

MODERNIZING EIA IMPLEMENTATION IN THE UNITED STATES

By Anne Norton Miller and Horst G. Greczmiel^a

Background

The Council on Environmental Quality (CEQ) is an office in the Executive Office of the President that has oversight authority for the National Environmental Policy Act -- the federal environmental impact assessment (EIA) statute in the United States. In 2002, CEQ established a National Environmental Policy Act (NEPA) Task Force to review current NEPA practices and provide recommendations to better integrate NEPA into federal agency decision making and to make the NEPA process more effective, efficient and timely. The task force was asked to review current NEPA implementing practices and procedures in several areas: (1) technology and information management and security, (2) federal and intergovernmental collaboration, (3) programmatic analyses and subsequent tiered documents, (4) adaptive management and monitoring, (5) procedures and documentation for promulgating categorical exclusions, and (6) the structure and documentation of environmental assessments.

The Task Force

The task force was composed of career civil servants from the Environmental Protection Agency, the U.S. Department of Agriculture (U.S. Forest Service), the Department of Energy, the Department of Transportation (Federal Aviation Administration), the Department of the Interior (Bureau of Land Management and the U.S. Geological Survey), the Army Corps of Engineers, and the Department of Commerce (National Oceanic and Atmospheric Administration). It was directed by the CEQ Associate Director for NEPA Oversight.

The task force consulted with other federal and state agencies, and received over 600 substantive public comments as a result of public consultation. It drew upon the work of CEQ's 25th anniversary report, *The National Environmental Policy Act: A Study of its Effectiveness after Twenty-five Years* (1997), public comments, current literature, interviews with federal NEPA practitioners as well as other sources provided by the public.

The task force report, *Modernizing NEPA Implementation*, was presented to CEQ in September 2003. It is available on the CEQ website at <http://ceq.eh.doe.gov/ntf/>. Following receipt of the report, the Chair of CEQ decided to seek expert comment on its recommendations. A meeting with federal NEPA experts in Washington, DC, was followed by four regional roundtables (Pacific Northwest, Mid-Atlantic, Mid-West, and Rocky Mountain regions) to raise awareness of the recommendations and to hear from national experts and the public regarding which recommendations should be implemented and their priority. In addition, the CEQ Associate Director for NEPA Oversight was available to meet with groups, organizations, and

^a Anne Norton Miller is the Director of the Office of Federal Activities at the U.S. Environmental Protection Agency and served as the deputy director of the task force (miller.anne@epa.gov). Horst G. Greczmiel is the Associate Director for NEPA Oversight at the Council on Environmental Quality and served as the director of the task force (horst_greczmiel@ceq.eop.gov). The views represented in this article represent the personal views of the authors and do not necessarily reflect the views of the U.S. Environmental Protection Agency or the Council on Environmental Quality.

individuals interested in providing their views on the report. He held and attended over ten such sessions in the four months following release of the report, meeting with representatives of environmental non-governmental organizations, federal agencies, business and industry, tribes, attorneys, practitioners, and state and local government officials.

Following his review of the task force report and the results of the follow-up meetings, the Chair of CEQ will determine which recommendations should be implemented and how that should be accomplished. His decision is expected later this year.

Task Force Priority Recommendations as presented in the Executive Summary of the Report^b

Recognizing that priorities must be set and understanding that action on the remaining recommendations should also be taken, the task force recommended that **CEQ initially focus on the first five recommendations** that follow regarding categorical exclusions, environmental assessments, federal and interagency collaboration, programmatic analyses and tiering, and adaptive management and monitoring.

1. Categorical Exclusions: The task force recommended that CEQ issue guidance to clarify and promote consistent practices for the development, documentation, public review, approval, and use of categorical exclusions by federal agencies.
2. Environmental Assessments: The task force recommended that CEQ issue guidance to:
 - Recognize the broad range in size of EAs;
 - Clarify that the size of EAs should be commensurate with the magnitude and complexity of environmental issues, public concerns, and project scope;
 - Describe the minimum requirements for short environmental assessments; and
 - Clarify the requirements for public involvement, alternatives, and mitigation for actions that warrant longer EAs, including those with mitigated findings of no significant impact.

In the near term, CEQ should issue a clarifying memo reiterating the minimum statutory and regulatory requirements for EAs when a short EA is warranted.

3. Federal and Interagency Collaboration: The task force recommended that CEQ form a Federal Advisory Committee to provide advice to CEQ on:
 - Identifying, developing, and sharing methods of engaging federal, state, local, and tribal partners in training designed to educate them about the principles of NEPA, agencies' missions, and collaboration skills.
 - Developing guidance addressing the components of successful collaborative agreements and providing templates applicable to various situations and stages of the NEPA process.

^b The Task Force Report including this portion of the Executive Summary is available on the CEQ web site at <http://ceq.eh.doe.gov/ntf/>.

