

NATIONAL ECR ADVISORY REPORT: AN INTRODUCTION

This report was produced by the National Environmental Conflict Resolution Advisory Committee (Committee), a federal advisory committee chartered by the U.S. Institute for Environmental Conflict Resolution (U.S. Institute) of the Morris K. Udall Foundation. The U.S. Institute serves as an independent, impartial federal institution to assist all parties in resolving environmental, natural resources, and public lands conflicts where a federal agency or interest is involved. The Committee’s charter and other pertinent materials, including this report, are posted on the U.S. Institute’s website www.ecr.gov.

In 2000, a bipartisan group of U.S. Senators asked the U.S. Institute to investigate “strategies for using collaboration, consensus building, and dispute resolution to achieve the substantive goals” of the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) (“NEPA”) and “resolve environmental policy issues....” The U.S. Institute conducted initial analytical work in response to the Senators’ inquiry, then, in 2002, created the Committee. The Committee was chartered to provide advice on future program directives—specifically how to address its statutory mandate to assist the federal government in implementing Section 101 of NEPA (42 U.S.C. 4331).¹ The 29 member Committee’s Designated Federal Official is Dr. Kirk Emerson, and it is chaired by Thomas C. Jensen. The Vice-Chair is Dinah Bear. The committee’s charter expires at the end of April 2005.

The Committee organized itself into three subcommittees. The Subcommittee on NEPA Section 101 and Environmental Conflict Resolution is co-chaired by Lynn Scarlett and Donald Barry. The Subcommittee on Capacity Building for Environmental Conflict Resolution and Collaboration is co-chaired by Christine Carlson and Cynthia Burbank. The co-chairs of the Subcommittee on Affected Communities are Larry Charles and Stan Flitner. The Committee met in regular session four times, in special sessions on two other occasions, and the three subcommittees met on various occasions in connection with full Committee meetings and separately.

The Committee conducted numerous analyses to develop objective information useful in advising the U.S. Institute on how to further promote resolution of environmental conflicts involving federal agencies and to help the federal government implement Section 101 of NEPA. The Committee sought to become thoroughly familiar with environmental conflict resolution and with the way in which Section 101 of NEPA has been implemented since enacted in 1969. The Committee approached the task from several directions, working in the first instance through its subcommittees

¹ Section 101 of NEPA establishes national environmental policy for the United States, but has been largely overlooked while Section 102, which requires preparation of environmental reviews, has received most attention from the courts, agencies, the Congress and the public affected by NEPA requirements. The Committee was not chartered to consider or provide advice with respect to Section 102.

Committee Findings

The Committee's analyses have led it to conclude that

- Effective environmental conflict resolution can produce agency decisions that manifest the national environmental policies framed in Section 101 of NEPA.
- NEPA's policies and environmental conflict resolution techniques are available to serve as mutually reinforcing tools to help the federal government make sound decisions.
- NEPA can provide common goals for all federal agencies, while environmental conflict resolution practices can create the conditions under which these goals can be realized.

The Committee has found a striking similarity between the policies set forth in Section 101 of NEPA and the principles and practices that characterize effective environmental conflict resolution. Where NEPA calls for productive harmony, the protection of health and environmental quality, sustainability and general welfare, environmental conflict resolution practices call for balanced representation of affected interests and values. Where NEPA calls for social responsibility, intergenerational welfare, sustainability and stewardship, environmental conflict resolution calls for full consideration of the short- and long-term implications of agreements and decisions, responsible and sustained engagement of all parties and wide access to the best available information.

The Committee found a broad array of situations where more effective engagement by federal agencies of interested groups and individuals has produced decisions seen favorably by all involved parties. These situations are characterized by broad involvement and representation for the spectrum of values and interests encompassed by NEPA's policy goals. The Committee recognizes the importance and effectiveness of agency efforts to bring potentially interested parties in very early in the process of setting policy, defining programs, or framing projects. The investment of time, effort, and thought "upstream" can reduce the risk of disputes "downstream," when positions may have hardened and options narrowed. Involvement alone is not enough, however, and process often can be improved if the involvement is governed by appropriate conflict resolution practices and principles and, where appropriate, guided by experienced facilitators or mediators. This is especially important in high conflict, complex, multi-party disputes. Where the process of making a federal decision involves the right parties, focuses on the full range of issues, uses scientific and other advice, and follows the appropriate conflict resolution principles and techniques, the odds are significantly improved that the quality of the decision will be higher and the degree of public support for agency programs will be strengthened.

Federal agencies bear a special responsibility to ensure that such processes are appropriately designed and implemented. It may be far worse to attempt a poorly designed environmental conflict resolution process than to follow the traditional practice of agency decision-making without any conflict resolution process. Well-managed conflict resolution practices repair and build relationships that are often critical to long-term implementation and administration of federal programs.

Though not all conflicts are appropriate for mediation, the Committee believes that the number and severity of "intractable" cases can be reduced significantly by proper use of environmental conflict resolution and awareness of NEPA's policy -- not because the various techniques or statutory language possess any special remedial powers, but because our fellow citizens usually have the capacity to be creative and fair and to want good results for the nation as a whole.

Committee Recommendations

The Committee is making recommendations to the U.S. Institute that, if adopted, would help the federal government improve the quality of agency decision-making consistent with the policies of NEPA. The Committee's recommendations manifest three objectives:

- Advancing federal agency use of collaboration and environmental conflict resolution;
- Advancing the ability of affected communities to participate effectively in environmental decision-making; and,
- Advancing the U.S. Institute's leadership role in assisting federal agencies and communities in resolving environmental conflicts.

