

THE NEPA TASK FORCE
REPORT TO
THE COUNCIL ON ENVIRONMENTAL QUALITY



*Pacific Rivers Council v. U.S. Forest Service
No. 08-17565 archived on February 9, 2012*

MODERNIZING NEPA
IMPLEMENTATION

S E P T E M B E R 2 0 0 3

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Preface

This report presents the results of research and consultations by the National Environmental Policy Task Force concerning the implementation of the environmental impact analysis requirement of the National Environmental Policy Act (NEPA). The task force interviewed Federal agencies; reviewed public comments, literature, reports, and case studies; and spoke with individuals and representatives from Federal, State, and local governments, Tribes, and interest groups. This report represents the views and opinions of the Task Force and does not establish new requirements for NEPA analyses. It is not and should not be viewed as formal CEQ guidance, nor are the recommendations intended to be legally binding.

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Executive Summary

In a memorandum dated April 10, 2002, James L. Connaughton, Chairman, Council on Environmental Quality (CEQ), established the National Environmental Policy Act (NEPA) task force. On May 20, 2002, the task force, composed of Federal agency employees with diverse skills, expertise, and perspectives, began its review of current NEPA implementation practices and procedures to determine opportunities to improve and modernize the NEPA process. The task force examined the “nuts and bolts” of NEPA implementation by focusing on:

- ❖ Technology and information management and security;
- ❖ Federal and intergovernmental collaboration;
- ❖ Programmatic analyses and tiering;
- ❖ Adaptive management and monitoring;
- ❖ Categorical exclusions; and
- ❖ Environmental assessments.

The task force interviewed Federal agencies; reviewed public comments, literature, reports, and case studies; and spoke with individuals and representatives from State and local governments, Tribes, and interest groups. The task force received comments from more than 650 respondents representing Federal, State, and local governments, Tribes, organizations, and individuals.

The task force prepared this report, recommending actions to improve and modernize the NEPA process, and a document of case studies highlighting useful practices, which will be published separately. This report, “Modernizing NEPA Implementation,” represents the professional expertise of the task force members, and our collective thinking and thoughtful deliberation of how NEPA implementation can be improved.

Technology and Information Management and Security

Effective and efficient NEPA implementation requires information-rich communication among Federal, State, and local governments, Tribes, private industry, citizens, and academia. Agency environmental planners must identify significant environmental issues, obtain and analyze relevant data, and convey quality, timely information to the decision makers and the public. Involving the public and other stakeholders in the NEPA analyses and the development of NEPA documents increases the value of citizens' experience and produces better results. Publishing and distributing NEPA documents is one aspect of effectively and efficiently conveying needed information.

To use information technology to address information management and technology concerns related to the NEPA process, and to enhance the effectiveness and efficiency of the NEPA process, CEQ should:

- ❖ Promote the development and use, and coordinate sharing of NEPA information systems by sponsoring meetings, conferences, and workshops.
- ❖ Ensure that NEPA net accommodates and responds to developing information technologies.
- ❖ Develop guidance to clarify the appropriate role of communication and information dissemination technologies during the NEPA process to enhance public involvement techniques.
- ❖ Establish a NEPA technical working group to coordinate with interagency groups to:
 - Ensure that NEPA-process information requirements are addressed when protocols and standards about data, information management, modeling tools, and information security are developed;
 - Increase awareness of NEPA-process information technology developments throughout the NEPA community; and
 - Facilitate identification and use of information resources developed according to established standards.
- ❖ Lead a review by the agencies of their quality control and assurance standards for NEPA analyses and documentation to ensure conformance with CEQ regulatory requirements and Federal requirements such as Section 515 of the Information Quality Act.
- ❖ Contact agencies and organizations that have experience working with sensitive information to establish a work group to develop and promote consistent policies for sensitive information in the NEPA process.