- Developing training for the public on NEPA requirements and effective public involvement.
 - Developing a “Citizens’ Guide to NEPA.”
4. **Programmatic Analyses and Tiering:** The task force recommended that CEQ convene a Federal Advisory Committee to provide advice to CEQ on the different uses of programmatic analyses, tiering, and associated documentation; and, where necessary, provide advice on guidance or regulatory change to clearly define the uses and appropriate scope, range of issues, depth of analysis, and the level of description required in programmatic and tiered NEPA documentation.
 5. **Adaptive Management and Monitoring:** The task force recommended that CEQ convene an adaptive management work group to assess the applicability of NEPA guidance and regulations related to integrating the NEPA process with adaptive management and environmental management systems. Further, the task force recommended that the work group initiate a pilot study to identify, implement, and document representative actions using an adaptive management approach during the NEPA process and work collaboratively with CEQ to identify aspects of the analyses and documentation requiring CEQ guidance or regulatory action.
 6. **Technology and Information Management and Security:** The task force recommended that CEQ: (1) promote the development and use, and coordinate sharing of NEPA information systems by sponsoring meetings, conferences, and workshops; (2) ensure that the existing CEQ NEPA website, NEPANet, accommodates and responds to developing information technologies; (3) develop guidance to clarify the appropriate role of communication and information dissemination technologies during the NEPA process to enhance public involvement techniques; and (4) establish a NEPA technical working group to coordinate with interagency groups on such issues as data protocols and standards, information management, and information security. The task force also recommended CEQ lead a review by experienced agencies and organizations to develop and promote consistent policies for sensitive information in the NEPA process.
 7. **Additional Areas of Consideration:** Finally, the task force considered several matters raised by comments that went beyond the six focus areas. The task force developed three general and four specific recommendations.

The specific recommendations call on CEQ to: (1) develop a handbook in consultation with relevant agencies to effectively integrate the NEPA process with other federal requirements; (2) explore the use of collaboration to develop and refine alternatives and provide guidance on the evaluation of all reasonable alternatives; (3) develop a handbook on social, cultural and economic analysis; and (4) study the effectiveness of options for resolving disputes both during and after the NEPA process.

The three general recommendations were viewed as essential to improving NEPA implementation. Those are: (1) establish an additional professional position, or positions, to provide technical NEPA process consultation and better coordinate advice and guidance to agencies about improving NEPA implementation and environmental

analysis; (2) convene an annual NEPA legal forum to discuss important NEPA legal developments, recommend any CEQ guidance needing clarification as a result of the case law, discuss NEPA issues of interest, and facilitate a consensus on addressing legal issues; and (3) develop a CEQ handbook that provides existing guidance identified by topic areas and is supplemented as new guidance is issued. The guidebook should be published on the Web, with updates published periodically in hardcopy.

Initial Feedback on the Recommendations from Meetings with National Experts^c **Suggesting Possible Future Direction**

As with the overall comments to the Task Force, it is fair to say that probably the only true consensus is that everyone who may be affected by a proposed activity wants a role in the NEPA process and that a substantial majority believe that NEPA is, or can be, of great utility to those making decisions and those interested in or affected by those decisions.

Overall a strong, though not universal, sentiment was expressed that the national legislative basis for environmental impact assessment (EIA) in the United States – the National Environmental Policy Act (NEPA) – is sound and should not be revised. It has served the nation well and needs no amendment. NEPA has served as a foundation for environmental protection and public involvement in federal agency decision making and some experts felt the report did not do enough to protect NEPA. They believe NEPA is critical to ensuring that decision making take place with full environmental and community consideration.

That said, many stakeholders believe that the NEPA process can be and should be improved so that it will better serve the public and decision makers. Emphasis was placed on the “actors” in the process – those performing and documenting environmental impact analyses who need additional training and guidance to better work together as well as with communities and the public, and to more efficiently and effectively implement NEPA requirements, as they are now or as they might be improved. Priorities for improvement were in: (1) communication and understanding between and among federal agencies and the public, communities and other stakeholders in the process; and (2) the substance of environmental analysis and documentation and its timeliness.

There is a strong sense that NEPA, both the law and the process, is still misunderstood by many. Agencies interpret the regulations differently; citizens often do not 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 and how it can assist them. There are misunderstandings on how best and when to participate in the NEPA process, and stakeholders may have different expectations of what the process can achieve.

^c The summaries of the meetings from which much of this text is taken is available on the CEQ web site at <http://ceq.eh.doe.gov/ntf/>.

