



Fire Suppression Interim Committee

60th Montana Legislature

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September 8, 2008

TO: Fire Suppression Interim Committee (FSIC) Members

FR: Todd Everts, FSIC Legal Staff

RE: Cooperating Agency Status Under the National Environmental Policy Act (NEPA) and Coordinating Agency Status Under the Federal Land Policy and Management Act of 1976 (FLPMA) and the Multiple-Use Sustained Yield Act of 1960 (MUSA).

The FSIC's draft report includes two recommendations regarding cooperating agency status under NEPA:

- ✓ Require the Montana Department of Natural Resources and Conservation to apply for NEPA cooperating agency status.
- ✓ In order to receive firefighting funding from the State of Montana, a local government must establish NEPA cooperating agency status with federal agencies concerning land and forest management.

At the Choteau meeting the Fire Suppression Interim Committee received an overview from staff regarding cooperating agency status. Committee members requested additional information on the cost of other state and local government efforts with respect to cooperating agency status. In addition, Representative Vincent has requested an analysis of coordinating agency status under the Federal Land Policy and Management Act of 1976 (FLPMA) and the Multiple-Use Sustained Yield Act of 1960 (MUSA).

This revised memorandum analyzes the legal implications of both cooperating agency status under NEPA and coordinating agency status under FLPMA and MUSA and provides cost information.

COOPERATING AGENCY STATUS UNDER NEPA

NEPA Legal Requirements Regarding Cooperative Agency Status

Generally, NEPA requires federal agencies to integrate environmental considerations into the federal planning and decision making process.¹ NEPA requires that for any major federal action that may significantly affect the quality of the human environment, an environmental impact statement (EIS) must be prepared.² Federal agencies responsible for compliance with NEPA are required to do so in "cooperation with State and local governments" or other entities, that have jurisdiction by law over the subject action or special expertise.³ NEPA regulations emphasize cooperative consultation among agencies before an EIS is prepared.⁴

With the agreement of the lead agency, a state or local government agency may become a cooperating agency under NEPA.⁵ Technically, a "cooperating agency" means:

any federal agency other than a lead agency 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. The selection and responsibilities of a cooperating agency are described in Sec. 1501.6. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.⁶

With respect to cooperating agencies, a lead agency is required to:

- (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.
- (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

¹42 U.S.C. 4332 (2)(A)

²42 U.S.C. 4332(2)(C)

³42 U.S.C. 4331(a), 4332(2)

⁴40 C.F.R. 1501.1(b)

⁵40 C.F.R. 1508.5

⁶40 C.F.R. 1508.5

- (3) Meet with a cooperating agency at the latter's request.⁷

If a state or local agency is designated as a cooperating agency, the cooperating agency is required to:

- (1) Participate in the NEPA process at the earliest possible time.
- (2) Participate in the scoping process.
- (3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.
- (4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.
- (5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.⁸

In response to a lead agency's request for assistance in preparing an EIS, a cooperating agency may notify the lead agency that other program commitments preclude any cooperative agency involvement in the EIS process.⁹

It is important to note that a cooperating agency's role in NEPA's environmental analysis "neither enlarges nor diminishes the final decision-making authority of any agency involved in the NEPA process".¹⁰

Montana State Law Regarding Cooperating Agency Status

During the 2007 Legislative Session, the Legislature enacted Senate Bill 293, sponsored by Senator Liabe, that requires that the Department of Natural Resources and Conservation (DNRC) shall "represent the state's interest in the federal forest management planning and policy process, including establishing cooperating agency status with federal agencies."¹¹ The 2007

⁷40 C.F.R. 1501.6(a)

⁸40 C.F.R. 1501.6(b)

⁹40 C.F.R. 1501.6(c)

¹⁰ Council of Environmental Quality Memorandum for State and Local Governmental Entities, Regarding Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, James Connaughton, Chair, February 4, 2002.

¹¹76-13-702(5), MCA

Legislature did not provide any money or FTEs to implement this requirement. To date, the DNRC has not pursued cooperating agency status. The DNRC has estimated that in order to implement the cooperating agency requirement, it would need a personnel and operating budget of \$200,000 per biennium and 1 FTE (see attached document entitled DNRC -Forestry Division Federal Cooperating Agency Status - Staff Analysis).

COORDINATING AGENCY STATUS UNDER FLPMA AND MUSA

Federal Requirements Regarding Coordinating Agency Status

The U.S. Forest Service under MUSA and the U.S. Bureau of Land Management (BLM) under FLPMA are both required to coordinate their natural resource and land planning processes with those of state, local, and tribal jurisdictions. The Forest Service must coordinate "with the land and resource management of State and local governments."¹² The Forest Service must provide opportunities for coordination between the Forest Service planning efforts and those of other resource management agencies.¹³ The Forest Service is required to seek assistance (where appropriate) from state and local governments in the planning process.¹⁴ If there is any inconsistency between the Forest Service planning process and state and local plans and laws, the Forest Service is required to discuss the inconsistencies and document in the plan the extent to which the Forest Service would reconcile its proposed action with the state or local plan or law.¹⁵

Unlike the Forest Service, the BLM's land use planning process is explicitly required to "be consistent with State and local plans to the maximum extent consistent with Federal law and the purposes of [FLPMA]".¹⁶ BLM's regulations require that BLM resource management plans must be:

consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or

¹²16 U.S.C 1604(a)

¹³36 C.F.R. 219.9

¹⁴Id.

