

December 23, 2004

MEMORANDUM FOR THE HEADS OF FEDERAL AGENCIES

FROM: JAMES L. CONNAUGHTON

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

The January 30, 2002, Memorandum for Heads of Federal Agencies, Subject: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act¹, consistent with the President's commitment to increase local participation and facilitate cooperative conservation, established a reporting requirement for all EISs and EAs. The purpose of this Memorandum is to establish a revised report 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 (NEPA).²

This memorandum ends the six month reporting requirement and establishes an improved reporting mechanism. We developed the new report format based on recommendations from your agencies to more accurately measure our progress in assuring cooperating agency status to federal and non-federal governmental bodies that qualify for such status. CEQ will convene an interagency work group to develop metrics applicable to all agencies for using the reports to improve agency NEPA processes and decisionmaking.

Agencies of the Federal government responsible for preparing NEPA analyses will now report once each fiscal year (FY). The report will be due three months after the close of the FY. For example, the first such report for October 1, 2004 through September 30, 2005 will be due on January 3, 2006.

For EISs with a Notice of Intent published between October 1, 2004 and September 30, 2005, the lead agency will report: (1) the title of the EIS; (2) the names of the cooperating agencies for the EIS; (3) the names of agencies who declined an invitation to participate as a cooperating agency or who requested but failed to reach agreement on establishing cooperating agency status and agencies whose cooperating agency status was ended, and the reason(s)

¹ Available at <http://ceq.eh.doe.gov/nepa/regs/guidance.html>

² 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 establishing or ending cooperating agency status does not satisfy or end those other requirements.

cooperating agency status was not established or was ended; and (4) the current status of the EIS. Reports after FY 05 would include updates to previous reports on EISs.

For EAs, the lead agency will report: (1) the number of EAs completed between October 1, 2004 and September 30, 2005; (2) the number of those EAs which included participation of one or more cooperating agencies; and (3) the reasons agencies did not accept invitations or reach agreement to participate as cooperating agencies, or ended the cooperating agency status prior to completing the EA.

The form for submitting the annual report is attached (Attachment 1). Also attached are Frequently Asked Questions and Answers developed with the agencies to address common issues and be used in conjunction with the report form (Attachment 2).

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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INSERT NAME OF AGENCY SUBMITTING THE REPORT

Cooperating Agency Report to the Council on Environmental Quality

October 1, 2004 to September 30, 2005

I. Environmental Impact Statements:

| <p>EIS TITLE</p> <p><i>(Insert Title of each EIS for which your agency published a NOI during the fiscal year)</i></p> | <p>COOPERATING AGENCIES</p> <p><i>(Insert names of agencies that were invited and agreed to participate in the EIS process as Cooperating Agencies or that requested Cooperating Agency status and reached agreement with the lead agency to participate in the EIS process as Cooperating Agencies)</i></p> | <p>CA STATUS NOT ESTABLISHED OR ENDED</p> <p><i>(Insert the name(s) of any agency(ies) that: declined in writing –required for federal agencies, see 40 CFR 1501.6(c) – or verbally to participate as a Cooperating Agency; requested Cooperating Agency status but was unable to reach agreement to participate as a Cooperating Agency; or that assumed Cooperating Agency status which was subsequently ended <u>and</u> the reason Cooperating Agency status was not established or was ended – see 5 listed reasons below)</i></p> | <p>STATUS OF EIS</p> <p><i>(Insert the following dates as mm/dd/yyyy)</i></p> |
|---|---|--|--|
| | | | <p>NOI: DEIS NOA:</p> |

| | | | |
|--|--|--|--|
| | | | FEIS NOA: ROD: |
| | | | NOI: DEIS NOA: FEIS NOA: ROD: |
| | | | NOI: DEIS NOA: FEIS NOA: ROD: |
| | | | NOI: DEIS NOA: FEIS NOA: ROD: |

Reasons CA status was not established or why it ended:

1. Potential Cooperating Agency lacked special expertise and jurisdiction by law.
2. Potential Cooperating Agency lacked authority to enter into an agreement to be a CA.
3. Potential or active CA lacked agreement with the agency.
(e.g., unable to accept the scope of the analysis or the purpose and need for the proposed action; unable to accept responsibilities and/or milestones for analysis and documentation; unable to develop information/analysis of all reasonable alternatives; unable to prevent release of predecisional information; misrepresents the process or the findings presented in the analysis and documentation).
4. Potential or active CA lacked capacity (training or resources) to participate.
(e.g., unable to participate during scoping and/or throughout the preparation of the analysis and documentation as necessary to meet process milestones; unable 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; unable to assist in preparing portions of the review and analysis and help resolve significant environmental issues in a timely manner; unable to provide resources to support scheduling and critical milestones).
5. Other (specify).

