



Bill Cohen Summit Report

1 Executive Summary

On December 2 and 3, 2014, the Environmental Law Institute, the Nicholas Institute for Environmental Policy Solutions at Duke University, and Perkins Coie LLP sponsored a two-day conference on the National Environmental Policy Act (NEPA). Entitled the Cohen NEPA Summit, the conference honored the work and lifelong service of William M. Cohen who, before his death in 2010, was one of the nation's leading NEPA practitioners, instructors, and mentors. Bill litigated NEPA cases for the federal government as an attorney in the General Litigation Section of the Environmental and Natural Resources Division of the Department of Justice from 1965-2000, serving as Chief of the General Litigation Section during his last 14 years at the Department. Upon his retirement, he continued to practice NEPA law as Of Counsel with Perkins Coie. Bill was a frequent lecturer and instructor on NEPA at the Duke Nicholas School, and was a frequent speaker on NEPA topics for ELI, the American Law Institute, the American Bar Association, and other institutions.

The dual purposes of the conference were to examine how and whether NEPA has achieved its objective for the federal government in cooperation with state and local governments and public and private organizations “to use all practicable means and measures...to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans” and to identify possible improvements in implementing NEPA. Approximately 45 NEPA experts attended the conference. The participants represented a broad spectrum of stakeholder interests, including the federal government, states, private companies, non-profit groups, and academia. The conference was facilitated by Tim Profeta, Director of the Nicholas Institute, and Professor Michelle Nowlin of the Duke University School of Law.

This report of the conference proceedings could serve as the basis for a follow-up conference and reform agenda. The program took place at the Washington D.C. office of

Perkins Coie, using funds from the Bill Cohen Memorial Trust. The conference planning team consisted of Don Baur, Perkins Coie; Dinah Bear, former CEQ General Counsel; Ray Clark, former Associate Director at CEQ, the founder of The Clark Group and President of River Crossing Strategies; Al Ferlo, Perkins Coie; Jim McElfish, ELI; and Michelle Nowlin and Tim Profeta.

A full list of attendees is provided at the end of this report in Appendix A. A copy of the Summit's agenda is also included in Appendix B.

2 The Bill Cohen Summit

2.1 Background

Generations of scholars, scientists, and advocates of both better governance and better protection of the nation's natural wealth have searched for the means to bring together the best minds and the honorable goals of a democratic beacon. It took more than 150 years of scholarship, alerts, advocacy, and political action to pass NEPA in 1969. It has changed the landscape of environmental protection in the nation and among federal agencies there is now a cadre of men and women working to implement the grandest goals of the statute that has been called the Magna Carta of environmental law, the environmental constitution, and America's greatest hope for true sustainability. NEPA created the structure and framework to ensure the "survival of man, in a world in which decency and dignity are possible," which "is the basic reason for bringing man's impact on his environment under informed and responsible control."

NEPA has done a lot of good, but it has also fallen short of Congress' original intent and its potential to build a sustainable world and avoid serious environmental harm. With the challenges of global climate change, species extinction, energy and water for growing populations, and the opportunity for high tech environmental entrepreneurship, if there is ever a time to revitalize NEPA, it is now. It can be done and the investment will pay returns environmentally, economically, politically, and socially.

Over the last 45 years, NEPA has affected many high profile projects and altered the way agencies make everyday decisions. It has started conversations, disagreements and helped resolve conflicts about the balance that should be struck between development activities and the environment. These conversations have led to involvement of the courts and Congress. Numerous court cases over the last 40 years have shaped the interpretation of the requirements of NEPA. The outcome has been both good and bad but it certainly has shaped NEPA's potential and limits.

The Council on Environmental Quality (CEQ) estimates that about 95 percent of NEPA analyses are Categorical Exclusions (CEs) (which require no documentation, except by agency policy), less than 5 percent are Environmental Assessments (EAs), and less than 1 percent are Environmental Impact Statements (EISs). Out of a \$3.5 trillion federal budget, about 250 projects are subjected annually to the detailed statement called the EIS. Yet, some say the EIS is costing too much and taking too much time to complete. Others say

the public is being left out of the process with too much haste to make a decision that will harm communities and the environment.

These forces are also affecting NEPA and include significant effects on the way the executive branch operates, and different approaches to agencies' implementation, judicial decisions, CEQ guidance, and advocacy from a variety of constituencies. Pressure to eliminate, or, more frequently, "streamline" the NEPA process has put Congress' original intent in passing NEPA, to inform decision-makers and the public, in peril.

The experts at the Cohen Summit identified both real and perceived problems with NEPA's implementation and discussed potential solutions. If warranted, a second or third session would refine those solutions and focus on implementation strategies.

This report is from the first phase of the Cohen Summit. It is designed to report highlights of the plenary sessions and the breakout groups over 2 days. It is intended as an internal report to the attendees and it was written by a small team who attended and recorded the sessions. There is necessarily a synthesis; however, this report does not reflect consensus but rather lists the issues and potential solutions identified by members of the group. The report is a starting point to begin another conversation. The drafting team has included some conclusions and recommendations, which is a consensus of only the drafting team. These conclusions and recommendations are clearly identified in the report.

2.2 Bill Cohen

The Bill Cohen Summit began with tributes to the life and work of Bill Cohen. Upon his death, Perkins-Coie and the entire Duke team raised money for the Bill Cohen Memorial Scholarship Program. This program aided students who wished to attend Duke NEPA classes, but were barred solely because of resources.

John Cruden, who worked with Bill for many years at the Department of Justice and is now the Assistant Attorney General for Environment and Natural Resources, praised Bill for his integrity and his lifelong willingness to be a mentor. John allowed that he owed much to Bill during his time at the Department of Justice and knew that many around the table also knew Bill well and they would feel the same way. John noted that Bill was devoted to alternative dispute resolution and helped agencies resolve complex issues before they went to court. In his time at the Environmental Law Institute, Bill was a major supporter of the work of the institute, as well as the ABA.



Don Baur, a partner at Perkins-Coie, recruited Bill to come to the firm and said lawyers across the firm benefited from his wisdom and counsel.

2.3 The Sponsors and their Interest in the Summit

The Bill Cohen Summit was sponsored by Duke University, Nicholas Institute for Environmental Policy Solutions, Perkins-Coie law firm, and The Environmental Law Institute. Bill was well known in all three of these communities and all wanted to honor his legacy in environmental law. But specific to the topic, all three institutions have an interest in seeing NEPA work better as a national policy. Duke has a number of efforts to ensure that ecosystem services are accounted for in federal agency decision-making and Bill had contributed over 15 years to NEPA instruction at the Duke Environmental Leadership Program. At Perkins-Coie, no NEPA litigation was without the advice and counsel of Bill. He was a frequent advisor, collaborator, and teaching faculty member for the Environmental Law Institute in its many training programs for federal employees and the legal profession.

3 Summit Workgroups

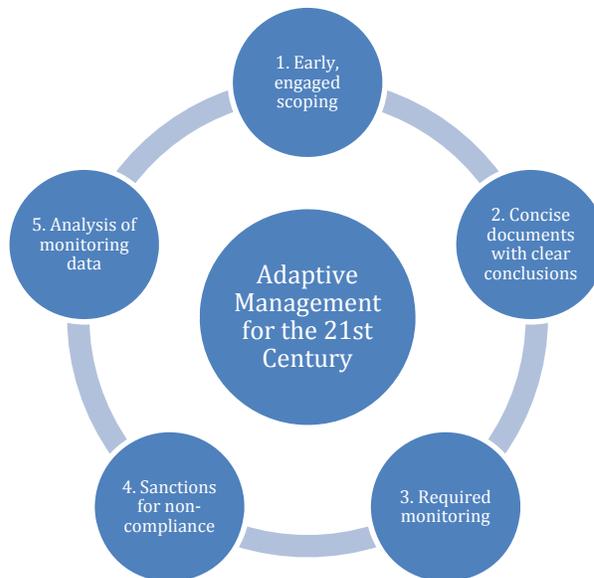
In order to focus efforts and encourage brainstorming, the Cohen Summit participants met in small workgroups to discuss five issues that they agreed were important areas of NEPA practice needing reform. The workgroups then examined the following agreed-upon subjects in order to come up with solutions and ideas:

- Building a 21st century environmental impact evaluation model;
- Improving document preparation and access;
- Improving public and agency involvement;
- Ensuring accountability for mitigation and monitoring; and
- Presenting creative concepts for resourcing NEPA.

