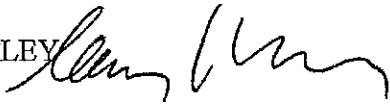




EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

May 23, 2012

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: NANCY SUTLEY 
SUBJECT: REPORT ON COOPERATING AGENCIES IN IMPLEMENTING THE
PROCEDURAL REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL
POLICY ACT

This report provides an overview of the progress made to involve Tribal governments and Federal, State, and local governmental agencies as formal “cooperating agencies” in preparing Environmental Assessments and Environmental Impact Statements under the National Environmental Policy Act (NEPA) and the Council on Environmental Quality regulations.¹ This is the second CEQ report on the use of cooperating agency status by Federal Departments and Agencies covering fiscal years 2005 through 2011. The first report was issued in May 2005 covering calendar years 2002-2004.²

Agencies and Departments reported annual data for FY 2005-2011 on establishing formal cooperating agency status with other Federal, Tribal, State, and Local agencies in preparing Environmental Impact Statements and Environmental Assessments. The reports followed the guidance and format issued in December 2004.³ The quantitative results are provided in Attachment A.

Use of cooperating agency status has increased in importance as it is integral to achieving:

1. The CEQ ongoing effort to improve agency implementation of the National Environmental Policy Act;

¹ The Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. pts. 1500-1508 (2011) [hereinafter CEQ Regulations], available on www.nepa.gov/ceq/ceq_regulations/regulations.html (last viewed on May 10, 2012).

² Available at ceq.hss.doe.gov/ceq_reports/cooperating_agencies.html (last viewed on May 10, 2012).

³ Available at ceq.hss.doe.gov/ceq_regulations/guidance.html (last viewed on May 10, 2012).

2. Agency implementation of Executive Order 13352, Facilitation of Cooperative Conservation, and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance;⁴
3. Agency implementation of the CEQ and OMB Memorandum on Environmental Conflict Resolution;⁵ and
4. Efforts to improve the timeliness and quality of Federal decisionmaking under the August 2011 Presidential Memorandum on Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review and the March 2012 Executive Order on Improving Performance of Federal Permitting and Review of Infrastructure Projects.⁶

The benefits of cooperating agency participation include: disclosure of relevant information early in the analytical process; receipt of technical expertise and staff support; avoiding duplicative reviews by Tribal, State, and local entities; and establishing a mechanism for addressing inter- and intra-governmental issues and enhancing inter- and intra-agency and governmental trust.

FINDINGS

Providing formal cooperating agency status to Tribal governments and Federal, Tribal, State, and local governmental agencies continues to show improvement. However, the effort is not yet fully realized. The agency data for fiscal years 2005 through 2011, as well as the explanations the Council on Environmental Quality received from lead Federal agencies and potential cooperating agencies indicate:

- The use of cooperating agency status is consistent with what was reported in the first cooperating agency report issued in May 2005 and demonstrates ongoing efforts to engage cooperating agencies in developing EISs. Cooperating agencies were involved in approximately 49 percent of Environmental Impact Statements and approximately 6 percent of environmental assessments during fiscal years 2005 through 2011.
- Lack of capacity or resources (i.e., training, time, personnel) continues to be a major reason that formal cooperating agency status is not established. Other reasons include lack of another agency with expertise to engage with a specific environmental review, no response from potential cooperating agencies, and agencies choosing to participate on an informal basis rather than through a formal cooperating agency status designation.

⁴ Available at ceq.hss.doe.gov/laws_and_executive_orders/executive_orders.html (last viewed on May 10, 2012).

⁵ Available at ceq.hss.doe.gov/nepa/regs/OMB_CEQ_Joint_Statement.pdf (last viewed on May 10, 2012).

⁶ See the Briefing Room available at www.whitehouse.gov (last viewed on May 10, 2012).

- Lead Federal agencies continue to frequently engage Tribal governments and Federal, Tribal, State and local governmental agencies during the National Environmental Policy Act process without formal cooperating agency status. This occurs more often when Federal lead agencies are preparing an Environmental Assessment or when they are proposing regulatory actions.
- Local and regional collaboration frequently takes place without formally establishing cooperating agency status. This is typically the case when intra- and inter-governmental relationships have been established and informal engagement – rather than formal designation of cooperating agencies – benefits the interests of the governments and agencies.

The information submitted by agencies over this seven year period is consistent with information submitted in 2005. Such consistency demonstrates the continued recognition by agencies of the importance of appropriately extending cooperating agency status when conducting National Environmental Policy Act reviews.

