

## **Enclosure 4: Lead, Participating, and Cooperating Agencies (Federal, State, Tribal, and Local)**

### Existing Regulatory Framework and Practice

Consistent with its National Environmental Policy Act (NEPA) implementing regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) 51.14, “Definitions,” and 10 CFR 51.29, “Scoping—environmental impact statement and supplement to environmental impact statement,” the U.S. Nuclear Regulatory Commission (NRC) staff identifies Federal agencies with jurisdiction by law or special expertise to cooperate on NEPA environmental reviews. Additionally, as stated in 10 CFR 51.14, “By agreement with the Commission, a State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may become a cooperating agency.” The NRC’s NEPA implementing regulations in 10 CFR 51.10(b)(2) also state that the Commission will do the following:

Follow the provisions of 40 CFR 1501.5 and 1501.6<sup>1</sup> relating to lead agencies and cooperating agencies, except that the Commission reserves the right to prepare an independent environmental impact statement whenever the NRC has regulatory jurisdiction over an activity even though the NRC has not been designated as lead agency for preparation of the statement[.]”

NRC regulations in 10 CFR Part 51, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,” require that the NRC identify cooperating agencies as part of the scoping process associated with the development of an environmental impact statement. The NRC typically develops and executes memoranda of understanding (MOUs) to establish the respective roles and responsibilities of the lead agency and cooperating agencies, and a schedule and deliverables for the NEPA environmental review. Previous cooperating agencies in the NRC’s NEPA environmental reviews have included Federal agencies, such as the U.S. Army Corps of Engineers (Agencywide Documents Access and Management System ML082540354), the National Park Service (ML18355A847), the U.S. Department of Energy (ML23213A147), and the U.S. Bureau of Land Management (ML18290A458); State agencies, such as the New Mexico Environment Department (ML19206A094); and Tribal governments, such as the Prairie Island Indian Community (ML081610273).

Additionally, to comply with other environmental statutes (e.g., the Endangered Species Act and the National Historic Preservation Act), the NRC consults with other Federal and State agencies and with Tribes. The staff typically fulfills these requirements in coordination with the NEPA environmental review. These consultations also are conducted consistent with the NRC’s Management Directive (MD) 5.1, “Consultation and Coordination with Governments and Indian Tribes,” dated July 6, 2020; Tribal Policy Statement (82 FR 2402, July 9, 2017); the Tribal Policy Statement (ML17011A243); and the 2004 Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions (“Environmental Justice Policy Statement”) (69 FR 52040, August 24, 2004).

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<sup>1</sup> In the Council on Environmental Quality’s 2020 rulemaking, “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” published in the *Federal Register* (FR) on July 16, 2020 (85 FR 43304), the regulations at 40 CFR 1501.5 and 40 CFR 1501.6 were renumbered as 40 CFR 1501.7, “Lead agencies,” and 40 CFR 1501.8, “Cooperating agencies,” respectively.

## NEPA Amendments

The most relevant NEPA amendments related to the issue discussed in this enclosure are reproduced below.

### SECTION 107. TIMELY AND UNIFIED FEDERAL REVIEWS.

#### (a) LEAD AGENCY—

##### (1) DESIGNATION—

(A) IN GENERAL—If there are two or more Federal agencies, such agencies shall determine, by letter or memorandum, which agency shall be the lead agency based on consideration of the—

- (i) magnitude of agency's involvement;
- (ii) project approval or disapproval authority;
- (iii) expertise concerning the action's environmental effects;
- (iv) duration of agency's involvement; and
- (v) sequence of agency's involvement.

(B) JOINT LEAD AGENCIES—In making a determination under subparagraph (A), the participating Federal agencies may appoint such State, Tribal, or local agencies as joint lead agencies as the involved Federal agencies shall determine appropriate. Joint lead agencies shall jointly fulfill the role described in paragraph (2).