It is important to note that the separate workgroups may have reached a consensus on an issue, and if it is reported as consensus, it is the workgroup's consensus and not that of the entire summit. It is also important to note that some agencies (such as the Department of Energy) have already implemented useful changes to NEPA practice that could be implemented at other agencies.

3.1.1 Building a 21st Century Environmental Impact Evaluation Model

Although this idea was put forth as a total reimagining of NEPA as a fully iterative process for the 21st century, the workgroups largely focused on applying adaptive management as a technique to expedite the process, acting in the face of uncertainty, incorporating monitoring, and ensuring mitigation is executed. This one change could fundamentally alter the existing practices so that the methods improve and data are not lost.



Because NEPA practice is the product of 40 years of case law, it may be difficult to change the practice without rethinking the NEPA regulations. But, in order to reinvigorate NEPA for the 21st century, some participants believed that certain steps must be taken now without contradicting existing case law. Provocative ideas that were discussed and debated include:

- Expand the use of adaptive management to act in the face of uncertainty;
 - Introduce sanctions and required remedies for mitigation failure
 - Engage the public in monitoring
 - Conduct more aggressive public and analytical scoping
- Provide rearranged and more readable web-based documents; and
- Combine the Final EIS and Record of Decision.

3.1.2 Improving Document Preparation and Access

The participants agreed that improving document preparation and access would benefit the public (by making documents more readable and accessible) as well as agency staff and decision-makers (by making existing information easier to locate and use, and by making documents more readable).

The main problems with document preparation and access, as discussed by several speakers at the Summit, are that the documents are often unreadable and inaccessible. It is entirely possible that producing more accessible, readable documents will be a key strategic change to ensure senior-level decision-makers will engage in the process and that the public can participate in the NEPA process. Excessively long and poor quality NEPA documents are a long-standing and recognized problem; this was cited by CEQ in their retrospective on NEPA's 25th anniversary and one of the main problems listed by agency and contract NEPA professionals in a 2006 national survey by the Federal Highway Administration (FHWA) and AASHTO.

To improve readability, options were put forth by individual speakers that included the improvement of EIS summaries, agency competitions to recognize well-written

documents, requiring agencies to write key sections (such as Purpose and Need, Alternatives), allowing the combining of the Final EIS and Record of Decision (which FHWA encourages), and asking CEQ for new guidance on EAs.

In terms of accessibility, many Summit participants would like to see all NEPA documents on publicly accessible, searchable websites. Several participants also put forth the idea of requiring public review and comment on EAs (with a realization that this would require CEQ guidance).

While these individual solutions may all have merit, the participants generally agreed that we must determine the best way to incorporate into NEPA analysis the vast body of environmental laws and regulations that independently require minimization of many typical impacts (dust, stormwater, etc.). Determining this may address the question of whether, and to what extent, practitioners should be analyzing issues in NEPA documents that are chiefly or entirely determined by following the law and whether these issues could be project design features. Some participants suggested the focus instead should be on enforcement and monitoring and whether NEPA regulations should be changed to reflect this change in focus.

Other suggestions to improve document preparation and access were:

- The need to address sharing of proprietary information;
- The consequences of establishing timelines with milestones and penalties; and
- Revamping the nature of the document itself so that the EIS is actually a summary of no more than 150 pages, with an accompanying volume of the science behind the conclusions.

3.1.3 Improving Public and Agency Involvement

Because of a lack of timely public and agency involvement, the participants agreed that some decisions are being made without all the relevant information. In order to improve public and agency involvement, the Summit participants discussed whether training, access to information, and/or better coordination is needed.

Training may be needed for both the public and for agency staff. Education could include guidance about effective use of scoping, purpose of the Federal Advisory Committee Act, the role of the public in making NEPA an effective decisional tool, and the use of modern technology such as social media for information exchange.

Better access to documents, data, and personnel would improve public and agency involvement. Actions that might further this goal include the establishment of a publicly accessible, searchable website or set of websites with all pending and completed EAs and EISs, including geolocation. EPA's "[NEPA Assist](#)" is a recent example of this type of tool.

Finally, coordination among different agencies and coordination of interactions between the public and agencies would increase involvement and ensure timely involvement. This could be done by requiring a default status or "opt out" for cooperating agencies, providing early public notice for EAs, amending regulations to encourage early

engagement, funding an interagency permitting center, and/or creating bridge positions between technical experts and decision-makers.

3.1.4 Ensuring Accountability for Mitigation and Monitoring

This was a topic that was discussed throughout the Summit and the majority of participants agreed that unless mitigation efforts are required to be monitored, very little effective mitigation is actually taking place and a wealth of useful data is being lost.

Further, because so many EAs result in a Mitigated FONSI, the Summit participants discussed the potential that the current failure to require monitoring may lead to a failure of mitigation and the loss of valuable scientific data, or worse, significant impacts to an important ecosystem component. Requiring a mitigation and monitoring action plan (and its funding) could go a long way to addressing this problem. Such a plan would include a process for administrative review, would consider climate change, and would benefit from a Presidential Executive Order directing the agencies to engage in early planning, engage the Office of Management and Budget (OMB) in agencies' management of the process, and fully fund commitments made in the NEPA analyses. Some thought that the full implementation of these ideas would then allow the pre-analysis of mitigation measures in which lessons learned from other projects could be incorporated.

These ideas would require additional thought, analysis, and debate. The time limitations of the Summit did not allow full discussions. Some thought that the Cohen Summit could yield small workgroups to assess the consequences and chance of success of these reforms. These long-term suggestions could be a part of a Phase II of the Summit, and if a general consensus could be reached, these suggestions might be included in a report to the next Administration.

3.1.5 Presenting Creative Concepts for Resourcing NEPA

Because improving NEPA analyses requires capital, people, or better use of existing resources, the participants discussed ways to increase the total amount of resources as well as make wiser use of resources.

The Summit participants understood, often from firsthand experience, that agency resources are limited and that agencies are very unlikely to simply receive more funding for NEPA. As a result, this workgroup discussed finding ways to account for existing assets and resources and reallocating them in a more effective manner. This workgroup also considered ways to bring in outside assistance without a direct monetary cost.

Early on in the discussions, it became clear that more information is needed on agency costs and organizational structures. Because each agency accounts for costs differently, and most do not have a line-item for "NEPA," it is impossible to accurately determine what resources currently exist. Until this is addressed it is difficult to determine how to better use the resources. The absence of assigned budgets and consistent costing protocols also make it difficult to broadly assess the cost of NEPA across many agencies. The Congressional Research Service (CRS) and the Government Accountability Office (GAO) has done numerous studies; GAOs' most recent study concluded it was almost impossible to tell the costs and time it requires because there is little data to support any conclusion.

Ideas were put forth for better use of existing resources. These included requiring Senior Executive Service NEPA training; improving and expanding data access and sharing; and establishing a Chief Sustainability Officer within each agency to oversee NEPA practices and ensure that the intent of Section 101 to drive federal policy toward sustainability is being followed.

Other ideas centered on provisions to allow using local expertise. This would entail working with colleges and universities or private institutions to conduct analyses, write sections of documents, assist with public engagement, and monitor mitigation efforts. This idea was further expanded to include partnering with tribes in order to strengthen cultural resources protection and to access tribal environmental expertise.

4 Themes from the Summit

Immediately following the Summit, the authors of this report¹ reviewed notes and flip charts to try and synthesize the proceedings. The drafters reached a consensus around five themes that the authors believe to faithfully represent the discussions at the Summit and that provide a useful means to report on what transpired and to plan for next steps. The common themes developed from the Summit are:

- A. Recommit Senior Leadership
- B. Organize NEPA Role in Government for Success
- C. Invest in Streamlining
- D. Maximize the Flexibility of the CEQ Regulations
- E. Open Government (Transparency) as NEPA Intended

Each theme is discussed below with reference to the Summit proceedings as well as providing additional supporting information.

4.1 Recommit Senior Leadership

The Summit dialogue concluded that successful use of NEPA to solve environmental issues and blend environmental goals with social, economic, security, and other needs occur when senior managers get involved, and agencies do not simply defer to consultants. In some quarters, NEPA has become a document to be prepared on the timeline of a project that is important to the agency leadership. However, NEPA is much more than a document, it is at the heart of how an agency carries out its public tasks in a responsible way, while using the best science and accountability tools. It is intended to help decision-makers balance policy, programs, and projects with the needs of communities and the environment. To truly embrace the letter and spirit of the statute, the leadership of an agency must be engaged in its implementation. It is only the senior leadership that can commit an agency to the goals of Section 101. Without such commitment, it is difficult to imagine a path to fulfill the ideas contained in NEPA.

