

# NEPA Comments

## Formalized War or *Opportunity for Interest-Based Dialog?*



NEPA comment analysis may need to be rethought. The sheer number of comments, the disconnect between what the agency will respond to and what the public seeks to express, and the emphasis on litigation outcomes has created a system that is as costly as it is polarizing. Might basic negotiation principles such as interest-based dialogue be capable of informing some aspects of NEPA comment analysis?

This session integrates practical information about the NEPA commenting and comment analysis process, the science (or art) of comment analysis, law, and the expertise of all the participants in the room to sketch some possibilities for the future.



These materials were prepared by the panel members. Each panelist’s biography is followed by her or his materials.

On page 2, please find an agenda and a description of the breakout groups.

As well, we’ve included a reprint of a National Public Radio article on e-government. E-government is not our topic, but it offers a thought-provoking contrast to NEPA’s “no voting” approach, which we *will* discuss.

### THE BREAKOUT GROUPS

Our design objective was to provide enough time for the wit and sparkle of the panelists to unfold (and likewise for them to lay out the basic foundation of a focused discussion), while leaving sufficient opportunity to explore the perspectives and insights of the participants.



We think we’ve struck a good balance by having each of the panelists host a breakout group after briefly laying out foundation information. These facilitators will then reconvene as a panel and debrief the breakout group information, with help from the larger group.

This is bound to be only slightly chaotic, very thought-provoking, and rife with strongly-felt opinion.

CARIE FOX, J.D., M.S.



Carie Fox, the panel moderator, is a public policy mediator who thought she knew a lot about NEPA before 2007. (She had facilitated the development of two NEPA-404 transportation MOUs and an award-winning Cumulative and Indirect Impacts Guidance, as well as some on-the-ground NEPA work.) Then she jumped in on a 2.5 million acre forestry plan, just as the DEIS was to be published—or rather, as it was scheduled to be published. The lure: not a mediation, but rather a chance to play with some ideas for improving public commenting opportunities through online multi-criteria decision support, map-based interactions, and enhanced document commenting.

Oh, my goodness, did she have a lot to learn!

**IS THERE A PROBLEM?**

One of the reasons Carie proposed this panel is because she realized she came through this process with more questions than answers. Maybe the panelists and participants can deepen the

questions, add to them, or even answer them.

For instance:

- Do we even have a complete characterization of NEPA’s comment analysis step? Or just a series of impressions supported by anecdote and less-than-random experience?
- What would one *want* this stage of the planning process to be? A chance for each side to check the other’s weapons? An opportunity for interest-based dialog? What would the latter look like?
- Is the timing of the comment process an issue—often too late for real dialog?
- Does the emphasis on “substantive comments” go too far, not far enough? What is the issue with “voting?”
- What are some of the motivators for commenting? Lots of sophisticated people understand the “substantive comments” system, yet they invest heavily in generating “voting” style comments. These people aren’t crazy. What needs are being met? Could we address these in a more constructive way?
- What does it mean to be neutral in the design of a DEIS commenting process? Does one design for needs that are “legitimate under NEPA” (whatever that is), or does one design for needs, whatsoever they may be? And in either case, what is a neutral’s role and responsibility in raising expectations about how comments will and will not be heard?

**Agenda**

- 10:30** Introductions & Overview  
 Panelist Presentations:  
 Dick Prather “Grounding in NEPA”  
 Gary Light “Comment Analysis”  
 Michael Mortimer “Research on Attitudes”  
 Rich Fairbanks “Agent Provocateur”  
 Plenary Discussion and Q&A
- 11:15** Break-out groups
- 11:40** Debrief Break-out Groups + Lively Exchange of Views
- 12:00** Adjourn

**Break-Out Groups**

**CLASH OF EXPECTATIONS**

Dick Prather will host this discussion of expectations raised by NEPA, define consequences and explore cures.

**WHAT NEPA ALLOWS**

Rich Fairbanks challenges participants to go beyond the perceived limitations of NEPA in the comment analysis stage.

