

D I A L O G U E

# The National Environmental Policy Act 40th Anniversary Symposium

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## Editors' Summary

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On September 15, 2010, the Environmental Law Institute, the Grand Canyon Trust, and the Partnership Project hosted a symposium to commemorate the 40th anniversary of NEPA. At the symposium, participants explored how agency engagement with the public results in better decisionmaking. Panelists explored some of the means by which agency practices have made the NEPA process more effective, ways in which agency practice has been less successful, and current opportunities to make NEPA work even better than it has during the statute's first 40 years. The symposium was followed by a reception, at which Russell Train, John Dingell, and Gary Guzy spoke, and the release of *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government*. The remarks made at the reception may be listened to at <http://www.eli.org/audio/09.15.10dc/09.15.10dc/reception.mp3>. The symposium, reception, and publication are all made possible with the generous support of the Henry M. Jackson Foundation, the 444S Foundation, and the Wilburforce Foundation.

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### Panelists:

**Jim McElfish**, Senior Attorney and Director, Sustainable Use of Land Program, Environmental Law Institute (Moderator)

**Dinah Bear**, Attorney at Law, Washington, D.C. (former General Counsel to the Council on Environmental Quality)

**Carol Borgstrom**, Director of the Office of NEPA Policy and Compliance, U.S. Department of Energy

**Sam Kalen**, Assistant Professor of Law, University of Wyoming; Of Counsel, Van Ness Feldman

**Mary O'Brien**, Utah Forests Project Manager, Grand Canyon Trust

**Nicholas Yost**, SNR Denton US LLP (former General Counsel to the Council on Environmental Quality)

**Leslie Carothers:** Good afternoon to all of you. I'm Leslie Carothers, president of the Environmental Law Institute (ELI). It's my pleasure to welcome you to this afternoon's symposium and reception celebrating some of the successes of 40 years of federal decisionmaking under the National Environment Policy Act (NEPA).<sup>1</sup> Today, we're issuing a publication, which you should have received when you came in, containing a selection of success stories.

We have a wonderful symposium panel that will elaborate on the results achieved by NEPA over the years. Later, at a reception following this symposium, we'll hear from three distinguished environmental leaders who all had something to do with NEPA. They include the Hon. Russell Train, Rep. John Dingell (D-Mich.) and Council on Environmental Quality (CEQ) Chair Nancy Sutley. [Mr. Gary Guzy, Deputy Chair, substituted for Ms. Sutley at the post-symposium reception.]

The publication was produced by the Grand Canyon Trust, the Partnership Project, and ELI. Stephanie Young, Mary O'Brien, and Jim McElfish have collaborated to pull this together. We are all grateful to the Henry M. Jackson Foundation led by Lara Iglitzin, as well as the 44S and Wilburforce Foundations for funding the publication and today's program.

Sen. [Henry M.] Jackson (D-Wash.) was, of course, an early environmental leader and advocate for better governmental decision affecting the environment and was in fact the man who introduced the bill in 1969 that became NEPA. So, we're especially proud to have the Jackson Foundation as a supporter of this event and this activity. We're happy to be a part of a program to showcase the positive results of this kind of law on all sorts of decisions—an often untold story.

You always hear a lot about the big controversies involving problematic projects that seem to go on and not have happy endings—depending on your point of view—although some do and some don't. But there isn't enough attention paid to the somewhat lower key day-to-day decisions applying NEPA to federal activities and the very positive and real results of many of those decisions. The people who conceived this project thought it was time to take a closer look at some examples of just what NEPA has accomplished and to emphasize what the law has contributed, not only to environmental protection, but to transparency and citizen participation in governance.

I'm especially pleased to be introducing this subject today because almost 40 years ago, I took my first environmental job at the U.S. Environmental Protection Agency (EPA) at the environmental impact statement (EIS) office, so I have some experience. I went into the enforcement program not too long after that, but I did get to work on some of the big projects of the day during my four months in the EIS office.

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1. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

Our “favorite” project was the Lower Teton Dam, where my colleague and I wrote scathing comments about this project. The CEQ rejected our comments because they were criticizing the economics of the project instead of just the environmental impacts. The economics were highly questionable. Some of you may remember that in 1976, the Lower Teton Dam collapsed, but not under the weight of our comments; it collapsed for engineering reasons. People were killed, and the dam is no more.

On today’s panel, our moderator is ELI’s Jim McElfish, who is a senior attorney and a leading expert on NEPA and many other areas of environmental law. He’s much too modest to allow me to give an elaborate introduction of him, so I will simply thank him for his leadership and his scholarship on this topic and ask him to introduce his colleagues on the panel. I want to personally thank all of them for participating in this program today.

I’ll be back later to introduce our distinguished guests as we begin the brief program, after the symposium and before the reception. Thank you all for coming, and I look forward to listening with you.

**Jim McElfish:** Thank you, Leslie. I’m Jim McElfish. I’m an attorney at ELI, and I’m very pleased to be participating in this 40th anniversary of NEPA celebration and symposium. The purpose of the symposium is really to focus on that aspect of NEPA that draws on the collective wisdom and expertise of the American people and agencies of state, local, tribal, and federal governments in making better decisions.

The primary focus of our panel is going to be on how engagement with the public results in better decisionmaking, different decisionmaking, and to look at some of the ways in which agency practices have made that process better and ways in which agency practice has been less successful and where we need to go back and look at opportunities to make NEPA work even better than it has these first 40 years.

We have a tremendously distinguished panel; and I’m going to introduce them all now. They will proceed in order, and then we’ll have time for questions and comments, I hope, at the end before we break for the reception.

Our first speaker is Sam Kalen, assistant professor at the University of Wyoming Law School, former partner with the Van Ness Feldman law firm. Sam is going to talk about some of the aspects of legislative history of NEPA that provide some unexplored opportunities for public involvement and participation, and engagement with some of the new and cutting-edge issues that are arising for the federal agencies.

He’ll be followed by Nick Yost, partner at Sonnenschein Nath & Rosenthal in San Francisco. Many of you know Nick as the author or co-author of the NEPA regulations, which I personally still regard as one of the finest exercises in regulation writing done by lawyers in my lifetime. I think they’ve held up well over the 30-plus years of their operation.

He will be followed then by Mary O’Brien, who is the Utah forest project manager for the Grand Canyon Trust. Mary is going to talk about some of the success stories that are high-

lighted in the publication,<sup>2</sup> and ways in which involving the public actually has resulted in changed outcomes and better relationships between the public and federal agencies—a story that is often overlooked by focus on mere controversy.

She’ll then be followed by Carol Borgstrom, who leads NEPA Policy and Compliance for the U.S. Department of Energy (DOE). Carol is going to talk about some of the cutting-edge things that DOE has done to make NEPA more effective and more transparent, including more accountability to the public. In many ways, DOE, having seen the value of NEPA in producing better decisions, is pioneering some of the things that other federal agencies are now looking at.

Then, we’ll conclude with Dinah Bear, long-time general counsel of the CEQ, 25 years through many administrations. She probably has the best bird’s-eye view of how NEPA has played out in practice and inside federal agencies over more than one-half of its history. Dinah now has left the government and is practicing here in Washington, D.C.

So, without further ado, I’m going to begin with Sam. I do want to leave one quote in your mind: Walt Whitman, a famous American poet, wrote a poem called *The Commonplace* in which he promoted something called the “democratic wisdom underneath.”<sup>3</sup> I think the democratic wisdom underneath is what NEPA really appeals to as the government seeks to make better decisions.

**Sam Kalen:** First, I’d like to thank ELI and the others for putting on this important and wonderful event and also for inviting me to speak. After about 40-and-a-half years, it seems propitious to begin our discussion of NEPA with the question often occasioned with age. Has age dampened the statute’s resilience, or in an ever-changing world, has the statute become capable of responding to today’s challenges and incorporating modern scientific principles?

It’s not surprising that after 40 years, some have begun to have a dialogue about whether NEPA can accommodate modern-day issues and concerns. In the brief time that I have, what I’d like to do is first review some of the current commentary about the act and then second, suggest that NEPA is perhaps one of the most resilient of all the environmental laws and capable of adapting over time to changing circumstances. I’d like to illustrate the Act’s resiliency by perhaps giving a bit more gloss to the often discounted history surrounding and animating the Act’s passage.

But first, let’s begin by reviewing two emerging areas of interest of acute importance and relevance to NEPA. They are *ecosystem services* and *adaptive management*. Each of these areas appears to be dominating many modern conversations

2. NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT (ELI 2010), available at [http://www.elistore.org/reports\\_detail.asp?ID=11405&topic=NEPA](http://www.elistore.org/reports_detail.asp?ID=11405&topic=NEPA).