This essential issue crossed many work groups. It was cited by the work groups, surveys, and external reading material. All the attendees had read-ahead material that included a survey that was conducted by Ron Lamb. He led a survey conducted with NEPA practitioners and published these findings in the National Association of Environmental Professionals Journal in an article entitled “Essential Elements of Effective Implementation of NEPA-Agency Decision-making Process.” The stark conclusion of this survey was that no other issue came close to the issue of senior leadership commitment. The highest ranked element (1. Critically important) was senior management support for the NEPA process. There was no substantive difference in responses from federal agency employees versus contractors. The top three responses were 1) senior management support for the NEPA process to include the consideration of environmental impacts along with technical and economic considerations, 2) adequate funding for EAs/EISs or other program elements, and 3) an agency culture in which

¹ Ray Clark, Lisa Mahoney, David Mattern, Michelle Nowlin, Tony Silvia

NEPA and related environmental staff can effectively participate in the decision-making process (Lamb, 2014).

Appointing an agency Chief Sustainability Officer who would report to the head of the agency or department with jurisdiction over the decision, and having oversight over the NEPA officer would bring the attention the statute requires. Just how this might work, its precedents, and its parallels in industry, along with an analysis of its success can be the mission of one of the follow-on work resulting from the Summit.

There are things that can be done in the short term. However, systemic fixes and analyses will take a longer time frame and can be brought to a new Administration during the transition phase.

4.2 Organize NEPA's Role in Government for Success

This also requires senior leadership and, as discussed above, there is a need to review the agencies' organizations for implementing NEPA and ensure that organizations at regional/field offices reflect alignment with the CSO chain of command and that NEPA staff in the field have access to senior level decision-makers. Common elements for agencies to consider are:

- a. NEPA is interdisciplinary, but there should be certain requirements in education and training that is required.
- b. The Office of General Counsel relationships to program management and interpretation of the requirements of NEPA should be clarified.

The current organizational structure in most federal agencies may not lend itself to ensuring that key people are in the right position to influence decisions that should benefit from the analysis coordinated under NEPA. There was discussion at the work group level as well as the plenary that the environmental specialists managing and/or preparing the analysis to support the NEPA document may be too far removed from the decision-makers on the project, geographically or organizationally. Staff managing the NEPA process have been cut in many agencies and remaining staff may have little or no experience or training in managing the NEPA process. Organizational placement can affect the integrity and value of the NEPA process for a given project or program.

Creating an atmosphere within federal agencies where the NEPA process is set up to succeed, and where the decision-makers can quickly advance to the functional end of the trajectory is key to ensuring that the intent of NEPA is met, which is to incorporate the consideration of the environment into federal decisions. Key elements of organizing the government for success include:

- Ensuring that NEPA staff has direct access to decision-makers.
- Creating job requirements that help to ensure that agency staff responsible for managing the NEPA process have the skills necessary to do so.

4.2.1 Access to Decision-makers

The purpose of the NEPA process is to inform decision-makers of the potential of their actions to affect the quality of the human environment. NEPA does not require a specific

outcome but requires that the decision-makers as well as the public have been made aware of the potential effects of the action.

Decisions about a project or program under consideration that are made outside of the NEPA process without any engagement or discussion of the decision with the resource experts, the NEPA project manager, or the public minimize the positive impact NEPA can have. This leads to not only program managers and decision-makers viewing NEPA as a check-the-box compliance requirement instead of a decision-making process, but also sends a message throughout the organization that NEPA is perfunctory.

In most agencies, NEPA staff is not organizationally co-located with the program staff who are the project proponents and/or decision-makers nor are they at a senior level to monitor the NEPA program. As a result, agency program staff, and sometimes the NEPA staff, tend to see their responsibilities as separate and distinct rather than as part of the integrated decision-making process that NEPA intended. Similarly, agencies are increasingly leaving the management of the NEPA process to junior-level field staff who have limited or no ability to communicate with the decision-makers in the regions and at headquarters who will be actually making decisions based on the NEPA analyses that the NEPA staff are preparing. In turn, junior-level staff contracts for the analyses to outside vendors.

To address this challenge, agency heads and their political deputies could:

- Establish a Chief Sustainability Officer that helps to ensure that NEPA analyses are integrated with agency decision-making processes at the highest levels. This person would be a senior-level person with the trust of the agency head and the gravitas to command the respect of the entire agency. It could be a political appointee position.
- Review organizational and office structures to ensure that execution of environmental policy is integrated with program and project development.
- Review field and headquarters office structures to ensure that NEPA staff is on the same organizational level as program decision-making staff and the General Counsel.
- Ensure that NEPA staff does not report directly to program staff with decision-making authority on their projects.

4.3 Invest in “Streamlining”

While there is much talk and Congressional support for “streamlining” NEPA, there are few analyses with details regarding what investments may be required that would be more than a one-dimensional “do it faster.” Few, if any, at the Summit thought that NEPA analyses should not be reviewed to make them more efficient. There are classical management techniques to make document production move faster. However, to gain these efficiencies and meet the spirit of the law, a more thorough analysis would include making the right investments to ensure performance for the dollars invested. In 2014 the General Accounting Office, at the request of Congress, did a survey and concluded:

“Little information exists on the costs and benefits of completing NEPA analyses. Agencies do not routinely track the cost of completing NEPA analyses, and there

is no governmentwide mechanism to do so, according to officials from CEQ, EPA, and other agencies GAO reviewed.”

An investment in monitoring and adaptive management may reduce the amount of time required to complete an analysis. It could also bring maturity to environmental impact analysis. There is almost always pressure to get a document done at the cheapest price point. This really is often a stranded investment because all the predictions about long-range impacts are fraught with potential errors and all the mitigation that is promised is not delivered, and the mitigation that is delivered is not monitored to ensure its effectiveness. A better method may be to admit our prediction weaknesses, invest in a solid monitoring program, set performance standards, and practice sound adaptive management.

An Administration can begin to put management metrics within the NEPA context, but it will take the OMB to put emphasis on the budget and the management of NEPA implementation.

The essential idea that NEPA implementation could be improved and would benefit from some type of investment emerged before the Summit meeting convened in comments submitted to the pre-meeting survey (Appendix C). When asked if there are problems with the implementation of NEPA and how to make it work better, multiple responses cited a lack of staff and training. Funding for technological improvements that would capitalize on the data and analysis developed in NEPA analyses was also a common suggestion.

Discussion during the Summit continued these ideas citing the inefficiencies and delays that are basically caused by a lack of funding. Inadequate funding currently causes some delays when there is too few staff and when the staff involved does not have sufficient training to manage the NEPA process efficiently. Because this condition is the baseline, simply having sufficient and consistent funding to fulfill existing requirements should improve performance and produce streamlining.

These ideas are not new, and while there has been much talk and Congressional support for “streamlining” NEPA, there are few analyses with details regarding how investments in NEPA could be effective and result in “streamlining” or even a return on investment. Work on this subject has been done by separate agencies, such as the FHWA for their “[Every Day Counts](#)” initiative. These concepts are sufficiently recognized and there are enough relevant studies that an analysis of NEPA practice as a whole now appears feasible without enormous effort.

4.4 Maximize the Flexibility of the CEQ Regulations

NEPA’s brevity and focus on analysis and disclosure lend great flexibility to federal agencies—a characteristic that is preserved in CEQ’s implementing regulations. While there are some prescriptive elements, primarily the requirement to conduct a thorough review of potential impacts to the environment, the program is easily adapted to accommodate projects of varying sizes, in different locations, involving both permitting and resource agencies, and for multiple audiences. NEPA’s focus on analytical process rather than strict compliance with substantive standards makes it an ideal tool for iterative decision-making.

Over the past decade, CEQ has worked with other agencies to develop guidelines that promote the program's flexibility and accommodate varying agency needs. Despite these efforts, agencies and permittees alike have been reluctant to take advantage of the program's adaptive features, and many critics of NEPA seem to be either unaware of its inherent flexibility or uncertain how to use it. It is not clear why this is so; for example, are agencies' attorneys unfamiliar with NEPA? Does NEPA's lack of measurable standards and substantive requirements lead to overly conservative, risk-averse approaches to compliance?

