A Beginner's Guide to Cooperating Agency Status

September 2012

A Public Lands Council Report

This report was prepared at the request of the Public Lands Council to provide general information about cooperating agency status, and to encourage future collaboration between public lands ranchers and rural governments.

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Introduction

In western counties that depend on public lands grazing for their economic stability, it is increasingly common that land use plans issued by federal agencies like the Bureau of Land Management (BLM) and the U.S. Forest Service do not reflect the needs or planning decisions of local communities. Nor is it the case that federal lands management decisions always incorporate or consider local knowledge and expertise regarding the environment, local socioeconomic conditions and needs, or the local custom and culture. Though ranching communities have struggled to have more of a voice in federal lands decisions that affect them, many report that their concerns have fallen on deaf ears, leading to a growing sense among ranchers of disempowerment and frustration.

But increasingly, rural communities are discovering that they need not stand by helplessly while their social and economic futures are determined for them by federal land managers. Congress has provided local governments with important tools– "cooperating agency" status and "coordination"–which can help local governments have substantial influence over how federal lands are managed. In the interest of educating the public lands grazing industry about these important opportunities, and to encourage interaction between ranchers and local governments, the Public Lands Council (PLC) has commissioned two "Beginner's Guides," one on coordination, and this report, which addresses cooperating agency status.

Cooperating agency (CA) status can give local government entities like boards of county commissioners (and potentially others, like conservation districts) influence over federal land use planning and project-level management decisions. If used properly, this tool can help local governments protect the interests of public lands grazing, upon which many rural counties economically depend. Yet due to a lack of knowledge about CA status among both elected officials and ranchers, many counties that strongly support public lands grazing have not availed themselves of the important opportunities and potential benefits that CA status offers.

This report is intended to give members of PLC, state affiliate organizations, county cattlemen's and woolgrower's organizations, and other parties with an interest in the public lands grazing industry a preliminary working knowledge of CA status. The information collected here is not meant to be exhaustive; due to the limited scope of this project there are many "advanced topics" which have been set aside for future discussion. Instead, this report is intended to provide sufficient information to members of the grazing industry to engage with their local governments regarding CA status, allow industry members to understand the uses and limitations of this tool, and help industry members talk with their local governments about how it might be used to benefit the grazing industry and rural communities generally.

It is possible that the grazing industry has been slow to utilize CA status as a general practice due to conflicting accounts of what it is and what benefits it affords. It is therefore a secondary goal of the present report to clarify the facts regarding CA status, and to create an accurate starting point from which PLC will be able to expand its use of this tool through subsequent projects.

Every effort was made to ensure that the information in this report is accurate. Information was drawn from a combination of federal agency documents, federal statutes and regulations, and consultations with experts such as attorneys and county

commissioners. The report was subsequently vetted both by federal agency personnel and by public lands attorneys who are well acquainted with the topic at hand.

The first section of this report will discuss general facts about CA status, while the second section looks at the key requirements for obtaining CA status and benefiting from it. Appendices provide a list of resources for further education and consultation that industry members and local governments can use to add to their understanding of CA status, as well as relevant statutory and regulatory references.

A few caveats are in order. First, this report documents the basic facts about how cooperating agency status *should* work. It does not cover in depth the pitfalls that can arise, nor does it discuss troubleshooting techniques at any length. Federal agencies *can* be unhelpful when local governments wish to be CAs, although many cooperators report positive and productive experiences. If problems arise, legal expertise or other assistance may be necessary. Contacts can be found at the end of this report.

Second, this report assumes that the reader has some basic knowledge of the NEPA process. If you are not familiar with NEPA, it may be helpful to gain some background by visiting an agency website.[1] Finally, for the sake of brevity this report is limited in scope. Although federal agencies, as well as state, tribal, and local governments may be eligible for cooperating agency status, our focus will be on local governments exclusively. We will further limit our discussion of federal agencies to the BLM and Forest Service, which manage most all public lands grazing permits.[2]

§1 The Basics

Background:

In 1969, Congress passed the National Environmental Policy Act[3] (NEPA), which required federal agencies to conduct an environmental analysis of any proposed action prior to approving it. Since then, federal agencies like the BLM and Forest Service have been required to "do NEPA," that is, create these environmental analyses, before every decision that has a potential environmental effect—from renewing grazing permits (due to various court decisions over time), to permitting a pipeline or reservoir, to closing or building roads, you name it. In the business of federal land management, NEPA is everywhere.

NEPA analyses come in two degrees of detail. When an action is large scale, or is expected to have an environmental impact, an "environmental impact statement" (EIS) is prepared. An EIS is an in-depth analysis of an action's impact, and is intended to provide a thorough scientific study of the proposed action. It also considers several alternatives to the action, which may ultimately be preferable, depending on how the analysis turns out. Public input is used to develop the alternatives. The final result of an EIS will be a management decision, with the agency choosing one of the alternatives (or a combination of several) as a "preferred alternative," indicating the agency's chosen course of action. This may be the action originally proposed, a different action, or it may be a "no action" alternative.