II. Environmental Assessments:

| | Total |
|--|---|
| Number of EAs completed by your agency during the fiscal year | |
| Number of those EAs your agency prepared with CAs | |
| The reason(s) from the list below that cooperating agency status was not established or was ended (NOTE: agencies may replace this row of the report with a paragraph describing the most frequent reasons) | <u>(number)</u> EAs – reason #1 <u>(number)</u> EAs – reason #2 <u>(number)</u> EAs – reason #3 <u>(number)</u> EAs – reason #4 <u>(number)</u> EAs – reason #5 |

Reasons CA status was not established or why it ended:

1. Potential Cooperating Agency lacked special expertise and jurisdiction by law.
2. Potential Cooperating Agency lacked authority to enter into an agreement to be a CA.
3. Potential or active CA lacked agreement with the agency.
(e.g., unable to accept the scope of the analysis or the purpose and need for the proposed action; unable to accept responsibilities and/or milestones for analysis and documentation; unable to develop information/analysis of all reasonable alternatives; unable to prevent release of predecisional information; misrepresents the process or the findings presented in the analysis and documentation).
4. Potential or active CA lacked capacity (training or resources) to participate.
(e.g., unable to participate during scoping and/or throughout the preparation of the analysis and documentation as necessary to meet process milestones; unable 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; unable to assist in preparing portions of the review and analysis and help resolve significant environmental issues in a timely manner; unable to provide resources to support scheduling and critical milestones).
5. Other (specify).

Cooperating Agency Report to the Council on Environmental Quality

Frequently Asked Questions and Answers

1. What are the major changes between the reporting requirement established in January 2002 and this reporting requirement?

The major changes: (1) increase the reporting period from six to twelve months; (2) align the reporting period with the fiscal year; (3) decrease the amount of information reported; (4) simplify the identification of challenges or barriers to establishing cooperating agency status; and (5) report completed rather than initiated environmental assessments.

2. Do agencies report Environmental Impact Statements (EISs) and Environmental Assessments (EAs) if they are a Cooperating Agency (CA)?

No. Report only those EAs and EISs that the agency is responsible for preparing. When more than one federal agency has NEPA responsibilities (e.g. one funds or approves a project that another implements) then the agencies should work together, either as joint-leads or as lead and cooperating agencies, to avoid duplicative NEPA work. The lead agency responsible for preparing the EA or EIS is responsible for submitting the CA report.

3. Who reports the EIS or EA when there are joint lead agencies responsible for preparing the EIS or EA?

Joint lead agencies can be involved when a Tribe, State or local agency with a requirement comparable to NEPA, or another federal agency either (1) proposes or is involved in the same action, or (2) is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity [see 40 CFR §§1501.5 and 1506.2]. When a federal agency is a joint-lead agency with a Tribal, State or local government, the federal agency will report the EA or EIS. When more than one federal agency is a joint-lead, the federal joint-lead agencies should agree on which one federal agency will report the EA or EIS. Although a formal document to establish Cooperating Agency Status is not required, the agencies involved need to clearly understand their respective roles and a formal document or exchange of letters may be helpful in correcting misunderstandings brought on by changing personnel and priorities. When a formal document or an exchange of letters is used, the agency with reporting responsibility should be identified.

4. Which EAs and EISs are reported?

The report will provide information on EISs begun during the fiscal year reporting period, and on EAs completed during the fiscal year reporting period. For purposes of this report, an EIS is begun when the Notice of Intent (NOI) is published in the Federal Register, and an EA is

completed when a Finding of No Significant Impact (FONSI) is completed or a NOI to prepare an EIS is published.

5. What is required for an agency to be reported as a Cooperating Agency?

Agencies with either "jurisdiction by law" or "special expertise" are eligible to be cooperating agencies. When they are invited and agree to be cooperating agencies or their request for cooperating agency status is granted, then they qualify and should be reported as cooperating agencies. When more than one federal agency has NEPA responsibilities – or in the case of tribal, state or local governments, responsibilities for requirements in addition to but not in conflict with those in NEPA – then the agencies should work together, either as joint-leads or as lead and cooperating agencies, to avoid redundant, duplicative NEPA work and cooperating agency status is one way to accomplish these responsibilities. Agencies with a permitting or approval role, often referred to as consulting agencies, can be invited to be cooperating agencies and lead agencies are encouraged to actively consider extending cooperating agency status to such agencies.

6. Does the cooperating agency's name go on the EA or EIS?

Yes. For an EIS, the cover must list all cooperating agencies (federal and non-federal) as required by Section 1502.11 of the CEQ NEPA regulations [see <http://ceq.eh.doe.gov/nepa/regs/000925letter.html>]. An EA must list the agencies consulted [see 40 CFR §1508.9] and agencies with cooperating agency status can be listed as a subset of those consulted.

7. Which agencies must be reported when Cooperating Agency status is not established or is ended?

Agencies should be reported in the EIS column "CA Status not Established or Ended" and in the EA report's third row or optional explanatory paragraph when:

- (1) An agency declines an invitation to participate as a Cooperating Agency in writing or verbally. Federal agencies are required to decline in writing and to provide a copy of their reply to the invitation to the Council on Environmental Quality (see 40 CFR §1501.6(c)).
- (2) An agency requests cooperating agency status but an agreement to participate as a Cooperating Agency is not reached with the agency responsible for the NEPA analysis and documentation.
- (3) An agency whose Cooperating Agency status was established but ended prior to completion of the NEPA analysis and documentation.

The reporting agency must indicate the reason that the Cooperating Agency status was not established or was ended. Five main categories of reasons, with examples, are provided on the report form. When there are several reasons, provide the primary reason(s) for not establishing or ending the Cooperating Agency status.

8. How will agencies update the EIS information in subsequent fiscal years?

The reporting agency will provide updated information (for example: new cooperating agencies; new EIS status) in subsequent FYs by submitting the previous EIS report with new information inserted and highlighted.