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Charlotte Bingham, Regional Environmental Advisor, REDSO/ESA and
Walter Knausenberger, Environmental Analyst & Advisor, AFR/SD /ANRE
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Is Reg 216 Ripe for Revision?

Some food for thought and discussion.....

22 CFR 216 has lasted for 20 years. Its stated purpose and policy (216.1) remain relevant. Because it is not easy to change a regulation, any new or revised regulation should provide a process that allows for adaptation and flexibility without needing to change the regulation itself.

Principle: Keep the regulation focused on objectives, policy, process and procedure so that it can be a flexible and adaptive tool and not a straightjacket.

Several identified wishes and needs are listed below. These are not meant to be exhaustive. We note that some of the items deal with topical issues, which need only be referenced in a regulation, as internal guidance can be more easily changed than a regulation. Let us keep in mind the question -- is the Regulation broken enough to justify fixing, when fixing is not an easy process (see commentary at the end)? Would our efforts be better directed to strengthening implementation within the boundaries of the current regulation?

1. Create a more user-friendly regulation with greater relevance to current operations, especially by incorporating the principles and language of reengineering and the concept of SOs. Not only is the terminology out of date, but the operating paradigm has changed.
2. Emphasize more the need for upstream consideration of environmental impacts in planning and design. Introduce newer concepts such as Strategic and Sectoral Environmental Assessment.
3. Emphasize more the downstream monitoring of environmental compliance and the role of audits.
4. Reference and get in touch with the fact that host countries increasingly have their own operative environmental procedures which should be taken into account (see also related Item 10).
5. Affirm the role of MEOs and partners. [With or without Reg 216 revision there is need for some action, through position descriptions or other appropriate agency procedures to achieve greater "standing" for MEOs.]
6. Provide clearer and up-dated guidance on applying environmental procedures to NPA, policy reform, and sectoral or structural adjustment.
7. Allow for a Negative Determination with conditions that follows design criteria, agency guidance or results of a Programmatic Environmental Assessment. [Currently, design criteria, if they were to exist, would permit Categorical Exclusion 216.2(c)(xv), but a Neg Det with conditions would appear to be a more sensible and less risky way to proceed.]

8. Better define Negative Determination criteria, including characterization of possible conditions for mitigation and/or monitoring, which are to be implemented to justify a ND.
9. Eliminate the Negative Declaration or link it better to design criteria or standards and/or to a Negative Determination with conditions.
10. Reflect and reference the development of host country and multi-lateral environmental assessment procedures, of which there are many since 1980, as the regulation does not provide an easy mechanism that would allow USAID/Missions to use documentation produced under multi-lateral or host country procedures (except 216.9, which requires Administrator approval).
11. Reference how the Agency intends to handle environmental documentation when more than one agency is involved, e.g., Ambassador's Self-Help Fund, USA Army or US Navy assistance on project work to build roads or fix ports that would typically entail another type of review by USAID, monies transferred to DOA or others, funding situations such as the BNC in South Africa.
12. Reference relationship of the regulation to FAA 118/119, other pertinent FAA provisions, Tropical Forest Conservation Act, other pertinent recent legislation, and key multi-lateral environmental agreements, etc. Indicate that future changes to the FAA or other legislation must be considered.
13. Address the applicability of the Environmental Procedures or analogous principles to transitional, food aid, emergency and relief situations.
14. Reconsider and make more specific the types of projects normally requiring an EA.
15. Reference to guidance or guidelines or policy recently emerging issues, such as biotechnology, genetically modified organisms, biosafety, biomedical wastes, etc. For biosafety, we understand guidance is in the wings. A revised regulation could, for example, refer to some series of guides that would provide such information that could be regularly updated.
16. Update the Pesticide Procedures regularly, and merely refer to them in Reg 216, rather than detailing them, so they can be adapted over time and be more useful to practitioners. Pesticide procedures in current Reg 216 have the diversionary or counter-productive effect of being so hard to deal with that USAID staff and partners tend to avoid engagement with pesticides. The result is to encourage funding for pesticides by others with less stringent standards or not to use them when they could be useful. Currently, there is insufficient emphasis upon Integrated Pest Management; USAID needs to address issue of botanical pesticides derived from products abroad that USEPA would likely never register.

Commentary

ADS 204 already addresses reengineering terminology as well as the need to consider environmental impacts early and monitor projects/activities during implementation. There are other documents that provide guidance on NPA. Biosafety or other emerging issues can be covered separately through guidance. Guidance or information that does not need to be part of a regulation could also cover the multi-agency funding question.

Nothing appears to prevent us from promoting host country procedures through joint reviews and assessments done in tandem and in collaboration. Getting to the point of agreeing when host country procedures could substitute for USAID procedures is likely to be more difficult. Harmonization or coherence, as the World Bank sometimes describes it, is simpler to achieve when one needs to change policy as opposed to codified regulations.

Because the regulation already contains detailed requirements for pesticides, it is difficult to update and change pesticide procedures to make them more flexible, without changing the regulation itself.

In order to provide reference to design criteria or standards for a negative determination with conditions, the regulation would also require revision. The same can be said in order to use as our own documentation the impact assessments produced as a result of host country or multi-laterals' procedures and not require AA or A approvals (A or AA for a negative declaration or A under 216.9). The need to utilize design criteria and/or rely on documents produced by other reliable and credible sources is especially important in the context of a decreasing cadre of technical staff within USAID. This dwindling technical capacity underlines our increasing vulnerability with regard to environmental compliance.

The downside of revising Reg 216 is that changing a regulation is time-consuming, not just on the part of the people who would do revisions, but time-consuming, because it is a "regulation," which requires Federal Register publication, public comment and response to comments. Revisions of regulations can take a year or years. The process is inevitably political and will attract the attention of varied and conflicting groups with different agenda. There will be pressures to weaken an environmental regulation as well as pressures to make USAID's procedures mirror or become more like those that regulate US domestic, federal activities.

If the Agency were to contemplate revising the regulation, US environmental NGOs would need to be brought into the process early on, so that they could understand and not oppose why USAID environmental procedures might need to be different from US Council on Environmental Quality regulations. The risk is that one might end up with less flexible regulations.

In the final analysis, it is the ADS 204 that can evolve where Reg 216 can't, to re-interpret or improve the applicability of environmental procedures. Also, Bureaus can develop their own supplemental guidance. This would help for anything we want to add or explain more, but at least a few of the concerns could not be fixed that way because they would potentially be in conflict with the regulations, unless GC can help us find some creative ways to do so. This applies especially to the dated pesticide procedures section of Reg. 216, or the negative determination with conditions, although we could certainly explain that in ADS 204 as a very helpful variation on the straight negative determination.