**MESSAGE IN A BOTTLE**

Gary Light will be the croupier in a card game designed to give people an experience of how NEPA comments are processed.

**CULTURE AND REALITY**

Michael Mortimer’s breakout group will discuss the perceptions of agency personnel regarding the utility of public comments in the NEPA process.

THE CIRCLE OF COMMENTS

This useful graphic depicts the filtering process in choosing which comments will receive an agency response. The universe of comments might be on the order of tens of thousands of comments for a large and controversial project. In practice, usually the first set of comments to be filtered out are duplicates (“forms” to agencies and “samples” to advocacy groups). If 1,000 people send the same letter, only one of those letters stays in the hopper.

The next step is to filter out the non-substantive comments. These range from statements of preference (*don't cut old growth*) to more complex comments which yet fail the test for a variety of reasons.

(“Substantive comments” are defined in the materials provided by Dick Prather on page 8.)

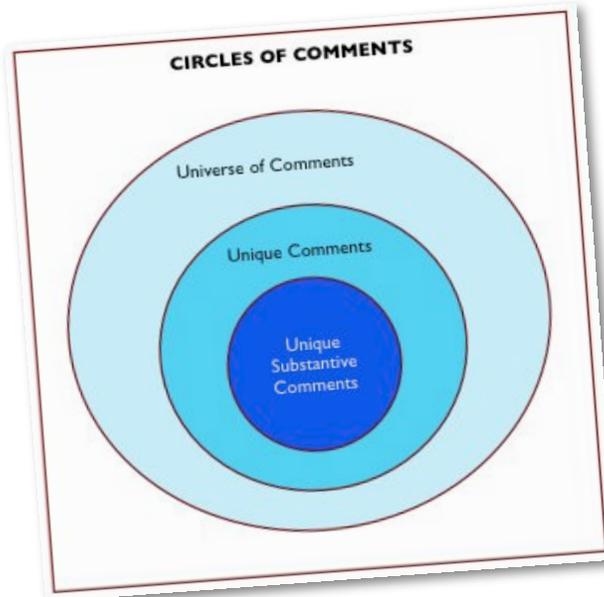
The problem is that the diagram is not to scale. The proportion of comments that are summarized and receive a response can be considerably less than 10%. That means that if 5,000 people bestir

themselves to write an original letter, e-mail, or other missive, more than 4,500 of them will be “ignored.”

That seems to be a recipe for dissatisfaction. And it can cost hundreds of thousands of dollars just to get to the point of responding to the surviving comments.

One way to approach this problem is to try to increase the proportion of unique substantive comments through processes that engage the public, and to support responses that meet the “substantive” standard—through shared learning.

Another approach is to try to decrease the number of nonsubstantive comments, perhaps by creating more realistic expectations about how comments will be used. (*Ouch.*)



Alternatively, agencies can choose to relax the standards. NEPA guidance says what they *must* listen to, it doesn't prohibit them from listening to more. How would casting a more inclusive net work in practice? It could range anywhere from smooth lip service to genuine collaboration, and simply may not make sense in every case.

SHOW ME YOUR HAND



So, ok, the NEPA comment system is expensive and often frustrating. But it is part of a larger *system*, and it persists, and so it might be useful to think about the things it does that help the system to putter along. For instance:

- When the agency publishes its DEIS, the rules are that it has to provide a robust level of information. Which is to say, it has to lay most of its cards down. When the commenter comments, she has to lay her own cards down, or risk losing standing. Then the agency has a chance (up to a point) to try to bolster its hand based on what was revealed. Now this elaborate stage is done, and they choose whether to go to court. Does this process, like the process of discovery in litigation, clarify people's alternatives to negotiated settlement and prompt negotiation?

- Many people who comment on a DEIS know perfectly well that the agency is not going to address their comments. Why do it? As a practical matter, those comments also make their way to legislators and other policy makers. And in our system, it is appropriate for legislators to hear “voting,” to respond to policy preferences, and to listen to a wide gamut of claims for attention. If this is the real audience, then arguably the statistics about proportions of unique substantive comments aren't altogether telling.

