Using the 3 C's: Cooperation, Coordination, and Collaboration

by Larry Freeman, PhD
The Shipley Group, *Senior Consultant*

The following newsletter discusses 3 important C's for NEPA analyses: **cooperation, coordination,** and **collaboration**. All three would contribute to a sound NEPA analysis process. Cooperation is the most clearly developed of the three, with the legal roles and responsibilities of cooperating agencies outlined in the Council on Environmental Quality (CEQ) Regulations, Sections 1501.5 and 1501.6.

Coordination between different levels of government is a new and developing topic of environmental and political concern. About a month ago I received an email from a political activist in Cody, Wyoming. She was writing to alert me to coordination as a potential compliance concern, especially because coordination overlaps with or competes with the traditional National Environmental Policy Act (NEPA) strategy of identifying cooperating agencies.

The newsletter covers the following recommendations:

1. **Distinguish between potential coordination steps and the more traditional NEPA practice of identifying cooperating agencies.**
2. **Remember that coordination is not as legally well established as is a clear cooperating agency status (usually outlined in a memorandum of agreement).**
3. **Decide how your agency wants to use cooperation, coordination, or collaboration.**
4. **Include coordination language in your environmental compliance records (as a proactive defensive strategy even if you do not have separate coordination steps).**
5. **Monitor your agency's use of the three C's (cooperation, coordination, and collaboration).**

The following text expands on the preceding five recommendations. As you consider the recommendations, remember that compliance with the NEPA process is subjective in many ways. The specific steps necessarily vary from one project to the next. So, realistically speaking, each NEPA compliance process might use its own blend of the 3 C's: **cooperation, coordination,** and **collaboration**.

1. **Distinguish between potential coordination steps and the more traditional NEPA practice of identifying cooperating agencies.**

In the following, I summarize the developing interest in legally required **coordination** between Federal agency planning actions and State or local planning interests. I also summarize the role of **cooperating agencies** within well-established NEPA legal procedures. Finally, I mention **collaboration** as a new scoping approach within Federal land management agencies.

Coordination

Coordination seems to have developed as a legal topic some two decades ago. Its origins are rooted in language from the Federal Land Policy and Management Act (FLPMA) of 1976. Section 202(c)(9) of FLPMA states that the Secretary [of Interior] shall . . . "to the extent consistent with the laws governing the administration of public lands, coordinate . . . with the land use planning and management programs of other Federal departments and agencies and of the States and local governments . . . ." Subsection (9) ends with this statement: "Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of the Act."

Language similar to this FLPMA guidance appears in other environmental laws. For example, as noted below, the National Environmental Policy Act of 1969 (NEPA) has broad requirements for an agency to consider State and local planning actions during its own planning processes.

Statutory references to coordination mean that some governmental agencies, especially counties, are beginning to rely on coordination requirements to provide access to and leverage on Federal planning decisions. For more information about such coordination activities, an excellent source is the website at www.standingground.us. This website has electronic copies of the "Standing Ground" newsletter, which is published by the Stewards of the Range and the American Land Foundation. As articles in "Standing Ground" suggest, a number of counties have adopted and are considering adopting coordination as their primary tool for influencing Federal land management decisions. See also www.stewards.us. This website summarizes the origins of the Stewards of the Range organization and discusses some of its legal principles.

The Shipley Group does not necessarily recommend or approve of the views on the preceding websites. These citations are provided as sources of background information on the coordination movement.

Notice that the FLPMA requirements are loosely phrased, as quoted above, thus giving Federal decision makers broad discretion as to just what compliance with the FLPMA coordination requirements means. The result is that ongoing and future case law decisions will have to determine how Federal agencies should comply with the FLPMA requirements.

As far as I can determine, based on my experience with Federal agencies, existing agency guidance on coordination is limited. Most often, agency planning guides may mention the need for coordination with local or State actions, but clear and detailed steps for achieving coordination are missing. This lack of clarity contrasts, as discussed below, with the legally established cooperating agency role under NEPA.