General Counsel offices within federal agencies understandably have the protection of the agency from litigation as one of their primary mission objectives. With 40 years of experience in case law interpreting NEPA to rely upon, the Office of the General Counsel (OGC) staff is often reluctant to embrace new and creative ways of conducting the NEPA process. This is especially true in agencies where there is a long history of litigation such as the Forest Service and Department of Transportation. The result is that agencies may become focused on trying to make their NEPA analyses litigation proof, which has resulted in incredibly lengthy documents (contrary to CEQ regulations) and a misplaced focus on documentation instead of the decision-making process intended by NEPA. While the courts have given federal agencies great deference under NEPA, and the CEQ regulations provide inherent flexibility in how to apply the statute, the fear of litigation has created an inherent tension between the creative and efficient application of the statute as a decision-making process and the OGC's desire to protect the agency from protracted litigation. Differences of opinion as to the preferred approach should not be left to OGC staff alone unless the proposed approach is clearly in violation of the statute or regulations.

Are agencies simply unwilling, or unable, to devote the resources necessary to update their own protocols or experiment with different approaches? A systematic review could provide insights into this dynamic, with the results used to improve training materials and develop guidelines to optimize NEPA's implementation and use as a decision-making tool.

Despite this inherent flexibility in the CEQ regulations, NEPA implementation has become mired in a predictable, linear fashion. Many of the "big ideas" put forth by Summit participants would benefit from example-based guidance from CEQ in order to illustrate how this flexibility could be applied in practice.

Ideas discussed at the Summit that might benefit from such example-based guidance include:

- Keeping pace with rapid developments in technologies and scientific advances that enable better identification and assessment of impacts to natural resources.
- Capitalizing on new communication platforms for public engagement and observational tools for continued learning and improved, iterative decision-making.
- Creating and sharing natural resource and environmental databases for reasons other than NEPA. A central database would enable data sharing and help

- eliminate duplication, particularly across projects and programs in the same eco-region.
- Utilizing better the expertise found in many colleges and universities or partner more effectively with non-governmental organizations (NGOs) that engage in “citizen science.”
 - Relying more on adaptive management strategies.

The CEQ regulations are now nearly 40 years old. When they were written, they were considered some of the best regulations in government—and they still may be some of the best regulations in government. However, current NEPA practice generally fails to take into account the flexibility built into these regulations, and thus one of the quickest and simplest ways to reinvigorate NEPA would be CEQ guidance on using the regulations in new and exciting ways.

The statute is constitutional in nature and few doubt that it can stand the test of time because it really is a reflection on American values and the “decency and dignity” of our federal government. However, the CEQ regulations, still very effective, have some flaws. They do not recognize the government-to-government relationship that exists between the federal government and federally recognized American Indian tribes. It is questionable whether the regulations ever anticipated the wide use of Categorical Exclusions (and extensive documentation) and EAs (with the offspring “mitigated FONSI”). Moreover, there have not been any attempts to incorporate lessons learned over the last 40 years from agencies such as the Department of Energy (DOE), Department of Transportation (DOT), Army, and others. At the Summit, a participant formerly with DOT recommended combining the Final EIS and the Record of Decision. This suggestion may save time and money, it may have unintended consequences, but it certainly would require a change to the CEQ regulations.

The regulations could actually slow the adoption of an adaptive management model. Legal counsels have argued that if an agency monitors under the adaptive management approach and finds inaccurate predictions, the agency would need to conduct a supplemental analysis. The agencies are likely to consider this a penalty of monitoring and believe it gives litigants a second shot at stopping a project.

In fact, an important statement at the Summit about the current regulations was “don't forget, there are 40 years of case law that go with those regulations.” It could be time to give more direct guidance in the CEQ regulations.

4.5 Open Government (transparency) as NEPA Intended

Many Cohen Summit participants commented that NEPA is supposed to promote transparency and that such transparency is one of the central tenets of NEPA. However, some participants also felt that current NEPA practice does not promote transparency to the degree that it could and should.

The Annual NEPA Report 2013 of the National Environmental Policy Act [NEPA] Practice concludes that over 95% of all NEPA analysis is done by Categorical Exclusions despite the fact that such exclusions are not widely advertised when applied. Each agency creates its own Categorical Exclusions and decides how and when to apply

them. That which might require further analysis in one agency is often considered Categorical Exclusion at another. Because of this, it is almost impossible to get an accurate grasp on just what is being categorically excluded across the federal government at this time.

EAs, which make up approximately 4% of all NEPA analyses, can also be a source of transparency problems. Like Categorical Exclusions, what actions trigger an EA (as opposed to an EIS) differ among agencies. Many EAs are not advertised or accessible on a central clearinghouse.

Thus, less than 1% of NEPA analyses are EISs—99% of NEPA analyses can be conducted without much public engagement or even with little exposure to the public or other agencies.

Some agencies, such as the DOE, have embraced transparency. DOE appears to be the only agency posting Categorical Exclusions online, and its Categorical Exclusion determination database provides information that was not previously available in any systematic way. It also makes draft EAs available for public comment whenever possible and posts most draft EAs on its NEPA website (nepa.energy.gov). DOE even provides timely email notification of postings and comment periods to individuals who register.

Lack of information is a two-fold problem—1) information is lacking as to the number of environmental analyses, and 2) there is a substantive lack of information as to what is contained in these documents because the data in these Categorical Exclusions and EAs are not easily accessible (if accessible at all). The Cohen Summit participants recognized that lack of transparency in NEPA limits the ability of NEPA to influence decision-making, and makes analyses of NEPA itself problematic.

4.6 Conclusions and Recommendations

This report was prepared by a small workgroup after the Summit. It is intended to report on the plenary and workgroup discussions for the internal audience of those attending the Cohen Summit. The authors hope there will be additional sessions to work on some of the major topics that they feel needs attention. For the authors, the following are our conclusions and recommendations:

- If federal agencies conduct NEPA analysis poorly, the law and the environment will suffer. Excellent analysis using good data will yield better decisions. We conclude some work needs to be done in this area.
- There were a number of excellent topics for which consensus was not reached. This may have been a function of time and size of the plenary. We think small groups need to get together over the summer. They can be self-selected and self-organized.
- We think there should be a small committee who visit some of the foundations to solicit funds to have a Phase II Summit that would be informed by the small groups.
- We think we should poll the attendees of the Cohen Summit regarding the usefulness of the Summit and whether changes would be required to make it more useful.

4.7 Future of Cohen Summit

The Bill Cohen Summit is the necessary start of a longer and more dynamic process. This report is the first tangible product but is not meant to be a definitive assessment or to offer recommendations.

Moving into a dynamic second phase will depend upon the general acceptance of this report from the participants. This is not the report for finding better words to describe the Summit or provide better analysis of the issues. The reviewers of this report are in no way bound by the particulars because there is much more work to be done. However, any substantive error of omission or commission should be corrected. Other groups will build upon this report.

We will develop a process to form small working groups to tackle specific issues. The reports from these groups will be incorporated into this initial report, as we build the case for change and what that change may entail.

Simultaneously, this report will be used to make the case to select foundations from which this work should continue. Sometime in the fall of 2015 a Bill Cohen Summit Phase II will be convened. From this Phase II, the vision to develop a professional report, which would include the ‘thinking’ of the professional NEPA community, broader dissemination in the environmental community, and recommendations for a new Administration in January 2017 would be finalized.