BACKGROUND

NEPA mandates that Federal agencies responsible for preparing NEPA analyses and documentation do so in cooperation with other governmental agencies.⁷ The CEQ Regulations specify that a lead agency consider establishing cooperating agency status to Tribes and State or local agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal for legislation or other federal action.⁸

To have jurisdiction by law, agencies must have “authority to approve, veto, or finance all or part of a proposal.”⁹ An agency is considered to have special expertise when it has a related “statutory responsibility, agency mission, or ... program experience.”¹⁰

Local and regional level offices typically have responsibility for preparing NEPA reviews. Offices responsible for implementing NEPA have the responsibility to identify potential cooperating agencies and to engage Federal, Tribal, State, and local governmental agencies to identify the environmental issues and coordinate the various roles and responsibilities of each participant in the NEPA process.

CEQ has long recognized the important role that cooperating agencies play in the decision-making process. After addressing these relationships in the CEQ Regulations and in the

⁷ 42 U.S.C. §§ 4331(a), 4332(2) *available at* ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html (last viewed on May 10, 2012).

⁸ 40 C.F.R. §§ 1501.6, 1508.5.

⁹ 40 C.F.R. § 1508.15.

¹⁰ 40 C.F.R. § 1508.26.

guidance for implementing them,¹¹ CEQ provided further clarification on the roles and responsibilities of lead and cooperating agencies in the “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations.”¹²

Subsequently, the importance of designating non-Federal agencies as cooperating agencies was emphasized in CEQ Memoranda to Federal Departments and Agencies in 1999 and 2002.¹³ These memoranda urge agencies to more actively solicit the participation of potential cooperating agencies in conducting National Environmental Policy Act reviews. The January 2002 memorandum called upon agencies to report on their efforts to engage Tribal governments and other Federal, Tribal, State, and local governmental entities as formal cooperating agencies. In December 2004, the reporting requirement was revised to ensure that all Federal agencies are consistently reporting designation of Federal and non-Federal cooperating agencies in the preparation of analyses and documentation required by the National Environmental Policy Act.¹⁴

On May 26, 2005, the Council on Environmental Quality issued the first Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act.¹⁵ This report covered the period of March 2002 through the end of fiscal year 2004, summarizing agency progress and the challenges identified in establishing cooperating agency status.

NEXT STEPS

Merely knowing how many EAs or EISs in a given year used cooperating agency status does not help identify and explain instances where cooperation went particularly well or poorly. Reporting agencies agree that the percentages provide a general overview; however, the reports should place a greater emphasis on identifying the challenges faced in establishing cooperating

¹¹ See 40 CFR 1500-1508 and “CEQ Memorandum for NEPA Liaisons: Agency Implementing Procedures Under CEQ’s NEPA Regulations, 19 January 1979,” *available at* ceq.hss.doe.gov/nepa/regis/exec11979.html (last viewed on May 10, 2012).

¹² *Available at* ceq.hss.doe.gov/ceq_regulations/guidance.html (last viewed on May 10, 2012).

¹³ CEQ Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA, July 28, 1999, and CEQ Memorandum for Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, January 30, 2002; *available at* ceq.hss.doe.gov/ceq_regulations/guidance.html (last viewed on May 10, 2012).

¹⁴ CEQ Memorandum for Heads of Federal Agencies: Reporting Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, 23 December 2004, *available at* ceq.hss.doe.gov/nepa/regis/connaughton.pdf (last viewed on May 10, 2012).

¹⁵ *Available at* ceq.hss.doe.gov/ceq_reports/cooperating_agencies.html (last viewed on May 10, 2012).

agency status as well as identifying the beneficial outcomes achieved when formal cooperating agency relationships are established.

CEQ will convene interagency meetings with Federal NEPA practitioners to discuss potential revisions to the report. Discussions will begin by focusing on the following questions:

- When and during which stages of the planning process does the lead Federal agency identify and reach out to potential cooperating agencies? Are there existing venues (e.g., interagency work groups) that facilitate identification and outreach?
- Are there opportunities for a lead agency to increase its capacity in order to address the lack of capacity of a potential cooperator? Do lead federal agencies offer training to agency personnel and potential cooperators to address capacity problems?
- Are there established programs or the authority to use funding or other resources to support potential cooperators? Has this been done? If so, in what ways, and to what result?
- Are lead agencies accommodating cooperators' basic needs, such as by providing adequate review time for drafts?
- Are there particular types of proposed Federal actions where the use of cooperating agency status was helpful in developing meaningful NEPA environmental review?
- What issues have led parties to end cooperating agency status prior to completion of the NEPA reviews? What if any systemic efforts have been undertaken to resolve those issues?

Moving forward, the cooperating agency report can provide the specific numbers of EAs and EISs which use cooperating agencies, and help inform what those numbers mean. CEQ is requesting your comments on how the reports can be improved to provide such information and develop new reporting to obtain this information.

We look forward to working with you in the coming months to ensure that cooperating agency status is readily available and assists your agencies in developing better NEPA reviews. For more information please contact Horst G. Greczmiel, Associate Director for NEPA Oversight at 202-395-5750, hgreczmiel@ceq.eop.gov, or 202-456-6546 (fax).

Attachment A: The Second Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (NEPA), May 2012.

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