Cooperating Agencies

Cooperation of a Federal agency with other interested and affected parties is a basic compliance requirement under the National Environmental Policy Act of 1969 (NEPA). Such cooperation is especially crucial when these other parties include governmental entities (local, county, state, Native American, or Federal). Statute language in Section 101(a) of NEPA directs that Federal Government policies be developed "in cooperation with other concerned public and private organizations." Notice, however, that the statute leaves open just how such cooperation is to be achieved. So both statute language in NEPA and FLPMA give agencies a lot of discretion as to how to provide for adequate coordination or cooperation.

How to achieve mandated NEPA cooperation is one reason the Council on Environmental Quality (CEQ) developed its guidance on Lead and Cooperating Agencies in Sections 1501.5 and 1501.6 of the CEQ Regulations (1978). This regulatory framework, as described in Sections 1501.5 and 1501.6, assigns a legal role and responsibilities to cooperating agencies. A possible cooperating agency has resources likely to be affected by a Federal action and has special expertise and decision authority in regard to affected resources.

Cooperation between agencies has never been efficient, especially for agencies from different levels of government. Agencies have built-in rivalries as well as different missions, so efficient cooperation has been difficult to achieve. Such difficulties are likely why the Bureau of Land Management published "A Desk Guide to Cooperating Agency Relationships" (2005). This Desk Guide is an excellent source for information about working with or working as a cooperating agency.

For efficiency, the role and responsibilities of cooperating agencies should be defined in a memorandum of agreement/understanding between the lead Federal agency and all cooperating agencies. Notice the lead agency must be a Federal agency (or one of the

lead agencies if more than one lead agency is involved). Cooperating agencies include other Federal agencies, and State or local governments, or Native American tribes. Private individuals or private interest groups are not cooperating agencies; instead, they are involved through agency scoping actions. The BLM Desk Guide mentioned above covers memos of agreement in Section 4. As the Desk Guide says, a good memo of agreement should guarantee that the views and expertise of a cooperating agency influence the lead agency's completion of the NEPA process.

Notice that the CEQ guidance provides an established legal framework for cooperating agencies to use in working with the lead Federal agency. This is not to say that all relationships between lead and cooperating agencies are productive. A common complaint of cooperating agencies is that the lead agency is not listening to them. Even a good memorandum of agreement will not guarantee that different agencies cooperate on a NEPA analysis.

The reality is that different governmental agencies are still learning how to work with each other. One feature of our United States political system is that different levels of government are forced to work with each other, given the complex layer of laws that exist at the Federal, State, county, and even local levels. NEPA cooperation reflects this political reality, which is difficult to achieve.

Collaboration

Collaboration has become a popular concept in recent discussions of NEPA compliance. Effective collaboration would seem to involve both substantive coordination and productive agency cooperation. As such, a legally compliant NEPA process would almost surely have some features of good agency collaboration. Collaboration in this sense complements the legal framework of lead and cooperating agencies, as established in the CEQ Regulations. But collaboration does not replace the process for identifying lead and cooperating Federal agencies when a NEPA process begins. As noted above, agency roles as lead and cooperating agencies are well established. But collaboration is not legally well established despite being an advisable approach to NEPA scoping, especially when interested and affected parties are asking to be brought into the NEPA process.

See my discussion of collaboration in the Shipley Group newsletter published in August 2009. This newsletter makes a case for building collaboration into every NEPA process as a contributing technique under routine scoping activities. Copies of Shipley Group newsletters are available at http://www.shipleygroup.com/news/0908.html.

2. Remember that coordination is not as legally well established as is a clear cooperating agency status (usually outlined in a memorandum of agreement).

Cooperating agency status is a clearly recognized legal role within the NEPA compliance process. Coordination is currently not legally established and does not provide clear roles and responsibilities for coordinating agencies.

Recommendation: This difference in legal status is the major reason why I would recommend that counties, state agencies, or Native American tribes explore cooperating agency status under NEPA rather than relying on less well-defined coordination.

If a Federal agency denies a local agency's request for status as a cooperating agency, the local agency can request help from the Council on Environmental Quality (CEQ). Such a request to CEQ would necessarily include information about the agency's reasons for believing that it should be given cooperating agency status. Notice, also, that the agency will have to show that it is willing to support this designated status by providing funding and staff support for its cooperating agency activities.