Sometimes, agencies aren't sure whether an action will have an environmental impact significant enough to warrant the time and trouble of an EIS. In those cases, the agency will prepare an "environmental assessment" (EA). An EA is a much less detailed analysis, the sole purpose of which is to determine whether an EIS is needed. If the result of the EA is that an EIS is needed, the agency will start to prepare one. On the other hand, if the EA determines that the environmental impact of the action is so minimal that it doesn't warrant an EIS, the agency will issue a "finding of no significant impact" (FONSI) and the action will go forward as planned. That, in a very compact nutshell, is how NEPA works.

In 1976, Congress passed the Federal Lands Policy Management Act (FLPMA), which introduced the concept of "land use planning." Land use planning is a major action, since it determines what uses and management will take place on the land under a regional office's jurisdiction for approximately 15 years. Although FLPMA applies exclusively to the BLM, the Forest Service also has its own laws requiring land use planning.[4]

Land use planning employs NEPA on a very grand scale because the outcome of the environmental analysis is not simply an action (for example, to put in a power transmission line) but a 15-year plan covering potentially millions of acres. For this reason, BLM and the Forest Service like to make the distinction between "project-level" NEPA and "planning level" NEPA. It's the same basic process, but planning-level NEPA is on a much larger scale.

Regardless of whether they are major land use plans or more isolated projects, many federal agency actions seriously impact public lands grazers. These decisions can also affect local economies, local environments, and local quality of life much more

directly than they affect other members of the public that do not live in the vicinity. However, the NEPA law specifically provides[5] local governments with an opportunity for special representation in the NEPA process: it's called *cooperating agency status*.

What is Cooperating Agency Status?

Cooperating Agency status is a special standing local governments can be granted when the BLM or Forest Service do land use planning or project-level NEPA analysis. In simple terms, CA status allows a local government entity[6] to assist a "lead agency" (for our purposes, BLM or Forest Service) in doing NEPA by being a member of the "interdisciplinary team" responsible for putting together the analysis.

What does that mean? It means that a local government entity, like a board of county commissioners, will be able to work side-by-side with the lead agency to identify important issues, determine what scientific data are needed for the analysis, help to form alternatives, analyze the impacts of the alternatives, and give input on selecting the final alternative. Also, because CA status is held relative to a particular NEPA decision, CA standing is not a status that a local government entity holds indefinitely; it has a beginning, a middle, and an end which coincide with the stages of the particular NEPA analysis. When the record of decision (ROD) for the particular action is finalized, CA status terminates.

When is Cooperating Agency Status Useful to Local Governments?

There are innumerable instances where getting CA status would benefit a local government. The most obvious example is the creation of land use plans, which can alter the socioeconomic landscape of an area depending on how agency determines the public lands should be used: for grazing, recreation, preservation of wilderness characteristics, timber harvest, wildlife habitat, etc. That said, there are also many project-level EISs, and even some EAs, where it would seriously benefit a county (or potentially other government entities) to get involved, as well. Just a few examples of project-level EISs are: energy proposals (like gas or oil pipelines) which can seriously impact grazing and many other uses; travel management plans, which determine which roads are open and the availability of cross-country travel (such decisions can impact hunting, tourism, and permitted users like grazers); species-oriented EISs like the current sage grouse conservation amendment, which has the potential to affect all uses of public lands and significantly impact counties, towns, and districts; transmission line EISs; EISs for vegetative treatments like juniper cutting, reseeding and weed control; and countless others. Wherever a BLM or Forest Service action could significantly impact the economy, environment, safety, or culture within a county, CA status can help to ensure that the outcome of a NEPA analysis is acceptable to the local community.

What is a Cooperating Agency Entitled To?

Although the BLM and Forest Service are required to canvass public opinion as part of land use planning and other actions requiring NEPA through a process called "scoping," CA status gives a local government entity substantially more influence and insight into the NEPA processes, as indicated by the following statement by BLM:

> "BLM managers and staff should acknowledge that the CA relationship requires new ways of doing business. Engaging with government partners as CAs is a unique form of consultation. Cooperating agencies expect, and should be given, a significant role (commensurate with available time and knowledge) in shaping plans and environmental analysis—instead of merely commenting on them."[7]

In other words, a CA does not merely give an opinion. It is a member of the interdisciplinary team responsible for crafting a land use plan or a project-level NEPA analysis. As such, it is involved in creating, not just commenting on, a NEPA analysis by:

- Identifying issues to be addressed
- Arranging for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data
- Developing alternatives
- *Most importantly*, evaluating alternatives and estimating the effects of implementing each alternative[8] on the environment, local socioeconomics, and local custom and culture

Exactly how much influence does a CA have over the outcome of the NEPA process? There is no precise answer to this question. On the one hand, BLM and Forest Service are required to make a serious effort to employ the recommendations of a CA to the maximum of their ability.[9] That said, it is important to recognize that being a CA does not give a local government the authority to tell the lead agency what decision it must make.[10] The lead agency (BLM or Forest Service) will have the final say in all key decisions (such as approving a range of alternatives, or choosing the preferred alternative) throughout the NEPA process. In other words, CA status gives *no guarantee* that the local government will be satisfied with the final decision, but it does increase the chances that this will be the case.

