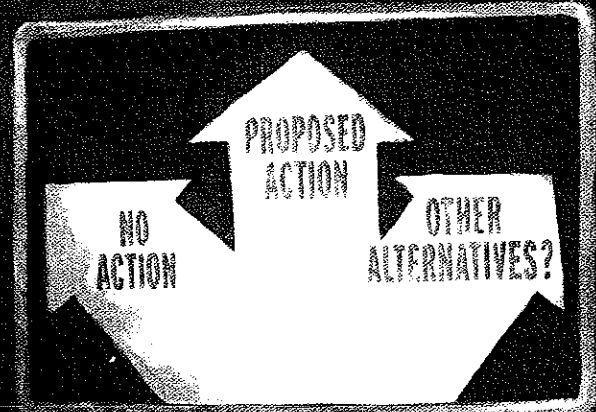


NATURAL RESOURCES & ENVIRONMENT

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

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NEPA

- APA'S INFLUENCE ON THE DEVELOPMENT OF NEPA
- INDIRECT IMPACTS AND CLIMATE CHANGE UNDER NEPA

- CEO'S "FORTY QUESTIONS"
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Issue Editor:

Arnold L. Lum

Assistant Issue Editors:

Hong Huynh, Maria Gillen, Andrea Rimer, Paula Schauwecker

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Karen Lee

Department art

Mike Callaway



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Collaborative Processes under NEPA: Are We There Yet?

Mark C. Travis

Since its passage in 1969, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, has been the principal impetus for public participation in environmental decision making by federal agencies. However, the statute itself and the regulations implemented by the Council on Environmental Quality (CEQ) do little to provide explicit guidance on how public participation and collaborative processes are to be utilized. Only two references in the statute hint at public participation in a government agency's performance of its functions under NEPA. The policy declaration in Section 4331(a) simply refers to federal government cooperation with "other concerned public and private organizations" and state and local governments to create and maintain favorable environmental conditions. Additionally, Section 4332(2)(C) requires environmental impact statements (EISs) to be made available to the public under the Freedom of Information Act but does not even mention public participation in the preparation of EISs. It only requires an agency preparing an EIS to consult with other federal agencies that have relevant authority or expertise and make available the EIS and comments of federal, state, and local environmental agencies.

Luckily for proponents of public participation and collaborative processes, the implementing regulations under CEQ provide broad requirements for public participation. Under the heading "Purpose," the regulations state:

NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and *public scrutiny* are essential to implementing NEPA.

40 C.F.R. § 1500.1(b) (emphasis supplied). In another section concerning public input and involvement, the regulations require that agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "[s]olicit appropriate information from the public." 40 C.F.R. § 1506.6. Lest there be any confusion, the term "NEPA procedures" as mentioned above, includes the

preparation of environmental assessments (EAs) and findings of no significant impact (FONSIs) for actions that are determined not to require EISs. Finally, in the "Policy" section of the regulations, agencies are required to the fullest extent possible, to "[i]mplement procedures to make the NEPA process more useful to decision makers and the public" and "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2. It is significant to note that this requirement to encourage and facilitate public involvement applies to all agency decisions that affect the human environment, not just those that significantly affect the quality of the human environment and, therefore, require an EIS.

Despite the limited references to public participation in NEPA, and the arguably ambiguous references in the CEQ regulations, courts have nevertheless generally recognized that NEPA's statutory purposes are best accomplished through an interchange of information between interested individuals and organizations and the federal agencies charged with complying with NEPA. Although courts struggled with this concept early in the history of NEPA, most decisions interpreted the Act as allowing those who would otherwise be removed from the decision-making process to be allowed to evaluate environmental factors affecting agency decisions and to provide for a free flow of information from agencies to affected citizens. *Environmental Defense Fund v. Tennessee Valley Authority*, 339 F. Supp. 806, 810 (E.D. Tenn.) *aff'd.*, 468 F.2d 1164 (6th Cir. 1972); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988). Additionally, from its inception, NEPA was generally construed to authorize action by a federal agency only after giving serious consideration to responses from interested individuals and organizations, and agencies that effectively precluded concerned members of the public from raising environmental issues were operating inconsistently with the purposes of NEPA. *Wisconsin v. Calloway*, 371 F. Supp. 807, 811 (W.D. Wis. 1974); *Calvert Cliffs Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.*, 449 F.2d 1109, 1123 (D.C. Cir. 1971). Indeed, in an early pronouncement from the Supreme Court relative to NEPA, the Court stated that one of the principal aims of the statute was to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

Mr. Travis is of counsel to the law firm of Wimberly Lawson Seale Wright & Daves, PLLC, in Cookeville, Tennessee, and a principal in Dispute Resolution Strategies, LLC. He may be reached at mtravis@wimberlylawson.com.