##### (2) ROLE—A lead agency shall, with respect to a proposed agency action—

- (A) supervise the preparation of an environmental document if, with respect to such proposed agency action, there is more than one participating Federal agency;
- (B) request the participation of each cooperating agency at the earliest practicable time;
- (C) in preparing an environmental document, give consideration to any analysis or proposal created by a cooperating agency;
- (D) develop a schedule, in consultation with each cooperating agency, the applicant, and such other entities as the lead agency determines appropriate, for completion of any environmental review, permit, or authorization required to carry out the proposed agency action;
- (E) if the lead agency determines that a review, permit, or authorization will not be completed in accordance with the schedule developed under subparagraph (D), notify the agency responsible for issuing such review, permit, or authorization of the discrepancy and request that such agency take such measures as such agency determines appropriate to comply with such schedule; and
- (F) meet with a cooperating agency that requests such a meeting.

- (3) COOPERATING AGENCY—The lead agency may, with respect to a proposed agency action, designate any Federal, State, Tribal, or local agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal to serve as a cooperating agency. A cooperating agency may, not later than a date specified in the schedule established by the lead agency, submit comments to the lead agency.
- (4) REQUEST FOR DESIGNATION—Any Federal, State, Tribal, or local agency or person that is substantially affected by the lack of a designation of a lead agency with respect to a proposed agency action under paragraph (1) may submit a written request for such a designation to a participating Federal agency. An agency that receives a request under this paragraph shall transmit such request to each participating Federal agency and to the Council.

#### SECTION 111. DEFINITIONS.

##### In this title:

- (2) COOPERATING AGENCY.—The term ‘cooperating agency’ means any Federal, State, Tribal, or local agency that has been designated as a cooperating agency under section 107(a)(3).
- (8) PARTICIPATING FEDERAL AGENCY.—The term ‘participating Federal agency’ means a Federal agency participating in an environmental review or authorization of an action.
- (9) LEAD AGENCY.—The term ‘lead agency’ means, with respect to a proposed agency action—
  - (A) the agency that proposed such action; or
  - (B) if there are 2 or more involved Federal agencies with respect to such action, the agency designated under section 107(a)(1).

Section 102(2)(C) states: “Prior to making any detailed statement, ~~the responsible Federal official~~ the head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”

#### Summary

The amendments to the Fiscal Responsibility Act of 2023 (FRA) revise or create the definitions and requirements for “lead agency,” “joint lead agency,” “cooperating agency,” and “participating Federal agency.” These amendments require that agencies identify in writing the lead agency when there are two or more participating Federal agencies and require that the head of the lead agency lead the consultation process.

Section 107(a)(1)(A) of the NEPA amendments states that “if there are two or more participating Federal agencies, such agencies shall determine, by letter or memorandum, which agency shall be the lead agency” and lists the considerations on which that determination should be made.

Section 107(a)(1)(B) indicates that the “participating Federal agencies may appoint such State, Tribal, or local agencies as joint lead agencies....”

Section 107(a)(2) defines the role of the lead agency. Section 107(a)(4) provides for a process when a lead agency has not been identified, stating that—

Any Federal, State, Tribal, or local agency or person that is substantially affected by the lack of a designation of a lead agency with respect to a proposed agency action...may submit a written request for such a designation to a participating Federal agency. An agency that receives a request...shall transmit such request to each participating Federal agency and to the Council [on Environmental Quality].

A participating Federal agency is “a Federal agency participating in an environmental review or authorization of an action.” For these purposes, participating Federal agencies are defined as nonlead Federal agencies that have a role in the authorization of an action or in an activity.

Cooperating agencies are designated by the lead Federal agency and are “any Federal, State, Tribal, or local agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal to serve as a cooperating agency.”

#### Change for the NRC

Currently, 10 CFR 51.14(a) defines a cooperating agency as—

any Federal agency other than the NRC 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. By agreement with the Commission, a State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may become a cooperating agency.