More generally, CA status gives a local government three key benefits:

- TRANSPARENCY
  A means of being informed, from the very beginning to the end of the NEPA process, of the lead agency's actions and intentions, what scientific and economic studies they are relying on, who they are consulting with, and what issues they are addressing;

- INFLUENCE
  A means of constant and direct input throughout the NEPA process;

- LEVERAGE
  A means of leveraging the process of **coordination** by reminding the lead agency of the expectations of local land use plans and policy throughout the NEPA process.[11] In fact, NEPA requires[12] agencies to document any inconsistencies with local land use plans directly in the EIS, along with an explanation of how those inconsistencies would be reconciled. It is therefore extremely useful for local governments to have a land use plan[13] in place to best leverage this opportunity.

What Obligations Does a Cooperating Agency Have?

Being a CA isn't just an opportunity to voice an opinion. A CA is a member of the NEPA interdisciplinary team, and that means *work*: reading scoping comments, EIS drafts, and studies; going to meetings; reading emails; crafting alternatives with other team members, and most importantly, analyzing the impacts of the various alternatives. For that reason, it is important that any local government entity seeking CA status be prepared to make the investment (both in terms of time and money[14]) to effectively participate at the CA level.

That said, there is no single level of participation that is mandatory for a CA. When a local government entity is granted CA status, it typically signs a **memorandum of understanding (MOU)** with the lead agency that defines the terms of the lead agency–cooperating agency relationship. This document is jointly written by the lead and cooperating agencies, and should reflect the level of involvement a CA can afford. It may be, for example, that the CA wants to be involved in all stages of crafting an EIS. Alternatively, it may be that the CA chooses to be involved only at certain stages in the NEPA process. The BLM or Forest Service should allow a local government entity to define what level of involvement works for them.[15]

It is also possible, if necessary, for a local government entity to renegotiate their level of involvement if it turns out that the CA's resources are overextended.[16] If time is an issue, a CA may also be able to use a contractor, or be represented by an intergovernmental organization of which it is a member.[17] (Details of the representation and authorization should be spelled out in the MOU.) On the other hand, if an eligible local government entity is unable to participate as a CA, they can still request to be kept "in the loop" on the NEPA process, and may be able to participate in a scaled-back role:

> "Whenever invited Federal, State, Tribal and local agencies elect not to become cooperating agencies, they should still be considered for inclusion in interdisciplinary teams engaged in the NEPA process and on distribution lists for review and comment on NEPA documents."[18]

§2 Nuts and Bolts

What Statute and Regulations Define Cooperating Agency Status?

The statutory requirement that BLM and Forest Service cooperate with local governments comes right out of NEPA itself, which states:

> "…it is the continuing policy of the Federal Government, *in cooperation with State and local governments*, and other concerned public and private organizations…to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans," [42 USC 4331(a), emphasis added].

Of course, this is very general language. The *who, what, when, and how* of being a CA are spelled out in the Code of Federal Regulations (CFR), which explains how government is supposed to implement the law. The primary location in the CFR for describing the CA process is in the Council on Environmental Quality (CEQ) regulations for implementing NEPA.[19] The CEQ regulations apply to all agencies that do NEPA, and thus cover both BLM and Forest Service equally. However, just to make things more complicated, BLM[20] and Forest Service[21] each have some CA regulations of their own. These do not override, but rather *add to* the CEQ regulations.

The aim of this report is to keep things as simple as possible. However, because BLM and Forest Service each have their own CA regulations to supplement the CEQ, there are occasional minor differences in how CA status works depending which agency you are cooperating with. Therefore, in the rest of this section, where BLM and Forest Service requirements for CA status diverge, we will look at the agencies separately.

Who can be a Cooperating Agency?

For our limited purposes in this report, *a cooperating agency is **a local government entity** with **jurisdiction by law** or **special expertise** that applies to the subject of the NEPA analysis*.[22] This definition has two parts. Let's look at them separately.

1) Local Government Entity

CA status is limited to government entities, and therefore excludes private individuals and organizations. While we often think of a local government as being a board of county commissioners, there are other entities that can fit this definition.

BLM and Forest Service treat this issue in slightly different ways.

BLM:
BLM has some language that helps to better clarify what counts as a local government entity. According to the *2012 BLM Desk Guide*,[23] "local government" is defined as *"a general purpose unit of government with resource management authority or a political subdivision of State."*

A "general purpose unit of government" is a government entity that serves a broad range of general-purpose functions, like a county, a city, or town. General purpose governments typically have land use, zoning, and resource planning authority.

A "political subdivision of the State" is a government entity that is less centralized than the state itself. Clearly, general-purpose units of government like counties and municipalities are also political subdivisions. However, states typically have statutory language that expands on what, within that state, counts as a political subdivision, making "political subdivision" a broader and more inclusive category. For example:

Wyoming Statutes 16-4-201(a)(iv)
" 'Political subdivision' means every county, city and county, city, incorporated and unincorporated town, school district and special district within the state."

Here, Wyoming explicitly recognizes that school districts and "special district[s]" are political subdivisions. This means that in Wyoming, school districts, conservation districts, water districts, fire districts, and potentially others qualify as local governments according to BLM regulations.[24] Refer to state statutory language to determine what counts as a political subdivision in your state.