3. The commonplace I sing;  
How cheap is health! how cheap nobility! Abstinence, no falsehood, no glut-tony, lust;  
The open air I sing, freedom, toleration,  
(Take here the mainest lesson—less from books—less from the schools,)  
The common day and night—the common earth and waters,  
Your farm—your work, trade, occupation,  
The democratic wisdom underneath, like solid ground for all.

about environmental management, and how each of these two concepts align with NEPA's integrated, transparent, and inclusive decisionmaking process is critical to any present dialogue about the act and its future effectiveness. So, let's begin with one of NEPA's fundamental assumptions, that is, of appreciating the value of natural environments.

Although an appreciation of ecosystems and ecosystem management has been around since roughly the time of NEPA's passage, an emerging synthesis of environmental science and economics has produced an ever-growing interest in what is commonly referred to as *ecosystem services*. Gaining prominence over approximately the last 20 years, the science of ecosystem services helps to identify, analyze, and value the multitude of goods, services, and cultural benefits that ecosystems provide to us on a daily basis.

A prominent proponent of ecosystem services explains that “[f]rom an idea a few ecologists suggested in the 1980s to a fast-emerging organizing principle of ecological economics in the 1990s and then to a viable natural resources management topic in the 2000s, the ecosystem services concept gained ground quickly.”<sup>4</sup> He further observed that “the central thesis of ecosystem services is that ecological resources serve as natural capital for producing not only valuable commodities such as timber, minerals, and water but also valuable services . . . such as water filtration, storm surge mitigation, water recharge, soil stability, and pollination.”

In short, the National Academy of Sciences (NAS) has poignantly observed that “[t]he development of an ecosystem services paradigm has enhanced our understanding of how the natural environment matters to human societies.”<sup>5</sup> But effective deployment of ecosystem services demands that we bring together economists, ecologists, philosophers, and others to develop and employ this growing field and then discern how best to utilize this field in our NEPA process. It's both too simplistic and an understatement to say that this presents a daunting task.

In 2004, the NAS also reported that “[d]espite growing recognition of the importance of ecosystem functions and services, they are often taken for granted and overlooked in environmental decisionmaking.”<sup>6</sup> Yet, to the extent that we can incorporate the ecosystem services paradigm into our NEPA process, we must next confront the dilemma of another changing scientific paradigm. When the U.S. Congress passed NEPA, a possibly dominant view in the ecological community was that our natural environment exists in equilibrium. That is, nature undisturbed by human presence exists in a balance—almost that it lacks a temporal component. Indeed, Lynton Caldwell, an active participant in the development of NEPA, would later recall

that at the time “concepts such as ‘balance of nature’ were ‘widely’ accepted.”<sup>7</sup>

Today, however, it's more common to talk in terms of our environment being in a chaotic state. That is, that it's dynamic, ever-changing, and not a static system. As one scholar describes it, “among the new paradigm in ecology, none is more revolutionary than the idea that nature is not delicately balanced in equilibrium but rather is dynamic, often unpredictable and perhaps even chaotic.”<sup>8</sup>

Indeed, some ecologists now suggest that we are in what's called a no-analog future for which “we have no experience on which to base projections of ecosystem change.”<sup>9</sup> This has important ramifications for NEPA, because NEPA documents generally purport to make ex ante predictions of what is likely to occur in the future if certain actions are taken, and these ex ante predictions are based on an assumption that we can have some degree of confidence in what the environment presently looks like: in effect, we can take a snapshot of the present environment and then identify the likely changes to that snapshot as a consequence of a particular action or actions.

Responding to this modern understanding of how ecosystems function, planners have advanced *adaptive management* as a productive tool for overcoming the shortcoming of ex ante predictions. Adaptive management, in the words of two prominent scholars, “is more evolutionary and interdisciplinary, relying on iterative cycles of goal determination, model building, predictive standard setting, outcome monitoring, and standard recalibration.”<sup>10</sup>

The CEQ recently nudged in this direction when it recognized that our environment “is evolving, not static,” and as such, “monitoring can help decisionmakers adapt to changed circumstances.”<sup>11</sup> Of course, adaptive management presents a significant issue for NEPA compliance. For instance, how can we avoid just deferring consideration of important issues until a later day, only to fail to address them later on? Or how do we address that the process for public participation under NEPA is often perceived of as a model of a single decisionmaking event, and yet adaptive management by definition demands an ongoing and continuous effort to monitor, revisit, and readjust when necessary?

An early proponent of adaptive management and the need to appreciate this dynamic model suggested that the iterative process in adaptive management is inconsistent with NEPA's premise.<sup>12</sup> More recently, a noted NEPA scholar commented that the Act demands too much clairvoyance, and that we must develop more effective mechanisms for follow-up mon-

4. J.B. Ruhl, *Ecosystem Services: The Nature of Valuing Nature*, in CONSERVATION FOR A NEW GENERATION 155, 167, 157-58 (Island Press, Richard L. Knight & Courtney White, eds. 2009).

5. National Academy of Sciences, VALUING ECOSYSTEM SERVICES: TOWARD BETTER ENVIRONMENTAL DECISION-MAKING vii (2004).

6. *Id.* at 2.

7. Lynton K. Caldwell, *The Environmental Factor in Development Planning*, in LYNTON K. CALDWELL, THE ENVIRONMENT AS A FOCUS OF PUBLIC POLICY 65, 71 (1995).

8. Reed F. Noss, *Some Principles of Conservation Biology, as They Apply to Environmental Law*, 69 CHI-KENT L. REV. 893 (1994).

9. J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analogy Future*, 88 B.U. L. REV. 1, 11 (2008).

10. J.B. Ruhl, Robert L. Fischman, *Adaptive Management in the Courts*, \_\_ MINN. L. REV. \_\_ (forthcoming).

11. DEQ, Memorandum for Heads of Federal Departments and Agencies, *Draft Guidance for NEPA Mitigation and Monitoring*, Feb. 18, 2010.

12. Adaptive Environmental Assessment and Management (Crawford S. Holling, ed. 1978).

itoring and empirical testing and adaptive management to mitigate for unanticipated or incorrectly assumed impacts.<sup>13</sup>

But what I'd like to suggest is that NEPA is resilient enough to respond to adaptive management, ecosystem services, and other tools, such as environmental management systems, the science of geoengineering, and, of course, climate change. All of this is evident from both the prescient language of this short but insightful statute, as well as the history and reasons animating several of the principal advocates for the Act. It is no surprise to anyone who reads or reviews the evolution of NEPA that the Act talks not just of the environment but in terms of "ecological systems," averting damage to our "biosphere," recognizing the "interrelations of all components of the natural environment," and of fostering "productive harmony" between human society and the environment.<sup>14</sup>

It talks about identifying and developing methods to ensure in the decisionmaking process consideration of "unquantified environmental amenities and values," as well as utilize a "systematic interdisciplinary approach" to "ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on man's environment."<sup>15</sup> That such language permeates and illustrates the resilience of the statute is a product of two often neglected and interrelated aspects of NEPA's evolution:

These are Congress' interests in promoting better *public administration* and its *acceptance of ecology as a matter of public policy*. These two aspects of the dialogue preceding the Act's passage were interrelated as ecology as it was then understood and embraced meant also better public administration, that is, more effective governmental organization, communication, and coordination.

Let's review, then, the role that the rising discipline of ecology played in the social history of NEPA. After all, it's not simply fortuitous that in the year Congress passed NEPA, *Time Magazine* dubbed it "the year of ecology," with ecologists labeled as the new Jeremiahs, or that in 1970, Robert Heilbroner would write in the *New York Review of Books* that ecology has become "the thing," and as Sen. Edmund Muskie's (D-Me.) Public Works Committee would later observe "[t]he message which has emerged from these investigations and from all studies of environmental problems . . . is essentially the message of ecology that we and all our activities are integral parts of the natural system."

Although the science of ecology has a rich history, it was not until about the mid-20th century that the science began to explore in earnest its role in helping to shape society. In 1953, Eugene Odum published his path-breaking book, *Fundamentals of Ecology*, where he outlined the classic approach to ecosystems and emphasized how nature could be managed

for the human benefit and, most importantly, that ecologists could serve an important role in public policy debates.

Odum, for us lawyers in the crowd, even encouraged law schools to establish landscape law departments—not sure what he meant by that—to assist in this endeavor. Other ecologists following or expressing similar sentiment to that of Odum also began to push the ecological community to become more active in public policy. It was during this period that ecology finally became a household word. NEPA, in large measure, reflects how Congress understood, embraced, and responded to the emergence of ecology and the associated emphasis on better public administration.

I should add here that it's not just for convenience that I lumped together public administration under the umbrella of ecology. This is because, again, in the policy arena, ecology often became linked to better coordination in lieu of fragmented federal decisionmaking. Even Odum, the ecologist, addressed this in his writings. Similarly, Paul Weiss, an eminent biologist, addressed this point during one of NEPA's hearings. But it was Lynton Caldwell, a political scientist from Indiana, often later identified with NEPA's passage, who forcefully advocated the new ecologists' agenda of becoming more relevant to matters of public policy and administration. It was in 1963 that Caldwell began his campaign to merge the developing field of ecology and its interdisciplinary focus with public policy, when he published an article entitled *Environment: A New Focus for Public Policy*.