Under current 10 CFR Part 51 regulations, eligible Federal agencies are those that have jurisdiction by law or special expertise, and eligibility is not dependent on Commission agreement. However, non-Federal agencies may become eligible either “by agreement with the Commission” (for State or local agencies) or “when the effects are on a reservation” (for Indian Tribes). The new NEPA definition of cooperating agency is similar to the definition in 10 CFR 51.14(a), except that the NEPA definition does not differentiate between eligibility requirements for Federal agencies and State, Tribal, or local agencies. This difference in eligibility requirements would not meaningfully affect the NRC’s NEPA environmental reviews because under either the NEPA definition or the 10 CFR 51.14(a) definition, the NRC (i.e., the lead agency) designates an eligible cooperating agency. Therefore, as part of the administrative and editorial changes in the rulemaking plan, the staff recommends updating the NRC’s definition of cooperating agency and including the definitions of lead agency and participating agency in 10 CFR 51.14(a) (see enclosure 7).

NEPA section 102(2)(C) requires that the “head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise....”

Under the new NEPA amendments, the head of the NRC is specifically identified as the responsible authority.

Under the NEPA amendments, lead agencies have the following responsibilities relating to cooperating agencies, which are not specifically identified in the current version of 10 CFR Part 51:

- NEPA section 107(a)(2)(B) requires that lead agencies “request the participation of each cooperating agency at the earliest practicable time.”
- NEPA section 107(a)(2)(C) requires that lead agencies “give consideration to any analysis or proposal created by a cooperating agency.”
- NEPA section 107(a)(2)(D) requires that lead agencies consult with cooperating agencies in the development of a schedule to carry out the proposed agency action.
- NEPA section 107(a)(2)(F) requires that lead agencies “meet with a cooperating agency that requests such a meeting.”
- NEPA section 107(a)(3) allows cooperating agencies to submit comments to the lead agency (dependent on a schedule established by the lead agency).

The NRC’s MD 5.1 addresses the agency’s responsibilities for consultation and coordination with governments and federally recognized Indian Tribes. MD 5.1 acknowledges that it “is not intended to exhaustively capture all consultation responsibilities,” and that other requirements, including those under NEPA, may apply. As such, MD 5.1 does not discuss cooperating, participating, or lead agencies.

The NRC also has several relevant policy statements. The NRC’s Tribal Policy Statement promotes effective government-to-government interactions with Tribes. The NRC’s Environmental Justice Policy Statement addresses the treatment of environmental justice in agency licensing and regulatory activities. However, neither the Tribal Policy Statement nor the Environmental Justice Policy Statement includes policies on designating cooperating agencies under NEPA.

#### *Staff Actions for Compliance*

The staff is reviewing Memoranda of Understanding currently under development for compliance with the new FRA NEPA amendments related to interagency coordination in multiagency NEPA reviews. The staff would not begin revision of internal procedures, prior MOUs, or guidance until Commission is received.

#### Implementation Options for Improved Alignment and Efficiency

The staff offers the options described below to more clearly and effectively implement the NEPA amendments on lead, participating, and cooperating agencies. Also, while the options discussed below generally assume the NRC to be the lead agency, the staff also recommends that the Commission consider, under any of the three options, developing policies and protocols for participation as a cooperating agency for NEPA processes where another agency is the lead agency. And, as part of the administrative and editorial changes in the rulemaking plan, the staff recommends updating the NRC’s definition of cooperating agency and including the definitions of lead agency and participating agency in 10 CFR 51.14(a) (see enclosure 7).

#### Option 4.a: Revise Internal Procedures

Under this approach, the NRC would continue current NEPA practice without a rule revision. MD 5.1 would be updated to include guidance that reflects the NRC's unique statutory authorities and obligations and incorporates the NEPA amendments in terms of the role of the lead agency, identifying cooperating agencies (including eligibility criteria for Federal, State, Tribal, and local agencies), and developing cooperating agency MOUs. Subsequently, NUREG-1555, Revision 1, "Standard Review Plans for Environmental Reviews for Nuclear Power Plants," issued July 2007; NUREG-1748, Revision 0, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs," issued August 2003; Regulatory Guide 4.2, Revision 3, "Preparations of Environmental Reports for Nuclear Power Stations," issued September 2018; and other relevant guidance documents could be updated to ensure consistency with the updated MD 5.1. Furthermore, the NRC's Division of Materials Safety, Security, State, and Tribal Programs may consider incorporating procedures relating to lead, cooperating, and participating agencies into future Tribal program procedures and protocols.