Forest Service:
Unlike BLM, the Forest Service has no special language in its regulations clarifying what counts as a local government entity. However, each individual state has a statute defining what qualifies within that state as a local government. For example:

Oregon Statutes 174.116 (1) (a)
Local government and local service district defined "…[L]ocal government means all cities, counties and local service districts located in this state, and all administrative subdivisions of those cities, counties and local service districts."

Because the Forest Service has no regulatory definition for local government, state definitions are particularly useful for verifying that a given entity is recognized within its state as a local government body.

It is worth noting that other types of government entities, like county sheriffs and judges, have occasionally sought CA status. If a local government official is elected on a general ballot, there is some chance they will be recognized by an agency as a local government, regardless of whether the official fits the above definition exactly. That said, if a government entity does not fit the BLM definition, allowing that entity as a CA is at the discretion of the BLM.

2) Jurisdiction by Law / Special Expertise

In addition to being a local government entity that is recognized by the lead agency, a prospective CA must also have either "jurisdiction by law" or "special expertise" that is relevant to the NEPA analysis they want to participate in. Let's look at these separately.

- **Jurisdiction by Law**
  CEQ regulations define "jurisdiction by law" as the authority of a local government to approve, deny, or finance all or part of the proposed action.[25] In most cases, local governments do not have this kind authority over projects on federal lands. Exceptions may include projects that require special county permitting authorization (like wind energy facilities or transmission lines) or projects that are affected by the presence of R.S. 2477 roads.

- **Special Expertise**
  CEQ regulations define "special expertise" as consisting of at least one of the following: **statutory responsibility**; **agency mission**; or **related program experience**.[26] As previously stated, such expertise must pertain to the NEPA analysis in question.

There is no requirement that either BLM or Forest Service approve a government entity for CA status simply because they are "locally elected officials." The local government must also have special expertise (or jurisdiction by law) relevant to the NEPA analysis. That said, special expertise represents a fairly broad basis from which local government entities can claim CA status across a range of issues.

Typically, each state has governing statutes clarifying the mission and responsibilities of local government entities. For example, a board of county commissioners might claim special expertise on the basis of having the statutory responsibility for managing and maintaining roads in the county; to provide fire protection; or to provide for the health, safety, and general well-being of people in the county. Alternatively (or additionally) the county can claim extensive program experience in providing for the socioeconomic[27] needs of the county. Counties and special districts might also be able to claim special expertise regarding the local environment, wildlife, land management, water and soil management, weed control, etc. The key point is that the government entity must be able to show that they have *regular programmatic responsibilities or experience*[28] in a given area to demonstrate that they have special expertise in that area. Some of these (but not necessarily all) will be

clarified in the state statute defining the mission and responsibilities of the given local government entity.

BLM and Forest Service treat this issue in slightly different ways.

BLM:
BLM explicitly acknowledges[29] that knowledge of local "custom and culture" counts as special expertise, which broadens the scope of special expertise even further. BLM also emphasizes that some special expertise are based on informal, as opposed to technical, knowledge.[30]

Forest Service:
Forest Service has no specific instructions for defining special expertise beyond the three criteria specified by CEQ above. Therefore, if the case for the special expertise of a CA applicant is not entirely obvious, the applicant should, if possible, emphasize state statutory language that demonstrates that the areas of special expertise they are claiming are within the applicant's mission, experience, or responsibilities. In cases where the expertise are not technical or formally recognized, statutory support may not be available, and the applicant will simply have to state their case as best they can.

A Note on Special Expertise:
Knowing how your state's statute defines the special expertise of a given local government entity helps you to safeguard that entity's CA role in the NEPA process. According to the *2012 BLM Desk Guide*, the CA is entitled to participate in the NEPA process in areas for which the MOU acknowledges the CA has special expertise (or jurisdiction by law), further stating that "a CA's formal involvement in other issues occurs at the [agency's] discretion…" and is a "matter of negotiation."[31] Therefore, in order to maximize involvement in a particular NEPA process, it would be wise for a local government to consider all of the various areas in which state statute indicates they have special expertise relevant to the NEPA analysis and make sure these are explicitly stated in the MOU, with the qualification that the local government's expertise "include, but are not limited to…" those listed in the MOU.

What if the Lead Agency Denies a Request for Cooperating Agency Status?

At the end of the day, the decision to grant a local government agency CA status is at the discretion of the field officer or line officer in charge of the NEPA analysis.

Occasionally applicants have been turned down, because the lead agency did not feel they fit the criteria for being a local government entity, or for having special expertise (or jurisdiction by law). In addition, the Department of Interior (DOI) regulations[32] specify that denial of a request for CA status "is not subject to any internal administrative appeals process, nor is it a final agency action subject to review under the Administrative Procedure Act…"[33] In other words, BLM (which is under DOI) will not allow a denial for CA status to be reviewed before the Interior Board of Land Appeals (IBLA). An appeal would therefore have to be made in federal court.

Forest Service regulations have no specific language either allowing or denying administrative appeals of CA decisions, but the agency does have a record of hearing administrative appeals of CA denials.

Lastly, note that both BLM and Forest Service are required to submit information of CA participation, denials for CA status, and letters declining an invitation to participate as a cooperator to CEQ Headquarters.[34] Agency documents explaining denials for CA status are public documents and are therefore available through a Freedom of Information Act (FOIA) request.

