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November 28, 2017

Ted Boling  
Associate Director for the National Environmental Policy Act  
Council on Environmental Quality  
730 Jackson Place N.W.  
Washington, D.C. 20503

Dear Associate Director Boling:

Western Governors urge the Council on Environmental Quality (CEQ) to capitalize on an opportunity to strengthen the state-federal relationship through its work to enhance and modernize federal environmental reviews pursuant to Executive Order 13807 ([Executive Order](#)). Because of their authority for the management of the environment and natural resources within their borders and their integral role in federal environmental reviews, states are necessary partners for determining how best to improve review processes. This letter and attachment are intended to initiate a collaborative process to engage Western Governors in the work of CEQ.

### **Recommendations for Modernizing the Environmental Review Process**

The Executive Order directs CEQ to ensure optimal interagency coordination of concurrent, synchronized, timely, and efficient environmental reviews, as well as to provide “an expanded role and authorities for lead agencies” and “more clearly defined responsibilities for cooperating and participating agencies.” Western Governors support improving the efficiency of environmental reviews and eliminating duplication between state and federal activities.

To accomplish these goals, CEQ should focus on expanding the collaboration between cooperating agencies and lead agencies, and should not expand the role of lead agencies at the expense of cooperating agencies or further limit the roles of cooperating agencies. The attachment outlines the Western Governors’ recommendations for fulfilling the objectives of the Executive Order.

In addition, the Executive Order designates the Departments of the Interior and Agriculture as “lead agencies for facilitating the identification and designation of energy right-of-way corridors on Federal lands for Government-wide *expedited environmental review* for the development of infrastructure projects.” Western Governors recommend CEQ regard the West-wide energy corridor designations as an opportunity to streamline the federal environmental review process. The Governors have long advocated incentivizing corridor use by providing a streamlined environmental review process for project proponents; for more detail, please see the Governors’ [letter](#) of October 13, 2016, to the Bureau of Land Management.

### **Inclusion of States in the Interagency Working Group**

The Executive Order further directs CEQ to create an interagency working group, which should include “such other representatives of agencies as CEQ deems appropriate,” to assess environmental review regulations and processes. In CEQ’s Initial List of Actions to Enhance and Modernize the Environmental Review and Authorization Process, [82 FR 43226](#) (September 14, 2017), CEQ has qualified this directive by stating that the working group will consist of “representatives of other such Federal agencies as CEQ shall deem appropriate.” Western Governors ask CEQ to remove this limitation and include representatives from state governments in the working group. The early inclusion of states in CEQ’s process will create a more effective result, which will better satisfy the intent of the Executive Order.

Do not hesitate to contact us to discuss our recommendations and CEQ’s efforts. We are eager to help CEQ improve the federal environmental review process.

Respectfully,



Dennis Daugaard  
Governor of South Dakota  
Chair, WGA



David Ige  
Governor of Hawaii  
Vice Chair, WGA

Attachment



## Opportunities for the Council on Environmental Quality to Improve the Cooperating Agency-Lead Agency Relationship

This document contains the Western Governors' recommendations to the Council on Environmental Quality (CEQ) for improving the National Environmental Policy Act (NEPA) process, focusing on the cooperating agency and lead agency relationship. It further cross-references those recommendations to WGA policy resolutions and related documents.