Caldwell lamented that until ecological concepts are somehow reflected in the public law of the United States, available administrative means for environmental control cannot be utilized with effectiveness. Not surprisingly, therefore, in January 1967, a congressional staff member wrote a memorandum about environmental administration with an emphasis on affording a new interdisciplinary social science an opportunity to assist in public administration.

This memorandum explained that the environment was at least a useful, if not necessary, focus of public policy and at the time appeared right for legislative proposals. It was then a year and one-half later when the now well-known colloquium described by the Conservation Foundation as an "environmental happening" was convened to address the need for a national approach to environmental policy. Well, undoubtedly, many of us are familiar with both the reports prepared before and after this colloquium. I want to encourage people to take a look at the reports whenever they have the chance—the participants discussed a wide range of issues during that colloquium.

But for present purposes, I want to highlight the words of then-Secretary of the Interior Stewart Udall, who observed that a national policy, one that would guide the attitude and conducts of the federal government, was in sight, adding that the task requires obeying the dictates of ecology, giving what he called "this master science, a new and central position in the federal scientific establishment."

This sort of social history of NEPA illustrates and helps underscore that NEPA's journey began with the ecologists' efforts to convince policymakers of the need to appreciate

13. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Performance*, 102 COLUM. L. REV. 903 (2002); Bradley C. Karkkainen, *Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation*, 86 TEX. L. REV. 1409 (2008).

14. 42 U.S.C. §§4321, 4331.

15. 42 U.S.C. §§4332(B), (A).

the new science and the urgency of addressing the pressing threats to the planet.

Soon after NEPA was passed, Odum would write that the public entry into the ecology movement is a natural and predictable response that has been in the making for some time. Another commenter proclaimed that it is heartening that the word “ecology” has taken on meaning through the nation and indeed a good part of the world. Of course, ecologists’ acceptance into the political arena prompted the noted scholar Paul Ehrlich to observe that “most politicians as well as a wide variety of physicists and engineers who advise politicians do not have the vaguest notion what ecology is all about.”

While I probably disagree in some respects with Ehrlich, one salient point is relevant for our purposes. Embedded in NEPA’s history is an acceptance of ecology and integrated decisionmaking. By accepting ecology into the administration of public policy, NEPA is surely robust enough to respond to evolving ecological and other principles, such as ecosystem services and adaptive management. NEPA accomplished what many ecologists sought: recognition of ecology and the need for coordinated and integrative approach to federal decisionmaking.

And Congress’ decision to make ecology a part of the national agenda offers the necessary latitude for agencies to incorporate modern scientific tools for better decisionmaking. So, when we visit, revisit, and perhaps revisit again the language in NEPA and its corresponding history about ecology, ecosystems, and interdisciplinary or integrated decisionmaking, we should appreciate and perhaps applaud that Congress crafted the statute resilient enough to accommodate the dynamics of a changing world paradigm.

**Nicholas Yost:** I’m going to talk about NEPA and public participation. What a glorious occasion today is—NEPA at 40. We have so much to celebrate. NEPA has achieved success, not only in its stated goal of building the environment into governmental decisionmaking, forcing agencies, if you will, to look before they leap environmentally, but it’s changed the way we think. It’s changed our very psyche.

We Americans now look for alternatives. We look for better ways of doing things, ways of doing things that may achieve an end but which are not as environmentally destructive as what might originally have been envisioned. Alternatives and mitigation have become part of the way we think of our assumptions, and that’s due to NEPA. This brings me to the point I’m going to be talking about for the next few minutes: NEPA and the public.

In addition to its stated purpose, NEPA has become a public participation model. It’s become so in ways that I think were not quite what the founders, farsighted though they were, originally envisioned. What did NEPA’s actual provisions in its action-forcing sections state about public participation? Not a lot. Look at [§]102(2)(C): prior to making “any detailed statement,” as an EIS was called, the agency is to consult with and obtain the comments of any federal agency

with jurisdiction by law or special expertise with respect to any environmental impact involved.

Then, copies of the statement and the comments and the views of appropriate federal, state, and local agencies “which are authorized to develop and enforce environmental standards” shall be made available to the president, to the CEQ, and to the public as provided by §552 of Title 5 U.S. Code, that’s the Freedom of Information Act (FOIA). In other words, this whole EIS and commenting process was to be something you could get through FOIA. Think about that.

Agencies and EISs were to be FOIAble. That’s not a hell of a lot of public input. It was the CEQ that really built the public into the NEPA process, starting with the guidelines and continuing with the regulations. Credit goes to the first chair, Russ Train, and to the draftspersons of those original guidelines, my and Dinah’s predecessor as general counsel of the CEQ, Tim Atkeson, and a young staffer, Bill Reilly. As we are in debt to the authors of NEPA, Scoop Jackson and John Dingell, we’re also in the debt of those who followed.

And then the regulations that remain in effect today, 30-some years after they were adopted, with only one amendment to one regulation, one section, provide explicitly for public involvement.<sup>16</sup> NEPA, as I suggested and as you all know, has become an instrument of public participation. One of those panoply of laws that convert democratic theory into everyday reality: you think of the statutes that do that, FOIA, sunshine, notice and comment, various public hearing requirements.

But NEPA goes beyond these other statutes. It’s the one provision that requires the government to *explain* itself to its citizens, to respond in public to public comments. In other words, if anybody writes a comment on a draft EIS, the agency is obliged, subject to court review, to respond. We just say we agree or we disagree, we agree with modifications. It can respond however the facts and the agency justify, but there is an obligation (judicially enforceable) to respond.

What do NEPA and its regulations now provide? First, scoping, and this too the CEQ added to what was in the sparse statutory framework that NEPA had created. We borrowed in adopting the regulations from one of the state “little NEPAs or mini NEPAs” from Massachusetts, which had devised the scoping process, and we made it a national process. Essentially, in scoping, you look to see and invite public and other agency comments on what the problems are, so that when you prepare your EIS, and some agencies do it for environmental assessments (EAs), you are studying the right things. You’re asking people what should we be studying. Then, of course, most significant of all: the comment process.

Commenting first on the draft EIS, which is explicitly required, and on the final EIS, which the regulations say one may choose to have such comments whether the agency invites them or not in the 30 days after the FEIS is issued. This commenting process is immensely important. I mean that has become very much the heart of the mechanism whereby NEPA works—in which the public is involved and which federal, state, and local agencies are involved. They say,

16. 40 C.F.R. §§1500 et seq.

you know, you did this right, you did this wrong, you either look at this or other alternative. You ought to be doing it this way, and the agency must respond in writing.

Then, §1506.6, as most of you know, outlines public participation generally in the regulations. We also borrowed, and this time wrote it from the California experience, the concept of records of decision. In ensuring that when decisions are made after an EIS is prepared under NEPA that they are linked to the agency's decisionmaking process and that in making its decision, the agency must reflect upon and state what attention it has paid to what was shown in the EIS process.

Now, let me pass to two related subjects both of which involve tension between public involvement and other values: one is time limits, and the other is mitigated FONSI [Findings of No Significant Impact] and the substantive impact of NEPA.

The NEPA regulations, as many of you know, require that an agency must establish time limits for a NEPA process if an applicant requires them. This provision was the single most desired provision, when we were going through the regulations adopting process, by the American business community—which had chosen as their representative, and I think fairly, the U.S. Chamber of Commerce. This is the single thing they wanted most. You're also dealing with states, you're dealing with the environmental community, and you're dealing with a wide spectrum of folks. It is also one of the most underutilized provisions of NEPA. I think that's because applicants at the beginning of the process think, oh, we have a good rapport with the agency. We don't want to annoy them by telling them at the outset of the process they have to have a time limit on themselves. I'm sure everything will work out fine.

Well, this is intuitively sensible and is almost always the wrong thing to do. Everything takes longer than one expects, and the most generous time limit in fact will be shorter than what it actually takes. But there can be a conflict between time limits and between public participation. So, there's tension, but there need not be irreparable tension. The usual 45- and 30-day comment periods need not be affected by an agency having to accelerate its own internal reviews.

Let me conclude with a few words about mitigated FONSI, which are another example of tension between public input and efficiency. You're all aware of the U.S. Supreme Court's unbroken series of rulings against NEPA. It has never ruled in favor of NEPA in every one of the 16 or 17 cases that it's had, going back to *Vermont Yankee*,<sup>17</sup> saying that NEPA was essentially procedural. But at the same time, there is a parallel set of rulings from the courts of appeal that are absolutely unanimous that have upheld the concept of mitigated FONSI whereby an enforceable commitment to mitigation was in effect exchanged for the non-preparation of an EIS by mitigating environmental impacts below the threshold of significance.