GARY LIGHT



Gary Light, an ICF Senior Vice President, currently runs ICF's CommentWorks® line of business – a successful commercial comment software and comment analysis business established in 2000. Since joining ICF in 1989, Mr. Light has worked on over 50 comment content analysis projects for regulatory, NEPA, planning, and/or policy documentation including projects for nearly every federal regulatory agency of the federal government. During his 19 of experience, Mr. Light has conducted and managed every aspect of public comment management support including: contract management, project planning and management, process and/or system development consultation, and hands on content analysis. In addition to his comment content analysis experience, Mr. Light has extensive experience preparing NEPA, regulatory, and planning/policy documents for many of the same federal agencies plus several state, international, and private sector clients. Mr. Light holds an M.S. in Systems Analysis and Economics for Public Decision-

making from Johns Hopkins University and a B.S. in Chemical Engineering from Bucknell University.

Gary Light will facilitate a card game designed to give people an experience of how NEPA comments are processed.

#### COMMENTWORKS

Project managers and planners routinely accept public comments on environmental impact assessments and other planning documents. Over the years, public participation in the planning and environmental review process has grown with the proliferation of e-mail and the influence of the internet. Increasing public scrutiny compounds the challenge of developing and analyzing projects with limited budgets and staff resources and often severe time constraints. In this environment, project managers and planners are under mounting pressure to be more efficient, thorough and transparent as the process, analyze, document, and respond to public comments.

Designed by ICF International experts with decades of planning and environmental analysis experience, CommentWorks is a commercial, web-based software tool set streamlining the process of managing and analyzing public comments.



MICHAEL MORTIMER



Dr. Mortimer is the Director of Forest Policy for the Society of American Foresters in Bethesda, Maryland. He is also an adjunct faculty member at Virginia Tech's Northern Virginia Center where he carries on an active teaching and research program. His primary professional and research interests center around public land management, environmental conflict resolution, and administrative processes. He received his PhD from the University of Montana's School of Forestry, his law degree from Penn State, and has also served as an assistant attorney general for the State of Montana's DNRC. He is the author of more than 40 scientific papers, technical reports, and popular articles addressing various natural resources issues, and in his free time he is currently co-authoring a textbook on natural resource agencies and administration.

Michael's breakout group will discuss the perceptions of agency personnel regarding the utility of public comments in the NEPA process.

RICH FAIRBANKS



*Rich Fairbanks does not believe that NEPA requires one to be painted into a corner.*

*Rich is the Fire Program Associate for the California/Nevada Region of The Wilderness Society.*

Prior to joining TWS, Rich Fairbanks worked thirty two years for the USDA Forest Service. He spent fourteen years working on suppression crews and hotshot crews. He spent six years working as a division supervisor, felling boss and other miscellaneous overhead jobs on fires throughout the west. Rich has worked as team leader for National Forest Fire Management Plans, has done burn severity analysis for post-fire planning and served as ID Team leader for the infamous Biscuit Fire Recovery Project. After leaving the Forest Service, Rich

set up a corporation and did fire management plans and fire data collection contracts for Tribal and County governments in Oregon and New Mexico. Rich has done graduate work in fire ecology and fire behavior, he has a degree in forestry and a masters degree in planning. As California/Nevada Fire Program Associate for the Wilderness Society, he works to improve wildfire management and fire policy at the regional and local levels.

Rich's breakout group will discuss the rich possibilities for meaningful comment analysis under NEPA as it exists today.