Appendix A - Summit Participants

Don Baur	Perkins Coie LLP	Partner
Dinah Bear		
Charles Blumenfeld	Jackson Foundation	
Ted Boling	U.S Department of the Interior	Deputy Solicitor-Parks and Wildlife
Carol Borgstrom	Office of NEPA Policy and Compliance	Department of Energy Director
Susan Bromm	EPA	Director, Office of Federal Activities
Sharon Buccino	Natural Resources Defense Council	Director, Land and Wildlife Program
Claudia Cappio	California Department of Housing and Community Development	Director
Ray Clark	Duke University Nicholas Institute	
Peggye Cohen		
Rick Cornelius		
John Cruden	Environmental Law Institute	President
Shannon Eggleston	AASHTO	
Geoff Fettus	NRDC	Senior Litigator
Al Ferlo	Perkins Coie LLP	Partner
Julia Forgie	Stanford University Law School	
Horst Greczmiel		Associate Director, CEQ
Jennifer Hernandez	Holland & Knight	Partner
Elizabeth Homer	Homer Law	
Elizabeth Hook	Stanford University Law School	
Lara Iglitzin	Henry M. Jackson Foundation	Executive Director
Matthew Lindstrom	Edward Henry Professor of Political Science, Director, Eugene J. McCarthy Center for Public Policy and Civic Engagement	
Linda Luther	Library of Congress	Congressional Research Service
Bill Malley	Perkins Coie LLP	

Lisa Mahoney	The Clark Group	President
David Mattern	Parametrix	
Bill McDonald	Sycamore Ranch	Executive Director
Jim McElfish	Environmental Law Institute	
Ann Navarro	U.S. Army Corps of Engineers	Assistant Chief Counsel
Barry Noon	Colorado State, Forest Service	
Michelle Nowlin	Duke Environmental Law and Policy Clinic Supervising	Attorney and Senior Lecturing Fellow
Mary O'Brien	Grand Canyon Trust	Utah Forests Program Director
Fred Pease	Air Force, former DAS	
Tim Profeta	Duke University - Nicholas Institute for Environmental Policy Solutions	
Scott Schang	Environmental Law Institute	
Stephen Schima	The Partnership Project	NEPA Campaign Director
Tony Silvia	The Clark Group	Attorney
Michael Smith	AECOM	Senior Program Manager
Mark Squillace	University of Colorado School of Law	Professor
Shannon Stewart	ESA, Energy & Industrial Practice	Principal Technical Associate
Fred Wagner	Beveridge & Diamond	Principal
Ken Weiner	K&L Gates LLP	Retired Partner



the Bill Cohen —————
NEPA SUMMIT
2 - 3 DECEMBER 2014

Appendix B

PERKINS-COIE LAW FIRM, DUKE UNIVERSITY, AND THE ENVIRONMENTAL
LAW INSTITUTE

AT THE PERKINS COIE LAW FIRM OFFICES

IN

WASHINGTON, D.C.

- 8:30 Call to Order.....Tim Profeta and Michelle Nowlin
- Civility is the rule of the summit
 - Respect for others' opinions
 - Put your name tent up when you wish to speak
 - Have your remarks tight and focused
 - Please no laptops at the table
 - Please refrain from texting and checking emails until the breaks
- 8:40 Welcome.....Don Baur
- 9:00 In Honor of Bill Cohen.....John Cruden
- 9:15 Introductions (time limit strictly enforced: please be succinct):
- Name and Professional Affiliation
 - Identify one thing you'd like to see as a potential outcome of the workshop

- 10:15 Review of key themes from the surveys, focusing on aligning responses to Questions 1 (problems) with responses to Questions 2 and 3 (what works well; recommendations for improvement)
- 11:00 Review of 2-3 successful* NEPA projects selected from participants' submissions. How were they done? What elements made these projects unfold in the way they did? How do they compare with responses to the surveys, especially the suggestions for making NEPA work better? Can we identify and agree on criteria for a successful implementation?
- * Success = where NEPA actually aided decision-making.
- 1:30 Open Discussion
- 2:00 Discussion: Identify current practices that are common across the agencies and the obstacles to successful implementation –i.e., why can't all NEPA processes be successful? What good practice by an agency can be implemented federal agency wide and what bad practices should be eliminated agency-wide? Why do different agencies implement the statute differently? What type of systemic change is needed? What are the key issues in need of reform?
- 3:30 Continue Discussion

Day 2:

8:30	Call to order.....Michelle Nowlin Synthesis of yesterday’s discussion. Transition to “World Café” In each workgroup, participants will be tasked with addressing a key issue for reform or development. The workgroups will be assisted by an assigned rapporteur, and will develop a clear mandate based on the following criteria: ➤ The action must be implementable ➤ The action must be undertaken by the executive branch (i.e., administrative agency or CEQ) ➤ Each proposed action must reflect the consensus of the workgroup. If consensus cannot be reached, then the workgroup must identify the barriers/obstacles to consensus. Workgroups will convene for 45 minutes, followed by a 10-minute break. After the break, participants will move to a different workgroup focused on a new topic. Each participant will be able to attend four of the five workgroups. Each rapporteur will serve as staff for one issue, and will synthesize and present a compilation of the recommendations for group discussion after lunch.
9:00	Workgroups, Round I.
9:55	Workgroups, Round II.
10:50	Workgroups, Round III.
11:45	Workgroups, Round IV.
2:00	Rapporteurs’ presentations of specific recommendations on how to move to fuller implementation on identified topics. What 3 (4?) (5) ideas have currency?*
3:45-4:45	Discussion of Action items and Next Steps.....Michelle Nowlin
4:45	Closing RemarksDinah Bear and Al Ferlo

* Currency= solves a fundamental problem and would have secondary positive impacts, is realistic and doable, can develop a campaign around it and connects the concerns of environment and development.

Appendix C – Pre-Summit Survey Responses

Q1 Do you think there are problems with the implementation of NEPA? If so, what specific problem areas (or examples) should be discussed?

Answered: 23 Skipped: 0

#	Responses	Date
1	Federal agencies still struggle with NEPA implementation. Climate change issues present significant problems for agencies where clear guidance from CEQ is missing. I think the courts role in NEPA is sometimes problematic. Is NEPA compliance driven by agency and CEQ regulations or must agencies always proceed mindful of a developing NEPA "common law."	10/31/2014 5:20 PM
2	One problem is that the persistent emphasis on reducing the length of time it takes to complete the NEPA process often ignores the value of an informed decision making process. Faster NEPA is not necessarily better. The focus should be on maximizing efficiencies in the NEPA process, e.g., through modern GIS and IT tools, better coordination among Federal and State agencies, and maintaining NEPA schedules that support mission decision making goals while conducting credible analyses and ensuring transparency and public participation.	10/31/2014 10:44 AM
3	The number one problem with the implementation of NEPA appears to be lack of staff, training, and funding. Agency employees I have spoken to have noted the increasing challenge of timely completing reviews in a fiscally austere environment. Assuming funding, staff, and training are indeed one of the primary challenges in NEPA implementation (as noted in multiple CRS and GAO reports), then it is worth considering how the discussion of "problems" with NEPA implementation gets distorted - at least among legislators. The primary legislative response to delays in NEPA implementation is to waive NEPA, either explicitly or through a legislative CE. In fact, nearly 75% of the 60 legislative proposals in the 113th Congress proposed a discrete or complete waiver of NEPA. Other bills that have passed have been similarly non-responsive to known facts about the principal causes of delay in environmental review (e.g., MAP-21 and WRRDA). I would be curious to hear what kind of positive NEPA reforms could be put in place that are actually responsive to the implementation challenges, legislatively/administratively viable, and sufficient to quite the increasing clamor for extreme NEPA "streamlining" proposals.	10/30/2014 10:28 AM
4	The statute provides a powerful and inspiring frame for government decision-making. CEQ regulations and guidance provide invaluable direction. Room for improvement remains in enhancing effectiveness and efficiency of the NEPA process. Proposed areas for improvement: Focusing agency time and resources on the issues that matter most. • How in practice to get issues on the table early, prioritize and put in place a collaborative plan for addressing • How to identify and disseminate best practices for public involvement • How to marshal the resources for effective publicinvolvement	10/29/2014 12:03 PM
5	The extraordinary amount of time required to complete the study process, and the absence of legal clarity (at least in the 9th) between compliance with other environmental laws/regs and the adequacy of the NEPA analysis/mitigation for topics covered by other laws/regs	10/27/2014 12:56 PM
6	1. The role of inter-agency comments especially environmental agencies. When agencies have differing assessments on impact, could there be a more forceful role for the EPA (doubtful but courts do seem to question EAs with disputed interagency commentary). 2. The process is criticized as too long and too short. 3. Mitigated EAs can avoid public comment. 4. NEPA agency officials get short circuited by political appointees (Bush Admin). 5. The biggest problem is the misunderstanding of NEPA as a checklist. NEPA's EIS requirement is "action- forcing" as in to force action related to the goals of Section	10/13/2014 5:04 PM
7	Yes.(1) Primarily it is not being used as a decisionmaking tool, but as a compliance constraint. (2) Still not seen as a democratizing-accountability aspect of government but as another instance of federal govt control.	10/13/2014 11:38 AM
8	Yes. The management of the NEPA process has flaws that reflect on the statute. Discuss contractors doing the work of the agency, the placement of the NEPA advisor in the organization, the expertise of the lawyers and their oversized role in the agency, and the lack of training and expertise of the agencies.	10/12/2014 5:41 PM