¹⁵40 C.F.R. 1506.2(d)

¹⁶43 U.S.C. 1712(b)(9)

implementation plans.¹⁷

The BLM is also required that in:

the absence of officially approved or adopted resource-related plans of other Federal agencies, State and local governments and Indian tribes, guidance and resource management plans shall, to the maximum extent practical, be consistent with officially approved and adopted resource related policies and programs of other Federal agencies, State and local governments and Indian tribes. Such consistency will be accomplished so long as the guidance and resource management plans are consistent with the policies, programs and provisions of Federal laws and regulations applicable to public lands, including, but not limited to, Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise and other pollution standards or implementation plans.¹⁸

It should be noted that BLM regulations provide that where "State and local government policies, plans, and programs differ, those of the higher authority will normally be followed."¹⁹

Coordinating status seems to provide a state or local government that has an adopted plan a little more leverage when it comes to incorporation of state and local government planning priorities within the federal land management agency resource management planning process. Through the use of duly adopted plans, state and local governments can formally identify and interpret the criteria that federal agencies are required to consider when they develop resource management plans. Because of the strong "consistency" language within FLPMA and MUSA and the accompanying federal regulations, a state or local government may have better intervention capabilities if litigation results. Having said that, if there are ultimately any inconsistencies, federal law clearly trumps state and local law.

Montana State Law Regarding Coordinating Agency Status

Montana law authorizes local governments to create planning boards.²⁰ If requested by a local government governing body, a planning board is required to prepare a growth policy.²¹ Growth

¹⁷43 C.F.R. 1610.3-2(a)

¹⁸43 C.F.R. 1610.3-2(b)

¹⁹43 C.F.R. 1610.3-2(c)

²⁰76-1-101, MCA

²¹76-1-105(1)

policies are land use planning documents, that at the discretion of the local government, can include a number of elements including but not limited to land use, economic conditions, local service, and natural resources.²² As noted above, these duly adopted growth policies can influence federal land management decisions.

Federal, State, and Local Government Initiatives Regarding Both Cooperating and Coordination Agency Status

Federal Initiatives:

In August of 2004, President Bush issued Executive Order 13352 regarding the facilitation of cooperative conservation that emphasizes that federal agencies implementing laws relating to the environment and natural resources do so "in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in federal decision-making, in accordance with their respective agency missions, policies, and regulations".²³ This executive order has led to a number of federal agency initiatives to promote cooperation and inclusion of state and local governments.²⁴

In addition, over the years, a number of memorandums from the federal Council on Environmental Quality have emphasized the importance of cooperative agencies in implementing the provisions of NEPA.²⁵ In one memorandum addressed to the Heads of Federal Agencies, the Chairman of the Council on Environmental Quality noted that:

²²76-1-601(3)

²³President Bush, Executive Order No. 13352, Section 1, August 26, 2004.

²⁴ For example, see Department of Interior Notice of Final Changes to Procedure, Federal Register, Vol 70, No. 107, June 6, 2005; Bureau of Land Management instructional memorandum entitled "The Scope of Collaboration in the Cooperating Agency Relationship", (IM No. 2004-231).

²⁵Council of Environmental Quality Memorandum for the Heads of Federal Agencies, Regarding Cooperative Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, James Connaughton, Chair, January 30, 2002; Council of Environmental Quality Memorandum for State and Local Governmental Entities, Regarding Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, James Connaughton, Chair, February 4, 2002; Council of Environmental Quality Memorandum for Heads of Federal Agencies, Regarding Report on Cooperating Agencies in implementing the Procedural Requirements of the National Environmental Policy Act, James Connaughton, Chair, May 26, 2005 .

The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents.²⁶

Federal agencies are now required to report to the Council on Environmental Quality on their efforts to engage other federal agencies and tribal, state, and local governmental entities as formal cooperating agencies under NEPA.²⁷ Reports from March 2002 through August 2004 concluded that cooperating agencies were involved in approximately 40 percent of EISs and approximately 8 percent of environmental assessments.²⁸ The report noted that lead federal agencies are increasingly considering designating formal cooperating agencies and that tribal, state, and local government agencies are becoming more aware of their roles and responsibilities as cooperating agencies.²⁹ A major stumbling block in establishing cooperative agency status, according to the report, is the lack of capacity and resources.³⁰

There are numerous examples across the West regarding federal agencies actively coordinating their land management agency planning processes with state and local government planning processes. See some examples below.

