January 30, 2002

MEMORANDUM FOR THE HEADS OF FEDERAL AGENCIES

FROM: JAMES CONNAUGHTON
Chair

SUBJECT: COOPERATING AGENCIES IN IMPLEMENTING THE PROCEDURAL REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of this Memorandum is to ensure that all Federal agencies are actively considering designation of Federal and non-federal cooperating agencies in the preparation of analyses and documentation required by the National Environmental Policy Act (NEPA), and to ensure that Federal agencies actively participate as cooperating agencies in other agency's NEPA processes.[1] The CEQ regulations addressing cooperating agencies status (40 C.F.R. §§ 1501.6 & 1508.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. (42 U.S.C. §§ 4331(a), 4332(2)). Despite previous memoranda and guidance from CEQ, some agencies remain reluctant to engage other Federal and non-federal agencies as a cooperating agency.[2] In addition, some Federal agencies remain reluctant to assume the role of a cooperating agency, resulting in an inconsistent implementation of NEPA.

Studies regarding the efficiency, effectiveness, and value of NEPA analyses conclude that stakeholder involvement is important in ensuring decisionmakers have the environmental information necessary to make informed and timely decisions efficiently.[3] Cooperating agency status is a major component of agency stakeholder involvement that neither enlarges nor diminishes the decisionmaking authority of any agency involved in the NEPA process. This

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[1] Cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage another governmental entity in a consultation or coordination process (e.g., Endangered Species Act section 7, National Historic Preservation Act section 106). Agencies are urged to integrate NEPA requirements with other environmental review and consultation requirements (40 C.F.R. § 1500.2(c)); and reminded that not establishing or ending cooperating agency status does not satisfy or end those other requirements.

[2] Memorandum for Heads of Federal Agencies, Subject: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, dated July 28, 1999; Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process, Subject: Questions and Answers About the NEPA Regulations (NEPA's Forty Most Asked Questions), dated March 16, 1981, published at 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended.

[3] E.g., *The National Environmental Policy Act – A Study of its Effectiveness After Twenty-Five Years*, CEQ, January 1997

memo does not expand requirements or responsibilities beyond those found in current laws and regulations, nor does it require an agency to provide financial assistance to a cooperating agency.

The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents. It is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local government agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis.

The Federal agency responsible for the NEPA analysis should determine whether such agencies are interested and appear capable of assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. § 1501.6. Whenever invited Federal, State, Tribal and local agencies elect not to become cooperating agencies, they should still be considered for inclusion in interdisciplinary teams engaged in the NEPA process and on distribution lists for review and comment on the NEPA documents. Federal agencies declining to accept cooperating agency status in whole or in part are obligated to respond to the request and provide a copy of their response to the Council. (40 C.F.R. § 1501.6(c)).

In order to assure that the NEPA process proceeds efficiently, agencies responsible for NEPA analysis are urged to set time limits, identify milestones, assign responsibilities for analysis and documentation, specify the scope and detail of the cooperating agency's contribution, and establish other appropriate ground-rules addressing issues such as availability of pre-decisional information. Agencies are encouraged in appropriate cases to consider documenting their expectations, roles and responsibilities (e.g., Memorandum of Agreement or correspondence). Establishing such a relationship neither creates a requirement nor constitutes a presumption that a lead agency provides financial assistance to a cooperating agency.

Once cooperating agency status has been extended and accepted, circumstances may arise when it is appropriate for either the lead or cooperating agency to consider ending cooperating agency status. This Memorandum provides factors to consider when deciding whether to invite, accept or end cooperating agency status. These factors are neither intended to be all-inclusive nor a rote test. Each determination should be made on a case-by-case basis considering all relevant information and factors, including requirements imposed on State, Tribal and local governments by their governing statutes and authorities. We rely upon you to ensure the reasoned use of agency discretion and to articulate and document the bases for extending, declining or ending cooperating agency status. The basis and determination should be included in the administrative record.

CEQ regulations do not explicitly discuss cooperating agencies in the context of Environmental Assessments (EAs) because of the expectation that EAs will normally be brief, concise documents that would not warrant use of formal cooperating agency status. However, agencies do at times – particularly in the context of integrating compliance with other environmental review laws – develop EAs of greater length and complexity than those required under the CEQ regulations. While we continue to be concerned about needlessly lengthy EAs (that may, at times, indicate the need to prepare an Environmental Impact Statement (EIS)), we recognize that there are times when cooperating agencies will be useful in the context of EAs. For this reason, this guidance is recommended for preparing EAs. However, this guidance does not change the basic distinction between EISs and EAs set forth in the regulations or prior guidance.

To measure our progress in addressing the issue of cooperating agency status, by October 31, 2002 agencies of the Federal government responsible for preparing NEPA analyses (e.g., the lead agency) shall provide the first bi-annual report regarding all EISs and EAs begun during the six-month period between March 1, 2002 and August 31, 2002. This is a periodic reporting requirement with the next report covering the September 2002 – February 2003 period due on April 30, 2003. For EISs, the report shall identify: the title; potential cooperating agencies; agencies invited to participate as cooperating agencies; agencies that requested cooperating agency status; agencies which accepted cooperating agency status; agencies whose cooperating agency status ended; and the current status of the EIS. A sample reporting form is at attachment 2. For EAs, the report shall provide the number of EAs and those involving cooperating agency(s) as described in attachment 2. States, Tribes, and units of local governments that have received authority by Federal law to assume the responsibilities for preparing NEPA analyses are encouraged to comply with these reporting requirements.

If you have any questions concerning this memorandum, please contact Horst G. Greczmiel, Associate Director for NEPA Oversight at 202-395-5750, Horst_Greczmiel@ceq.eop.gov, or 202-456-0753 (fax).

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