9	Yes. Agency capacity (trained and knowledgeable people and other resources); agency procedures and guidance documents that have added to or, some cases, limited the scope of the agency NEPA work; taking a linear approach to implementation that fails to take the dynamics of decisionmaking into account; failing to describe the reasonable alternatives or range of alternatives that leads to a disconnect between the NEPA alternatives analyzed and the alternatives (aka options) senior level decisionmakers bring up late in the process.	10/8/2014 2:56 PM
10	yes -- overly complex procedures and processes. Way too restrictive -- should be given more flexibility and permissiveness on analysis and mitigation strategies	10/7/2014 5:06 PM
11	Incorporating NEPA into an Agency's early planning process, especially when environmental planning is not a core competency of the agency.	10/7/2014 2:29 PM
12	Inadequate assessments of cumulative impacts, downstream and upstream impacts, social cost of carbon, and environmental justice.	10/6/2014 7:26 PM
13	1. There is a need for agencies to undertake pre-NEPA conversations to foresee potential opposition and alternatives to what they're thinking of proposing. 2. Using NEPA simply as a required process to do what the agency wanted to do from the start. 3. Proposing projects that are not careful of the environment, requiring major do-overs in the wake of opposition or litigation. 4. Where applicable, forcefully consider global warming (aka climate change)	10/6/2014 6:46 PM
14	Agencies often treat NEPA compliance as though it were an item to be checked off a tick list and not as information to be used to inform its decisions. In a sense, a major issue with NEPA is an attitudinal one. Agencies resist it. Agency personnel often dislike public engagement because it often tends to be critical and acrimonious. Agency staff sometimes feels that public engagement is not beneficial and that the agency has superior technical knowledge and capability.	10/6/2014 3:22 PM
15	The NEPA process currently defines project development as a simple, linear process that does not match the gradual, iterative way decisions are actually made. In practice there is a lot of valuable evaluation and learning that takes place behind the scenes of the NEPA process as plans and designs move from initial concept towards practical proposals. Often this internal work will include some participation from environmental staff and possibly other agencies. Who ends up excluded from early planning are the public and interest groups. They almost always have to wait until the proposal has been refined into a set of competing alternatives or a single proposal. If NEPA is really serious about including the public and non-governmental stakeholders then they should be brought into the process.	10/6/2014 12:42 PM
16	I think there are agency-specific issues associated with the broad environmental review process that are related to THAT agency's approval of distinct federal actions subject to NEPA. I don't think those issues are necessarily a "problem" directly related to NEPA's implementation.	10/3/2014 1:28 PM
17	NEPA seems to be administered on a somewhat arbitrary basis.	10/3/2014 12:06 PM
18	NEPA has become too voluminous, too detailed, too comprehensive. The purpose- disclosure and informed decision making- have been lost. Documents have become bullet proof to protect against legal challenge.	10/2/2014 8:42 PM
19	NEPA orientation still seems to carry a litigation emphasis, rather than thoughtful analyses of environmental assessment. Parties tend to view it as a "necessary" (or perhaps unnecessary!) evil, rather than a helpful process for good decision making. The tendency remains for proponents of environmental alteration to seldom find an impact they don't like.	10/1/2014 9:50 AM
20	Yes. Government agencies, consultants, and project proponents need to discuss how to better make use of existing and publicly available information to avoid repetition in the process. All stakeholders need to consider better coordination between "lead" agencies and permitting agencies so that crucial decisions can be better harmonized. More needs to be done to "front load" the NEPA process for EA/EIS-level projects. CEQ and the federal government in general need to agree upon a reasonable method of assessing GHG impacts and attempt to harmonize an approach across the government. Deadlines for certain action aren't necessarily evil -- how can the timely completion of administrative actions be encouraged? NEPA practice concludes after a ROD (or litigation) like the closing of a Broadway show. Nobody goes back to see what happened or if there are lessons learned. How does that become a part of an agency's obligation? At DOT, we focused on efficiency and reaching better environmental outcomes. How can that be encouraged across the government? EPA's system of evaluating NEPA documents is broken and needs to be dramatically changed.	9/30/2014 9:10 AM

21	A. Environmental impact assessment is only one component of NEPA. What needs to be discussed most is whether NEPA's other mandates and provisions can be brought to bear effectively on the most important environmental challenges of our time, such as climate change and sustainability. In short, is it possible to reinvigorate NEPA to tackle the most pressing environmental and natural resource issues of our time, as Congress originally intended? B. The biggest problems with implementation of NEPA's environmental impact assessment process are: lack of effective training and poor management of the NEPA process (related to each other), lack of engagement by agency decisionmakers, and lack of accountability for the effectiveness of mitigation measures (both in evaluating their effectiveness prior to making decisions as well as assuring their implementation after decisions are made).	9/30/2014 1:07 AM
22	Yes. We need to rules to ensure that when an agency justifies a decision on the grounds that impacts can be mitigated, it actually carries out the mitigation. Related to this problem is the choice of using adaptive management to address uncertainty surrounding decisions. We need some better assurance that the agencies are actually monitoring conditions and adapting when necessary. On an unrelated topic, I'd like to see some discussion about how to better engage the public in a meaningful way. Some agencies clearly do better than others. Discussion and guidance on what works and what doesn't would be useful.	9/29/2014 7:03 PM
23	Yes. The amount of oversight required by Federal Agencies looking over the shoulders of their contractors.	9/29/2014 4:36 PM

Q2 Do you think there are practices that work well in the implementation of NEPA? If so, what are those practices and why do you think they work?

Answered: 23 Skipped: 0

#	Responses	Date
1	Many agencies respond to comments and prepare NEPA documents with scant attention from lawyers. I think we should ask is this a good or bad thing? Some agencies have started innovated programs to enhance NEPA compliance. Region 5 of the Forest Service (a majority of reported NEPA decisions are Forest Service decisions) recently undertook a "Law for Foresters Training Course) to train NEPA professionals in the fundamentals of administrative law. Some agencies still struggle to "show their work" and such courses reinforce the need to make agency decisions and documents understandable to a lay public and judges.	10/31/2014 5:20 PM
2	Many aspects of the NEPA process work well much of the time. At the Department of Energy, we maintain and publish comprehensive data on the cost and time required for NEPA implementation. The theory is that management attention to NEPA metrics helps align the NEPA process with the planning and decision making process.	10/31/2014 10:44 AM
3	Early coordination/collaboration, better use of online tools/technologies, meaningful public participation and effective notification to public of opportunities.	10/30/2014 10:28 AM
4	Giving communities affected by government decisions a say in those decisions.	10/29/2014 12:03 PM
5	In theory NEPA can be improved - in practice there are too many strongly held views by individuals even within an agency (and more by consultants) to meaningfully enforce any streamlining or best practices NEPA approaches	10/27/2014 12:56 PM
6	The public comment is or can be over-whelming but it provides a valuable democratic pressure release valve. CEQ regs and guidance is good but still waiting for CO2 guidance. Electronic commenting has improved dramatically.	10/13/2014 5:04 PM
7	If EAs are the new "EIS" then the practice of having real alternatives and soliciting comments tends to work better than a one-shot EA that is all tied up in a bow.	10/13/2014 11:38 AM
8	When an agency is adept at preparing Programmatic EAs and EISs they get more bang for the buck, the public gets in on the process earlier. BLM's renewable energy PEIS is a good example.	10/12/2014 5:41 PM
9	Practices that focus on collaboration (both inter- and intra-governmental), outreach to stakeholders, integration of other environmental requirements; and decision makers participation/understanding of the importance of articulating the appropriate purpose and need and alternatives.	10/8/2014 2:56 PM
10	A preliminary consultation process with involved federal and other agencies that would require a commitment to the overall analytical framework and outline project mitigation measures -- not on a locked in basis but an overall right direction basis	10/7/2014 5:06 PM
11	My observation as to NEPA successes and setbacks revealed two main causes for both categories Setbacks were mainly the result of 1) major changes in proponent proposal parameters and 2) discovery of planning info gaps after the NEPA process had already started (added time and \$) Successes had strong proposals, senior proponent involvement and comprehensive pre-knowledge of planning info (enviro, infrastructure, etc) related to the proposal	10/7/2014 2:29 PM
12	EPA's independent review of EISs works well and should be safeguarded.	10/6/2014 7:26 PM
13	1. Pre-NEPA discussions, collaborations 2. Fully analyzing non-agency, reasonable, feasible alternatives 3. Being willing to significantly change initial ideas as a result of the scoping process, or pre-NEPA discussions.	10/6/2014 6:46 PM
14	Good NEPA analysis is best effected through a multi-disciplinary effort. Opportunities for networking both within agencies and departments and between agencies and departments would be beneficial in informing agency personnel as to other resources available either in their own agency or department in other agencies and departments.	10/6/2014 3:22 PM