*The federal government wields an extraordinary amount of power that reverberates in all corners of this nation. The National Environmental Policy Act is one way ordinary citizens can weigh in on federal decisions that affect their lives. From highways to oil wells NEPA ensures that a variety of factors, including public input, are considered before the dirt is moved. NEPA is a common sense process that works and any action taken to weaken its provisions would be an assault not just on environmental and health protections but the value of public participation. The evidence is everywhere—public input and a thorough review process lead to good, broadly supported projects...*

**Fossil Creek Restoration**

Fossil Creek is a major tributary to the Verde River, which provides water, recreation and wildlife habitat along its course through central Arizona. Fossil Creek has been dammed for power generation since 1908, largely drying up more than 14 miles of natural stream bed – until now. Thanks to the public review process mandated by National Environmental Policy Act (NEPA), alternatives to continue operation of this outmoded power plant were reviewed by the public and were so broadly supported that the plant owner decided to close the plant and allow the stream to run freely.

The NEPA public review process, brought together wildlife experts, conservation groups, the Yavapai-Apache Tribe, APS and others who then got involved in planning the best way to restore the stream's wildlife and manage the area for visitor use. The result will be an opportunity to restore five rare native fish populations, and to reestablish the unusual travertine mineral formations that once created miles of waterfalls and deep pools.

Without NEPA, the dam on Fossil Creek would probably still be there and the plant's neighbors might not know about alternatives to keeping this outmoded plant. . But with NEPA, the public voice

This is perhaps NEPA's most important authority: Ensuring the government tells the truth about the way in which its action will affect people, local communities and the land, water, life itself.  
**Calbert A. Seciwa, Pueblo of Zuni Tribal Member**  
*Testimony Before the Committee on Resources Task Force on Improving the National Environmental Policy Act, Monday August 1, 2005*

was heard and better choices were made. As a result, that rare opportunity to restore a special place for future generations has been realized at Fossil Creek.

### NAVY OUTLYING LANDING FIELD

The U.S. Navy proposed building an Outlying Landing Field (OLF) in eastern North Carolina. This jet training facility would be located adjacent to the Pocosin Lakes National Wildlife Refuge, in the heart of the Atlantic migratory bird flyway, posing a severe safety risk to Navy pilots and a serious threat to large flocks of migratory birds such as tundra swans and snow geese.

The proposed OLF has garnered strong opposition from local farmers who found out through the NEPA process that their land would be taken for construction before a truly accurate study of the environmental and public health impacts was completed. The Navy's own documents further showed that an existing facility in southeastern Virginia meets the Navy's needs, yet, responding to political pressure, the Navy "reverse engineered" the process and mischaracterized scientific studies to justify the new OLF in North Carolina.

As the District Court Judge, Terrence Boyle, observed, "NEPA's purpose is ... to foster excellent

action. ... The very purpose of the environmental due process afforded by NEPA is eradicated if a federal agency makes a decision without proper consideration of the environmental impacts of the proposed project."

This is a crucial example of the importance of the NEPA process. For centuries, this unique area has coexisted in a harmonious union of rural farming communities and vast wildlife. Thanks to NEPA, the Navy will have to take a hard look at their proposed plans and thoroughly evaluate their impact on the Refuge and the rural community.



*Pocosin Lakes National Wildlife Refuge, Courtesy Tyrell County, North Carolina.*

### **Must your comments be "substantive"? Not necessarily.**

Forest Service regulations regarding appeal of National Forest system projects and activities, promulgated in 2003 (68 Federal Register 33,582) include a requirement that individuals must have submitted "substantive comments" to be eligible to appeal a final agency decision (36 CFR 215.5, 215.6 and 215.13)

In April 2006, The Wilderness Society convinced a judge in Montana that this requirement was contrary to the Forest Service Decision-making and Appeals Reform Act (16 U.S.C. § 1612 note.) The judge enjoined the rule, on a nationwide basis, from being implemented.

While this judicial decision preserves your right to appeal this type of project regardless of whether your comments are "substantive" or primarily offer an opinion, providing substantive comments is usually a better option. They may be more effective in convincing the agency to change a decision sufficiently to avoid having to escalate to the appeal process.