Who *Should* be a Cooperating Agency?

People interested in the CA process often want to know how to get as many parties approved as CAs as possible, thinking that the more CAs from a local community they have, the better represented that community will be. There has consequently been a lot of effort in some areas to get school boards, as well as other small government entities, CA status. In some circumstances, this may not be the best strategy. First, every entity that gets CA status must have the time and resources to actually participate to a meaningful degree as a member of the NEPA team. Second, the goal of the NEPA process is to produce an analysis that respects local needs, is environmentally sound, and is defensible in court. Arguably, achieving this goal would be more difficult if every local government entity was individually represented as a CA. In many cases, a better method would be to consolidate local input, say, by county commissioners being the CA and other groups submitting their concerns to the commissioners. A notable exception would be if there is a potential CA candidate with special expertise that a county commission lacks. For example, a conservation district may have extensive expertise pertaining to environmental conditions and land management. In that case, it might be smart for both the commissioners and the conservation district to seek CA status individually.

Of course, there are sometimes circumstances where county commissioners are not supportive of grazing, are out of touch with rural communities' needs, or simply do not have the resources to participate as CAs. In those cases, it does make sense for smaller, less centralized groups to seek CA status if it is feasible for them.

How Does a Local Government get Cooperating Agency Status?

The CEQ has strongly and repeatedly urged agencies to invite the participation of eligible local governments to participate in NEPA as CAs.[35] Agencies should issue invitations to local governments early, preferably before the Notice of Intent or "NOI" (which

officially initiates the NEPA process) is published in the *Federal Register*, and definitely before scoping has begun. Although it is possible to establish a CA relationship later in the NEPA process,[36] it is the agency's responsibility to get partners involved early.

If no invitation is extended, a local government entity that wants to have CA status should request it from the agency, preferably with a statement outlining their special expertise. The agency will then decide whether they think that entity fits the eligibility criteria described above. If the local government is approved, they and the lead agency typically write up a memorandum of understanding (MOU) that contains all the specifics and expectations of the relationship.

BLM and Forest Service treat this issue in slightly different ways.

BLM:
BLM *requires* managers to invite eligible local government entities to become CAs.[37] This means that managers are expected to make a good faith effort to identify eligible entities and extend an invitation before initiating NEPA. Obvious CA candidates, like counties and conservation districts affected by the NEPA action, should therefore expect that BLM issue them an invitation to participate as a CA in NEPA at the outset of every NEPA process that potentially impacts them. If no invitation is issued to an obviously eligible entity, the BLM regulations have been violated.

It is not, however, required that BLM invite every conceivable CA candidate. Less obvious CA candidates will likely need to request CA status from BLM if they desire it. BLM field managers must consider any request of a local government entity for CA status. If the field manager denies CA status, he or she must notify the State Director, who will determine whether the denial is appropriate.[38] Furthermore, if a manager denies a CA request or decides it is inappropriate to extend an invitation, he or she must state the reason in the EIS.[39]

Forest Service:
Forest Service regulations add nothing extra to the basic CEQ regulations, which indicate that Forest Service has a "responsibility" to invite eligible local governments to participate as CAs, but leaves the final decision up to the discretion of the agency. In other words, although Forest Service is strongly encouraged by CEQ to invite eligible local government entities to participate in NEPA, they are not required to do so, as BLM is. If a local government agency does not receive an invitation to be a CA from Forest Service, they should request it.

Some local governments have been frustrated by agencies failing to invite them to the table to participate as CAs. A good solution is for the local government to be engaged in

coordination[40] on an ongoing basis with both BLM and Forest Service. Regularly scheduled meetings and an explicit request that both agencies inform the local government of upcoming NEPA at the earliest possible time should help to ensure that CA opportunities are not missed.

A Note on EAs:
EAs present a minor exception to the invitation rules; neither BLM nor Forest Service has any responsibility to invite local governments to participate in EAs. That said, it is permissible for a local government to request participation as a CA for an EA. However, their participation is entirely at the agencies' discretion.[41]

What goes into an MOU?

A memorandum of understanding (MOU) is a document jointly written by the cooperating and lead agencies that clarifies the roles the two agencies will have in the NEPA process. The BLM requires that all non-federal government entities develop an MOU together with the lead agency in order to gain CA status.[42] Forest Service has no such requirement, although CEQ "encourages" them to do so.[43] As a general practice, creating an MOU is a smart move, since it makes the CA's role and the scope of their participation clear by giving the CA a means of having their special expertise and/or jurisdiction by law explicitly recognized.

That said, while the MOU is an important document, some beginning cooperators have spent a vast amount of time and resources on the MOU negotiation process, leaving few resources for the main NEPA process. If possible, such hang-ups should be avoided. **It is also important that local governments do not bind themselves in the MOU to agree with the final record of decision (ROD) of the EIS, or limit their right to legally appeal that decision in a court of law. That right needs to be specifically reserved to the local government in the MOU.**

There is no required format for an MOU, but there are several essential ingredients that should always be present:

- A description of the NEPA analysis to be undertaken.
- A description of the CA's qualifications–whether jurisdiction by law or special expertise–and where these derive from, including any state statute clarifying the CA's governmental mission or responsibilities. Special expertise listed in the MOU should be qualified as "including, but not limited to…"
- A description of the portions of the NEPA process the CA will have responsibility for participating in (including all areas in which the CA has special expertise or jurisdiction by law, and, at the lead agency's discretion and CA's request, possibly others.)
- An explanation of the resources and time the CA will commit to the project.