Federal and Intergovernmental Collaboration

Collaboration with stakeholders in the NEPA process is important to help ensure that decision makers have the environmental information they need to efficiently make informed and timely decisions. The task force focused on whether efforts to collaborate on projects subject to NEPA were successful and, if so, what contributed to their success. Our goal was to recommend practical steps for CEQ either to enhance collaborative processes in support of better NEPA analyses or remove barriers hindering such collaboration. We focused our inquiry on the characteristics of successful collaboration, collaboration barriers, and how training might improve collaborative efforts.

To continue to build better collaborative relationships among agencies and between agencies and the public, CEQ should form a Federal Advisory Committee of diverse individuals, with a variety of experiences in the NEPA process, which can contribute to the development of collaborative guidance and training. The committee should advise CEQ on:

- ❖ Focusing on better collaboration among agencies by identifying, developing, and sharing methods of engaging Tribal, State, and local partners in training designed to educate them about the principles of NEPA, partner agencies' missions, communication skills, and public involvement skills.
- ❖ Developing guidance addressing the components of successful collaborative agreements and providing templates for memoranda of understanding applicable to various situations and stages in the NEPA process. The guidance should provide the foundation for successful agreements and provide the templates as examples, but it would not dictate the exact construction of the agreements. The templates should include sample language for dispute resolution and termination clauses.
- ❖ Examining lessons learned by others through CEQ-sponsored meetings, workshops, and training.
- ❖ Developing training that uses traditional and non-classroom methods, such as videos or Web-based training to enhance agencies' work with the public. Some topics include:
 - The requirements of NEPA and explanations of the different NEPA processes, including categorical exclusions, environmental assessments (EAs), environmental impact statements (EISs), and programmatic NEPA analyses;
 - How to become involved early and effectively contribute to the NEPA process;

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- Individual and generic agency needs and requirements, including what agencies look for when soliciting comments, and effective ways to provide comment; and
 - How to identify and determine if and how barriers to collaboration can be eliminated.

- ❖ Developing a “Citizen’s Guide to NEPA” to explain basic NEPA requirements, dispel common misinterpretations, and provide helpful tips about how to participate in the NEPA process. The publication should be posted to the Web and traditionally published.

CEQ should also periodically sponsor forums designed to address topics such as creating documents that satisfy both Federal and State NEPA requirements and how agencies can better integrate the needs of regulatory agencies into their NEPA processes.

Programmatic Analyses and Tiering

Programmatic NEPA analyses and documents are valuable decisionmaking tools. Some agencies use programmatic analyses to evaluate cumulative effects effectively and to formulate mitigation efforts comprehensively, while others struggle with how best to use this analytical tool. Still other agencies use programmatic analyses to address mitigation parameters at the broad landscape, ecosystem or regional level, thereby reducing the need to re-address these measures at the site-specific level.

In discussions with the task force, many issues were raised by the public and Federal agencies concerning programmatic analyses and tiering. The task force focused on five areas of interest: types of programmatic documents, scope of programmatic analyses, content of programmatic documents, longevity of programmatic documents, and links to adaptive management and environmental management systems (EMS).

To promote consistent, clear, cost-effective programmatic NEPA analyses, documents, and tiering that meet agency and stakeholder needs, the task force recommends that CEQ provide guidance to:

- ❖ Emphasize the importance of collaboration as agencies expand the use and scope of programmatic NEPA analyses.
- ❖ Include a section in the first tier document that explains the relationship between the programmatic and future tiered analyses and documents, and describes how stakeholders will be involved.
- ❖ Emphasize that programmatic documents should explain where and when deferred issues that were raised by the public or regulatory agencies will be addressed, and describe the proposed temporal and spatial scales that will be used when analyzing those issues.

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- ❖ Develop criteria for agencies to use when evaluating whether a programmatic document has become outdated, and articulate a general life expectancy for programmatic documents.

To assist it in developing this guidance, CEQ could form a Federal Advisory Committee to provide advice or form a CEQ chartered work group.