##### Pros:

- Fewer resources would be needed than under Option 4.b or Option 4.c.
- Allows for flexibility during project-specific implementation.

##### Cons:

- Potential inconsistencies may occur for individual projects in identifying and coordinating with cooperating agencies, depending on the timing of updating the various guidance documents.
- Revising MD 5.1 may not involve the same level of public participation or input regarding the appropriate role of agencies in the NEPA process as a policy statement, limiting the NRC's openness and transparency.
- MDs do not propose new policy, and therefore updates to the MD would be limited to policy decisions already established.

#### Option 4.b: Revise Existing Policy Statements

This approach would involve revising the NRC's Tribal Policy Statement and Environmental Justice Policy Statement to include consideration of the NEPA cooperating agency relationships. MD 5.1 would be updated after existing policy statements are revised.

##### Pros:

- Sets clear expectations for roles and responsibilities within the context of these policy statements that have been endorsed by the Commission.
- Promotes NRC openness and transparency through the public comment process.

Cons:

- Because the focus of these existing policy statements is limited to either Tribal or environmental justice communities, the revisions may not cover all types of agency relationships. For example, relationships with certain cooperating agencies such as the U.S. Army Corps of Engineers may not be appropriate to include in either the Tribal Policy Statement or the Environmental Justice Policy Statement.
- Substantial resources would be needed to update policy statements in comparison to Option 4.a, but the resource requirements to revise these policy statements would likely be similar to those for Option 4.c.

Option 4.c: Develop New Policy Statement (Recommended)

Under this approach, the staff would draft a new policy statement to outline expectations around lead, participating, and cooperating agencies, consistent with the NEPA amendments.

Subsequently, the staff would revise MD 5.1, NUREG-1555, and NUREG-1748 to include the process and guidance for implementing the policy statement, including respective office or agency internal controls on establishing the lead agency, identifying cooperating and participating agencies, and developing participating and cooperating agency MOUs. The staff considered revising 10 CFR Part 51 regulations to incorporate requirements for how cooperating agencies would participate in the NRC's NEPA process and concluded that defining specific processes through the development of MOUs is more effective, efficient, and flexible for interactions with Federal, State, local and Tribal partners.

A new policy statement could address the following issues:

- the appointment of State, Tribal, or local agencies as joint lead agencies
- the distinction between and identification of potential roles and responsibilities for NRC participating and cooperating agencies
- definitions of cooperating agency eligibility
- guidance on how potential cooperating agencies can request cooperating agency status
- timing associated with when and how an agency is designated as a cooperating agency
- guidance on when and how to engage potential cooperating agencies
- potential mechanisms for assisting cooperating agencies with resource constraints
- review of other Federal agency policies and practices surrounding cooperating agencies
- discussion of how cooperating agency input will be considered
- dispute resolution procedures
- explanation of consistency with other Federal law, policy, and guidance

- distinction between cooperation, coordination, and consultation requirements for other statutes versus those for a cooperating agency under NEPA
- how the NRC may consider requests for participating or cooperating agency status in other agency NEPA processes
- confidentiality associated with reviews of predecisional documents
- consideration of relevant executive orders and Presidential memoranda
- development of a template/draft cooperating agency MOU

Pros:

- Allows the agency to address all relevant issues, which may not be within the scope of existing policy statements.
- Promotes openness and transparency through the public comment process.
- Promotes clarity, and reliability by using a single document to describe the NRC's approach to working with other agencies under NEPA.
- Sets clear expectations for roles and responsibilities that have been endorsed by the Commission.
- Similar resource requirements compared to Option 4.b.

Con:

- Substantial resources would be needed to develop a new policy statement, but the resource requirements would likely be similar to those for Option 4.b.

Recommendation

The staff recommends Option 4.c, development of a new draft policy statement on lead, participating, and cooperating agencies. Enclosure 8 provides resource information.

Separate from this recommendation to develop a new policy statement, the staff is recommending, as part of the administrative changes within the rulemaking plan, updating its definition of cooperating agency in 10 CFR 51.14 to align with NEPA definitions (see enclosure 7).