- ❖ An explanation of how the lead and cooperating agencies plan to interact to ensure that the NEPA process goes smoothly and on schedule.

This report is not meant to give detailed instruction on writing an MOU; the above are just a sampling of several key elements. Other elements may include specifics regarding particular responsibilities each party will have, issues of compensation (if applicable), procedures for handling confidential information, conflict resolution procedures, how and when to terminate the CA relationship, and many others. For an agency perspective on MOUs, refer to the *2012 BLM Desk Guide*, pp. 17-19. The BLM also provides a sample MOU and an MOU template on their website[44] that can be used to give CAs a general idea of what the agreement might look like. These samples should work equally well for cooperation with the Forest Service. Remember that these samples should be used as guides; it is expected that every MOU will be distinct, and should reflect the unique qualifications, expectations, and needs of the cooperating and lead agencies. Most importantly, a local government should feel comfortable and confident about the information and commitments laid out in the MOU. If they are not, or are unsure about some of the stipulations in the MOU, it is important to seek advice from an experienced cooperator or an attorney familiar with the CA process.

Cooperating Agency FAQs

Unfortunately, many misconceptions about CA status are in circulation. This has led to confusion, false expectations, and occasionally an inability to utilize CA status to its fullest potential. Here are answers to some of the more frequently asked questions about CA status:

Q: Can a local government be a CA and coordinate at the same time?

A: Yes. There are many examples where local governments have done so. Furthermore, the BLM has clarified that "[t]he BLM has a responsibility to coordinate with other government units. …This responsibility applies whether or not a CA relationship has been established."[45]

Q: Is it better to skip being a CA and just coordinate?

A: Not necessarily. It is PLC's position that CA status and coordination are both important means of influencing public lands decisions. CA status is an excellent tool to leverage coordination during the NEPA process,[46] because it puts a local government on the planning team where they can constantly be pushing forward the incorporation of the local land use plan into the EIS. Furthermore, CA status gives a degree of insight and influence into the NEPA process which coordination does not necessarily do. Therefore, these tools are best used together where time and financial resources allow.

Q: Can a local government legally appeal an EIS if it was a CA on the interdisciplinary team that developed that EIS?

A: Yes. Provided it has not voluntarily relinquished its rights of appeal in the MOU, a CA can challenge an EIS and the ROD in federal court.

Q: Do the BLM and Forest Service have to grant CA status to any "publicly elected official(s)?"

A: Neither agency is required to grant CA status to any entity they do not believe fits the CEQ eligibility criteria, i.e. a local government entity with either jurisdiction by law or special expertise pertinent to the NEPA analysis.

Q: Does a local government need to sign an MOU to be a CA?

A: A local government is *required* to have an MOU to be a CA where BLM is the lead agency. A local government may not be asked to sign an MOU if Forest Service is the lead agency.

Q: Does having many local government entities (the board of county commissioners, conservation district, water district, school district, etc.) involved on a particular EIS give better community representation in the NEPA process?

A: "The more, the merrier" is not a good rule for utilizing CA status. The goal is to produce a balanced and effective NEPA analysis, but this can actually be obstructed by numerous CAs pulling in different directions. A better approach is for one local government entity (say, a county) to represent a community and receive input and advice from other parties. A notable exception to this approach is when a government entity, say, a conservation district, has special expertise that the county lacks. Then, it would make sense for both the county and the conservation district to apply for CA status. A further exception is when a county is not willing or able to represent rural interests.

§3 Conclusion

Cooperating agency status is not a cure-all, but it has yielded very significant benefits to rural governments who know how to utilize it and understand the responsibilities it involves. Successful cooperators know that the keys to making CA status effective are *communication* and *negotiation*. In other words, CA status is not an opportunity for a local government to face off in confrontation with the agency. Rather, successful cooperators approach agencies with an attitude of helping them do better, more comprehensive NEPA analyses: analyses that will incorporate a wider array of local knowledge, concerns, and expertise.

Successful cooperators also enter into this role with a clear understanding of what they are entitled to as CAs, and are prepared to remind the lead agency if they are not being given the full scope of influence they are due. Unfortunately, there have been instances where agencies have not followed through with the CEQ mandate that cooperating agency status entitles a local government to significantly more influence than simply commenting on a plan or EIS. The best way to protect against such circumstances is to educate yourself; don't expect agencies to educate you or facilitate your participation. Put yourself in a position to remind the lead agency of the level of participation and influence you are entitled to.

Beginning cooperators should plan to read the *2012 BLM Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners*.[47] This guidance document gives the BLM perspective on CA status, and goes beyond the simple facts covered in this report. Although the *Desk Guide* was not written with local government input, and is only authoritative regarding the BLM, it is still a useful road map for engaging as a CA with any federal agency, including Forest Service.