The courts' rationale has been [that] NEPA isn't there to generate paperwork. If you get the desired end—less environmental impact—without going through the second round of paperwork having to achieve NEPA's ends. And that has an intuitive appeal. The CEQ had at the beginning in its "40 questions"<sup>18</sup> put something of a damper on the concept of mitigated FONSI, and we did that because we felt that was a prospect for backroom deals in which an applicant can negotiate with an agency not preparing the EIS but only prepare an EA followed by FONSI, and the public could be shut out of that process.

That too, I think, represents a legitimate concern. I think both sides have merit in that, but I think it's important to keep things in perspective. Every year, there are about 450 EISs prepared, and those are both draft and finals that we're talking about—somewhere around 225 EIS targets in a given year. Every year, there are 40,000 EAs prepared, presumably followed by FONSI, many of them mitigated FONSI. A vast proportion of NEPA practice consists of these EAs and mitigated FONSI, that's just a fact of life. But it's something that is also enforceable if you have a mitigated FONSI with enforceable provisions, and that's substantive despite what the Supreme Court said in the EIS context; people have agreed in order to get a mitigated FONSI to have enforceable conditions of mitigation.

So, over time, I've come to think that we went too far at the CEQ in discouraging mitigated FONSI. It is after all possible to ensure public participation, which I think must be done in mitigated FONSI. You can't have backroom deals, but still bypass some of the paperwork and the delay that give the NEPA process a bad name in many people's minds and raise the possibilities of amendments on the Hill.

Let me conclude now by stressing again that NEPA has furthered not only its stated aim of building environmental considerations into government decisionmaking. It has also become an instrument of democracy—building public participation into that very decisionmaking. NEPA has spawned progeny throughout the United States with about one-half the states having some sort of NEPA requirement, eight of them having ones about as pervasive as the federal government. It has become what is, I believe, the most imitated law in American history, with over 80 countries having adopted statutes based on NEPA. NEPA has served the nation well. It has served the environment well. It has served the public well. Happy birthday.

**Mary O'Brien:** No U.S. law comes close to NEPA in its honoring of public input and acknowledgment that anyone might have a better idea or information than the lead agencies. No U.S. law implements democracy more comprehensively than NEPA. NEPA §1502.14, requiring the lead agency to rigorously explore and objectively evaluate all reasonable alternatives, even those not within the jurisdiction of the lead agency, is an unusually open door through which

17. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 511 (1978).

18. CEQ, *The Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 40 Fed. Reg. 18026 (Mar. 23, 1981).

good ideas, previously ignored values, new information, and business-not-as-usual can enter.

NEPA supports American ingenuity. Five examples with which I'm personally familiar offer a sense of how the NEPA process, when engaged in by the public, can lead to—again quoting NEPA regulations—“a clear basis for choice among options by the decisionmaker and the public”<sup>19</sup> and to decisions that simultaneously better protect our shared environment and achieve, if not consensus, at least a disinclination to litigate.

1. In the mid-1970s, the U.S. Forest Service in Oregon and Washington had been locking horns with citizens over the aerial spraying of herbicides to kill vegetation that might compete with commercial conifer trees planted in logged forest units. When a series of courts ruled that the Forest Service was not admitting the dangers of these herbicides as required by NEPA, the Forest Service decided to write an EIS for managing competing vegetation.

Citizens, tree planters, and scientists communicated with local district rangers and private foresters who were quietly using alternatives to herbicides, for instance planting two-year-old trees rather than one-year-old trees to resist plant competition and manually clearing competing vegetation in the immediate vicinity of conifer saplings. Out of this, a set of alternatives leading to greatly reduced herbicide use was submitted to the Forest Service for consideration and analysis in the EIS. That is the process aspect of NEPA. But in a fundamental about-face in forest management, the regional office adopted most of the submitted alternatives to reliance on herbicides in its 1988 EIS.

2. Hells Canyon National Recreation Area in Western Idaho and Northeastern Oregon is the deepest river-cut canyon in North America, ranging from rocky alpine habitat to desert at the Snake River. In 1994, the Wallowa-Whitman National Forest supervisor initiated a new Hells Canyon national recreation area comprehensive management planning process. A citizen's group, including a hunter, commercial forester, Nez Perce tribal member, Confederated Tribes of the Umatilla Indian Reservation tribal member, geologist, botanist, local hiker, and a staffer of The Wilderness Society spent days and then months writing a comprehensive alternative for all aspects of Hells Canyon management. When the forest was about to publish a final EIS without analyzing the group's native ecosystem alternative, the Forest Service's Washington Office stepped in, saying that NEPA requires consideration of reasonable alternatives and that the relatively new forest supervisor needed to restart the entire EIS. The local Wallowa County Commission then submitted their own alternative and the supervisor established a federal Resource Advisory Committee (RAC) subgroup to study all three alternatives. This RAC subgroup of diverse stakeholders met in the field and in a room for more than one year looking at the three alternatives, management issue by management issue. The 2004 final EIS was markedly more conservation-oriented than the original one that had been heading to the printer years earlier, including leaving one-half of Hells Can-

yon free of livestock grazing and closing numerous roads to the benefit of the Nez Perce tribe, backcountry hunters, and wildlife; no one litigated.

3. Now to Moab, Utah. Sixteen million tons of uranium mining tailings are sitting in a floodplain of the Colorado River adjacent to Moab and Arches National Park. You can see the Colorado River in the lower part of the picture and how close the 16 million tons of uranium mining tailings are in relation to the river. The Colorado River supplies drinking water for millions of people in Phoenix, Las Vegas, Los Angeles, and San Diego. The possibility that a flood could pollute the Colorado River with radioactive wastes is a classic of a low-probability, catastrophic consequence, a situation warned of in the NEPA regulations. We're all painfully aware of a 2010 catastrophic consequence that had a low probability of occurring but which had been foreseeable as a possibility.

Nevertheless, in 1986, 1993, and 2000, the Nuclear Regulatory Commission (NRC) issued two EAs and an EIS with only one option: cap the tailings in place with clay. The NRC asserted that only the company managing the site could propose alternatives. The EIS claimed groundwater contamination would not happen, but the Oak Ridge National Laboratory found groundwater contamination, and the U.S. Fish and Wildlife Service found the water lethal to fish.

Since the company managing the site had no financial ability to clean up the groundwater contamination, it filed for bankruptcy, and Congress gave site management to DOE. DOE worked with 12 cooperating federal agencies, states, and several local units of government, as well as the Ute Mountain Ute tribe and local individuals and conservation groups to craft an alternative of transporting the radioactive tailings away from the Colorado River. In less than two years, an acceptable site had been found, and an EIS was in place for moving the tailings 30 miles to the north, away from any river. Now a train leaves each night from Moab carrying uranium waste away from the vulnerable Colorado River.

4. For 20 years, the Oregon Department of Transportation and Federal Highway Administration were hell-bent on building a four-lane highway through the same wetlands that the Bureau of Land Management and U.S. Army Corps of Engineers (the Corps) were restoring in West Eugene—the gray [in the photo]<sup>20</sup> being the wetlands, the black being the highway.

Twice the citizens of Eugene voted to build the highway, even as the wetlands' Fenders blue butterfly and the Willamette daisy became federally endangered. In 2007, a local group of pro-highway business leaders and pro-wetlands environmentalists decided to simply meet together regularly and look at their options in West Eugene. They eventually engaged city, town, county, and state representatives, and in 2009, decided that a variety of nonfederal actions could be taken to simultaneously protect the wetlands and provide for better traffic flow than would have been provided by the

19. 40 C.F.R. §1502.14.

20. For photographs of the wetlands, see *A Highway, A Wetland, and A Divided Community*, in NEPA SUCCESS STORIES, *supra* note 2.

highway. As a result, the no-action alternative was selected for the final EIS.

5. One last example: in 2004, the Dixie National Forest in southern Utah initiated a travel planning EIS with the goal of deciding which of 5,200 miles of roads and off-road vehicle (ORV) routes on the forest, many of them created by ORV users over the years, should remain for recreational, commercial, and/or forest management uses.

Now ORV users are passionate about their ability to access the national forest on diverse, challenging, long, scenic, or near town routes. Many other forest users find that proliferation of routes is excessive, the maintenance needs large, and the impacts destructive of fish and wildlife habitat. In 2007 and 2008, the current forest supervisor directed a superb effort. He actually claims to not like NEPA, but he implemented it superbly. The Dixie National Forest gathered and electronically posted on-ground information on each route, and the supervisor both sought and considered all community, county, and regional organizations' suggestions regarding retention or closure of individual ORV and other vehicle routes and roads.