The task force also recommends that CEQ convene a Federal Advisory Committee to aid in evaluating and improving understanding of the uses and purposes of programmatic NEPA analyses and documents by providing advice on:

- ❖ Validating the different uses of programmatic analyses.
- ❖ Examining whether programmatic NEPA analyses and documents for the different uses have similar scope, range of alternatives, and specificity of environmental analysis.
- ❖ Evaluating the depth and breadth of the analyses and documentation associated with the different uses of programmatic documents.
- ❖ Proposing guidance or regulatory changes to clearly define the uses and appropriate scope, range of issues, depth of analyses, and the level of description required in NEPA analyses and documents.

Adaptive Management and Monitoring

The term “adaptive management” has been used since the late 1970s to describe certain ecosystem management approaches. Adaptive management includes post-decision responses to conditions, circumstances, or acquired information related to the observed impacts of the implemented activity. Although not all Federal actions lend themselves to incorporating adaptive management into the NEPA process, nor do they require the monitoring and evaluation necessary for such an approach, the task force focused on integrating the adaptive management model into the NEPA process to provide agencies with another tool to improve their NEPA implementation.

The task force anticipated that CEQ’s 1997 NEPA effectiveness study, “The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years,” had fostered an understanding of the value of integrating adaptive management into the NEPA process. However, we discovered that fully incorporating adaptive management, to include monitoring and taking adaptive measures, into the NEPA process was still a relatively new concept for many NEPA practitioners.

The task force recommends that CEQ convene an adaptive management work group to consider revising existing regulations or establishing new guidance to facilitate agencies’ ability to exercise the option of incorporating adaptive management into their NEPA process. The working group should consider whether it is appropriate and necessary to:

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- ❖ Establish a definition for adaptive management in the NEPA process.
 - ❖ Describe how adaptive management measures, or the range of such measures, can be included in alternatives, and how to use adaptive management when the alternatives involve uncertainty or variability affecting the ability to predict the significance of impacts.
 - ❖ Consider whether adaptive management can be used instead of some or all of the agency's evaluation of significant adverse impacts using theoretical approaches or research methods to address incomplete or unavailable information when the means to obtain the data for such evaluation are not known.
 - ❖ Use adaptive management for a mitigation monitoring and enforcement program.
 - ❖ Integrate adaptive management into EAs, especially when a mitigated finding of no significant impact (FONSI) is required to prevent potential impacts from being significant.
 - ❖ Determine when adaptive management actions are reasonably foreseeable and how they are to be considered in cumulative effects analyses, including when the impacts should be addressed incrementally or collectively and how to establish the boundaries of the analysis when a series of adaptive management responses is likely.
 - ❖ Allow for the use of required State or local processes instead of Federal review and/or monitoring processes to assess the potential impacts of adaptive management approaches.
 - ❖ Identify mechanisms for oversight and enforcement of adaptive management commitments.
 - ❖ Allow the use of a federally-recognized or independently certified EMS that considers a proposed action and adaptive management measures described in an EIS to satisfy the mitigation and monitoring enforcement provisions in CEQ's regulations.
 - ❖ Allow the use of a recognized EMS to serve as the mitigation implementation vehicle when a FONSI depends on adaptive management measures.

If the work group determines that new guidance or regulatory revisions are needed, the work group should assist CEQ in preparing and issuing such guidance or revisions. The work group should also gather all NEPA guidance on adaptive management for inclusion in a CEQ reference handbook.

We further recommend that the work group initiate a pilot study to identify the types of actions best suited for integrating adaptive management into the NEPA process. The pilot program should include several diverse actions, including those that could be integrated into an existing EMS, involve a high degree of uncertainty, or contain highly variable potential impacts. Actions associated with enforceable mitigation (e.g.,

conditions of a grant, permit, license, or approval) or when there might be duplicate Federal, State, or local environmental reviews should also be included in the pilot program. The study should identify the appropriate assessment strategies and documentation for incorporating adaptive management into the NEPA process and identify issues requiring CEQ guidance.

Categorical Exclusions

The task force focused its efforts on documenting the basis and process for establishing categorical exclusions, the categorical exclusion approval process, and documenting the use of categorical exclusions.

