
Chapter 2

Federal and Intergovernmental Collaboration

On January 30, 2002, CEQ Chair James Connaughton issued a guidance memorandum to the heads of all Federal agencies regarding cooperating agencies, “Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act” (Appendix A). The memorandum promotes collaboration³⁶ among Federal, State, and local agencies and Tribes in preparing and documenting environmental impact analyses. The memorandum did not grant new authorities, but instead emphasized CEQ’s commitment to using cooperating agency status³⁷ as one means of achieving greater collaboration, and accruing its attendant benefits.

The task force found that collaboration with stakeholders is important to help ensure that decision makers have the environmental information they need to efficiently make informed and timely decisions. The task force focused on whether efforts to collaborate on projects subject to NEPA were successful and, if so, what contributed to their success. Our goal was to recommend practical steps for CEQ either to enhance collaborative processes in support of better NEPA analyses or remove barriers hindering such collaboration.

We focused our questions on the characteristics of successful collaboration, collaboration barriers, and how training might improve collaborative efforts. In addition, agency staff were asked about joint-lead NEPA efforts, and efforts involving cooperating agencies. Because we received few comments about joint-lead projects, we concentrated on cooperating agencies. Many of the concepts discussed in this section

³⁶ For this discussion, collaboration means working together using a team or partnership approach.

³⁷ “Cooperating agency” means any federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian tribe, may by agreement with the lead agency, become a cooperating agency. 40 C.F.R. § 1508.5.

will not be new to some readers; methods of enhancing collaboration have been studied before. This chapter provides practical advice and recommendations for CEQ to facilitate collaboration on environmental impact analyses across all government levels. The task force received many comments about integrating members of the public into collaborative efforts; where appropriate, we incorporated that input.

Collaboration is a deceptively simple concept. Most people that we interviewed or that commented on the Federal Register notice (Appendix D) agreed that collaboration in the NEPA process is appropriate. However, while many agencies are trying to use a collaborative process, no uniform approach to successful collaboration exists, and most respondents indicated that improvement is needed. Although many agreed with the concept of collaboration, only a few claimed a successful collaborative experience. How can a generally acceptable idea be so elusive to implement?

The task force believes that although many concepts supporting successful collaboration are inherently understandable, differing priorities and organizational values, and shrinking resources make their execution difficult. Implementing a successful collaborative process can initially be time consuming, and it requires a commitment by all parties. The decision to bring people to the NEPA table and not proceed with the analysis until everyone is comfortable with their role, the process, and the projected products seems to contradict agency objectives to expedite analyses and decisions. Many comments received from the public, and Federal, State, and local agency staff supported the need for greater collaboration and cooperation among all participants. They also expressed frustration with the process and identified perceived and actual barriers to successful collaboration. If integrating more agencies into NEPA processes is a goal of the Federal government, time must be spent instilling the values underlying that goal. CEQ, as the guardian of the NEPA process, is in a unique position to foster such values.

2.1. Characteristics of Successful Collaborative Practices

It is important to understand the characteristics of successful collaboration in the NEPA process. Although the identified barriers to successful collaboration are often the antitheses of the successful characteristics, they are discussed in the following sections because we believe that their exposition might help future collaborative efforts.

2.1.1. Vision

Sharing the vision of the collaborative process, and taking ownership of that process is essential. The process of creating a shared vision might be time intensive, but it is a critical early step. The comments received revealed that the following elements are needed to establish a shared vision:

- ❖ Clarify the process expectations;
- ❖ Identify the statutory and regulatory tensions;

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- ❖ Define the outcomes; and
 - ❖ Commit the resources to do the job.

Before formally beginning the process, lead agencies need to identify other agencies that might have an interest in the new or revised proposal or project. Affected tribes and Federal, State, and local agencies should be invited to engage in the process. In addition, Federal, State, and local agencies and Tribes with jurisdiction by law or special expertise,³⁸ should be invited to participate as cooperating agencies,³⁹ and their needs and expertise should be recognized as an important part of the NEPA process.

To clarify the process, the lead agency should ensure that all cooperating agencies and other participants in the collaborative process understand the lead agency's mission, needs, and NEPA procedures. Time must be allowed for participants to define their role in the process, as they see it, and to resolve differences. Frustration and tension increase when collaborative efforts move forward without agreement on roles.

Both the public and Federal agencies recognize that the collaborative process is inefficient if tension between different agencies' laws, statutes, policies, missions, and cultures is not addressed early. Some agency staffs were frustrated that resource and regulatory agencies sometimes focus only on their issue, ignoring other agencies' missions and needs. Additionally, inconsistency in the interpretation of regulations and guidance among national and regional staffs can create a dysfunctional collaborative effort. Trying to overcome these differences by ignoring them or forcing agreement is not productive.