15	Congressman John D. Dingell, one of the original authors of NEPA, said NEPA can be surmised as one main concept, to look before you leap. I think that in that regard we have largely succeeded. NEPA has succeeded in making environmental considerations a real part of most decisions. While there is certainly some room for improvements, agencies and interest groups know and understand when and how they can make their voices heard. Internally most agencies have procedures in place around the NEPA process that bring environmental considerations into planning and project development.	10/6/2014 12:42 PM
16	I can't identify specific practices that work well, apart from broad agency efforts to bring interested project stakeholders and participating agencies to the table as early as possible.	10/3/2014 1:28 PM
17	not ready to answer this question.	10/3/2014 12:06 PM
18	Creative and thoughtful approaches that address the unique aspects of a project (not one size fits all). Programmatic NEPA to allow for informed decision making upfront and streamlined approvals down the road.	10/2/2014 8:42 PM
19	NEPA does encourage encourage consideration of environmental issues and consequences to different stakeholders. Science and technology have been brought to bear on issues that formerly were not considered end, mistakenly, not thought to be important. Stakeholders are involved in the issues identification and analyses process who formerly sometimes never even knew about plans and proposals important to their futures. NEPA has served an "awareness function" re the sometimes unforeseen environmental and social consequences of plans and projects.	10/1/2014 9:50 AM
20	A lot of progress is being made regarding effective communication with the public. Better websites, easier commenting opportunities, etc. We need to build on that progress. Programmatic Agreements between permitting and lead agencies are the most effective way to anticipate recurring issues so that the NEPA wheel doesn't have to be reinvented. What sort of Agreements work best and what others can be created? Good planning should be rewarded. As DOT has tried, linking planning to NEPA and giving credence to community-based decisions through planning should be honored. The shorter statute of limitations has generally worked well. The NGO community has not been hampered by the 150-day SOL in MAP-21. That standard should be incorporated government-wide. Efforts to simplify NEPA studies have been encouraging. That effort should be expanded.	9/30/2014 9:10 AM
21	NEPA works exceedingly well when (1) decisionmakers themselves are engaged in the scoping process and in the shaping the alternatives -- in other words, looking for better, more sustainable solutions based on the environmental analysis; (2) agencies involve the public and all affected interests in a meaningful dialogue throughout the process and the implementation of a decision (not just a comment/response approach); and (3) the process is iterative, meaning that better approaches get identified, discussed and developed in the course of the process. The goal of environmental impact assessment under NEPA is, quite simply, to find better ways for people and nature to live in harmony, not simply to disclose the "impacts" of a proposal. When the process is implemented with this goal in the forefront, NEPA works well and often helps to resolve seemingly intractable conflicts because participants have good information that enables them to understand and productively work with each other to deal with the choices inherent in difficult decisions. NEPA also works well when an agency meets the mandates of Sections 102(2)(A) and (B), namely, having a professionally competent staff using an interdisciplinary approach that integrates the environmental arts and sciences and does not simply hire third parties to prepare 'discipline reports' that get blended into a document that will appear 'adequate' to comply with NEPA.	9/30/2014 1:07 AM
22	The rules relating to the alternatives analysis are terrific but implementation of those rules is often less so. I'd love to participate in a discussion about why and how the alternatives analysis works (when it does work) and why and how it doesn't (when it doesn't work).	9/29/2014 7:03 PM
23	Yes. Use Ea's whenever there is a question about whether or not there is a significant impact on the human environment. That's why they are there.	9/29/2014 4:36 PM

Q3 Do you have specific suggestions on how to make NEPA implementation work better?

Answered: 23 Skipped: 0

#	Responses	Date
1	I think we should have a serious conversation about CEQ's role in NEPA. The regulations are now quite dated and the agency proceeds on guidance documents. I expect that there are many good explanations for CEQ's reluctance to refresh its regulations but there should be serious discussion as to whether this harms NEPA implantation.	10/31/2014 5:20 PM
2	NEPA implementation works best when senior leadership recognizes that NEPA is not "just another hurdle," but rather a benefit to decision making that results in informed, sustainable decisions. NEPA always works better when it is connected in a meaningful way to the decision making process. It is also important for NEPA practitioners to keep up with the times, including analysis of climate change, sustainability, new floodplain standard, etc., and use of modern analytical tools.	10/31/2014 10:44 AM
3	Beyond better funding, training and perhaps stronger mitigation and monitoring commitments, I do not have specific suggestions. I am however eager to hear what the group suggests.	10/30/2014 10:28 AM
4	Improve monitoring to assess actual impacts and address; find a way to build into analysis and decision-making at front end; tie to landscape planning and mitigation	10/29/2014 12:03 PM
5	Update CEQ Regs - 1. Clarify reliance on enviro statutory/regs 2. Require EIS contract scopes to complete all fieldwork within 8 months, complete DEIS drafting in 4 more months, etc. - in other words, clarify that the scope of the work is definitionally constrained by the schedule, not vice versa	10/27/2014 12:56 PM
6	NEPA officials at the agency levels have to understand the purpose of NEPA isn't to generate meetings and paperwork. The NEPA process isn't meant to rubber-stamp pre-existing agency decisions. NEPA should be embedded into every the agencies do as NEPA establishes a national policy for the environment. Guidance for CO2 is needed.	10/13/2014 5:04 PM
7	There should be a way to provide continuing feedback to the public (including all) on what is happening to comments/concerns. The "black box" model of NEPA (notice-comment-black box-decision) doesn't work in the information age.	10/13/2014 11:38 AM
8	Make the agency NEPA person a senior level person who is not focused on documents but on outcomes; prepare the analyses at a more strategic level; Ensure that lawyers serve an ancillary role in the agency implementation and that the agency move to an adaptive management model of NEPA implementation.	10/12/2014 5:41 PM
9	Figuring out how to overcome the years of ingrained practices, guidances, and policies in order to revisit agency NEPA implementing procedures. The CEQ regulations could be refreshed; however, that raises the risk that they would be weakened. There has also not been a clear identification of what needs to be changed because there is a barrier (for example, the regulations don't address email and IT capabilities; however, they don't preclude their use).	10/8/2014 2:56 PM
10	A better FONSI process - inclusive of some significant but mitigable impacts. Substantial evidence standard.	10/7/2014 5:06 PM
11	Refocus the NEPA to do what it was originally intended. i.e. an "analysis" process and not a "discovery" process	10/7/2014 2:29 PM
12	Improve programmatic EISs to make decisions and remove adverse impacts at the big level and when cumulative impacts can be addressed, while preserving site-specific environmental analysis for site impacts. Earlier engagement to enable citizen proposed alternatives to be incorporated meaningfully. Increase budgets to speed up the process. Better models for environmental justice and social cost of carbon analysis.	10/6/2014 7:26 PM
13	1. Use of consensus collaborations pre-NEPA for major proposals. 2. Use of extensive conversations with diverse constituencies pre-NEPA. 3. Field visits (where applicable) pre-NEPA 4. Focus on the issues about which interested parties disagree.	10/6/2014 6:46 PM