To promote consistent categorical exclusion development and use, the task force recommends CEQ should expeditiously issue clarifying guidance to:

- ❖ Address the documentation prepared at the time a categorical exclusion is used. CEQ should consult with department and agency counsel and the Department of Justice when developing this guidance.
- ❖ Suggest methods and information, such as post-implementation monitoring and effects analyses and studies, categorical exclusion benchmarking studies, and statements of agency professionals, which agencies can use to determine whether a category of activity does not individually or cumulatively have a significant effect on the human environment.
- ❖ Encourage agencies to develop categorical exclusions, where appropriate, based on broadly defined criteria that will provide the agency with sufficient flexibility, and encourage the agency to offer examples of frequently conducted activities that would usually fall within the categories.
- ❖ Emphasize that agencies should periodically review and update their categorical exclusions, and their procedures for adding, revising, or deleting categorical exclusions. The guidance should also encourage agencies to establish a mechanism to track suggestions from their field offices for developing or revising their categorical exclusions. The guidance should emphasize the benefits of such information when establishing categorical exclusions.
- ❖ Clarify the CEQ review process and provide a renewed commitment to meeting the CEQ 30-day period for reviewing proposed categorical exclusions.
- ❖ Encourage agencies to expand public outreach beyond the Federal Register notice and comment period to facilitate more public involvement in changing their categorical exclusions and to scale that outreach to the extent of the proposed changes to the categorical exclusions.

Environmental Assessments

The task force considered the appropriate use and structure of EAs, and identified four areas of interest: EA and FONSI use, mitigated EAs and FONSI, EA alternatives analysis, and EA public involvement.

To consider the appropriate use and structure of EA documents that meet agency and stakeholder needs, new CEQ guidance is needed to:

- ❖ Specify existing minimum EA requirements for all EAs in one guidance document. This guidance should also explain:
 - Appropriate analysis of alternatives, including the no action alternative;
 - When mitigation measures must be considered;
 - Appropriate public involvement; and
 - Suitable use of an EA standardized analysis form.
- ❖ Address what should be included in an EA and FONSI to demonstrate that agencies have comprehensively considered the potential environmental consequences of the proposed action before taking the action (i.e., taken a “hard look”).
- ❖ Emphasize that EAs and FONSI should focus on issues or resources that might be significantly affected or are a public concern. Specifically, the guidance should:
 - Emphasize that agencies should address proposed alternative effects and provide sufficient evidence and analysis about whether to prepare an EIS;
 - Emphasize that agencies should provide and explain effects determinations for each issue of interest to the public and of potential significance;
 - State that following the CEQ EIS format to prepare an EA is unnecessary even though the issues might be similar to those addressed in an EIS;
 - Clarify that the impact discussion requirements within an EA and FONSI should be proportional to their significance and level of public concern;
 - Support and identify the methods to incorporate documents by reference;
 - Recommend that an EA should be attached to a FONSI or incorporated by reference; and

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- Emphasize that agencies must ensure the professional integrity and high quality of the environmental information within EAs.
 - ❖ Provide an easily understood and applied definition of mitigated FONSI, and clarify that a mitigated FONSI is approved based on the mitigation measures and therefore an EIS is not required (i.e., the FONSI would not be appropriate without the mitigation measures). Specifically, the guidance should:
 - Address mitigated FONSI requirements, including whether post-project monitoring and enforcement are required;
 - Describe when a monitoring and enforcement program should be adopted and the factors that should be considered in this determination; and
 - Discuss how mitigation will be conducted and enforced including the length of the mitigation period, how success will be measured, and when alternative monitoring and adaptive management approaches are acceptable.
 - ❖ Address the ability of a FONSI to serve as a legally binding mechanism to enforce mitigation particularly when mitigation measures must be considered and adopted (e.g., for any project impacts, only when significant adverse impacts exist, for an entire project, only where feasible).
 - ❖ Discuss how to adequately incorporate the EA analysis into FONSI.
 - ❖ Address unresolved conflicts concerning alternative uses of available resources and call upon agencies to clarify their rationale for presenting alternatives within an EA. Specifically, the guidance should:
 - Define the meaning of “unresolved conflict concerning the alternative uses of available resources”;
 - Identify the core elements of an EA when unresolved conflicts concerning alternative uses of available resources are either present or not;
 - Clarify that alternatives must be evaluated and documented within the EA when unresolved conflicts concerning alternative uses of available resources exist; and
 - Specify that each EA should contain a discussion of unresolved conflicts concerning alternative uses of available resources when alternatives beyond the preferred and no-action alternatives are being considered.
 - ❖ Support documenting eliminated alternatives in a separate section at the beginning of EAs, and identify criteria that agencies can apply to eliminate alternatives including cost, logistics, technology, and greater adverse environmental effects.

