

## **National Environmental Policy Act: Enhancing Collaboration and Partnerships**

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Forty years ago, the United States Congress enacted the National Environmental Policy Act (NEPA). In the intervening years, the Act has become the bedrock for evaluating environmental and other social and economic impacts of federal actions. Equally significant, the Act lays out the central architecture for agency collaboration, cooperation, and public participation in evaluating federal actions. In its 1997 report reviewing 25 years of NEPA in action, the Council of Environmental Quality (CEQ) opined that the Act's "most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of agency decisions."<sup>i</sup>

Among five key elements of the NEPA process identified in the CEQ report as critical to its effective implementation, three pertain, at least in part, to participation and collaboration. These three elements include NEPA's role in facilitating: 1) public information and input; 2) interagency coordination; and 3) interdisciplinary place-based approaches to decision making.<sup>ii</sup>

NEPA and associated implementing regulations established a participatory and collaborative decision-making architecture. Yet achieving robust public participation and collaborative engagement has been a four-decade evolutionary and sometimes rocky journey. Though the Act laid the foundations for participation and collaboration, its critics, over four decades, have pointed to missed opportunities and, sometimes, an emphasis on procedural fidelity rather than meaningful collaboration.<sup>iii</sup>

In a 25-year retrospective, for example, participants in a CEQ review of the Act offered a number of critiques.<sup>iv</sup> These critiques included:

- A sense that the process sometimes treated the public and other agencies as adversaries rather than welcome participants;
- Lack of consistency in timetables, modes of public participation, and other requirements has hampered interagency coordination;

- Public and other agency participation often has occurred too late to be fully effective to enhance strategic planning through NEPA processes.

Others criticized NEPA processes as failing to achieve a scope of citizen involvement reflective of broad societal interests.<sup>v</sup> Others pointed to participation limited to commentary at public hearings or through written responses to agency documents and decisions. Changing circumstances, evolving agency cultures, and public expectations have, however, resulted in a significant reaffirmation—in rhetoric, regulation, and practice—of NEPA as a basis for strengthening public engagement, interagency coordination, and collaborative decision making.

Consider these “big picture” dynamics. First, the setting in which NEPA evaluations and decision making unfolds increasingly involves ecosystem-based, large landscape-scale planning and actions.<sup>vi</sup> Consider Everglades Restoration projects that involve multiple agencies coordinating actions that affect public and private lands, rural and urban communities, and impact millions of acres. Large, landscape-scale projects and actions often transcend single-agency jurisdictions—both geographically and functionally. Moreover, actions often have multi-jurisdictional, multi-faceted effects.

Second, agencies are increasingly engaged in partnerships with other federal, state, local, and Tribal agencies and the public in partnerships that leverage resources and skills to enhance the outcome of agency actions. Put another way, agency cultures are shifting toward network cultures.<sup>vii</sup>

Third, the public, familiar with the limits of traditional processes of passive participation centered on commenting on proposed agency actions, has pressed for and pioneered more collaborative decision processes.<sup>viii</sup> In 1992, when the Quincy Library Group in California assembled multiple stakeholders and agencies in a collaborative process to craft a forest management plan, it made headlines as a pioneering dialogue. Nearly two decades later, collaborative processes to find common ground in resource management decisions have spread across the Nation.

The rules, processes, and guidelines for implementing NEPA have both responded to and mirrored these broader decision making trends. Cooperation, collaboration, and active public engagement are central features of 21<sup>st</sup> century NEPA implementation.

Four events mark key steps in this trajectory. Cumulatively, flowing from these steps have come tangible federal policy changes or process clarifications that have helped NEPA processes set the stage for and reinforce collaborative decision making, agency coordination, and public participation.

First was the 1997 CEQ retrospective report on the effectiveness of NEPA after 25 years. Much of the report focused on streamlining processes, citing “one-stop shopping” such as that used by the Federal Highway Administration in its Red Book policy that coordinated five agencies to address requirements under the Clean Water Act Section 404 process. Implicit in the streamlining was, however, greater coordination, including with state

agencies, where relevant. The report also examined ways to breathe life into NEPA as a process for strategic planning, including use of ecosystem-based regional EIS planning. Using such an approach, the Southern Appalachian Man and Biosphere Program coordinated actions of several federal agencies as a precursor to future similar efforts.

