

Recording NEPA Meetings

by Larry Freeman, PhD

The Shipley Group, *Senior Consultant*

Richard Nixon is reported to have required all staff attendees at meetings with him to submit written minutes to him. The result is that the Nixon papers often have separate minutes from four or five attendees at a single meeting. Richard Reeves records this policy on page 16 of *President Nixon, Alone in the White House* (New York: Simon and Schuster, 2001).

This curious fact about Nixon's management of information got me thinking about how NEPA practitioners record NEPA meetings.

Initially, I was surprised by Nixon's policy. Most U.S. presidents have had record-keeping policies for important meetings. Usually, they have assigned a single person to keep official minutes. No other president seems to have had a policy similar to Nixon's. Reeves even comments (p. 16) that Nixon's unique policy created more extensive written documents than for any previous administration (some 44 million pages in the National Archives alone). Reeves does not tally written documents for later administrations.

Nixon's policy likely resulted in minutes that differed greatly. Such discrepancies in the Nixon minutes would not be a legal issue even though the different recorded viewpoints may well have raised Nixon's ire.

In the NEPA world, however, discrepancies are a legal problem. Inconsistent information is almost always a gift to the plaintiff's attorney. Too many inconsistencies and the agency's decision making looks arbitrary and capricious.

Recording each step in the NEPA process is an important agency responsibility. Such records have a legal role if someone appeals an agency's decision or takes the agency to court. The agency has to show through its records that its NEPA practitioners analyzed all points of view fairly and carefully. This analysis is the required agency hard look at impacts. Such analysis records assist an agency to prove that its decisions are not arbitrary or capricious.

Record keeping is especially important when NEPA practitioners meet in interdisciplinary team sessions.

Who routinely takes the minutes? How much detail is necessary? How actively do team members review and correct minutes of earlier meetings? What recorded information should be deleted?

Participants in Shipley Group NEPA workshops have inconsistently answered the preceding questions. Some NEPA teams keep detailed minutes. Others retain few minutes, and those retained are sketchy. Each NEPA team seems to have its own process, and agency guidelines are too general to be very helpful, if they even exist.

The following recommendations suggest how to record NEPA meetings effectively (and legally!).

1. Rotate responsibility for minutes to all NEPA team members, especially those new to the NEPA process.
2. Record and retain information that captures the actual thought processes used by team members to discover alternatives and estimate possible impacts.
3. Label information as to its status—for example, approved by the team or deemed by the team to be outside the scope of the analysis.
4. Retain original minutes for the legal record, and keep careful track of corrections and clarifications to the original minutes.
5. Delete information that is repetitive or that does not provide insights into the team's analysis process.

I briefly discuss each of these five recommendations in the following paragraphs.

- 1. Rotate responsibility for minutes to all NEPA team members, especially those new to the NEPA process.**

Who usually keeps minutes? Most often it is the NEPA team leader. This answer makes sense because the team leader is the person who knows the most

about the project and about where the NEPA process is heading.

However, my recommendation about rotating the responsibility reflects several benefits.

One benefit is that all team members are encouraged to engage with the full NEPA process, not just their own resource details. Too often, resource specialists are mainly interested in their own resources. They rarely read or review information from other specialists. The final text of the EA/EIS relies on the team leader for overall consistency. And team review of the final draft EA/EIS is rare, usually because the team members argue that they don't have time for such a review.

Resource specialists recording minutes of meetings would be encouraged to review submissions from other specialists and to track conscientiously the steps in the NEPA process.

A second benefit of rotating the responsibility occurs if team members new to NEPA occasionally prepare the minutes. Decisions about what to include and delete would educate a NEPA novice as to what the full NEPA process requires.

A final benefit of rotating the responsibility is that the team leader can focus on NEPA steps and other content questions. Some team leaders have even said that they are really too busy managing a meeting to keep concurrent minutes. The result is that they write up the minutes days or weeks later. No wonder minutes are often sketchy, even cryptic!

2. Record and retain information that captures the actual thought processes used by team members to discover alternatives and estimate possible impacts.