In what is a major accomplishment, the final EIS of 2009 was not litigated by any party, even though the decision was to close 73% of user-created routes and 27% of forest system routes and roads. This does leave 2,700 miles of more thoughtfully located routes and roads for vehicle access.

The implementation of the new plan is equally impressive with the staff tailoring route closures and camping site modifications to both the needs of natural resources and the psychology of forest users. The meadow shown in this photo<sup>21</sup> was once used as a free-for-all camping site for motorized vehicles. With no signs excluding the use of vehicles but simply the well-placed boulders and a gravel track, motorized vehicles now head to less than one-half the meadow and have a recovering meadow as an amenity.

In all of five of these cases and in this new publication, *NEPA Success Stories*, coalitions of citizens worked together to submit comprehensive alternatives or federal agencies actively sought out the ideas of individuals and groups. In each case, the lead federal agency, if not initially, ultimately seriously engaged with the proponents of alternatives and acknowledged that at least some, if not most, of the proposed alternatives' key features were wiser than their original proposed action.

Humans are notoriously creatures of habit and agencies even more so. Thus, none of these agency decisions to change proposed plans or habits took place quickly. It is to the credit of the NEPA regulations that the changes did take place. Such changes could happen because NEPA regulations require federal agencies to operate as if they're in a democracy. That is, the regulations require the lead agency to seek out, objectively analyze, respond to, and—most importantly—consider *adopting* alternatives or parts of alternatives that the public—not they—proposed. This is a law whose 40th birthday hopefully will be followed by its 100th. Thank you.

**Carol Borgstrom:** I'll start with an observation, and that is that I'm the only current federal employee on the panel, which gives me an awesome responsibility to represent the entire federal family that is implementing NEPA. I would say that there are a lot of feds out there who are sincerely dedicated to good NEPA compliance and are doing a good job as environmental professionals. Next, is a disclaimer: I realize I'm speaking to a group of distinguished legal scholars, and I have to admit that I'm not a lawyer. I'm hoping that we have time for some active public participation before our session is over, but I would ask you to direct your tricky legal questions to other members of the panel.

What I'm going to do is talk to you about what we are trying to do at DOE to make NEPA work and work well. Most of my experiences with NEPA come from my work at DOE. I've been there since day one of DOE doing NEPA, so I bring that perspective to this conversation. I can tell you that even with all of that experience and the desire, and the willingness to engage in good public outreach and good transparency in the NEPA process, that sometimes it is a struggle. What I'm going to do today is accentuate the positive and tell you about our success stories, and maybe we can talk on the side about some of the things that aren't working so well. But I'm happy to tell you that in the *NEPA Success Stories* booklet, there are three DOE stories. We can be proud of that.

The first thing I wanted to talk about is the NEPA website at DOE. I think it's fair to say in "NEPA space," as in any other endeavor, knowledge is power; information is key. And I think that the proper use of the Internet is a part of good government today. It's a way that the government communicates with its citizens. It's not the only way; it may not always be the best way, but I think we need to acknowledge that it is an important way of communicating with citizens. We're proud of our NEPA website. I hope you've seen it. I hope you use it. It's a resource that frankly was initially envisioned as a tool to help us internally at DOE. We thought by getting things organized on our website, it will help our NEPA Compliance Officers, it will help our NEPA contractors, and the result will be a more efficient NEPA process at DOE.

What's happened over time is that the NEPA website has become an effective community bulletin board. That's where you can find information about what's going on in NEPA space at DOE and in fact elsewhere in the federal government. So now it's both a resource or a reference document, and it's a community bulletin board. It's "all things NEPA" for us at DOE.

The NEPA website is the go-to place for everything NEPA related—past, present, and future—at DOE. We have on the website all of the NEPA guidance that one would need, all the NEPA regulations that we're going to refer to from the Department, as well as EPA's and the CEQ's. It's all there, handy, at one place for everybody to see.

We have a public participation calendar on the website so you, as members of the public or you as other federal agencies, state agencies, environmental groups, representatives of industry, can see in one place what the deadlines are for public comment periods on EAs, or EISs. You can see the

21. For photographs, see *Rethinking Routes and Roads on a National Forest*, in *NEPA SUCCESS STORIES*, *supra* note 2.

dates for upcoming scoping meetings and public hearings. Everything is laid out there for people to see in the public participation calendar.

The website is also our library, our archive. We have been posting our NEPA documents since the mid-1990s. You'll find all of our EAs, EISs, FONSI, regulations, and notices of intent posted on the website, with a few exceptions. The exceptions have to do with national security considerations. We also have a secure server, and certain documents are only available with a password. If you are another federal agency or a state agency and have a reason that you need to see these documents, we can make arrangements, as appropriate.

Categorical exclusion determinations are a new area of public involvement for the Department. Last November, our deputy secretary issued a policy that DOE will document and post on our website categorical exclusion determinations from Appendix B of our regulations, which is most of our categorical exclusions. We have posted about 3,000 categorical exclusions since last November. They are available to you in a searchable database, so you can search by location, by keyword, by date, by categorical exclusion applied. In fact, that categorical exclusion database is posted on the Data.gov website and was identified as a high-value data set—a part of DOE's transparency.

Say you're a member of the public and you're interested in the status of a NEPA document. You've heard DOE has started an EA or an EIS, but you haven't heard anything in the paper, you don't know what's going on, when is it coming out, when do you need to get ready to comment. All of that information is available on the website. On a monthly basis, we update EIS schedules showing the milestones that have been accomplished and the milestones that are anticipated, and the same thing with the EA schedules. This is also a place where we will note cooperating agencies that are working with DOE. We try to keep everybody informed of what's going on.

Also, relatively new as a policy in the Department—since July—we are now posting on our website draft EAs that add to the public participation for the EA process. The way we set up this policy is we haven't required that all draft EAs be posted on the website, but we have a strong encouragement from the deputy secretary that all draft EAs be posted. If one is going to make a draft EA available for comment, then it shall be posted on our central website. We're trying to encourage and facilitate more public participation in the EA process.

The last bullet refers to the other NEPA resources on the website. We've established a listserv-type of e-mail notification system. If you'd like to know when a draft EA is available for comment, we'll send you an e-mail notification. If you want to know when a NEPA document has been made available or any other type of notification, sign up, subscribe to one of two listservs that we're maintaining. We have an Ask.NEPA e-mail. If you have a question about NEPA—general or specific—send an e-mail to Ask.NEPA and we'll get back to you. We have a toll-free phone number. We're there. We'll answer any questions the best we can.

Please get back to us if you have suggestions on things that we can do. We're always looking for new ideas. Some members of the staff weren't born when NEPA was enacted. They have some new ideas that they're throwing at me: Facebook pages, social media sites, so you may see that coming from DOE.

I'd like to talk a little bit about our Lessons Learned report, because I think that also is another vehicle that we have at DOE to reach out to the public. We've been doing this for 16 years. What you see up there is the 64th edition of Lessons Learned and it's available online. If you'd like a paper copy, send us an e-mail and we'll send you a paper copy and put you on our distribution list. We found that more and more people are satisfied with the electronic notification. Again, this started out as a tool for our own people. So, the target audience was NEPA Document Managers, our NEPA Compliance Officers, our NEPA support service contractors, and what we found over the years is that our readership has grown. We get a lot of responses from academia, from other agencies, people who are reading our publication and use it as a way of getting further information about what's happening in the NEPA world generally.

Actually, the idea for the NEPA Lessons Learned Quarterly Report stemmed from an initiative from one of our prior secretaries of energy, and the emphasis at that time was NEPA must be cheaper. It was metrics. The idea being what is measured gets done, and so the NEPA Lessons Learned Quarterly Report was intended to be the way we would report on the cost, and the time, and the effectiveness of NEPA documents. So, we have data on the cost and the schedule (the time) for every EA and EIS since the mid-1990s. And it's interesting. We periodically will report the average and median cost for EAs or EISs, or project EISs versus programmatic EISs and that sort of thing, and we use that information to help us improve our processes.

We also track what we call effectiveness, and that's a very subjective rating, but I think it's also useful to us. And that is a rating that's made by DOE participants in the NEPA process. It may be the document manager; it may be somebody in the program office who was affected by the NEPA decision, whether or not they feel the NEPA process had an influence on decisionmaking. Was it effective or was it just an exercise? So, we keep track of that.

You'll see in the September issue, which I've got highlighted up there, we had the article about using eNEPA, we use eNEPA or our NEPA website, as a way of enhancing public participation.

In general, what we like to do in Lessons Learned is spotlight the success stories, and I was going to give you a reference, because Mary talked about the Moab uranium tailing success story. Well, we had written about that in our Lessons Learned Report back in 2005, and I want to quote from the article in which we noted the extraordinary collaborative efforts among DOE and the 12 cooperating agencies. The stakeholders praised DOE for listening to public concerns and reflecting responsible opposing views. So, what we hope happens when we circulate these kinds of good news stories is

that they inspire other people and other parts of DOE—who may not have experienced such joyful public interactions—to give it a try.