The early decisions arising under NEPA can be summarized as addressing two critical areas of public participation that remain important today. First, it is clear that agencies must provide opportunities for public participation in preparing EISs and in their decisions on whether to prepare an EIS in a particular case. Before an agency decides whether an agency action requires an EIS, "the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." *Hanly v. Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). If the agency decides not to prepare an EIS, it must explain its decision and why the public's environmental concerns are insignificant. *The Steamboaters v. Federal Energy Regulatory Comm'n*, 759 F.2d 1382, 1393 (9th Cir. 1985).

Second, court decisions have made clear that NEPA's requirement that the agency consider alternatives, serves as a critical source of public involvement into the process, making it imperative that agencies evaluate and consider those alternatives. *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997). However, the Supreme Court has held that it is imperative on public participants that their suggested alternatives be reasonably specific so as to allow the agency to intelligently evaluate those alternatives. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978).

Public Participation under NEPA

Public participation in the NEPA process arises basically at three points in the statutory mechanism: (1) in the decision-making process where an EA with a FONSI will be prepared in lieu of an EIS; (2) in the preparation of an EIS; and (3) in the post-EIS process. With respect to the first scenario, as many federal actions will arguably not rise to the level of requiring an EIS, the preparation of an EA provides the primary opportunity for interest groups to contribute to that decision and perhaps cause the agency to reconsider its decision to classify the action as not requiring full NEPA analysis. While the CEQ regulations generally require public notice and involvement of interested parties in the preparation of EAs, they do not contain the same exhaustive requirements as seen in the regulations dealing with EISs. Nevertheless, several courts have inferred a requirement for a public comment period. *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1246, 1260 (D.C. Cir. 1988); *Kerr-McGee Corp. v. United States*, 32 Fed. Cl. 43, 51 (1994). Further, many agencies regularly circulate EAs for public comment and may even provide some opportunity to provide public comment before an EA is drafted. In either case, a final EA must address environmental issues that have been raised by the public and the failure to do so may invalidate the agency's conclusion that no EIS was required. *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988).

Once the agency determines that an EIS will be prepared, the CEQ regulations require it to determine "the scope of

issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7. The public participation requirements in this phase of the process are certainly more exhaustive than in any other step in the process. The agency must invite the participation of federal, state, and local agencies; any affected Indian tribe; and other interested persons. The regulations further require circulation of a draft EIS for public and government agency comment, and the comments must be as specific as possible. 40 C.F.R. § 1503.3(a). Additionally, the agency must request comments from the public, "affirmatively soliciting comments from those persons or organizations who may be interested or affected." 40 C.F.R. § 1503.1(a)(4). The agency is not required to address ambiguous or obscure comments, and if a party fails to raise an issue during the public comment period on a draft EIS, that party may be barred from raising that issue in a subsequent action for judicial review of the agency's final decision. *Vermont Yankee*, 435 U.S. at 553-54.

In the final EIS, the agency must discuss any responsible opposing view that was not adequately addressed in the draft EIS, along with the agency's response. 40 C.F.R. § 1502.9(b). The agency may respond to comments by modifying the alternatives, including the proposed action evaluated in the EIS; developing and evaluating new alternatives; supplementing or modifying the analysis in the EIS; making factual corrections; or explaining why the comments do not warrant a further response. 40 C.F.R. § 1503.4(a). Courts generally have not required agencies to respond individually to each and every comment, and agencies may exercise some discretion in that regard. *Vermont Yankee*, 435 U.S. at 553-554; *North Carolina v. Federal Aviation Administration*, 957 F.2d 1125, 1135 (4th Cir. 1992). On the other hand, an agency must address each significant issue raised by the public comments. *Oregon Natural Resources Council v. Marsh*, 52 F.3d 1485, 1489-90 (9th Cir. 1995).

If the public comments result in a modification of the proposed action or add new alternatives to the EIS, such an action could deny interested parties the opportunity to comment on the new alternatives. In such a case, a supplemental EIS (with appropriate notice and public comment) may be required if changes to the proposed action are considered "substantial." *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982).