Examples of State Initiatives:

A cursory review of state initiatives regarding cooperative agency status revealed that the State of Wyoming, through the State Planning Office, has been actively involved in working on ways to improve cooperator agency status and coordinating agency status in Wyoming. The

²⁶ Council of Environmental Quality Memorandum for the Heads of Federal Agencies, Regarding Cooperative Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, James Connaughton, Chair, January 30, 2002.

²⁷ Council of Environmental Quality Memorandum for Heads of Federal Agencies, Regarding Report on Cooperating Agencies in implementing the Procedural Requirements of the National Environmental Policy Act, James Connaughton, Chair, May 26, 2005.

²⁸ Id.

²⁹ Id.

³⁰ Id.

office has approximately 12 FTEs. The office has held several well-attended trainings for state agencies and local government officials regarding cooperating agency guidelines.³¹ After talking with a representative from the Wyoming State Planning Office, it was clear that Wyoming resources devoted to cooperating agency status under MEPA have resulted in very positive working relationships with federal agencies and that Wyoming has seen concrete results.

Other states actively involved in establishing cooperative agency status include California, New York, Nevada, Utah, South Dakota, Oregon, and Washington. An excellent example of a state agency request to become a cooperating agency is illustrated by the attached letter from the New York State Department of Environmental Conservation to the Bureau of Indian Affairs.

Local Government Examples:

In Montana in 2002, Madison and Beaverhead Counties jointly sought and gained cooperating agency status with the Beaverhead-Deerlodge National Forest to revise and update the Forest Plan. The Counties' efforts as cooperating agencies extended over a 6 year period. After I had discussions with the Counties' consultant and a Beaverhead County Commissioner, it was clear that they felt it was a productive process that netted some concrete results. They noted that it was a big commitment of time on the part of the Counties. As Commissioner Mike McGinley noted, "if you make the commitment to cooperating agency status, you are in it for the long term".³² Total resources expended by the Counties during this process amounted to approximately \$60,000.³³ Attached is the MOU that Madison and Beaverhead Counties entered into with the Beaverhead-Deerlodge National Forest.

Wallowa County, Oregon, went through an extensive organizational and planning process to credibly establish themselves as an entity eligible for cooperating agency status under NEPA.³⁴ Wallowa County has also utilized the coordination provisions under FLPMA and MUSA through the use of MOUs. The attached document entitled "Becoming a Joint Lead or Cooperating Agency Under NEPA" provides an excellent overview of the resources and commitment it takes for a local government agency to become a cooperating agency under NEPA. The author of that article, John Williams, has stated that Wallowa County's involvement in terms of cooperating

³¹ Ryan Lance, Endangered Species Act Policy Coordinator, Office of Governor Dave Feudenthal, Testimony Before the Committee on Resources, United States House of Representatives, Hearing on Role of NEPA in the Intermountain States, August 1, 2005.

³² Phone conversation with Commissioner Mike McGinley on September 8, 2008.

³³This figure was provided by Commissioner Mike McGinely.

³⁴ John Williams, Oregon State Cooperative Extension Agent for Wallowa County, *Becoming a Joint Lead or Cooperating Agency Under NEPA*, (no date).

and coordinating agency status has resulted in tangible benefits for the County.³⁵ According to Mr. Williams, the costs associated with Wallowa County cooperative and coordinated agency status can be broken down into costs attributable to developing a county plan and costs attributable to ongoing County involvement in cooperating and coordinating activities on a project by project basis.³⁶ He estimated that Wallowa County's land use planning development process cost about \$35,000.³⁷ Project by project ongoing costs are estimated to be about \$35,000 per project.³⁸

Parting Thoughts

Cooperative agency status under NEPA allows a state or local government a seat at the lead federal agency round table at the front end of the NEPA process. It allows the state or local government to identify issues in the scoping process as an agency peer. It allows state and local governments to develop information and prepare NEPA analysis to be potentially included in the environmental review. If requested by the lead agency, it allows state and local governmental staff to be intimately involved in the interdisciplinary team process. It may provide a state and local government with better legal standing should court action ensue. Cooperative agency status does not ultimately affect the lead agency's decision making authority under NEPA. The designation of cooperative agency status does not necessarily result in federal monetary support for the cooperative agency's activities.

Coordinating agency status under FLPMA and MUSA provides state and local governments with duly adopted plans and policies the ability to directly influence federal natural resource and land management planning activities. The federal statutes and regulations seem to provide more leverage for state and local governments to influence federal decisions in the natural resource planning process than cooperative agency status under NEPA. Coordination status could also provide better intervention capabilities than cooperating agency status if litigation results.

Both cooperative agency status and coordinating status could result in a significant commitment in time and resources on the part of a state or local government. Those state and local entities that have committed time and resources to cooperative agency status and coordinating status have reported positive concrete results in terms of influencing federal land management decisions.

³⁵Phone conversation with John Williams, Oregon State Extension Agent for Wallowa County, September 8, 2008.

³⁶ Id.

³⁷ Id.

³⁸ Id.