The report also took the issue of coordination head on, proposing that agencies coordinate and share information and planning responsibilities with federal and other agencies. The 1997 report set the stage for strengthening NEPA coordination and collaborative processes and was, in many ways, a precursor to subsequent actions by the Bush Administration.

Marking a second major step toward enhancing collaboration through NEPA processes, on January 30, 2002 CEQ issued guidance memorandum to heads of all federal agencies regarding cooperating agencies and how to implement related NEPA provisions. CEQ also convened a NEPA Task Force, which made intergovernmental collaboration a significant part of its focus. The report suggested that lead agencies should actively “identify other agencies that might have an interest in the new or revised proposal or project.”<sup>ix</sup> The report set forth various concepts, including use of training, facilitators, interagency work groups, and cooperative agreements to foster collaboration through all phases of NEPA processes.

A third impetus to greater NEPA interagency and public coordination and collaboration came with the 2005 presidential Executive Order on Cooperative Conservation.<sup>x</sup> Though the order did not specifically focus on NEPA processes, it raised the bar for federal agencies, directing that they strengthen their processes for coordination, collaboration and cooperation with one another, non-federal agencies, Tribes, and the public.

A fourth impetus was the NEPA Report of the National Environmental Conflict Resolution Committee.<sup>xi</sup> The Committee found a significant nexus between the provisions of Section 101 of NEPA and characteristics of environmental conflict resolution. Those characteristics involve the consideration of multiple values and sustained engagement of all parties in decision making processes.

These four documents set forth both the rationale and the basic underpinnings for strengthening the role of collaboration and partnerships within NEPA decision processes. Building upon this rationale and given both CEQ and presidential emphasis on collaboration, cooperation, and coordination, agencies began giving greater NEPA policy and regulatory substance to these concepts. Several of these policies and regulations illustrate the evolving emphasis on collaboration, cooperation, and coordination.

A major step came with issuance in 2003 by the Department of the Interior of “Procedures for Implementing Consensus-Based Management in Agency Planning and Operations.”<sup>xii</sup> The document was among the first formal federal policies to support active community (and non-federal) agency collaboration to shape NEPA alternatives rather than be confined to commenting on agency-generated options. The document, later translated into the first-ever Interior Department NEPA regulations, set forth three main provisions. First, it indicated that bureaus “should initiate the scoping process with full and direct involvement by the community.” Second, “when feasible and practicable, one alternative

evaluated in the NEPA analysis should be the community alternative if one exists.” Third, when feasible and practicable, “the community alternative should be designated as the bureau’s preferred alternative in the NEPA process, so long as a consensus exists within the community for support of that alternative.” Other provisions qualified and explained this general guidance.

The Department of the Interior’s NEPA regulations, published in October 2008, align the Department’s NEPA procedures, among other provisions, with Executive Order Executive Order 13352 on Cooperative Conservation, and CEQ regulations. The regulations (Section 46.110) provide directions for agency use in incorporating consensus-based management into the NEPA process.<sup>xiii</sup> The regulations state that, “in incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action.”

In keeping with these efforts to strengthen agency coordination and collaboration, Interior’s Bureau of Land Management issued new land use planning regulations that clarified and strengthened the role of cooperating agencies. The rule “clarifies the responsibility of managers to offer [cooperating agency status] in the various steps of BLM’s planning process.”<sup>xiv</sup> The rule does not alter prior processes for public participation. It does, however, add a new requirement in the planning process—specifically, that managers must offer cooperating agency status to eligible agencies for all resource management plans. That participation is required to occur at the earliest possible time in the planning process, including participation in initial scoping.

BLM’s land use planning process results in a dual-purpose document—a resource management plan and an environmental impact statement as required under NEPA. In effect, the rules mandate collaboration with cooperating agencies at most stages of planning, providing the same eligibility to tribes, states, local governments and federal agencies. The requirement to offer cooperating agency status applies to all environmental impact statements. BLM’s regulations have one key distinction from CEQ’s general NEPA regulations: CEQ regulations encourage but do not mandate the offer of cooperating agency status to eligible participants.