The post-EIS mechanism also brings its own set of challenges to the public participation process, most of which relate to the preparation of supplemental EISs, as just discussed. *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. 360 (1989). Except for scoping, the agency should follow the same procedures for circulation and public comment as it does for the original EIS. 40 C.F.R. § 1502.9(c)(4); *California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982). Although it would appear logical that public comment to a materially different supplemental EIS should be allowed to the same extent as the original, this is an issue that has been frequently litigated, and other courts have reached different conclusions. *California v. Watt*, 683 F.2d 1253, 1268 (9th Cir. 1982).

Judicial Constraints and Executive Initiatives

In its almost forty years of existence, NEPA arguably has created one of the largest subjects of regulatory compliance and litigation in any comparable area of the law, despite its implicit focus on collaboration and public involvement. Instead of simplifying the process and reducing litigation, the regulatory requirements and the cases arising from technical noncompliance have created a myriad of complexities that frustrate individuals, organizations, and government agencies. Instead of creating an environment of "participation" and "collaboration," NEPA issues have often resulted in the opposite: litigation. One need only review the number of cases brought under the statute to see that litigation is often the result of a procedural misstep in the NEPA process. Agency decision makers complain that NEPA processes frequently are employed defensively as a risk-management tool, as opposed to a mechanism designed to utilize collaborative processes in achieving durable results for government action. The cases that have arisen since the inception of NEPA indeed evidence a failure of true public participation and collaboration in environmental issues. Most NEPA practitioners today would not argue with the premise contained in CEQ's 1997 report *The National Environmental Policy Act—A Study of Its Effectiveness After Twenty-Five Years*, which stated that "the EIS process is still frequently viewed as merely a compliance requirement rather than as a tool to effect better decision-making." <http://ceq.hss.doe.gov/nepa/nepa25fn.pdf>.

The cases that have arisen since the inception of NEPA indeed evidence a failure of true public participation and collaboration in environmental issues.

Partly in response to these frustrations, Executive Order 13352 was signed by President Bush on August 26, 2004. The purpose of this order was to promote "cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking." "Cooperative conservation" was defined in the order as "actions that relate to use,

enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, and other nongovernmental entities and individuals." The Departments of Interior, Agriculture, Defense, and Commerce and the Environmental Protection Agency were charged with implementing laws relating to natural resources and the environment toward that end. These departments and agency were directed to carry out their respective programs and activities in a manner so as to facilitate cooperative conservation, taking into account the interests of persons with interests in land and natural resources and in a manner that properly accommodates local participation in federal decision making. Additionally, the CEQ chairman was directed to convene a White House Conference on Cooperative Conservation to facilitate the exchange of information relating to cooperative conservation and means for achieving the executive order's purposes.

A year later, in August 2005, the White House Conference on Cooperative Conservation was convened in St. Louis, Missouri. The conference included over 1,200 invited participants drawn from diverse sectors involved in environmental conflict resolution (ECR) and cooperative conservation. Day two of the conference focused on small group discussions related to particular areas and challenges to cooperative conservation. www.doi.gov/initiatives/DaytwoAnalysis12-28-05.pdf. Specifically, the topics of discussion were: (1) changing organizational culture; (2) maintaining effective communication; (3) building trusting relationships; (4) increasing collaborative leadership capacity; (5) planning for action; (6) bringing science and information to problem solving; (7) designing and managing meaningful participation; (8) creating incentives; and (9) measuring progress. While all of these subjects relate to important components of ECR, a full analysis of each topic area is beyond the scope of this article. However, the objective of "designing and managing meaningful participation" is particularly relevant. Regarding this topic, conference participants recognized that cooperative conservation efforts should involve all affected stakeholders meaningfully and consistently. They noted that this involvement needed to start early in the process with stakeholders being consulted about the possible design and scope of the process under consideration. While recognizing that identifying and ensuring participation of all stakeholders was time consuming, the participants stressed the importance of satisfying this objective.

Participants also pointed out the need for qualified convenors and facilitators to provide realistic expectations about the process, the timing of results, and the ability to deliver a truly consensus-based result. Participants were also concerned about the possibility of "late hits," in the nature of changes in the decision-making frameworks or legal challenges, and emphasized the need to limit these exigencies to the extent possible.