RECOMMENDATION	CURRENT STATUS	ISSUE	WGA POLICY
<p><b><i>Ensure cooperation entails meaningful, substantive, and ongoing government-to-government consultation throughout all stages of the NEPA process.</i></b></p> <p>To help accomplish this, CEQ could make its suggestions to “Consult,” “Involve”, and “Collaborate” with cooperating agencies mandatory.</p>	<p>CEQ regulations require federal agencies to cooperate with state agencies to the fullest extent possible to reduce duplication between NEPA and comparable state requirements. <a href="#">40 CFR §1506.2</a>. CEQ regulations do not require the lead agency to incorporate or respond to cooperating agency input and CEQ guidance places the means and extent of cooperation solely at the discretion of the lead agency. <a href="#">CEQ Collaboration in NEPA: A Handbook for NEPA Practitioners</a> (2007), p. 16. CEQ guidance, however, currently provides excellent suggestions for effective cooperation, at p. 13:</p> <ul style="list-style-type: none"> <li>• Consult: Lead agencies should keep cooperating agencies informed and consider their concerns and suggestions on the NEPA process and provide documentation on how their input was considered in the decision-making process.</li> <li>• Involve: Lead agencies should communicate with cooperating agencies to ensure that their input is addressed and reflected within legal and policy constraints and provide iterative feedback on how their input is considered in the decision-making process.</li> <li>• Collaborate: Lead agencies should seek cooperating agency advice and agreement on various aspects of the NEPA process.</li> </ul>	<p>If cooperating agency status does not ensure effective cooperation, there is little incentive for state and local agencies to seek that status.</p> <p>The regulatory directive to cooperate needs more substance to ensure there is a two-sided, government-to-government exchange of information and ideas.</p> <p>Federal agency interaction with states – as sovereigns – should not be relegated to the public stakeholder process, regardless of cooperating agency status.</p>	<p>States must have early, meaningful, and substantive input in the development of regulatory policies that have federalism implications, such as reviews. WGA Policy Resolution <a href="#">2017-01</a>, <i>Building a Stronger State-Federal Relationship</i>.</p>

<p><b><i>Guarantee that the coordination and consultation requirements in other federal statutes are respected, regardless of whether an agency is designated as a cooperating agency.</i></b></p>	<p>NEPA explicitly states that it does “not in any way affect the specific statutory obligations” of a federal agency “to coordinate or consult with any other Federal or State agency” or to act “upon the recommendations or certification of any other Federal or State agency.” 42 U.S.C. §4334.</p> <p>CEQ regulations require agencies to prepare environmental analyses concurrently with other environmental review laws and executive orders to the fullest extent possible. <a href="#">40 CFR §1502.25(a)</a>.</p> <p>CEQ memoranda reminds federal agencies that “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. . . [and] not establishing or ending cooperating agency status does not satisfy or end those other requirements.” <a href="#">CEQ Memorandum: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act</a> (January 2002).</p> <p>The Federal Land Policy &amp; Management Act’s (FLPMA) consistency requirements and the National Forest Management Act’s coordination requirements apply to states without a designation of the state as a “consulting agency” or “coordinating agency.”</p> <p>BLM has incorporated cooperating agency status into its resource management planning process under FLPMA, describing the cooperating agency model as “an excellent opportunity to meet, and exceed, these coordination responsibilities under FLPMA [maximizing consistency]” because the cooperating agency relationship “goes beyond coordination.” <a href="#">43 CFR §1610.3-2(b)</a>; <a href="#">BLM’s Desk Guide</a>, p. 32.</p>	<p>Federal agencies must meet all applicable statutory requirements. Due to the common overlap between NEPA and resource management planning, simultaneously navigating a cooperating agency relationship and a consultative relationship can be challenging.</p> <p>Clarifying the consultation and cooperating agency relationship interaction will aid both federal and state agencies as they work together on resource management issues.</p>	<p>Federal agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states’ borders. WGA Policy Resolution <a href="#">2017-01</a>, <i>Building a Stronger State-Federal Relationship</i>.</p>
<p><b><i>Require the EIS/EA to: (1) incorporate state environmental review requirements in addition to but not in conflict with NEPA into an EIS/EA; and (2) be consistent with state and local plans and laws to the maximum extent possible.</i></b></p>	<p>Pursuant to CEQ regulation, “[w]here State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.” <a href="#">40 CFR §1506.2(c)</a>.</p> <p>An EIS must address any inconsistency between the EIS and any state or local plan and laws and describe the extent to which the agency would reconcile its proposed action with the plan or law. <a href="#">40 CFR §1506.2(d)</a>.</p>	<p>While it is the clear intent of CEQ regulations to reduce duplication, there is no clear directive for a final EIS/EA to incorporate state environmental review requirements that go beyond federal requirements or to ensure consistency with state</p>	<p>Federal agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states’ borders. WGA Policy Resolution <a href="#">2017-01</a>, <i>Building a Stronger State-Federal Relationship</i>.</p>