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- ❖ Clarify that all agencies can address the no action alternative by contrasting the current condition and future condition in the absence of the proposed action, and clarify whether this approach can be used when there are unresolved conflicts concerning alternative uses of available resources.
 - ❖ Clarify and highlight the definition of the no action alternative to foster consistent application.
 - ❖ Explain that public involvement requirements in an EA should be commensurate with project scale and complexity, required mitigation, and public interest. Specifically, the guidance should:
 - Reemphasize that public availability of EAs and FONSI is required;
 - Emphasize and clarify special cases where a FONSI must be available for public review for 30 days;
 - Specify the public involvement requirements for EAs that either do or do not have a remaining unresolved conflict in alternative uses of available resources and/or that have been mitigated below the threshold of significance that would usually require an EIS; and
 - Facilitate public involvement in EAs by encouraging agencies to electronically establish and maintain NEPA information and documents, provide information via agency websites, and develop and maintain links to other agencies' NEPA Websites where ongoing and proposed NEPA work would be advertised. CEQ should provide links to these sites on its NEPA Website.

Additional Areas of Consideration

Several issues were raised in public comment and during interviews with Federal agencies concerning procedural aspects of the NEPA process that went beyond the six focus areas examined by the task force. Suggestions included a proposal that the Environmental Protection Agency oversee the NEPA process, strict enforcement of page limits for EAs and EISs, and a requirement that agencies submit annual progress reports about their ability to achieve NEPA-process improvements. Several observations and additional topics presented to the task force warranted recognition and some additional recommendations were developed.

The task force developed specific recommendations for four additional areas that were considered: coordinating compliance with other laws; alternatives; social, cultural and economic effects analyses; and dispute resolution during and after the NEPA process.

The task force recommends that CEQ:

- ❖ In consultation with the Environmental Protection Agency, Advisory Council on Historic Preservation, Fish and Wildlife Service, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service and other agencies, as appropriate, develop a handbook to effectively integrate the NEPA process with Endangered Species Act Section 7 consultation, National Historic Preservation Act Section 106 coordination, Clean Air Act conformity requirements, and Clean Water Act total maximum daily load and Section 404 requirements.
- ❖ Explore the use of collaboration to develop and refine alternatives by working with a facilitator, and then provide guidance that outlines how agencies can document the process of refining a proposal and conforming to the CEQ regulations requiring the rigorous and objective evaluation of all reasonable alternatives.
- ❖ Develop a handbook on social, cultural and economic analysis similar to the cumulative effects or environmental justice publications.
- ❖ Study the effectiveness of alternatives for resolving disputes, including those about environmental mitigation and project implementation, both during and after the NEPA process.

Three recommendations were viewed as essential to improving NEPA implementation and should be acted on in order to enhance CEQ's ability to act on other recommendations and to continue efforts to improve the efficiency and effectiveness of NEPA implementation.

- ❖ Establish a 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.
- ❖ 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.
- ❖ Develop a 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.

CONCLUSION

This task force report will be published in hardcopy and electronic form. The report will be distributed using established distribution lists as well as by posting on the task force web page. After publishing and considering the report, CEQ will inform the public and other agencies how it will address these recommendations.

We hope that our efforts provide the groundwork for a renewed and dynamic process to improve and modernize NEPA implementation.

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