Section 1501.6 is not very clear about the CEQ's role when the lead agency denies an agency's request for cooperating agency status. Instead, most of the discussion is focused on cases when a potential cooperating agency argues that it does not have funds or staff to support cooperating agency activities. I suspect, however, that CEQ would provide positive support if a local or state agency or if a Native American tribe argued that it was being denied an opportunity to participate in a NEPA analysis process. Such a denial would be counter to many Federal agency internal guidelines encouraging broad participation from governmental agencies in NEPA analyses.

In contrast with these provisions for cooperating status, no established framework exists for challenging a Federal agency's decision not to coordinate planning activities with local governments. This is why earlier I mentioned that future case law decisions would be necessary before coordination processes are clearly defined between a Federal agency and state or local agencies or between a Federal agency and Native American tribes.

3. Decide how your agency wants to use cooperation, coordination, or collaboration.

A long-standing Shipley Group suggestion is that agencies should prepare a written public involvement plan. A written plan is important piece of legal record keeping. It also reminds all contributors of the need to follow compliance steps.

A written plan should address which agencies would be involved in a proposed NEPA analysis. And the plan would properly document any or all of the following Federal agency strategies: **cooperation, coordination,** or **collaboration.**

If a Federal agency decides that cooperation should be the main emphasis, then agency managers would necessarily identify in this written plan all potential cooperating agencies or tribes. From the CEQ guidance, these would be governmental agencies or tribes with affected resources or with special expertise in regard to these resources.

Next, the Federal agency would need to negotiate a memorandum of agreement/ understanding with each cooperating agency identified. As noted above, these memos would properly identify when and how the cooperating agencies would be asked to contribute their expertise.

In my Collaboration newsletter for the Shipley Group (August 2009), I list the follow major tasks as ones that might be cooperatively developed:

- **An agency's purpose (listed objectives) and need for a proposed action**
- **Possible impact topics/issues of concern**
- **Alternatives analyzed and alternatives rejected**
- **Possible mitigations, if desired**
- **Impact projections (appropriate details and clear and valid methodologies)**

Most Federal agencies routinely handle the preceding tasks internally. So even with well-identified cooperating agencies, the lead Federal agency rarely will solicit much help from cooperators on these tasks. As I suggest in the collaboration newsletter, cooperating agencies should actively solicit permission from the lead agency to participate in meetings on these tasks and should submit their viewpoints whenever possible.

Notice that such participation from cooperating agencies does not mean that the lead agency is delegating its decision authority. From a legal standpoint, the lead agency is still responsible for the final decisions regarding all of the above listed topics.

4. Include coordination language into your environmental compliance records (as a proactive defensive strategy even if you do not have separate coordination steps).

Recommendation: Include references to coordination actions in your compliance records if your agency is subject to FLPMA or to any of the similar land management planning laws that mention coordination.

Such references would be a prudent legal defense in case your agency is legally challenged to prove that it has completed the appropriate coordination with local, state, and tribal planning information, as mentioned in the statute language from the Federal Land Policy and Management Act (FLPMA).

Solid coordination actions would also support the agency's contention, under a NEPA challenge, that it has taken the recommended "hard look" at all potential effects and that it has made a "good faith" effort to involve any and all interested parties (under the scoping guidance in Section 1501.7 of the CEQ Regulations).

5. Monitor your agency's use of the three C's (cooperation, coordination, and collaboration).

Monitoring NEPA compliance is an important final step. Monitoring is especially important if your agency has decided to use and to document its use of **cooperation, coordination**, or **collaboration.**

This final review is essentially a lessons-learned step. Contributors to an EIS or a high-profile EA should meet a final time to discuss what went well and what didn't go well.

The three C's should be a major review topic during any late-stage monitoring discussion. If the 3 C's are going to be reviewed during a monitoring phase, they are likely to appear in the agency's written administrative record for a NEPA proposal.

As noted above, under suggestion 4, inclusion of the 3 C's in a NEPA analysis would support an agency in the event of a legal challenge. An agency could argue that it has conducted a good faith effort to involve all interested parties, including affected governmental agencies, and to address any and all concerns from these parties.