14	To successfully implement any initiative within federal agencies requires leadership on the highest rung of the agency. As noted previously, a negative attitude within the ranks can and does affect the compliance and the quality of the work product. Efforts to improve upon these attitudes and to stimulate the establishment of best practices government-wide should be considered. Perhaps an annual government-wide conference coupled with increased training within agencies and departments is one means of shifting attitudes in a more positive direction.	10/6/2014 3:22 PM
15	For many years the data and analysis developed for NEPA evaluations has been lost. This is a lost opportunity to increase our knowledge and ability to make better decisions. More importantly, the effectiveness of mitigation or minimization measures is rarely if ever made available and used to inform subsequent actions. If consistently available this information would be particularly valuable for understanding cumulative effects. Technology now makes tracking and synthesizing this information practical with minimal effort. Steps in this direction are already underway, but without a national-level requirement data gaps will persist. A unified data sharing and tracking system should be made mandatory.	10/6/2014 12:42 PM
16	Ensure that the entities most affected by the law (private applicants seeking federal agency approval for a regulated activity, state/local agencies seeking federal funds for a project, and agency employees in state/local field offices tasked with implementing NEPA) understand the difference between actions that must be taken to document compliance with NEPA and requirements applicable to a given project that are identified and addressed within the context of the NEPA process (e.g., identifying agency-specific restrictions on certain actions, such as Section 4(f) prohibitions on projects that receive DOT program funds; complying with permitting/consultation requirements established under the Sec 404 of the CWA, the NHPA, or ESA; and federal requirements implemented by state agencies). Ensure that those entities recognize that, for a given private or federally-funded action, Congress may have established multiple federal actions subject to NEPA (e.g., the separate approvals required from DOE and FERC before LNG can be imported to or exported from the US). Also, clarify that NEPA compliance rarely means preparation of an EIS--increase focus on actions necessary to expedite projects processed using an EA or approved as a CE.	10/3/2014 1:28 PM
17	probably, but currently not ready to answer.	10/3/2014 12:06 PM
18	Training Less lawsuits More risk taking and creative approaches Figure out how to make adaptive management work given the need to develop bullet proof documents. Good examples	10/2/2014 8:42 PM
19	Integrate the human impacts of environmental alteration with bio-physical impacts (e.g., translate the impacts of biodiversity loss to human consequences beyond the ethical implications of killing off species to futures forgone for new medicines and, ultimately, impacts of ecosystem fragility and instability on humankind, or at a less ambitious level, when timber production road building causes stream silting that kill insects and other aquatic life, this harms the fishery, which in turn causes area tourism dollars to decline, which has impacts on surrounding communities' economic well-being). Push all environmental impacts to social impacts; push for a participatory process to win-win goal achievement for stakeholders, a "navigation model," rather than an "if-this, then this model" for EIA.	10/1/2014 9:50 AM
20	Please see Number Two, above. In addition, instead of EPA grading NEPA documents, EPA's federal programs team should review project implementation AFTER NEPA to determine if the models used, the predictions made, the mitigation offered, etc., were accurate or if they actually worked. This will assist future NEPA analysis by encouraging reliance on effective methodology. The Administration's proposed Inter-agency Permitting Center should be fully funded. This sort of entity reflects what has worked well in multiple Administrations, under different names/titles. Whether it is a "Rapid Response Team" or an Executive Order Task Force, the notion to have executives on call and engaged in high-profile, projects of national significance is long overdue. Citizens deserve decisions and explanations for decisions, not years of delay for a variety of reasons.	9/30/2014 9:10 AM
21	See #1 and #2 above: In brief, reinvigorate NEPA by moving beyond simply good environmental assessment to having NEPA be an effective tool in developing sustainable actions in a society whose younger generations are far more environmentally-aware and entrepreneurial than their predecessors -- and who are skeptical that a healthy environment, a healthy economy, and a healthy community are necessarily conflicting. If the baggage that NEPA now carries -- as one more procedural hurdle to be overcome in the regulatory process -- cannot be jettisoned in favor of a more inventive and creative vehicle for problem-solving and generating solutions, then NEPA will not work better or fulfill its purpose.	9/30/2014 1:07 AM

22	<p>The current approach to EAs under the CEQ rules has outlived its usefulness. Despite the admonition in 40 CFR 1501.4 about the purpose of the EA, agencies rarely use the EA to decide whether to prepare an EIS. They have already decided when they prepare the EA. If this is true, then perhaps we might rethink the role of the EA. It serves a very useful function and is far more common than an EIS, so perhaps we should develop some new and better guidelines for preparing EAs.</p>	9/29/2014 7:03 PM
23	<p>Agencies need to have a solid proposed action, which is not likely to change dramatically. When they have that then NEPA can work efficiently.</p>	9/29/2014 4:36 PM

Q4 What articles or other material would you like to see circulated prior to the meeting that offer insight into current NEPA implementation issues ? Please provide links or references in the space provided for any material you suggest.

Answered: 23 Skipped: 0

#	Responses	Date
1	I think having the CEQ regs provided makes sense.	10/31/2014 5:20 PM
2	Participants are invited to review the Department of Energy's NEPA website: http://energy.gov/nepa . In particular, more than 20 years of Lessons Learned Quarterly Reports offer NEPA success stories, What Worked and Didn't Work, NEPA metrics, etc. Numerous NEPA guidance and requirements documents are also available on the website.	10/31/2014 10:44 AM
3	None presently, but will contact if some come to mind.	10/30/2014 10:28 AM
4	Implementation Plan for the Presidential Memorandum on Infrastructure Permitting (May 2014) http://www.permits.performance.gov/pm-implementation-plan-2014.pdf Richard Lazarus, "The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains," 100 Georgetown Law Review 1507 (2012) http://georgetownlawjournal.org/files/2012/06/Lazarus.pdf Bradley Karkkainen , "Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance" 102 Colum. L. Rev. 903 (2002) http://www.scopus.com/record/display.url?eid=2-s2.0-0036330469&origin=inward&txGid=8C9B12492A189F792D39513817A116CB.WIW7NKKC52nnQNxjqAQrIA%3a2	10/29/2014 12:03 PM
5	All of the pieces that Ray has assembled for the AEP publication	10/27/2014 12:56 PM
6	Environmental Practice / Volume / Issue 04 / December 2005, pp 207-209 2005 National Association of Environmental Professionals Environmental Practice. Mar2014, Vol. 16 Issue 1, p52-76 NATIONAL ENVIRONMENTAL POLICY ACT Little Information Exists On NEPA Analyses. .Authors:Fennell, Anne-Marie1 fennella@gao.gov Gomez, Alfredo1 gomezj@gao.gov Lepore, Brian2 leporeb@gao.gov .Source:GAO Reports. 4/15/2014, p1-42 The underappreciated role of the National Environmental Policy Act in wilderness designation and management Author(s): Michael C. Blumm and Lorena M. Wisehart Source: Environmental Law. 44.2 (Spring 2014): p323.	10/13/2014 5:04 PM
7	http://blogs.law.columbia.edu/climatechange/2014/08/13/council-on-environmental-quality-declares-that-climate-change-is-already-covered-in-environmental-impact-review-and-no-new-regulations-needed/	10/13/2014 11:38 AM
8	1. "The NEPA, Judicial Misconstruction, Legislative Indifference, and Executive Neglect", Lindstrom and Smith 2. NAEP 2014 Journal-numerous articles	10/12/2014 5:41 PM
9	Provided separately.	10/8/2014 2:56 PM
10	None come to mind at this point.	10/7/2014 5:06 PM
11	I will e-mail you a PowerPoint slide presentation. "Merging Environmental Planning and Proponent Responsibilities"	10/7/2014 2:29 PM
12	none	10/6/2014 7:26 PM
13	NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government - at Environmental Law Institute's website.	10/6/2014 6:46 PM
14	Collection of papers critiquing the implementation of NEPA together with a set praising it. A set of agency studies or reviews focusing on the agencies implementation.	10/6/2014 3:22 PM
15	If it can be made available the December issue of "Environmental Practice" should be circulated.	10/6/2014 12:42 PM
16	Can't think of any in particular.	10/3/2014 1:28 PM
17	no articles or material	10/3/2014 12:06 PM

18	The to be released NAEP Journal on NEPA. Good examples.	10/2/2014 8:42 PM
19	Suggest that Lynton Caldwell's book of lectures he gave at the University of Alabama in the early 1980s is a useful reference for the original intent of NEPA and can serve as a reference point for why NEPA may not be as effective as hoped--Science and the National Environmental Policy Act: Redirecting policy through procedural reform. University, AL: University of Alabama Press, 1982. ISBN 978-0-8173-0112-5	10/1/2014 9:50 AM
20	Please review the various MAP-21 practices through DOT. They provide excellent examples of innovation and collaboration between agencies.	9/30/2014 9:10 AM
21	The articles written for the special issue Ray Clark assembled. President Obama's 4th Anniversary NEPA Proclamation (Dec. 31, 2009). US DOE also did a good summary of the 40th Anniversary White House event. ELI did a good special issue on the occasion of NEPA's 40th Anniversary Symposium (Vol 39 Issue 7 July 2009). CEQ's NEPA Effectiveness Study (Jan 1997) is also very good.	9/30/2014 1:07 AM
22	There is plenty to read but I would be happy if we focused most of our attention on the CEQ rules. I am a big fan of the rules but they are almost 40 years old now. It would be nice to think we might come out of this meeting with a working group to draft a petition to update the rules.	9/29/2014 7:03 PM
23	None	9/29/2014 4:36 PM