The Committee's key recommendations are that the U.S. Institute should:

- Work with the Council on Environmental Quality to develop approaches to implementing Section 101 of NEPA through environmental conflict resolution;
- Develop a "toolkit" of management approaches for federal executives to transform agency culture in support of environmental conflict resolution and collaboration;
- Develop cross-agency training on environmental conflict resolution and collaboration;
- Identify ways to expand its leadership in developing applications of collaborative monitoring in the context of alternative dispute resolution and adaptive management;
- Collaborate with the Council on Environmental Quality to guide federal agencies and Affected Communities in the application of NEPA using the Affected Communities Subcommittee's recommended framework for environmental conflict resolution and collaboration;
- Continue to foster networks and partnerships that promote the best environmental conflict resolution practices and promote use of technology to facilitate sharing of lessons learned, science, literature and data; and,
- Obtain funding for and implement the U.S. Institute's participation grant program.

The Committee also recommends that other agencies of government, at all levels, take advantage of the resources represented by effective environmental conflict resolution techniques and the principles and policy of NEPA to improve the quality of agency decisions and earn broader support from affected interests.

NEPA 101 Overview

"NEPA is equal parts philosophy and law, and that's what makes it so beautiful."
- Stan Flitner, Diamond Tail Ranch, Greybull, Wyoming

The National Environmental Policy Act of 1969 ("NEPA") combines philosophy, policy and process. NEPA is best known for its process: it is the law that requires federal agencies to conduct environmental reviews and prepare environmental impact statements, a procedure that has been copied by many states and by nations around the world. NEPA is less well recognized for the remarkable and ambitious philosophy at its core, which is stated in NEPA Section 101.

NEPA Section 101 declares that it is and shall be the continuing policy of the federal government to create and to maintain conditions under which man and nature can exist in productive harmony. The federal government is to use all practical means to improve and coordinate federal plans, functions, programs and resources to achieve a wide range of social, cultural, economic, and

environmental values. And NEPA is clear in stating that each American has a responsibility to contribute to the preservation and enhancement of the environment. The nation's environmental policy is written in expansive, hopeful terms that virtually any American would accept.

National Environmental Policy Act of 1969

Title I

Congressional Declaration of National Environmental Policy

Sec. 101 [42 USC 4331].

- (a) *The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated 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.*
- (b) *In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may –*
- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;*
 - (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;*
 - (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;*
 - (4) preserve important historic, cultural and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;*
 - (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and*
 - (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.*
- (c) *The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.*

As the framers of the statute intended, NEPA brought the public, including state, tribal, and local governments, much greater information regarding environmental issues and awareness of the of the potential environmental impacts of federal agency actions.

Three decades after NEPA was enacted, environmental protection has become a widely accepted social goal, and the nation has enjoyed many successes in conservation of public resources, reduction of pollution, and remediation of damage done by prior generations. Many of these achievements came about through NEPA-governed decision processes. The traditional model for NEPA implementation is not a failure.

But the traditional model for NEPA is not a complete success, either. Any observer of environmental and natural resource issues will recognize that the number of points where interests

are coming into conflict on environmental matters is not decreasing and environmental issues appear to be increasing in scope and complexity. The decision-making success stories, though real, are shadowed by too many failures.

Today, agency decisions affecting the environment are often highly confrontational. Project and resource planning processes routinely are too lengthy and costly. Environmental protection measures are often delayed. Public and private investments are foregone. Decisions and plans often suffer in quality. Hostility and distrust among various segments of the public and between the public and the federal government seem to fester and worsen over time. The traditional model for NEPA is not responsible for all these problems--indeed it is not even applicable in all cases--but it does not take full advantage of the many strengths of Section 101. NEPA, a tool meant to foster better governance to help America find productive harmony between people and nature, is now, in some cases, used or experienced as a process available to delay or defer agency decisions or as a negative intrusion into socially important government and private sector initiatives.

It is a deeply rooted American value that citizens and their government at all levels should be in continuous dialogue aimed at successfully reconciling our diverse interests and values. We are a country that prides itself on diversity – a hallmark of a pluralistic and democratic society. It should not be surprising or seen as problematic that interests and values will come into conflict –the fact that they do is a vital aspect of societal growth and fuels creative aspects of our collective lives. But freedom of expression and freedom of thought and the right to petition for redress, and ultimately the right to vote, are about more than shouting into a void.

Americans expect to be able to work things out and make things better over time. It is not inevitable, and it is clearly not desirable, that society's ability to constructively address and resolve conflicts should languish or fail to adapt to changing times. The current state of environmental and natural resource decision-making is dominated by the traditional model, which too often fails to capture the breadth and quality of the values and purposes of NEPA. It cannot be the best we can do, nor can it be what NEPA's drafters intended. Could a different approach, in appropriate circumstances, better reflect NEPA's policies and help our country achieve the law's valuable purposes? The Committee believes that we can, in fact, do a much better job.

During the same three decades that have passed since NEPA was enacted, a new profession has emerged that is committed to development and application of conflict-avoidance and conflict-resolution techniques in the context of environmental decision-making and environmental disputes. "Environmental Conflict Resolution," or "ECR," is best understood as a mechanism to assist diverse parties to gain an understanding of their respective interests and to work together to craft outcomes that address those interests in effective and implementable ways. ECR takes many forms and can be applied in many settings (see text box at the end of this section), but in the context of federal decision-making, it enables interested parties (including state, tribal, and local governments, affected communities, and citizens) to engage more effectively in the decision-making process. Interested parties are no longer merely commenting on a federal proposal, but act as partners in defining federal plans, programs, and projects. ECR offers a set of tools, techniques and processes that can complement traditional NEPA processes and improve the procedural and substantive quality of agency decisions.

The U.S. Institute for Environmental Conflict Resolution
National Environmental Conflict Resolution Advisory Committee

Committee Members

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