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

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

[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.

Sample Report to the Council on Environmental Quality
on Cooperating Agency (CA) Status
March 1, 2002 to August 31, 2002

I. Environmental Impact Statements:

	1.	2.	etc.
EIS	(Title of EIS)		
Potential CA	(Name of potential CA)		
Invited CA	(Name of potential CA and basis – identify the jurisdiction by law or special expertise)		
Agency Requesting CA Status	(Name of potential CA and basis – identify the jurisdiction by law or special expertise)		
CAs	(Name of CA engaged in the EIS)		
CA Status not Initiated or Ended	(e.g., name of agency – reason status was not initiated or was ended – see examples listed below		
Status of EIS	(e.g., begun on mm/dd/yy; DEIS published mm/dd/yy; FEIS published mm/dd/yy; ROD published mm/dd/yy)		

Examples of reasons CA status was not initiated or why it ended:

1. Lack of special expertise – identify the expertise sought by the lead agency and/or offered by the potential cooperating agency).
2. State, Tribal or local entity lacks authority to enter into an agreement to be a CA.
3. Potential CA unable to agree to participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process.
4. Potential or active CA unable or unwilling to identify significant issues, eliminate minor issues, identify issues previously studied, or identify conflicts with the objectives of regional, State and local land use plans, policies and controls in a timely manner.
5. Potential or active CA unable or unwilling to assist in preparing portions of the review and analysis and resolving significant environmental issues in a timely manner.
6. Potential or active CA unable or unwilling to provide resources to support scheduling and critical milestones.
7. Agency unable or unwilling to consistently participate in meetings or respond in a timely fashion after adequate time for review of documents, issues and analyses.

7. Can the cooperating agency provide resources to support scheduling and critical milestones such as:

- personnel? Consider all forms of assistance (e.g., data gathering; surveying; compilation; research.
- expertise? This includes technical or subject matter expertise.
- funding? Examples include funding for personnel, travel and studies. Normally, the cooperating agency will provide the funding; to the extent available funds permit, the lead agency shall fund or include in budget requests funding for an analyses the lead agency requests from cooperating agencies. Alternatives to travel, such as telephonic or video conferencing, should be considered especially when funding constrains participation.
- models and databases? Consider consistency and compatibility with lead and other cooperating agencies' methodologies.
- facilities, equipment and other services? This type of support is especially relevant for smaller governmental entities with limited budgets.

8. Does the agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses? For example, are either the lead or cooperating agencies unable or unwilling to consistently participate in meetings in a timely fashion after adequate time for review of documents, issues and analyses?

9. Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

10. Are the agency(s) able and willing to provide data and rationale underlying the analyses or assessment of alternatives?

11. Does the agency release predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents? Disagreeing with the published draft or final analysis should not be a ground for ending cooperating status. Agencies must be alert to situations where state law requires release of information.

12. Does the agency consistently misrepresent the process or the findings presented in the analysis and documentation?

The factors provided for extending cooperating agency status are not intended to be all-inclusive. Moreover, satisfying all the factors is not required and satisfying one may be sufficient. Each determination should be made on a case-by-case basis considering all relevant information and factors.

Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status

1. Jurisdiction by law (40 C.F.R. § 1508.15) – for example, agencies with the authority to grant permits for implementing the action [federal agencies shall be a cooperating agency (1501.6); non-federal agencies may be invited (40 C.F.R. § 1508.5)]:

- Does the agency have the authority to approve a proposal or a portion of a proposal?
- Does the agency have the authority to veto a proposal or a portion of a proposal?
- Does the agency have the authority to finance a proposal or a portion of a proposal?

2. Special expertise (40 C.F.R. § 1508.26) – cooperating agency status for specific purposes linked to special expertise requires more than an interest in a proposed action [federal and non-federal agencies may be requested (40 C.F.R. §§ 1501.6 & 1508.5)]:

- Does the cooperating agency have the expertise needed to help the lead agency meet a statutory responsibility?
- Does the cooperating agency have the expertise developed to carry out an agency mission?
- Does the cooperating agency have the related program expertise or experience?
- Does the cooperating agency have the expertise regarding the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

3. Do the agencies understand what cooperating agency status means and can they legally enter into an agreement to be a cooperating agency?

4. Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

5. Can the cooperating agency, in a timely manner, aid in:

- identifying significant environmental issues [including aspects of the human environment (40 C.F.R. § 1508.14), including natural, social, economic, energy, urban quality, historic and cultural issues (40 C.F.R. § 1502.16)]?
- eliminating minor issues from further study?
- identifying issues previously the subject of environmental review or study?
- identifying the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

(40 C.F.R. §§ 1501.1(d) and 1501.7)

6. Can the cooperating agency assist in preparing portions of the review and analysis and resolving significant environmental issues to support scheduling and critical milestones?

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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8. CA unwilling or unable to accept the lead agency's decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action or to develop information/analysis of alternatives they favor and disfavor.
9. Agency unable or unwilling to provide data and rationale underlying the analyses or assessment of alternatives.
10. Agency releases predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents.
11. Agency consistently misrepresents the process or the findings presented in the analysis and documentation.
12. Other. Identify the other:

Environmental Assessments:

	Total
Number of EAs started during the reporting period	
Number of EAs involving potential CAs	
Number of EAs where agencies were invited to participate	
Number of EAs where agencies requested CA status	
Number of EAs where a CA status was not initiated or was ended for the reasons identified	
Number of EAs involving CAs begun and ongoing during the reporting period	
Number of EAs involving CAs begun and completed during the reporting period	