Consistent with the broadening trend toward strengthening collaborative processes through NEPA implementation, CEQ weighed in with a draft handbook in 2007 on Collaboration in NEPA.<sup>xv</sup> The Draft Handbook, while not policy, nonetheless puts down a strong marker reinforcing the view that NEPA is intended to generate “meaningful public input and involvement in the process of evaluating the environmental impacts of proposed federal actions.” The document opens with a caveat, noting that “the full potential for more actively engaging other agencies, affected and interested parties, and the public at large in collaborative environmental analysis and federal decision-making is rarely realized.”<sup>xvi</sup> The handbook sets forth measures for improving use of collaborative processes within NEPA decision-making contexts. The Handbook defines collaboration as agency engagement of

“other governmental entities and/or a balanced set of affected and interested parties in seeking agreements at one or more stages of the NEPA process by cultivating shared vision, trust, and communication.”<sup>xvii</sup> Though the Handbook offers this definition, it also underscores that there is no set definition and is considerable variation in how collaboration can occur within a NEPA context.

NEPA regulations, CEQ guidance, and the policies and regulations of some federal agencies are clearly moving toward aligning NEPA practice with growing community trends toward collaboration. Beyond such alignment, these regulations and guidance are striving to better fulfill NEPA’s potential to drive such collaborative processes. The question is why? What are the perceived benefits?

In its Handbook on Collaboration, CEQ sets forth eight benefits.<sup>xviii</sup> Generally, these conform to benefits described in much of the literature on collaboration. They include:

- enhanced generation and use of relevant scientific, technical, and local knowledge that reflects a diversity of perspectives, professional disciplines, and creativity;
- fair processes through the inclusion of most or all interests involved in an issue;
- Integration, by emphasizing a sharing of ideas and resources and facilitating coordination among jurisdictions;
- conflict prevention;
- joint fact-finding to foster mutual learning and collaborative monitoring to strengthen buy-in of data and results;
- social capital through the building of trust;
- enhanced implementation resulting from participants having a greater stake in a decision;
- reduced litigation

These benefits describe the potential of collaboration through NEPA processes. With these collaborative efforts still relatively recent, their performance record remains to be written.

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<sup>i</sup> Council on Environmental Quality, “The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years,” January 1997.

<sup>ii</sup> *Ibid.*, p. ix.

<sup>iii</sup> Tomas Koontz, et al., *Collaborative Adaptive Management: What Roles for Government?* Washington, D.C., Resources for the Future, 2004.

<sup>iv</sup> CEQ, *op cit.*, pp. ix-x.

<sup>v</sup> CEQ, “Collaboration in NEPA: A Handbook for NEPA Practitioners,” Revised Draft, March 16, 2007.

<sup>vi</sup> Matt McKinney, Lynn Scarlett, Dan Kemmis, *Large Landscape Conservation*, Cambridge, Mass., Lincoln Institute, June 2010.

<sup>vii</sup> Stephen Goldsmith and William Eggers, *Governing by Network*, Washington, D.C., Brookings Institution, 2004.

<sup>viii</sup> Donald Snow, “Coming Home: An Introduction to Collaborative Conservation,” in *Across the Great Divide: Explorations in Collaborative Conservation and the American West*, ed. Philip Brick, Donald Snow, and Sarah Van de Wetering, Washington, D.C., Island Press.

<sup>ix</sup> NEPA Task Force, *Modernizing NEPA Implementation* (available at <http://www.ceq.eh.doe.gov/ntf>)

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<sup>x</sup> Executive Order 13352, "Facilitation of Cooperative Conservation," August 26, 2004.

<sup>xi</sup> National Environmental Conflict Resolution Advisory Committee, NEPA Report, 2004 (available at <http://www.ecr.gov/Resources/NationalECRAdvisoryReportIntro.aspx>)

<sup>xii</sup> Environmental Statement Memorandum No. ESM03-7, U.S. Department of the Interior, 2003.

<sup>xiii</sup> 43 CFR Part 46, "Implementation of the National Environmental Policy Act (NEPA) of 1969; Final Rule," October 15, 2008.

<sup>xiv</sup> 43 CFR Part 1600, Land Use Planning, Final Rule, March 23, 2005.

<sup>xv</sup> CEQ, Collaboration in NEPA

<sup>xvi</sup> *Ibid.*, p. 2.

<sup>xvii</sup> *Ibid.*, p. 4

<sup>xviii</sup> *Ibid.*, p. 5