One method for overcoming such differences is to provide opportunities for interagency training and team building to promote better understanding among agencies. For example, the U.S. Environmental Protection Agency (EPA) invites agencies to assign a senior staff person to work in EPA's NEPA group. Usually a part-time assignment, the person participates in staff meetings, makes presentations, and attends training and briefing sessions. EPA regional staff is sometimes assigned to work either full-time or part-time with another agency's staff. Such interactions allow cross education and team building.

Another method for addressing differences is to agree, at the beginning of the process for an individual proposed action, that the process should not move forward until differences are recognized and addressed through the agreed upon methodology. Agencies must accept that sometimes participants will have fundamental differences in missions or statutory requirements. When this occurs, the task force believes that early recognition and a decision to either focus on existing collaborative possibilities or ending involvement is necessary.

³⁸ 40 C.F.R. §§ 1508.15, 1508.26.

³⁹ A Federal agency with jurisdiction by law shall, upon the request of the lead agency, be a cooperating agency. A State or local agency or Tribe with jurisdiction by law and all agencies or governmental entities with special expertise may, upon the request of the lead agency, be a cooperating agency. 40 C.F.R. §§ 1501.6, 1508.5.

To clarify outcome expectations, the lead agency should define needs and be willing to listen to alternative suggestions especially when outcomes rely on another agency's expertise. Additionally, many States have their own NEPA-like statutes and other environmental requirements that they must address. Conducting analyses and creating documents that address multiple stakeholders' needs is an important aspect of a collaborative effort, but it requires additional work to ensure that information needs are addressed by mutually acceptable data and methodologies. The task force learned that sometimes non-Federal stakeholders are frustrated with Federal NEPA requirements that cannot be addressed through a State's NEPA-like process, or that do not allow the State's needs to be incorporated into the Federal process. Lead agencies should look for opportunities to share expertise to fulfill data and information requirements. Forging such commitments early and objectively might minimize disputes about conflicting expertise, information, and data if a controversial decision results.

It is imperative that all parties commit to the process and to the expected products. The person responsible for making the commitment should have the authority to commit resources early in the project-planning cycle and to complete the effort. To solidify commitments, agencies should consider making greater use of formal joint lead and cooperating agency arrangements with Federal, State, and local agencies and Tribes to add structure and definition and to dedicate resources to the collaborative effort.

Using trained facilitators helps the collaborative process take shape and stay focused, while increasing trust in the lead agency's desire to conduct an unbiased process. It is important to understand that a professional facilitator and those with only facilitation training have different skill levels. Agencies can improve their credibility with their partners by investing in a professional facilitator, especially when the NEPA process is likely to be controversial, scientifically challenging, expensive, or time consuming.

One example of a facilitated process involves the complex work being done in the Everglades. The Army Corps of Engineers conducts the NEPA analysis for the Modified Water Deliveries and the C-111 Canal, two Corps-sponsored Everglades restoration projects. The purposes of the projects are to improve water deliveries to Everglades National Park and restore natural hydrologic conditions to the Park, while maintaining existing flood protection to adjacent agricultural areas. To facilitate cooperation among the Corps, National Park Service, South Florida Water Management District, and the U.S. Fish and Wildlife Service, the Corps asked the U.S. Institute for Environmental Conflict Resolution to facilitate negotiation of a memorandum of understanding. The purpose of the memorandum is to clarify roles and responsibilities and to outline the shared decisionmaking process to be followed in collaboratively developing the environmental impact statement. In signing the memorandum, the four agencies have formally committed to work together on the NEPA analysis and to jointly sponsor a multi-stakeholder involvement process.

2.1.2. Trust

Lack of trust can be a significant barrier to any collaborative effort. Although disagreements might be resolved, it is difficult to overcome an initial lack of trust or

breakdown in trust among parties who have agreed to collaborate. Statements regarding distrust of the lead agency by the cooperating agencies, of the cooperating agencies by the lead agency, and of the Federal agencies by State and local governments and by private citizens were expressed in numerous comments and interviews.

Several respondents felt that often the cooperating agencies did not respect the mission and role of the lead agency; instead, the cooperating agencies viewed their role as equal to the lead agency role. Others described situations where they felt that the lead agency had preconceived ideas, failed to listen to the cooperating agencies, did not consider the cooperating agency's expertise, neglected to respond fully to the information or comments provided, did not sincerely exhibit a desire to partner, and thought that environmental requirements were hurdles to overcome.