<p>Both an EIS and EA should describe any inconsistency between the document and any state or local plan and laws and describe the extent to which the agency should reconcile its proposed action with the plan or law.</p>	<p>FLPMA requires BLM land use plans to be consistent with state and local land use planning to the maximum extent consistent with federal law, and BLM must assist in resolving inconsistencies to the extent practical. 43 U.S.C. §1712(b)(9). BLM has incorporated cooperating agency status into its resource management planning process under FLPMA. <a href="#">43 CFR §1610.3-2(b)</a>.</p>	<p>and local plans. Such a clear requirement would also reduce potential confusion due to the overlap of FLPMA and NEPA.</p>	
<p><b><i>Simplify the definition of a cooperating agency.</i></b></p> <p>CEQ could, for example, define cooperating agency to include a state or local government affected or potentially affected by the proposed federal action that agrees to become a cooperating agency. Alternatively, CEQ could adopt the definition of cooperating agency included in the Responsibly And Professionally Invigorating Development Act of 2015 (<a href="#">RAPID Act</a>).</p>	<p>Under CEQ regulations, a state agency is eligible for cooperating agency status if either: (1) the agency has “jurisdiction by law” – the authority to approve, deny, or finance all or part of a proposal; or (2) special expertise with respect to any environmental impact, which must be relevant to the decisions to be made and demonstrated through program focus and capabilities.</p>	<p>These requirements lend themselves to debate and subjectivity.</p>	<p>Agencies should better define “cooperating agency” under NEPA processes. <a href="#">WGA Regulatory Reform Recommendations</a>.</p>
<p><b><i>Create a standard, documentation, and review process for a lead agency’s denial of a request for cooperating agency status.</i></b></p> <p>CEQ regulations should require lead agencies to:</p>	<p>Lead agencies may grant or deny state, federal, local, and tribal government entities’ requests to become cooperating agencies. <a href="#">40 CFR §1501.6</a>.</p> <p>The standard for, documentation requirements pertaining to, and review of a lead agency’s denial of a request for cooperating agency status are not addressed in CEQ regulations.</p> <p>The Tenth Circuit has held that an agency’s decision to deny a request for cooperating agency status was not judicially reviewable, because CEQ</p>	<p>Without documentation requirements or opportunities for review, lead agencies cannot be not held accountable for their decisions to deny these requests.</p>	<p>Federal agencies should respect state sovereignty. WGA Policy Resolution <a href="#">2017-01, Building a Stronger State-Federal Relationship</a>.</p>

<ul style="list-style-type: none"> <li>• Provide a clear and thorough explanation of the reasons for the denial of cooperating agency status to the requesting agency;</li> <li>• Record and maintain this explanation at the lead agency and by submission to the Office of Management and Budget; and</li> <li>• Provide a remedy for the requesting agency and a standard of review for that remedy, such as clear and convincing evidence.</li> </ul>	<p>regulations currently provide no standard for the court to apply. <i>Wyoming v. U.S. Dept. of Agriculture</i>, 661 F.3d 1209 (10th Cir. 2011).</p>		
<p><b><i>Require the use of cooperating agencies’ environmental analyses and data, subject to existing state data protection and transparency requirements, as well as agreement on the methodologies for joint reviews.</i></b></p>	<p>CEQ regulations require federal agencies to reduce duplication and create a single environmental review document, as well as encourage the performance of joint studies and analyses. <a href="#">40 CFR §1506.2</a>.</p> <p>CEQ regulations do not require lead agencies to include the information and data submitted by cooperating agencies – or explain why it was not included – in an EIS/EA or to obtain cooperating agency agreement on joint review methodologies.</p>	<p>A cooperating agency will need to create an additional environmental review document if the EIS/EA does not contain the information necessary for that agency to complete its review. This results in duplication and redundancy.</p> <p>A cooperating agency may also be reluctant to engage in a joint study or analysis if its agreement on the methodology is not required.</p>	<p>Federal agencies should leverage the use of state, tribal, and local expertise and science in federal environmental review, consultation and permitting. <a href="#">National Forest and Rangeland Management Initiative June 2017 Special Report</a></p> <p>Federal actions should use state data and expertise, subject to existing state requirements for data protection and transparency. WGA Policy Resolution <a href="#">2017-08, State Wildlife Science, Data, and Analysis</a>.</p> <p>States must have early, meaningful, and substantive input in the development of regulatory policies that have federalism implications,</p>