Addressing potential actions for consideration, several participants, noting how expensive collaborative efforts can be, encouraged federal and state agencies to provide funding and

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other incentives to encourage local participation. Participants also pointed out that in many situations, federal regulations serve as barriers to authentic and sustainable participation on cooperative conservation projects. They recommended that senior policy leaders should adequately assess where such problems might exist before involving stakeholders in processes that might ultimately be ineffective and provide information on how to participate collaboratively without conflicting with existing laws and regulations. Internally, participants recommended that federal agency personnel be provided incentives for utilizing collaborative processes and that training and performance measures be implemented within agencies. Participants commented that while some federal agency staff possessed the necessary facilitative training, too often there was a lack of such skills.

Later, in November 2005, CEQ's chairman and the Office of Management and Budget's director issued a "Memorandum on Environmental Conflict Resolution," setting forth the basic principles for engaging federal agencies in environmental conflict resolution and collaborative problem solving. http://ceq.hss.doe.gov/nepa/regs/OMB_CEQ_Joint_Statement.pdf. The memorandum acknowledged that presidential administrations would continue to face the challenge of competing public interests and federal agency responsibilities when attempting to accomplish environmental protection. The memorandum addressed the fact that governmental challenges continued to exist through protracted and costly environmental litigation; unnecessarily lengthy project planning processes; costly delays in implementing needed environmental protection measures; foregone public and private investments when projects are delayed; lower-quality outcomes when environmental decisions are not well informed; and deep-seated antagonism repeatedly reinforced between stakeholders. The memorandum recognized that federal agency and departmental leadership charged with carrying out NEPA should develop strategies and institutional capacity toward increasing the utilization of ECR in order to avoid or limit these effects. Specifically, those departments and agencies were directed to (1) integrate ECR objectives into agency mission statements, government performance and results acts goals, and strategic planning; (2) assure that the agency's infrastructure supports ECR; (3) invest in support of ECR programs; and (4) focus on accountable performance and achievement of ECR objectives.

Regarding the first directive, departments and agencies were directed, among other things, to incorporate ECR goals and objectives into their strategic plans; set performance goals for increasing the use of ECR; and track annual resource costs and savings achieved through the use of ECR. With respect to the second mandate, departments and agencies were directed to draw upon existing agency expertise in alternative dispute resolution; provide leadership support for the use of ECR; create incentives for the use of ECR; and support staff outreach,

education, and training activities. Similarly, relative to the support of ECR programs, departmental and agency leadership was charged with identifying existing needs and resources in the field of ECR; building partnerships with existing agency programs; fostering agency leadership in the field through recruitment and career development; and implementing tracking systems for ECR project needs. Finally, departments and agencies were directed to provide periodic progress reports; issue guidance on expected outcomes; and conduct program evaluation.

Although much evaluation is necessary in order to assess the effectiveness of these initiatives in the executive branch, substantial agency activity has indeed taken place. Consistent with the implementation objectives of the cooperative conservation initiative, the Departments of Interior, Agriculture, Defense, and the Environmental Protection Agency have issued annual reports on their efforts to increase the effectiveness of cooperative conservation within their respective agencies, and many of the successes are notable. These departments and agencies have also produced planning documents on how each plans to advance the use of cooperative conservation in the future. <http://cooperativeconservation.gov/library/index.html#ar2007>.

Additionally, both the U.S. Forest Service (Forest Service) and the U.S. Bureau of Land Management (BLM) have taken the initiative to more fully address public participation in NEPA issues. The Forest Service transferred much of its NEPA procedures from an agency handbook to the Code of Federal Regulations, in order to more fully satisfy CEQ regulations. The Forest Service regulations, which were implemented on July 24, 2008, have increased public participation by allowing alternatives to be developed as a NEPA analysis progresses, allowing interested parties to collaboratively develop alternatives and amend a proposed action. 36 C.F.R. § 220.5(e). These changes are also reflected in a new Forest Service Handbook, § 1909.15. The new BLM manual for NEPA purposes, adopted January 30, 2008, also provides a more comprehensive treatment of NEPA processes than previously provided in its departmental manual. www.blm.gov/wo/st/en/info/nepa.html.

It has now been four years since these new measures were initiated, and to some degree, implemented. Although it could be argued that there has been a decrease in NEPA litigation over the past several years, at least pertaining to public participation issues, it is unclear whether such a decrease is due to an increase in effective collaborative processes or simply to agencies and stakeholders becoming more accustomed to working within the process. Only time and further study will reveal the answer to that question. In either case, if these efforts can be institutionalized, perhaps NEPA can be transformed from a mere procedural, administrative mechanism into a truly collaborative process that provides durable and consensus-based resolutions to environmental conflict. ♻️