This recommendation suggests keying the recorded minutes to major steps in the NEPA process. In this instance, such steps necessarily focus on the projected impacts and the design of the alternatives.

The person recording minutes should provide enough detail to prove that the team members were aware of the NEPA basics relating to each step in the analysis process. As appropriate, the minutes should refer to supporting information, such as draft materials from

a specialist on key impacts. These draft materials become important if, for example, they provide a justification for a mitigation that is included in one or more of the alternatives.

The criterion would be that the information in minutes should be detailed enough for an outside reader to understand. Sketchy, cryptic minutes are not adequate.

3. Label information as to its status—for example, approved by the team or deemed by the team to be outside the scope of the analysis.

Participants in Shingley Group workshops routinely suggest that minutes and other supporting documents should include these minimums: subject, date, and participants.

They often fail to mention that every recorded document should be clear as to its status. Status, as the above recommendation says, includes what the team has decided to do with the recorded information.

The team might, for example, have discussed an alternative that had undesirable impacts on one or more resources. If the team decides to reject this alternative, then team minutes should record this alternative and provide a clear rationale for the team's decision to reject it. Notice that this step clearly parallels a NEPA legal requirement that a team address a range of reasonable alternatives, including a discussion of those eliminated from detailed analysis.

A second example might be the team's decision that a resource question (raised by a member of the public) is beyond the scope of the current NEPA analysis. Again, team records and backup reports should include a clear rationale for all such decisions.

4. Retain original minutes for the legal record, and keep careful track of corrections and clarifications to the original minutes.

The original minutes have a legal role: they provide a record of a team's thought processes as the members

work through each step in a NEPA analysis. As such, the minutes should show what the team actually discussed at what point in the process. And as recommendation 3 above suggests, the minutes should record the status of retained information.

In Utah there was a recent instance where the Salt Lake Tribune described county officials in Utah going back to earlier county council minutes and scrubbing them to remove points and soften comments. Understandably, members of the public are skeptical about the value of minutes that are scrubbed!

The courts would be similarly skeptical about NEPA minutes that looked to have been scrubbed. Such minutes would surely fail to satisfy recommendation 6, as discussed below.

5. Delete information that is repetitive or that does not provide insights into the team's analysis process.

Deletion of information is necessary given the amount of detail available during each step in a simple NEPA analysis.

Throughout the NEPA process, team members and the team leader should be discussing what background information to retain. Most minutes should likely be retained because each usually records a separate meeting. But background reports or draft text for an EIS/EA need not be retained if the draft text does not reflect a substantive development during the NEPA process.

The best example of documents to discard would be the multiple versions of the same draft text. Often writers print review copies that contain only a minor rewording of a few sentences and the correction of a few typos. Such minor changes would usually not reflect major steps in the NEPA process. So teams (and resource specialists) would not be responsible for multiple draft copies without major, substantive changes.

But consider an instance where a resource specialist has provided draft text showing that a proposed alternative has undesirable impacts. As Recommendation 2 says, the team should retain the draft text and record its existence in minutes because it represents a key step in the NEPA process.

A Final Test. Teams should review their recordkeeping process by asking this question: Do the records show a good faith effort to assess fairly and adequately all points of view, especially views from constituents?

The good faith test is no more than common sense. If NEPA is a law of disclosure, and case law shows that it is, then all NEPA records should reflect good faith from beginning to end. No managed or slanted information should appear, and the entire NEPA process should be as open and transparent as possible.

To return to the Nixon policy, H. R. Haldeman, Nixon's chief of staff, was responsible for seeing that attendees at meetings submitted minutes. His standard reminder memo to attendees began with a reminder that minutes were required. Then Richard Reeves quotes (on p. 17) the final paragraph from the standard Haldeman memo:

Your Memorandum for the President's File need not be lengthy, but you should keep in mind the historical significance of your report and understand that its significance will increase greatly with time. We hope you will be able to write and return such Memorandum to this office within five (5) working days.

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