Educational opportunities in the form of training sessions and workshops are indispensible to beginning cooperators: local government officials and livestock producers alike. Be prepared. Beginners should definitely take advantage of the hard-won experiences of other local governments and CA experts. PLC expects to be involved in sponsoring educational workshops on CA status in the future. If you would like a schedule of events, or are interested in scheduling a training session in your area, please contact PLC.[48]

As a final note to members of the public lands grazing industry, please remember that most county commissioners (and other local government officials) are extremely busy and may not have had the opportunity to educate themselves about CA status. The best way to help them take advantage of this tool is to schedule a meeting, and have a sincere and fruitful conversation about the advantages CA status affords. This report may be a useful aid in that process, as well as the *2012 BLM Desk Guide*. It may also help to contact commissioners in other counties, in your state association of counties, or within a multi-county organization like the National Association of Counties[49] to discuss the CA process with others. Please contact PLC for references in your area.

Appendix I:
Educational and Consulting Resources

References

A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners (BLM, 2012):

http://www.blm.gov/wo/st/en/info/nepa/cooperating_agencies.html

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Appendix II
Statute and Regulations Relevant to Cooperating Agency Status

National Environmental Policy Act of 1969 (NEPA)

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331]

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans…

Council on Environmental Quality (CEQ) Regulations

Title 40 CFR: Protection of Environment

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(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.

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

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in §1501.7).

(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.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1508.5 Cooperating agency.

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 §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.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

Department of Interior (DOI) Regulations

Title 43 CFR: Public Lands

§ 46.225 How to select cooperating agencies.

(a) An "eligible governmental entity" is:

> (1) Any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15;
>
> (2) Any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its special expertise, as defined in 40 CFR 1508.26; or
>
> (3) Any non-Federal agency (State, tribal, or local) with qualifications similar to those in paragraphs (a)(1) and (a)(2) of this section.

(b) Except as described in paragraph (c) of this section, the Responsible Official for the lead bureau must invite eligible governmental entities to participate as cooperating agencies when the bureau is developing an environmental impact statement.

(c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to participate in a particular environmental impact statement as a cooperating agency. If the Responsible Official for the lead bureau denies a request, or determines it is inappropriate to extend an invitation, he or she must state the reasons in the environmental impact statement. Denial of a request or not extending an invitation for cooperating agency status is not subject to any internal administrative appeals process,

nor is it a final agency action subject to review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

(d) Bureaus should work with cooperating agencies to develop and adopt a memorandum of understanding that includes their respective roles, assignment of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule. Memoranda of understanding must be used in the case of non-Federal agencies and must include a commitment to maintain the confidentiality of documents and deliberations during the period prior to the public release by the bureau of any NEPA document, including drafts.

(e) The procedures of this section may be used for an environmental assessment.

§ 46.230 Role of cooperating agencies in the NEPA process.

In accordance with 40 CFR 1501.6, throughout the development of an environmental document, the lead bureau will collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise. Cooperating agencies may, by agreement with the lead bureau, help to do the following:

(a) Identify issues to be addressed;

(b) Arrange for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data;

(c) Analyze data;

(d) Develop alternatives;

(e) Evaluate alternatives and estimate the effects of implementing each alternative; and

(f) Carry out any other task necessary for the development of the environmental analysis and documentation.

Bureau of Land Management (BLM) Regulations

Title 43 CFR: Public Lands

§ 1601.0-5 Definitions.

As used in this part, the term:

(d) *Eligible cooperating agency* means:

(1) A Federal agency other than a lead agency that is qualified to participate in the development of environmental impact statements as provided in 40 CFR 1501.6 and 1508.5 or, as necessary, other environmental documents that BLM prepares, by virtue of its jurisdiction by law as defined in 40 CFR 1508.15, or special expertise as defined in 40 CFR 1508.26; or

(2) A federally recognized Indian tribe, a state agency, or a local government agency with similar qualifications.

(e) Cooperating agency means an eligible governmental entity that has entered into a written agreement with the BLM establishing cooperating agency status in the planning and NEPA processes. BLM and the cooperating agency will work together under the terms of the agreement. Cooperating agencies will participate in the various steps of BLM's planning process as feasible, given the constraints of their resources and expertise.

(h) *Local government* means any political subdivision of the State and any general purpose unit of local government with resource planning, resource management, zoning, or land use regulation authority.

§ 1610.3-1 Coordination of planning efforts.

(a)(5) Where possible and appropriate, develop resource management plans collaboratively with cooperating agencies.

(b) When developing or revising resource management plans, BLM State Directors and Field Managers will invite eligible Federal agencies, state and local governments, and federally recognized Indian tribes to participate as cooperating agencies. The same requirement applies when BLM amends resource management plans through an environmental impact statement. State Directors and Field Managers will consider any requests of other Federal agencies, state and local governments, and federally recognized Indian tribes for cooperating agency status. Field Managers who deny such requests will inform the State Director of the denial. The State Director will determine if the denial is appropriate.

Forest Service Regulations

Title 36 CFR: Parks, Forests, and Public Property

§ 219.4 — Identification and consideration of issues.