A Citizens' Guide to NEPA is seen as a very important and easily achievable recommendation. Such a guide can help clarify the requirements for agencies to include the public in the NEPA process, and can explain the context in which the NEPA process takes place. **Additional training for federal agencies**, not only the NEPA practitioners but also the decision makers, could also improve the process by fostering more consistent interpretations of what is required both in terms of substance of analysis and in terms of communication and involvement of the public and other stakeholders. Better collaboration can also strengthen and streamline the process when more than one federal agency has a decision affecting the proposed activity under review. The experts agreed with the task force which saw **shared training** as one means to increase knowledge and, perhaps as important, improve the level of trust among agency staff implementing the NEPA process. Training for others participating in the NEPA process would also be valuable in fostering practical expectations and finding how best to involve others in an efficient and effective way.

In terms of substantive guidance and training, there is strong support for **additional guidance on the preparation of environmental assessments (EAs)**. While most experts believe that flexibility needs to be maintained, additional guidance is necessary to more clearly and defensibly distinguish when an EA is appropriate and what it should contain, in contrast to the more comprehensive environmental impact statement (EIS). In particular, guidance is necessary for EAs in cases where mitigation is critical in reaching a finding of no significant impact (FONSI), thereby raising the question of how to make such mitigation enforceable. Such guidance would be helpful both for agencies preparing such EAs and for reviewers who in the absence of such guidance believe that such projects should always be supported by an EIS. EA guidance would also address how best to include the public in the EA process, since there are currently no standard approaches and the practice varies dramatically among federal agencies. Other issues to be clarified are cumulative effects, post-decision monitoring, the content of purpose and need statements, and the use of scoping. The importance of EA guidance overall is understandable, since far more projects are analyzed and documented in EA/FONSIs each year than in EISs.

Another priority is **clarification and possible reform of the categorical exclusion process**. Categorical exclusions (from the NEPA process, either an EA or an EIS) exist for activities that will not individually or cumulatively have a significant effect on the human environment. Classes of these activities generally must be identified, presented for public review and comment, and approved by the Council of Environmental Quality in advance of their publication for use by the agency. Further, the agency must ensure that a particular activity is not subject to extraordinary circumstances that would lead to significant effects – this ensures that the appropriate analysis is conducted on activities that are exceptions to the expectation that there will be no significant effects. Agencies would like clear criteria on what is needed to substantiate a categorical exclusion and what sort of information or administrative record is necessary to support it legally. Environmental organizations and many of the public would like to see some kind of monitoring or tracking to ensure that activities undertaken subject to a categorical exclusion in fact are not likely to have a significant impact as implemented “in the real world”. It is not clear how many activities are being categorically excluded from the EA/EIS process, but there is concern that: (1) projects that could be excluded are not being

excluded and (2) projects that should not be excluded are being excluded. The first case is not an efficient application of NEPA and the second case is not an effective application of NEPA.

Considerable support was expressed for moving forward with **incorporating adaptive management approaches into the NEPA process**. Adaptive management holds a promise to move decision making along without having NEPA documents that become stale while time passes as issues are resolved. But there are concerns that adaptive management not replace the initial analysis that occurs in an EIA. Additional concerns are that the monitoring that is required to make adaptive management work will not be adequately funded or otherwise supported by agencies once an activity moves forward. Adaptive management is seen as having great potential for the future, and there is a belief that the monitoring that would occur as part of a good adaptive management process could be used in future decision making to refine predictive methodologies and mitigation measures. Adaptive management may have even more potential if **environmental management systems** are integrated into the NEPA process because a vital component of any environmental management system is constant monitoring and, as necessary, reevaluation. This was also seen as a reasonable priority.

Programmatic analyses and tiering elicited much discussion but little consensus. It appears that there is a need to revisit this topic and rethink what a programmatic is or should be and how it should be best used in the NEPA process.

The last priority to mention here, which is relevant to all the recommendations, is that **CEQ** develop a **handbook** that provides existing guidance identified by topic areas and that is supplemented as new guidance is issued. The guidebook would be published on the Web, with updates published periodically in hardcopy. Such a handbook would be of great value not only to NEPA practitioners in the federal government but also to all those – the public, state and local governments, tribes, environmental groups, industry and academia – who are participants in the process.

Conclusion

EIA is in its 35th year of practice in the United States, and it is time to regroup. The 1978 regulations issued by CEQ focus primarily on the requirements for environmental impact statements. Most actions are covered by environmental assessments or categorical exclusions, for which there are fewer requirements and guidance. It is time to document our best practices, and to better communicate among the large community of NEPA practitioners the expectations that the Council on Environmental Quality, as overseer of EIA, has for environmental analyses, public involvement, and documentation. The tension has been, and remains, between flexibility and clarity of expectations. But a clearer understanding on the part of all parties on how to approach the NEPA process and how to involve the public and other stakeholders will go a long way to ensuring that decisions are made based on appropriate information and take public and private concerns into account through community involvement. This should result in a more informed process, a more efficient and timely process, fewer frustrated stakeholders, and less time-consuming litigation.