I'll give you two quotes. This is regarding the Moab uranium mill tailings EIS that Mary was talking about, and this is a quote from Jerry McNeely, who was at the time chairman of the Grand County (Utah) Council. He said: "The Department of Energy's position in the final EIS is evidence that the DOE has listened to our concerns." That's nice to hear, and we got 16,000 comments. We had a lot to listen to.

Another comment: this is from the Utah Chapter of the Sierra Club, Jean Binyon—this is speaking to DOE—"You are to be congratulated on the careful consideration and thoughtful responses you gave to the large volume of comments received." I think that's the NEPA process working well, and it resulted in a decision that everybody is happy with.

Other things that are in our Lessons Learned Quarterly Report are listed there (on the slide). We have guidance that is in the form of mini-guidance and informal guidance. We provide information on NEPA training and conferences. The December issue will have something on this meeting, and we also welcome guest articles. If anybody would like to contribute an article, we would be very happy to consider publishing that. And, of course, we also have the Cumulative Index. Again, it becomes a useful reference tool, and frankly we often go back and check and rely on the statistics that were reported in Lessons Learned.

My last one, you'll be happy for that. This is actually my favorite slide and I call it, "When NEPA matters." It could also be called "Why NEPA matters." But it's a slide that I often use or a variation of the slide in presentations to senior management, people that have to be convinced that NEPA matters. The two stories are both in your booklet.

First, on the new production reactor, and that was when Admiral James Watkins was the Secretary of Energy, and this was in the post-Cold War era. The Department had to rethink its whole approach to the nuclear weapons complex, and we had been preparing an EIS that was looking at the possibility of a new production reactor for tritium. In the course of doing the alternatives analysis, it was learned that we really didn't need a new production reactor. Admiral Watkins, in testimony before the House Armed Services Committee, actually said: "Thank God for NEPA. If it weren't for the NEPA process," he said, "we would have made a bad decision." That's good to hear.

The other example is also one of my favorites, and that's the Los Alamos sitewide EIS. Los Alamos is a large 25,000-acre site in New Mexico. It's a laboratory facility of DOE. We had done a sitewide draft EIS, and at the public hearing on the draft EIS, the local forester from the national forest nearby commented that we had discounted the possibility of a wildfire at the Los Alamos site. He pointed to the fact that the Forest Service had some new data that DOE ought to consider in its analysis. We also got some comments from the public along the same lines. So, the analysts went back and looked at the Forest Service report, agreed with their conclu-

sions, and found that the probability of a forest fire was one in 10 years. That was considered to be a significant risk.

Immediately, the Department began to take action to mitigate the possible impacts of a wildfire. We cut vegetation in the vicinity of the buildings. Radioactive waste that had been stored on wooden pallets was moved to aluminum pallets. In the final EIS, we improved the analysis and explained what the impacts of a wildfire might be at the site.

Well, less than one year later, there was in fact a devastating wildfire at Los Alamos. About 9,000 acres of the site burned. And what happened was—well, first of all, you remember we had chopped down the trees and we had moved the radioactive materials. The Emergency Operations Center in our Washington office called the NEPA office right away and said, can we get a copy of that EIS? They wanted to know what's going to happen.. And the truth is that that fire progressed almost exactly as was projected in the EIS, and that gave comfort both to our people, as well as the public, that we knew what we were doing and that we had taken the appropriate measures to reduce the consequences. So, again, NEPA matters. Thank you.

**Dinah Bear:** I was asked to talk about what works and what doesn't work about public participation. The first part of that has been made a lot easier by Mary and Carol's remarks. In the second part—the negative part—I will omit names to spare the guilty. Then, I want to add a thought about what we should do in the future over the next 40 years of NEPA compliance in relationship to public involvement.

First of all, I think, as a general observation, we have come a long way with public participation in NEPA. Nick mentioned the statutory language that ties public involvement to FOIA. And in fact, shortly after I got to the CEQ, actually a couple of years after I've been there, I remember getting a call from a citizen, and then I called the department, which was in fact requiring people to file FOIA requests to obtain EAs, not classified or anything, just on a routine basis. You want to see the EA, you file an FOIA request. Well, it's been decades since I've heard anything along those lines, and I think we quickly disabused that particular department of the notion that such a practice met the spirit and letter of the CEQ regulations.

So, we have come a long way. Mary O'Brien's presentation emphasized what I think of as the most important innovation in NEPA and one, of course, the CEQ regulations call the "heart of the NEPA process," the alternatives process. Every once in a while, we see someone in one of the buildings to our left or to our right [House and Senate] think, oh well, we'll just eliminate the alternatives analysis for a particular project or type of actions. If that happens, what you have left is the documentation of the effects of a decision already made. The analysis may add some mitigation, but it's certainly not the kind of robust consideration of decision-making that the NEPA process under the CEQ regulations provides. So, alternatives I think have been and will stay, I suspect, the single most important place for public involvement. Some agencies have been much more open to that than

others; even the agencies that have been more open to it at times need a nudge in that direction. But I think by now we have some terrific successes in this area. It takes a lot of hard work for people outside of the agencies to put together alternatives just as it does in-house, and that work should be respected and encouraged.

Of course, for citizens or people outside the lead agency to put together an alternative, they have to know that something is happening. Many of the innovations that DOE has undertaken that Carol talked about, the latest of which is actually providing notice of all the categorical exclusions, I think, is extremely helpful in that regard.

I've also seen some other innovations over the years that don't necessarily, I think, make sense in every single situation but I think in certain situations make sense. In several situations I've seen, before actually starting the NEPA process, the decisionmaker undertakes a public process to talk about what the purpose and need should be. In one case I can think of, this was a national forest plan. There had been years of litigation and fights over the forest plans. The forest supervisor at the time realized that one of the reasons they kept having these fights over and over and over again was because there was a wide difference of opinion and wide range of opinion about what the forest should look like—literally look like—and what functions it should serve.

So, he decided not to release another management plan without having a really robust kind of discussion about what the public wanted this forest to look like. It wasn't going to go back to completely pre-European conditions, but did the community want to strive for something the way that it was 46 years ago? What would climate change do to that forest? How did the public want to think about that forest? In that case, it made sense to have that dialogue before even trying to articulate the purpose and need.

Another thing that the Forest Service is doing from time to time, an agency that I realize gets criticized a lot but also actually has done some of the best innovation in the public involvement area, is to post preliminary draft chapters and the administrative records on the websites. This is not without controversy. I once had a person from another agency who does almost as many EISs as the Forest Service start to harangue me in a public forum and followed me all the way out to the parking lot, saying how terrible it was that the Forest Service would release a preliminary draft chapter of an EIS because the public would get incredibly confused. If there was a single change in the preliminary draft of the draft chapter for public comment, the public would be suspicious and upset, and it was going to cause that agency a whole bunch of problems.

I actually think sometimes, again, not necessarily every single time, it is a good idea—and also some of the underlying administrative record documents. I'm seeing that happen right now, where the Forest Service has posted technical reports as well as a draft chapter on their EIS website. I do think in those situations, the agency needs to explain to the public what it's doing. In fact, the situation I'm familiar with now, the agency posted the preliminary draft chapter in kind

of a strange place on the website without explaining what it was doing, and I had this whole slew of calls from reporters, as well as a number of public citizens saying: "There's a draft chapter that's being circulated. There's been a leak." No, actually the Forest Service meant to do that, which they did, but they didn't explain they were going to do this on a rolling basis as chapters develop, and that the public was still going to get comment opportunity to comment once they released the draft EIS. They didn't put it in context. An agency does need to explain what it is doing, but overall I think it can be a good idea.

Flexibility in public forums: I've heard some very creative stories about how public involvement takes place in coffeehouses in Seattle or other kinds of venues that are specific to the culture and location. That happens. Unfortunately, I think it's the exception, often not the rule. I'll talk about that more in a minute.

But I really do want to shift now to a few things that I see that have been problems over the years and continue to be a problem. Thinking about this, I looked at the National Academy of Sciences (NAS) 2008 report on public involvement in the EA process.<sup>22</sup> There is some good work in that report, and I was really struck by several of the factors that they identified as being kind of make-or-break factors as to whether or not public involvement was successful. By successful, I don't just mean that the agency checked the box, "yes we've have our comment period," but that they'd actually provided a sense to the public that they had a meaningful opportunity to participate and hopefully at least provided the option of influencing decisionmaking in various ways.

One of the factors that the NAS panel identified was clarity of purpose. Why is the agency undertaking a particular NEPA analysis? Now, if you told me this 25 years ago, I would have thought, this is pretty basic. Of course, they know why they're doing it. They have a proposed action. They know what the proposed action is. That would be wrong. It usually is the case, I have to say, for site-specific actions. If there is a proposal to build an off-ramp or to fund a particular grant or whatever, the agency usually does know why it's doing it. But I find this to be more common in the case of programmatic EISs.

