

October 4, 2016

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: CHRISTY GOLDFUSS 

SUBJECT: FOURTH 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 Federal, State, Tribal and local government 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 (CEQ) regulations implementing NEPA.¹ This is the fourth CEQ report on the use of cooperating agency status by Federal Departments and Agencies covering fiscal year 2015. The first report was issued in May 2005 covering calendar years 2002 through 2004.² The second report was issued in May 2012 covering fiscal years 2005 through 2011.³ Last year’s report was issued in June 2014 covering fiscal years 2012 through 2014.⁴

Federal Departments and Agencies reported annual data for FY 2015 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 2004.⁵ The quantitative results are provided in Attachment A.

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

1. CEQ’s ongoing efforts to improve agency implementation of the National Environmental Policy Act through CEQ guidance and use of coordination mechanisms such as the Permitting Dashboard for Federal [infrastructure projects](#);

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].

² Council on Environmental Quality, “[Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act](#),” May 26, 2005.

³ Council on Environmental Quality, “[Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act](#),” May 23, 2012.

⁴ Council on Environmental Quality, “[Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act](#),” June 10, 2015

⁵ Council on Environmental Quality, “[Reporting Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act](#),” December 23, 2004.

2. Agency implementation of Executive Order 13352, Facilitation of Cooperative Conservation, and Executive Order (EO) 13693, Planning for Federal Sustainability in the Next Decade;⁶
3. Agency implementation of the CEQ and OMB Memorandum on Environmental Conflict Resolution;⁷ 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,⁸ March 2012 Executive Order on Improving Performance of Federal Permitting and Review of Infrastructure Projects,⁹ and the May 2013 Presidential Memorandum on Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures.¹⁰

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

⁶ Executive Order 13352, Facilitation of Cooperative Conservation (August 26, 2004); [Executive Order 13693, Planning for Federal Sustainability in the Next Decade](#) (March 19, 2015).

⁷ Council on Environmental Quality and Office of Management and Budget, [Memorandum on Environmental Conflict Resolution](#), November 28, 2005.

⁸ Presidential Memorandum, [Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review](#), August 31, 2011.

⁹ Executive Order 13604, [Improving Performance of Federal Permitting and Review of Infrastructure Projects](#), March 28, 2012.

¹⁰ Presidential Memorandum, [Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures](#), May 17, 2013.

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 year 2015, 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, second, and third cooperating agency reports and demonstrates ongoing efforts to engage cooperating agencies in developing EISs. Cooperating agencies were involved in approximately 66 percent of Environmental Impact Statements and approximately 5 percent of environmental assessments during fiscal year 2015. More EISs are being prepared with the assistance of cooperating agencies than was reported in the first CEQ report (up from 40 percent in 2005).
- 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.
- The reported use of cooperating agencies in EAs has remained low and has not increased over the levels reported in 2005. Lead Federal agencies continue to frequently engage Tribal governments and Federal, Tribal, State and local governmental agencies during the NEPA 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 through comments on scoping notices and draft documents 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 one year period is consistent with information submitted for 2002 through 2014. Such consistency demonstrates the continued recognition by agencies of the importance of appropriately extending cooperating agency status when conducting NEPA reviews.

BACKGROUND

NEPA mandates that Federal agencies responsible for preparing NEPA analyses and documentation do so in cooperation with other governmental agencies.¹¹ The CEQ Regulations specify that a lead agency consider establishing cooperating agency status to Tribes and State or

¹¹ 42 U.S.C. §§ 4331(a), 4332(2).

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.¹² The CEQ Regulations also provide that agencies “shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing” EAs.¹³

To have jurisdiction by law, agencies must have “authority to approve, veto, or finance all or part of a proposal.”¹⁴ An agency is considered to have special expertise when it has a related “statutory responsibility, agency mission, or ... program experience.”¹⁵

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 guidance for implementing them,¹⁶ 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.”¹⁷

Subsequently, the importance of designating non-Federal agencies as cooperating agencies was emphasized in CEQ Memoranda to Federal Departments and Agencies in 1999 and 2002.¹⁸ 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.¹⁹

On May 26, 2005, CEQ issued the first Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act.²⁰ This report covered the

¹² 40 C.F.R. §§ 1501.6, 1508.5.

¹³ 40 CFR §1501.4(b)

¹⁴ 40 C.F.R. § 1508.15.

¹⁵ 40 C.F.R. § 1508.26.

¹⁶ See 40 CFR §§ 1500-1508 and Council on Environmental Quality, “[Agency Implementing Procedures Under CEQ’s NEPA Regulations](#),” January 19, 1979.

¹⁷ Council on Environmental Quality, “[Forty Most Asked Questions Concerning CEQ’s NEPA Regulations](#),” March 16, 1981.

¹⁸ Council on Environmental Quality “[Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA](#),” July 28, 1999 and Council on Environmental Quality, “[Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act](#),” January 30, 2002.

¹⁹ Council on Environmental Quality “[Reporting Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act](#),” December 23, 2004.

²⁰ Council on Environmental Quality, “[Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act](#),” December 23, 2004.

period of March 2002 through the end of fiscal year 2004. On May 23, 2012, CEQ published its second report covering fiscal years 2005 through 2011. On June 10, 2015, CEQ published its third report covering fiscal years 2012 through 2014. These reports summarized agency progress and the challenges identified in establishing cooperating agency status.

NEXT STEPS

As has been noted in prior CEQ Reports, merely knowing how many EAs or EISs in a given year used cooperating agency status does not help identify instances where cooperation went particularly well or poorly, address issues, or maximize the use of agency cooperation to advance NEPA's policy goals. Moving forward, CEQ is requesting your comments on how the CEQ reporting process can be transitioned to broader, more systematic means of tracking NEPA performance and related environmental and community outcomes.

In particular, CEQ requests your views on the use of the Federal Infrastructure Permitting Dashboard and other online tools for Federal agencies, project sponsors and interested members of the public to track the involvement of cooperating agencies on priority infrastructure projects that require authorization or environmental review by a Federal agency. The Federal Infrastructure Permitting Dashboard will track all "covered projects" subject to Title 41 of the Fixing America's Surface Transportation (FAST) Act and all major DOT-led surface transportation projects subject to Titles I, IX, and XI that require an environmental impact statement (EIS) and/or, after June 1, 2016, and Environment Assessment (EA), associated with the construction of transportation infrastructure. The Dashboard is also available for other Federal agencies to track additional projects which seek to benefit from the various benefits its use provides regarding transparency, predictability, and efficiency, even if not subject to FAST-41.

We look forward to your thoughts on whether CEQ should transition from the tracking of the percentage of environmental documents that involve cooperating agencies to another means of ensuring that cooperating agencies are effectively involved in all environmental documents of national or regional importance. We look forward to working with you to ensure that cooperating agency status is readily available and assists your agencies in developing better NEPA reviews.

For more information please contact Ted Boling, Associate Director for NEPA at 202-395-5750, Edward_A_Boling@ceq.eop.gov.

Attachment A: The Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (NEPA), October 2016.

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