(a)(1)(iv) Federal agencies, States, counties, and local governments, including State fish and wildlife agencies, State foresters and other relevant State agencies. Where appropriate, the responsible official shall encourage States, counties, and other local governments to seek cooperating agency status in the NEPA process for development, amendment, or revision of a plan.

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[1] http://www.blm.gov/wo/st/en/prog/planning/nepa/webguide.html

[2] Note that any federal agency conducting a NEPA analysis—U.S. Fish and Wildlife Service, U.S. Parks Service, U.S. Bureau of Reclamation, U.S. Geological Survey, etc.—can be petitioned for cooperation agency status.

[3] 42 USC 4321-4347 (NEPA)

[4] The Forest and Rangeland Renewable Resources Planning Act (1974); The National Forest Management Act (1976)

[5] 42 USC 4331(a) (NEPA)

[6] Although various government entities—federal agencies, state agencies, federally recognized tribes, and local governments—can obtain CA status, this discussion will focus exclusively on local governmental entities.

[7] *A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners* (BLM, 2012), p. 4. (Henceforth, *2012 BLM Desk Guide*.)

[8] *2012 BLM Desk Guide*, p.11

[9] "The lead agency shall…[u]se the environmental analysis and proposals of cooperating agencies…to the maximum extent possible consistent with its responsibility as lead agency," [40 CFR 1501.6(a)(2) (CEQ)].

[10] *2012 BLM Desk Guide*, pp. 3-4

[11] See the Public Lands Council report *A Beginner's Guide to Coordination* for further discussion of the coordination process.

[12] "To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law," [43 CFR 1506.2(d) (CEQ)].

[13] For further discussion of local land use plans, see the Public Lands Council report *A Beginner's Guide to Coordination.*

[14] CAs typically pay for their own salary, travel, and expenses. However, the lead agency should cover the costs of any studies it commissions from the CA [40 CFR 1501.6(b)(5) (CEQ); *2012 BLM Desk Guide*, p. 30].

[15] 43 CFR 1601.0-5(e) (BLM); *2012 BLM Desk Guide*, pp. 26-7

[16] 40 CFR 1501.6(c) (CEQ)

[17] "An intergovernmental organization may represent one or more CAs, provided that all agencies to be represented are members of that organization and all have formally authorized it to act on their behalf," *2012 BLM Desk Guide*, p. 24.

[18] CEQ Memorandum "For Heads of Federal Agencies," 1/30/02, p. 2

[19] 40 CFR Parts 1500-1508 (CEQ)

[20] 43 CFR 46.225, 46.230 (DOI); 43 CFR 1601.0-5, 1610.3-1 (BLM)

[21] 36 CFR 219.4(a)(1)(iv) (FS)

[22] 40 CFR 1508.5 (CEQ)

[23] 43 CFR 1601.0-5(h) (BLM); 2012 *BLM Desk Guide*, p. 23

[24] *2012 BLM Desk Guide*, p. 23

[25] 40 CFR 1508.15 (CEQ)
[26] 40 CFR 1508.26 (CEQ)
[27] Although CEQ regulations (40 CFR 1501.6) only explicitly mention special expertise "with respect to any environmental impact," CEQ memoranda "For the Heads of Federal Agencies" dated 7/28/99, and 1/30/02 both explicitly mention that special expertise can pertain to "social or economic impacts associated with a proposed action."
[28] 40 CFR 1508.26 (CEQ)
[29] *2012 BLM Desk Guide*, p. 22
[30] *2012 BLM Desk Guide*, pp. 21-2
[31] *2012 BLM Desk Guide*, p. 21
[32] 43 CFR 46.225(c) (DOI)
[33]5 USC 701 *et seq*
[34] CEQ Memorandum to Heads of Federal Agencies: Reporting Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, 12/23/04
[35] 40 CFR 1501.6 (CEQ); CEQ memoranda "For the Heads of Federal Agencies" dated 7/28/99, 1/30/02
[36] *2012 BLM Desk Guide*, p. 11
[37] 43 CFR 1610.3-1 (BLM), *2012 BLM Desk Guide*, p. 9
[38] 43 CFR 1610.3-1(b) (BLM)
[39] 43 CFR 46.225(c) (DOI); *2012 BLM Desk Guide*, p. 10
[40] See the Public Lands Council report *A Beginner's Guide to Coordination* for further discussion.
[41] CEQ Memorandum "To Heads of Federal Agencies," 1/30/02, p. 2; 43 CFR 46.225(e) (DOI)
[42] 43 CFR 46.225(d) (DOI)
[43] NEPA 40 Most Asked Questions: 14.a
[44]http://www.blm.gov/wo/st/en/prog/planning/nepa/webguide/document_pages/12_1_4__sample_mou.html
[45]*2012 BLM Desk Guide*, p. 31
[46] See the Public Lands Council report *A Beginner's Guide to Coordination* for further discussion of the coordination process.
[47] http://www.blm.gov/wo/st/en/info/nepa/cooperating_agencies.html
[48] Contact Theodora Dowling at PLC: (202) 347-0228; tdowling@beef.org
[49] National Association of Counties (NACo): (202) 393-6226; www.naco.org

This report was researched and compiled by Andrea Rieber
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