I personally had experience with two very large extremely expensive high profile EISs, in one case where the agency came over to the CEQ and briefed us on what they were doing—not why—but what they were doing in terms of a very large national-scale programmatic EIS. It was clear in the presentation that they're expecting the CEQ to say, oh, well, that's good, you should do an EIS. Thank you. Bye.

It wasn't clear to me why they were doing it, and I asked them why they were doing it. Unfortunately, this is a common refrain when agencies don't know why they're doing a NEPA document. Well, first they looked at the floor, and then there was a little bit of muttering about, well, the lawyers told us we had to. In that particular instance, I talked to the decisionmaker. It turns out, there actually was a good reason

22. NAS, *Public Participation in Environmental Assessment and Decisionmaking* (2008).

to do the programmatic EIS, but she needed to explain to her folks what that reason was and why it made sense.

In connection with another very large, extremely extensive EIS, I talked to the decisionmaker and asked him what decisions he was going to be making as a result of that EIS. He looked at me and he said, you know, I really don't know. I don't understand this. The lawyers told me it had to be done. The reason to do a NEPA document is not because the lawyers told you to do it. The lawyers may be right, but the agency itself and the people working on the NEPA document and communicating to the public need to understand why they're doing it, besides the fact that lawyers told them to do it, and what decisions are going to be made out of it. And again, this is particularly, I think, a problem in the programmatic EIS context. We see programmatic EISs as good vehicles for cumulative impacts analysis, connected action analysis, etc. But a programmatic EIS is not just a study. It's something that supports a decision. That must be made very clear.

Another factor that the NAS identified was the commitment to use the process to actually inform decisionmaking. I think as a whole, we're getting better at this. When I first came to the CEQ, I think there were more instances I saw of disdain—to put it bluntly—for why we have to go through a public process. We're the experts. What can these people possibly know that we don't know? And Carol's example with Secretary Watkins, Admiral Watkins, saying, thank God for NEPA, here's a man who knew much more about Tritium waste than probably everybody in this room put together. He's an expert on it. But he needed the NEPA process to really focus on what the right decision was. I do see less of this attitude these days. But I think there is still some of that attitude out there, particularly in agencies that have had less experience with the public.

Adequate funding and staff: well, this is kind of probably preaching to the choir because many of you are either still with agencies or have been with agencies, and some of you, I know upfront and personal are suffering seven days a week, 22 hours a day from lack of adequate resources and staff. This is a huge problem that runs the gamut from the CEQ down to all the lead agencies across the board up and around all parts of the NEPA infrastructure, and it is a problem that unfortunately I see getting worse.

I saw a situation last year in which an agency that had lost an entire component of its staff actually tried to get the public involved in a part of the process that I can think of as a government function.

They were clearly doing it because of a lack of resources. The public wasn't comfortable with it, the third-party mediator that was called in ended up assessing and then saying, this doesn't work. I certainly did not think it made a lot of sense. But we are in a situation, and unfortunately I'm afraid we'll continue to be so, in which you can only do less with more so much at some point. I know that this administration is trying to define what a government function is for the first time, and I think that's a commendable effort that may assist in this situation. And a lot of support is needed from

the appropriations committees and those of us who are free to say that agencies need adequate appropriations for NEPA compliance need to be saying that early and often in the appropriation cycles.

Appropriate time and relation to decisions: Nick mentioned the single most sought-after regulation by business was the ability to request schedules being set. I have also noticed the lack of use of that, but I have also seen situations where sometimes under pressure, whether it was self-imposed or by an outside applicant, an agency has set totally unrealistic schedules. Oh, yeah, we'll knock that EIS out in six months. Sometimes, staff knows that isn't going to happen. I have seen an EIS done in six months, but in situations where the resources aren't there, the issues are too complex, and the agency keeps having to announce delay after delay after delay after delay, the public gets exhausted and frustrated. It is not always the case that the public wants more and more and more meetings. At times, they actually want some closure.

One of the things that continues to amaze me, and I still see this problem quite a bit, is fear of the public on the part of some agency representatives. I realize that a lot of people did not join their respective agencies to deal with the public. They may have joined because they want to conduct studies in the wilderness, or because they wanted to design better transit systems or whatever, and they find themselves in a situation where they're supposed to walk out in front of a big crowd of people and talk about things, and then—“they want me to answer questions, too.” But somehow, agency personnel need to get over the fear of the public. One important factor is to understand how the public you're dealing with in a particular context wants their involvement structured, starting off with this scoping period.

At one particular point, I was dealing with two situations, two completely different communities and cultures. If anybody thinks that we're done with social differences in this country, they should go to NEPA meetings all around the United States. Very, very different cultures in different parts. I was dealing with one situation where people hated formal public hearings and very much wanted the kind of informal dialogue that agencies sometimes do in different [discussion] tables—a discussion about water issues, one on transportation issues, etc. They wanted that opportunity. They wanted the chance to actually talk to an agency person in an informal and unstressful situation. They absolutely could not get the agency to do that.

At the same time, I was dealing with another group of people who were very sophisticated about processes, a community made up largely of, frankly, retired federal employees, that knew exactly what they wanted and by God, they wanted a public hearing on the record. The agency absolutely refused to do that. Well, it took this particular group about four days to get letters from two congressmen that said, could you tell us again why you're refusing to do this? Ultimately, the agency redid the scoping meetings.

This isn't an issue of litigation; nobody I know who has ever been successful at suing an agency over what kind of format they had at scoping meetings, but in both cases an

enormous amount of goodwill lost, over what? What is conveyed to the public is that because we decided we're going to do it this way, we're going to do it this way, and we don't really care that that's not the way the public wants to communicate with us.

In both of those situations, I think, a lot of what I actually saw personally was fear. There was this kind of deer-in-the-headlights look. That is really something to get over. I do realize that some aspects of this are very stressful for agency people, but agencies that work over and over and over again with the same constituents should really get to know how their constituents like to interact, and if you're going into community for the first time, ask. Most communities, they may not be completely unanimous, but I have been surprised actually in how many communities—not speaking on a national level but on site-specific levels—communities know how they want to interact with the agency.

I want to shift to my third point, which is a plea for the future. One of the things that has become very clear to me over the years about public participation is that we need to do a much better job of public education before we ever get to a proposed action. The CEQ, in large part as a matter of necessity because of a lack of resources and also because of the mandate to work with the federal agencies, focuses on education of the federal agencies. There is very little training and education for the public interest community and almost nothing for communities, for members of the public at large.

Now, you may say that the websites, for example, DOE's website, which really is terrific, has changed all that. It has helped, but it is not the entire answer. First of all, while DOE really does have an outstanding website, there are some agencies—I have to say—where you could start an electronic treasure hunt by asking who can find the NEPA procedures on their website. And the procedures are there, but they are in places that are not obvious. You have to know precisely what to put in to bring them up. And if you really don't even know the name of the statute, you're really going to have a hard time.

But even a website, it only takes you so far. I remember getting a call when I was at the CEQ, from one lady who did get on the CEQ website. She was in a small town near Santa Fe concerned about a proposed action. She Googled all over the place, found the CEQ regulations, and much to my entertainment value, told me when she first called me that she and her husband had gone to Las Vegas for the weekend and when they drove back, she read every single CEQ regulation out loud to her husband from cover to cover. The good news is they were still married when they got to Santa Fe. I was pretty astonished, but she had a million questions, needless to say, after that. As a result of her self-education, she did end up influencing the decisionmaking process.

On the other hand, I have had a considerable amount of interaction with publics who really don't know anything about the process and don't know where to begin. To start off talking about the NEPA regulations is the wrong place to start. You have to really start off with the organizational structure of the federal government, who these agencies are,

really basic stuff before you go to NEPA process. It's not that they're not interested. They care a lot, but they don't know where to start.

I had a situation a few years ago where I stumbled into a coffeehouse, hoping to not do any work for two hours hiding behind my *New York Times* and latte, hearing a group of people at the table next to me starting to talk about how this highway was going to take their homes and businesses, and one woman bursting into tears saying, does anybody know anything about this law? How do we get help finding about this law? I dropped the newspaper, went up, and said I actually know something about this law.

More recently, I spent three hours just doing a basic primer on NEPA in a community that does not have anything in the way of environmental nongovernmental organizations or environmental infrastructure that was very interested in how they could participate, a community dominated in large part by one particular agency. But let me give you an example of the shocking kind of questions I got. One elderly lady said, you said something about the ability to ask for an extension on a comment period. Could I be arrested if I ask for that? And she was dead serious.