Several State agencies commented that State expertise is sometimes ignored by Federal lead agencies, and that State data and information were not adequately used in the NEPA analysis. Although some comments were grounded in a desire to play a larger role in the decisionmaking process, most respondents were merely interested in providing valuable information to the Federal decisionmaker. In a successful collaborative NEPA process, it is essential that partners trust that the Federal agency will consider all the relevant data, and that tribal, State, and local partners will produce relevant, quality data.

Lead agencies must consider how to develop and maintain trust when establishing collaborative relationships. Additionally, all parties must recognize and respect each other's missions, responsibilities, authorities, and expertise, and understand how differences can be accommodated. Collaboration is hindered when there is a lack of trust, understanding, leadership, and willingness to share resources and information.

To eliminate organizational barriers and develop trust among Federal agencies, the Federal Highway Administration and the Federal Transit Administration established an interagency working group comprised of seven Federal agencies shortly after passage of the Transportation Equity Act for the 21st Century.⁴⁰ The goal of the group is to promote streamlining of transportation projects, while maintaining environmental protection. The group works together to facilitate joint meetings and training for field staff, leverage interagency resources, and share briefing materials for upper management. The premise is that working collaboratively at all organizational levels fosters greater efficiencies in project delivery and environmental protection. The goals and work of that group are being furthered and enhanced by the Transportation Infrastructure Streamlining Task Force, formed by Executive Order No. 13274.⁴¹

⁴⁰ Transportation Equity Act of the 21st Century, Pub. L. No. 105-178, as amended by title IX of Pub. L. No. 105-206, codified at 23 U.S.C. § 101 *et seq.* (2000).

⁴¹ Exec. Order No. 13,274, "Environmental Stewardship and Transportation Infrastructure Project Reviews," 67 Fed. Reg. 59,449 (Sept. 18, 2002), 3 C.F.R. 250 (2003), available at <http://ceq.eh.doe.gov/nepa/regs/executiveorders.htm>.

CEQ is in a unique position to advance trust and cooperation among all agencies and should continue to play that role. However, agencies should not expect nor wait for CEQ intervention to develop better working relationships with their partners.

2.1.3. Communication

Early and open communication, like a shared vision and mutual trust, is integral to the success of any collaborative effort. Communication must be ongoing and have an established feedback mechanism. The task force received comments suggesting that collaborative processes can be hindered by failure to share information, define common terms, and provide the appropriate feedback. Underlying reasons for this were unclear but might be linked to lack of trust, poorly established processes, and a need for better training.

Based on the comments that the task force received, an increasing number of members of the public and partnering agencies want access to the lead agency's information and the ability to establish a dialogue about the information. Additionally, members of the public expressed a desire for agencies to post information about planned environmental impact analyses to the Internet as early as possible in the planning process. Although technology cannot address lack of trust or poor communication, it can efficiently help develop and maintain communication channels (see the Technology and Information Management and Security chapter of this report).

The failure of the lead agency to listen to the local population was a common complaint heard by the task force. Many citizens feel left out of the process and unheard. Similar comments were also received from representatives of local government. The task force recognizes that whenever a Federal agency makes a decision that affects people's lives, some will agree with the decision and some will not. The tone of the comments indicated that agencies have not done enough to explain proposals or why the proposals are needed, and they have not provided training opportunities to help the public better contribute to the NEPA process.

The Bonneville Power Administration (BPA) establishes cooperative agreements with Federal and State agencies and Tribes at project inception to foster collaboration before scoping. BPA also establishes advisory and working groups during project development to resolve issues early, or to at least acknowledge them. To encourage public involvement, BPA provides information and receives feedback about the proposed action in multiple formats, including public meetings, one-on-one note takers, prepaid and other comment forms, electronic comments, and toll-free telephone numbers. Citizens are encouraged to form teams to help shape analyses, work on modeling, and develop alternatives.

The Nuclear Regulatory Commission (NRC) uses an employee as their facilitator to create and channel interest in participating in the NEPA process for nuclear reactor license renewals. When a license renewal application is received, the facilitator travels to the site location, talks to the local library, meets with the mayor and/or city administrator, determines locations for a public meeting, and distributes posters to advertise the public meeting. From the office, the facilitator contacts local tribal

authorities soliciting their participation, and Tribal councils to help determine which Tribes outside the project area should be contacted. The NRC also uses a Web-based system to disseminate information and a States-only server to facilitate State interaction. NRC's communication goal is to increase public confidence in their efforts.