Red Lodge Clearinghouse <http://rlch.org/content/view/262/27/>

DICK PRATHER



Dick is a 1968 graduate of Northern Arizona University School of Forestry in Flagstaff, Arizona. He is a 36 year veteran of the BLM. He is currently Project Manager for Western Oregon Plan Revisions. He was the team leader for the Final SIES for Survey and Manage in 2001 and 2003. For 20 years he was Field Manager in the Salem District. He was the Chair of the Oregon and Washington BLM GIS Field Users Group for many years. He has previously worked in Coeur d'Alene, Idaho and Coos Bay, Oregon.

**Summary**

As an Agency we are making diligent efforts to involve the public and receive appropriate information related to a proposed action. We want comments to be specific as possible and address either the adequacy of the statement or the merits of the alternatives. The Agency's expectations are the comments will:

1. Question, with reasonable basis, the accuracy of information.
2. Question, with reasonable basis, the adequacy of, methodology for, or assumptions used for the environmental analysis.
3. Present new information relevant to the analysis.
4. Present reasonable alternatives other than those analyzed
5. Cause changes or revisions in one or more of the alternatives.

Does the public have the same understanding of what the Agency

wants? Do they have the same expectation of what there comments mean and how they will be used?

What happens is about 90% of the comments do not meet one the 5 criteria above and are not addressed in the Final Environmental Impact Statement.

Dick's breakout group will discuss the tensions between expectation, timing, and what the law requires/ pushes one towards.




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**National Environmental Policy Act of 1969**  
 Council on Environmental Quality's NEPA regulations  
 (40 CFR Parts 1500–1508)

**Public involvement:**

- Sec. 1506.6 a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
- (d) Solicit appropriate information from the public.

**Scoping:**

Sec. 1501.7 Scoping. There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping.

**Inviting comments on the Draft:**

Sec. 1503.1(a) “After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:” ....

4. Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

**Specificity of comments on the Draft:**

Sec. 1503.3 (a) ... “as specific as possible and may address either the adequacy of the statement or the merits of the alternatives”

**Response to comments on the Draft:**

Sec. 1503.4 (a) ... assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below:

1. Modify alternatives including the proposed action.
2. Develop and evaluate alternatives not previously given serious consideration by the agency.
3. Supplement, improve, or modify its analyses.
4. Make factual corrections.
5. Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

**Links:**

NEPA Net

<http://www.nepa.gov/nepa/nepanet.htm>

BLM NEPA

<http://www.blm.gov/wo/st/en/info/nepa.2.html>

**A Citizen’s Guide to the NEPA**  
*Having Your Voice Heard*  
 December 2007

- Comments should be clear, concise, and relevant to the analysis of the proposed action
- Comments that are solution oriented and provide specific examples will be more effective than those that simply oppose the proposed project
- Focus on the purpose and need of the proposed action, the proposed alternatives, the assessment of the environmental impacts of those alternatives, and the proposed mitigation.
- Commenting is not a form of “voting” on an alternative
- Number of negative comments an agency receives does not prevent an action from moving forward
- Numerous comments that repeat the same basic message of support or opposition will typically be responded to collectively
- Comments that state an action will have “significant environmental effects” will not help an agency make a better decision unless the relevant causes and environmental effects are explained.

## BLM NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK January 2008

6.9.2 Comments – all substantive comments received before reaching a decision must be considered to the extent feasible

6.9.2.1 Substantive Comments do one or more of the following:

6. question, with reasonable basis, the accuracy of information.
7. question, with reasonable basis, the adequacy of, methodology for, or assumptions used for the environmental analysis.
8. present new information relevant to the analysis.
9. present reasonable alternatives other than those analyzed.
10. cause changes or revisions in one or more of the alternatives.



### EXPECTING MORE FROM YOUR E-GOVERNMENT

By *ANDREW RASIEJ & MICHAEL SIFRY* | 4/10/08 4:59 AM EST NPR

Last year, nearly 80 million individual taxpayers filed their taxes over the Internet, out of 138 million individual returns in all, according to the Internal Revenue Service. They were taking advantage of the fact that e-filing speeds tax refunds, saves paper and often catches errors. Forty-one million taxpayers in 38 states also filed their state returns electronically. The number of participants will undoubtedly be even higher this year.