There is a lot of work that needs to be done out there. We obviously cannot undertake the whole job at once. But if you are in an agency that has field offices, I encourage you to think about some sort of maybe yearly open-house briefing forum, educating the public on NEPA in that community or regional offices. If you know something coming that will be big and controversial and involves NEPA compliance, educate the public first about what the NEPA process is, so you're not explaining after the draft EIS comes out what this is all about, they have some sense in the beginning. I think an educated public is a public that is much more likely to be able to take advantage of the kinds of alternatives that Mary talked about and other kinds of successes through the NEPA process. In many places, including rural America and small towns, there is a lot of puzzlement, a lot of concern, and a lot of fear about federal agencies. Talking about NEPA can in fact help not only the environment but people's basic understanding of democracy. That's my challenge for the next 40 years. Thank you.

**Jim McElfish:** I think Dinah has brought us full circle. Sam began talking about NEPA as having its roots in public administration, and Dinah reminds us just how very hard public participation is. And as I look out over this audience and many of you that I do know, I see maybe a thousand years of NEPA experience gathered here. I'm hearing it in a way as a challenge or invitation to do some pro bono or education of our citizens, because we have opportunities to do that moving forward.

**Audience Member:** As a lawyer, I feel constrained to give the opposite views, because no has really done this, I think, with the exception of Dinah at the end.

NEPA is procedural, it is in many instances window-dressing, it's expensive in time and money, it's not frequently

timely for an ultimate decision. It has many loopholes, including mitigated FONSI and categorical exclusions. The ultimate decision that's made under NEPA is not monitored to see whether it's actually followed and done. The Supreme Court recently greatly reduced the effectiveness of NEPA with 17 straight lawsuits, which should tell us something.

The success stories could have as well been done and frequently were done under other statutes that require planning, such as National Forest Management Act or under the terms of the Endangered Species Act [ESA]. NEPA doesn't apply to EPA where allegedly all of EPA's actions are the functional equivalent of NEPA, but tell that to somebody who's trying to find out what's happening in a pesticide registration hearing. And the CEQ has been enormously weakened by being set into the executive office of the president. A good example, the recent Gulf oil spill where leadership on the environment has been taken in many places, but certainly [not at CEQ], at least from the sense of what the public learns. So, I don't expect any particular answers, although I'm sure there are answers to all of these, but I do think it's necessary that the full picture be given, because a vast number of at least the regulated public thinks that NEPA is expensive bunkum.

**Dinah Bear:** Yes. Unfortunately, very unfortunately, time isn't going to allow it, but I would like to address the list of 17 items. I do think some of them were completely wrong.

I agree with you about EPA, in fact. I'll give you that. But I think I just will, in the interest of time, take on your last comment about the vast majority of the public thinks it bunkum. There was an effort, you may recall, several Congresses ago led by the then-chairman of the House Committee on Resources—not to be confused with Natural Resources—Richard Pombo. I don't think that anybody thought that was a pro-NEPA activity. There was a great deal of anticipation that the recommendations coming out of that will be negative. They did—to their credit—run a series of hearings around the country. It was fairly clear, I think that they expected a number of members of the public to be there complaining about what a burden NEPA was. I would encourage you strongly to look at that record.

The environmental community barely needed to show up. They did, to some extent, but if they hadn't, I think the results would have been the same. You had a number of people from the ranching community, from the water-users community, from small businesses, etc., complaining, all right. But if they complained, most of the complaints were about we want to be *more* involved. We want to be at the table even more. They wanted to use NEPA to get their voice heard in the decision-making process. And you did not see any changes to NEPA coming out as a result of that effort.

**Mary O'Brien:** Regarding that NEPA is procedural. It's interesting because of the requirement to consider alternatives, and the agency doesn't have to adopt the obviously most environmentally protective alternative or the soundest or wisest. So then, the claim is, well, it's just procedural, but what I have found over 29 years of working with that par-

ticular regulation is that just the process of having to *look* at alternatives has almost always—if a robust set of alternatives is there—made the ultimate decision better and that where the resistance has come from agencies, it's been the resistance to that process of actually considering or looking at alternatives. So, it's interesting to me that the procedure itself is extremely powerful.

**Audience Member:** I'm interested in hearing the factors that DOE is using in determining effectiveness in the NEPA process.

**Carol Borgstrom:** The rating system we have is a scale of 1 through 5, 5 being deemed to be most effective in terms of influencing the decision. But remember, this is very much a subjective evaluation based on the people who are participating in the process. On the scale of 1 to 5, I just checked with our people—average 3. If you read our Lessons Learned Quarterly Report, we give a little narrative that goes along with this, so people express why they feel NEPA was or was not effective. Very often, they feel if that was not effective, it's because some other process had already achieved the same objective. That does happen sometimes, but they also identify situations where NEPA did in fact make the difference.

The other thing is just to follow up on what Mary said, is the process itself deselects a lot of bad ideas. So bad ideas never make it to the table, because the agency knows that they would be subject to public scrutiny, so a lot of things never get out of the agency based on that process.

**Audience Member:** I do think it's interesting that perhaps with the exception of the discussion of the road project, all of the examples of NEPA success were federal agencies carrying out their federal programs on federal property with federal resources; whereas, the difficulties that were mentioned come up much more because NEPA is a decision program for agencies. Part of that arises from something that Sam didn't really raise in adaptation and flexibility.

But the beauty of NEPA in its elasticity, which is very helpful for federal program decisionmaking, is one element that drives the permit applicant community crazy because they're dealing with uncertainty. You can start a major permit application as a private applicant to a federal agency and have particular concerns, plan your investment, plan your project, allow some flexibility but as things happen, the beauty of it from one purpose is I think a difficulty of it in the application for permits. I'm not surprised that with the few exceptions of major infrastructure, there aren't a lot of good examples of these private applicant permit NEPA processes when they go to EISs.

**Jim McElfish:** So, to summarize it, I think everyone could hear it, putting out the distinction between government-initiated government program or project actions, and private applicants, and whether there are not those opportunities for NEPA success that we're able to find at least on the government-initiated projects and whether the flexibility or elastic-

ity of NEPA poses difficulties or headaches for the private applicant and it's perceived or actually is a detriment rather than a benefit. Somebody—

**Nicholas Yost:** I once had an interstate natural gas pipeline 300 and some miles of going through people's backyards, and so on, and very unhappy people along the way, alternatives coming up usually not in terms of alternatives to the whole but alternative routings within specific portions of the 300 and some miles. In one place, a local citizen activist whose first name was Ann that will have significance that I'll get to in a moment, I don't remember her last name, but she proposed an alternative routing over a several mile period, and that was ultimately adopted by FERC [the Federal Energy Regulatory Commission], and it became known as Ann's alternative.

**Jim McElfish:** When I was in private practice, I had the same experience, actually, so Nick and I should compare notes.

**Sam Kalen:** Just as a follow-up, I think that in terms of your question about basically using adaptive management in the context of permitting, I think in one of the recent CEQ documents, they talk about that and the effectiveness of mitigation, and in fact they look at the Corps and they note the Corps' regulations.

**Audience Member:** It's the U.S. Department of the Army's, not the Corps'.

**Sam Kalen:** Oh, it's Department of Army regs?

**Audience Member:** Yeah.

**Sam Kalen:** And they note that those regs in particular, I think, have adapted management built in there, and some of the recent legal inquiries are in terms of how courts are going to be responding in the future to this kind of adaptive management approach and in particular things like in private permit applications, and so on.

**Nicholas Yost:** I'm involved in a pro bono representation of a group opposing a U.S. Defense Department action and the adaptive management, which is part of the agency's solution that sort of scares the hell out of the plaintiffs, because they don't know what the government agency is really committing to.

**Audience Member:** This goes back to what you said, Dinah. On March 31, a proposed rule came out that I think is really important as it relates to NEPA, because of that balancing act on what you said with lack of resources and personnel and you the use contractors for the preparation of EAs and EISs, particularly EISs. One, I'd like some comments from the panel, and two, I'd like to know, does anyone know the status of when the final rule is expected to come out?

**Dinah Bear:** I don't think that they've announced when it's coming out, but I don't know. I am very uncomfortable with the third-party consultant situation. It has certainly been sanctioned by the CEQ. It's not explicit in the regs, but there are some parameters like the financial disclosure requirement that are intended to make it somewhat better. I think it is a bad situation. From an applicant's point of view, I don't think it's a great situation.

A long time ago, there was a lawsuit by an applicant who spent lots of money for an EIS, and then a U.S. Department of the Interior agency chose the no-action alternative. The applicant was not happy about having paid for the EIS, went to court, and the court said, no, the agency is perfectly entitled to take the no-action alternative. True, of course. But this isn't a great solution for either the agency or the applicant. It's a pragmatic one, because of the budget issues.

I do think at times unless handled very carefully, it can undermine public confidence and at times it can really not work very well. I don't have a great solution for this other, than adequate appropriations for agencies so they can pay for this federal responsibility themselves.