2.2. When and How to Create Collaborative Agreements

Federal agencies, and their responsibilities as lead agencies, were discussed during the interviews with Federal agency staff. The task force asked when, in their planning or project development process, agency staff seek collaborative working relationships, including establishing formal cooperating agency agreements in accordance with the CEQ guidance. Some comments received on the Federal Register (Appendix D) notice also addressed this question.

Everyone that we interviewed thought that collaborative agreements, including informal and formal cooperating agency agreements, work best when they:

- ❖ Are established early;
- ❖ Designate a lead agency with well-defined roles and responsibilities;
and
- ❖ Use terms and conditions understood by everyone involved.

However, collaboration at any point in the process is beneficial.

Besides determining if a collaborative agreement would be helpful, agencies must decide if a group of non-Federal advisors would be useful. Interviews with Federal agency staff and comments received from the public showed some confusion about the intent of the Federal Advisory Committee Act (FACA).⁴² A misperception exists among some that FACA only permits nongovernmental participation in open public meetings. Additionally, both agency staff and the public believe that establishing a FACA committee is a difficult process. Several agency staff asked that CEQ clarify what is allowed under FACA, with respect to the NEPA process (see the Hold Annual Legal Forum section of the Additional Areas of Consideration chapter of this report).

Collaborative agreements need not be limited to single projects or issues. The Federal Highway Administration has had success with comprehensive collaborative agreements. In the mid-Atlantic and other regions of the country, Federal Highway Administration staff has met with their Federal and State counterparts to establish interagency working agreements. The agreements typically address how to integrate the requirements of NEPA and Section 404 of the Federal Water Pollution Control Act, commonly known as the Clean Water Act of 1972,⁴³ and they describe agency roles, the collaborative process, and dispute elevation mechanisms. While initially challenging and time consuming, once established the agreements can serve all projects in a

⁴² 5 U.S.C. app. 2 § 1.

⁴³ 33 U.S.C. § 1251 *et seq.*

particular geographic area. Additionally, individual agreements between State transportation agencies and Federal and State environmental agencies regarding resource sharing sometimes exist.

Respondents to the Federal Register notice (Appendix D) suggested that future misunderstandings might be avoided if the negotiators and staff implementing the agreement were the same people. The task force agrees with this point adding that, at a minimum, the staff working under the agreement should have access to the negotiators. Additionally, upper management's lack of support for the process and/or the agreements regarding the process can undermine the collaborative process when disagreements arise. Outlining a dispute elevation process is helpful for formal agreements, particularly if trained facilitators are not used.

The task force considered Federal agencies' use of mediation or Alternative Dispute Resolution (ADR) techniques to resolve differences with cooperating or joint lead agencies. While agencies liked the idea of using facilitators, most thought that resorting to ADR or mediation meant that the collaborative effort had failed. Several pointed out that ADR assumes that the dispute is resolvable when sometimes it is not.⁴⁴

Some Federal agency staff saw collaboration as integral to the success of the planning process, which usually begins before formal announcement of a project subject to an EA or EIS. They believed that their agencies would be served better if the collaboration process began during the early planning stages before the formal NEPA process begins. The Federal Transit Administration is an example of an agency that works with local transit boards when the board identifies a transit system need. When the Federal Transit Administration reaches the formal NEPA analysis stage for a specific transit project, many issues and information needs have already been identified collaboratively.

Cooperative agreements can range in formality from unwritten to written and signed documents depending upon preferences, institutional circumstances, the complexity of the project and issues involved, and the trust among those involved. A strong working relationship diminishes the need for formal memorandums of understanding. Multiple layers of management and lengthy review, revision, and signature processes often discourage written agreements. The task force believes that agencies have and should retain the flexibility to decide whether agreements should be in writing.

If an agency determines that the agreement should be in writing, including a termination clause is common. Agency staff commented that using templates for either the agreement or the termination clause is not routine, but that considering other agency documents for similar activities when drafting agreements might be useful.

⁴⁴ Although ADR techniques are useful tools that can be used from the time a proposal is conceived, most interviewees viewed ADR as a technique or techniques to be employed after a dispute has arisen. While ADR is often thought of as being synonymous with mediation, it actually includes a broad spectrum of voluntary and flexible techniques, including facilitation, mediation and fact-finding that involve the use of a neutral third party to assist participants in decision making processes, and arbitration where the parties choose their own decision-maker. Assisted consensus-building and collaborative processes can be very helpful in mitigating potential conflicts that may arise and ADR can be and is being used at the very start of the NEPA process.

The Department of Energy provides agreements developed for one State office to other State or regional offices. CEQ should continue to provide and update examples of agreements that establish collaborative relationships and present sample elevation language for dispute resolution, termination clauses, and FACA requirements.