Now that we're well into the Internet's second decade, is this all Washington can offer us in terms of e-government? "Isn't it interesting that the best-designed government websites are those collecting your taxes, while the worst sites are those giving you a say on how your taxes are spent?"

asks Steven Clift, a longtime e-democracy advocate.

Clift has a point. While Americans can easily go online to access government information, though limited in scope, or download forms, there's little we can upload to our government other than our tax payments and comments on proposed federal regulations. It's as if Al Gore's "information superhighway" was somehow designed to run in only one direction.

Experiments with more participatory approaches to government are blossoming all over the world. In Estonia, for example, an official website called "Today I Decide," launched by the government press office, allows citizens to comment on draft laws

and submit their own ideas for new ones. If a majority of online voters support a draft bill, it is forwarded to the relevant government department for review. Last fall in New Zealand, the government launched a wiki

<http://wiki.policeact.govt.nz/>  
(a site that anyone can edit) to solicit citizen input on the wording of a new national Policing Act before it was formally introduced in parliament.

Similarly, in France, the Parliament Law Commission recently launched a website seeking the public's help in simplifying laws to make them more readable and understandable. Two weeks later, more than 80 pages of comments had been submitted and

published. French citizens can also participate in an online forum on the parliament's website to comment on laws currently being considered. (Our friends at the Sunlight Foundation, which we advise, have started a similar effort in the United States, called PublicMarkup.org, around a draft bill on government transparency.)

In England, anyone can submit an e-petition<<http://petitions.pm.gov.uk/>> directly on the 10 Downing Street website, and the most popular ones are featured on the site's home page. More than 7 million people — one in 10 British citizens — have signed one of those petitions since the site's launch in the fall of 2006. "The next stage is to enable e-petitioners to connect with each other around particular issues and to link up with policy debates both on and off government Web space," says member Tom Watson, the parliamentary secretary of the Cabinet Office and a leader of the British government's e-democracy efforts.

Last week, Watson gave a major speech on the "power of information," and even a cursory glance shows how far we in the United States have to go to catch up with our cousins across the pond. Here, he talked about how the government could enable citizens to connect to each more effectively for the social good:

"I recently registered my local Labour Party with [groupsnearyou.com](http://groupsnearyou.com)<<http://www.groupsnearyou.com/>>. ... Through the site, I found West Bromwich Freecycle. I'm the member of Parliament for West Bromwich East, and I didn't know about an important recycling initiative going on in my own patch. This information now means that a bag-load of clothing for a small child and a habitat sofa are about to be given a second chance to give pleasure. A simple, free tool enabled a small social good. Do this on at scale, and you have a very good thing going on. Nine million people now pay their car tax online. Wouldn't it be great

if, when they have finished their transaction, they can be directed to a kind of golden page that lets them find small local community groups in their area or offers them a menu of things to do that are good?"

Imagine then, that the next time you file your taxes online, your government asks for your feedback on how those tax dollars are being spent. Or it takes your suggestions on how to make a law more understandable. Or it helps you find groups near you that are doing things that benefit your community. It may sound mundane, but today in America, it would be the equivalent of a revolution. How much longer do we have to wait to bridge yet another digital divide?

*Andrew Rasiej and Micah L. Sifry are, respectively, founder and editor of the Personal Democracy Forum, an online magazine and annual conference on how technology is changing politics.*

Three Documents which the Institute for Environmental Conflict Resolution prepared or assisted in preparing provide important context for a discussion about collaborative opportunities at the comment stage... but of all the stages of NEPA, commenting and comment analysis related to the DEIS might be the least well examined. The documents are the:

**National ECR Advisory Report**

<http://www.ecr.gov/ecr.asp?link=522>

**Memorandum on Environmental Conflict Resolution** and the

<http://www.ecr.gov/ecr.asp?link=550>

**Multi-Agency Evaluation Study**

<http://www.ecr.gov/ecr.asp?link=511>