			such as reviews. WGA Policy Resolution <a href="#">2017-01, Building a Stronger State-Federal Relationship</a> .
<b>Clarify that cooperating agency status continues until the EIS/EA is fully implemented.</b>	<p>CEQ regulations are silent on when cooperating agency status ends. CEQ guidance recommends that the lead agency consider comments received on a draft or final EIS/EA with other cooperating agencies before issuing its final decision, but a lead agency is not required to share public comments on a draft EIS/EA with cooperating agencies prior to the final EIS/EA. <a href="#">CEQ Collaboration in NEPA: A Handbook for NEPA Practitioners</a> (2007), p. 16.</p> <p>CEQ memoranda and BLM's regulations and guidance imply that cooperation ends after the preparation of a proposed EIS. <a href="#">CEQ Memorandum: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act</a> (January 2002); 43 CFR §1610.3-2(b); <a href="#">BLM's Desk Guide</a>, p. 30.</p>	Ending cooperating agency status once an EIS/EA is drafted eliminates state engagement at the crucial phases of finalization and implementation.	Federal agencies should consult with states on a regular basis as a predicate to federal action and on an ongoing basis, including throughout implementation. WGA Policy Resolution <a href="#">2017-01, Building a Stronger State-Federal Relationship</a> .
<b>Extend cooperating agency status to EAs while providing state agencies with the flexibility to decline an invitation to become a cooperating agency.</b>	<p>CEQ regulations do not require federal agencies to invite other governmental entities to participate as cooperating agencies for purposes of producing an EA; CEQ memoranda, however, indicates that lead agencies may, through their own discretion, invite governmental entities to participate as cooperating agencies for EAs. <a href="#">CEQ Memorandum: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act</a> (January 2002); <a href="#">CEQ Memorandum: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act</a> (July 1999).</p>	<p>Federal agencies prepare far more EAs than EISs, but in 2015, cooperating agencies were involved in only five percent of EAs (compared to 66 percent of EISs). <a href="#">Attachment A</a> of CEQ 2016 Report.</p> <p>The same reasons for cooperation – depending on the circumstances – can exist for EAs as for EISs.</p>	Federal agencies should be consistent in environmental analysis and align agency practice in conducting EAs with the administrative policy goal of streamlined, summary documents. <a href="#">National Forest and Rangeland Management Initiative June 2017 Special Report</a>
<b>Form an advisory committee with representatives from states to monitor implementation of these recommendations and provide additional recommendations.</b>	<p>The most recent regulatory and legislative task forces on improving the NEPA process submitted their reports in 2003 and 2006, respectively, and were time-limited. <a href="#">2003 CEQ NEPA Task Force Report</a> on Modernizing NEPA Implementation; <a href="#">2006 House Natural Resources Committee NEPA Task Force Report</a> on Improving and Updating the National Environmental Policy Act.</p> <p>CEQ's Initial List of Actions to Enhance and Modernize the Environmental</p>	An ongoing committee could work to continuously improve the NEPA process. Currently, CEQ has no formal, ongoing, and permanent method to receive feedback from cooperating agencies or states on the NEPA	States should have representation on all relevant committees and panels advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes. WGA Policy Resolution <a href="#">2017-01, Building a</a>

	Review and Authorization Process, 82 FR 43226 (September 14, 2017) includes the creation of an Interagency Working Group.	process.	<i>Stronger State-Federal Relationship.</i>
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