2.3. Collaboration Training

The task force found that, overall, agencies have not implemented training programs to teach collaborative practices. At a minimum, agencies undertaking long term or complex collaborative efforts should ensure that all those participating have sufficient training to understand both the NEPA process and the partner agencies' needs, expectations, and responsibilities. In particular, while agency staff might understand relevant regulatory agency requirements, it is not clear whether agency staff have had sufficient training about how to integrate the requirements into their own planning and NEPA processes. If agencies collaborate with regulatory agencies to define and develop the information and data needed to address the regulatory agencies' requirements during the NEPA process, time might be saved in project delivery and the public might benefit from a comprehensive disclosure. For example, the Advisory Council on Historic Preservation specifically allows agencies to combine the requirements of Section 106 of the National Historic Preservation Act⁴⁵ with their NEPA process if doing so would be beneficial.

Collaboration training should be designed to:

- ❖ Prepare agency personnel to work in a team setting;
- ❖ Negotiate agency positions;
- ❖ Resolve differences; and
- ❖ Recognize situations where a successful collaborative effort is unlikely.

The Bureau of Land Management has developed classes for their staff and partners that address aspects of collaboration, including partnering and citizen involvement.⁴⁶

Several respondents commented that there is a lack of training for citizens and local representatives about how to participate in Federal agency NEPA processes. It was also noted that local representatives often serve in a part-time or voluntary capacity and therefore, are unable to attend multiday training courses. Other respondents suggested that there are no readily available materials in print or on the Web outlining the NEPA process. Some agencies have information tailored to their needs, but CEQ does not have such general information available for the public.

⁴⁵ 16 U.S.C. § 470 *et seq.* (2000).

⁴⁶ More information, including sample syllabi, is available at www.ntc.blm.gov.

2.4. Issues and Recommendations

Throughout this chapter, the task force has discussed issues and recommendations that it believes CEQ should consider regarding guidance or changes to the regulations implementing NEPA. All the issues and recommendations are presented in this section.

To continue to build better collaborative relationships among agencies and between agencies and the public, CEQ should form a FACA committee of diverse individuals, with a variety of experiences in the NEPA process and a non-Federal perspective, which can contribute to the development of collaborative guidance and training. The committee should advise CEQ on:

- ❖ Focusing on better collaboration among agencies by identifying, developing, and sharing methods of engaging tribal, State, and local partners in training designed to educate them about the principles of NEPA, partner agencies' missions, communication skills, and public involvement skills.
- ❖ Developing guidance addressing the components of successful collaborative agreements and providing templates for memoranda of understanding applicable to various situations and stages in the NEPA process. The guidance should provide the foundation for successful agreements and provide the templates as examples, but it would not dictate the exact construction of the agreements. The templates should include sample language for dispute resolution and termination clauses.
- ❖ Examining lessons learned by others through CEQ-sponsored meetings, workshops, and training.
- ❖ Developing training that uses traditional and non-classroom methods, such as videos or Web-based training, to enhance agencies' work with the public. Some topics include:
 - The requirements of NEPA and explanations of the different NEPA processes, including categorical exclusions, EAs, EISs, and programmatic NEPA analyses;
 - How to become involved early and effectively contribute to the NEPA process;
 - Individual and generic agency needs and requirements, including what agencies look for when soliciting comments, and effective ways to provide comment; and
 - How to identify and determine if and how barriers to collaboration can be eliminated.
- ❖ Developing a "Citizen's Guide to NEPA" to explain basic NEPA requirements, dispel common misinterpretations, and provide helpful tips about how to participate in the NEPA process. The publication should be posted to the Web and traditionally published.

Lastly, CEQ should periodically sponsor forums designed to address topics such as creating documents that satisfy both Federal and State NEPA requirements and how agencies can better integrate the needs of regulatory agencies into their NEPA processes (see the Additional Areas of Consideration chapter of this report).

2.5. Summary of Recommendations

The task force recommends that CEQ form a Federal Advisory Committee to provide advice to CEQ on:

- ❖ Identifying, developing, and sharing methods of engaging Federal, State, local, and tribal partners in training designed to educate them about the principles of NEPA, agencies' missions, and collaboration skills.
- ❖ Developing guidance addressing the components of successful collaborative agreements and provide templates applicable to various situations and stages of the NEPA process.
- ❖ Developing training for the public on NEPA requirements and effective public involvement.
- ❖ Developing a "Citizen's Guide to NEPA."

The task force further recommends that CEQ periodically sponsor forums to address integrating Federal and State NEPA requirements and integrating the needs of regulatory agencies into the NEPA process.