

Coordination between the Forest Service and County Governments

The regulations pertaining to the U.S. Department of Agriculture's Forest Service's primary responsibilities to coordinate with counties can be found in the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA). Although some provisions in the Federal Land Policy and Management Act (FLPMA) apply to National Forest System lands, none require the Forest Service to coordinate with counties. The coordination requirement in FLPMA (43 U.S. Code 1721(c)(9)) applies to the Secretary of the Interior, not the Forest Service.

Under NFMA and its implementing regulations, the Forest Service is required to coordinate land management planning for the National Forest System (such as the amendment and revision of forest plans) with land management planning conducted by State and local governments. This coordination allows the Forest Service to take into account and consider the State or county's proposed management for lands under their jurisdiction, and vice versa.

Based on recent local government resolutions or ordinances and letters to some National Forests, it appears that some local government officials believe the NFMA coordination requirement means that the Forest Service must incorporate specific provisions of county ordinances into forest plans or that the Forest Service must obtain local government approval before making planning decisions. This position overstates the NFMA obligation of the Forest Service. The statute does not specify what actions are required to coordinate Forest Service planning with local government planning, and it does not in any way subordinate Federal authority to counties. Rather, the Forest Service must consider the objectives of State and local governments and Indian Tribes as expressed in their plans and policies, assess the interrelated impacts of these plans and policies, and determine how the forest plan should deal with the impacts identified.

The Council on Environmental Quality's (CEQ) NEPA regulation requires Federal agencies to cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and similar State and local requirements (40 Code of Federal Regulations (CFR) 1506.2). Where the requirements of both a State environmental policy act and NEPA can be fulfilled, the Forest Service may enter into joint environmental analysis processes with the States and counties. For example, when the Forest Service and the State or county are each preparing an environmental impact statement (EIS) for a proposal for which each entity must make a decision, the Forest Service may designate the State or county as a "joint lead agency" for the purpose of coordinating the preparation of a joint EIS that will be used by each agency in making its decision. Each joint lead agency retains its decision-making authority over the part of the proposed action over which it has authority, and one agency does not acquire influence over the other's decision-making.

Additionally under the CEQ's NEPA regulations, the Forest Service may designate a State or county as a "cooperating agency" to assist the Forest Service in preparing an EIS for a project on National Forest System lands (40 CFR 1501.6 and 1508.5). A cooperating agency may provide special expertise or assistance to the lead agency in analyzing the effects of the lead agency's proposed action. Cooperating agencies have jurisdiction by law or special expertise on environmental issues that should be addressed in the environmental analysis.

The Forest Service strives to identify, as early as practicable in the planning and environmental analysis process, any Federal, State, local, or Tribal government to participate in the NEPA process as a cooperating agency. While a local government, by virtue of its cooperating agency designation, has no authority to impose specific provisions of county ordinances in forest plans or to require that the Forest Service comply with its procedural obligations, the county can provide its special expertise to the analysis regarding its concerns and can provide staff support to further the interdisciplinary nature of the NEPA process.

However, as to incorporating county ordinances into Forest Service management, under both the Property and Supremacy Clauses of the United States Constitution, as well as Forest Service land management statutes such as NFMA, the Organic Administration Act, and the Multiple-Use Sustained-Yield Act (MUSYA), and applicable case law, the Forest Service is not subject to either the substantive or procedural provisions of State and local law, ordinances, land management plans, or resolutions.

Question: What are the Forest Service's legal responsibilities to coordinate specifically with state and local governments under the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) regulations?

Answer: The Forest Service is required to seek comment from state or local agencies on a draft environmental impact statement (DEIS) when the agencies are authorized to develop and enforce environmental standards. 40 CFR 1503.1(a)(2)(i). The Forest Service must cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements. 40 CFR 1506.2. When the Forest Service and the state or county each is preparing an environmental impact statement (EIS), the Forest Service may designate the state or county as a joint lead agency. 40 CFR 1501.5(b) and 1508.5. The Forest Service also may give cooperating agency status to a state or local agency, whose role would be to assist the Forest Service in preparing an EIS. 40 CFR 1501.6 and 1508.5.

Question: Does the Forest Service have to adopt recommendations made by local agencies in connection with land management planning? What are the Forest Service's legal responsibilities to coordinate with states and local governments under the Forest and Rangeland Renewable Resources Planning Act, as amended by the National Forest Management Act (NFMA)?

Answer: Under NFMA and the planning regulations, the Forest Service is required to coordinate land management planning for the National Forest System with land management planning conducted by state and local governments. However, the Forest Service is not required to adopt recommendations made by state and local governmental entities. In particular, the Forest Service is not required to incorporate specific provisions of county ordinances or resolutions into land management plans or to comply with procedural requirements, such as a requirement to obtain county approval before amending or revising a land management plan. Neither the statutes governing Forest Service land management planning nor their implementing regulations provide for more than an advisory role for state and local governments.

Discussion:

Under NFMA (16 USC§1604(a)), the Forest Service is required to:

develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(Emphasis added.)

The planning regulations under which the current forest plans were developed and revised elaborate on how the Forest Service must coordinate its planning efforts with those of local governments, and we expect that under a new planning rule these coordination requirements will continue (See Proposed Rule, Forest Service Land Management Planning, 76 Fed. Reg. 8514, 8515 (Feb. 14, 2011)). In general, the planning regulations have required that the Forest Service to coordinate its planning processes with those of the state and local agencies. However, neither the NFMA nor the planning regulations require the agency coordinate the content of the forest plan with the state or county plan.

Specifically, the Forest Service is not required either to incorporate the specific provisions of county ordinances into forest plans or to comply with procedural obligations such as those requiring county approval before the planning decision is made. In short, neither the statutes governing Forest Service

planning nor their implementing regulations provide for more than an advisory role for state and local governments. In the end, the Forest Service retains discretion and authority to make forest planning and use decisions.

Nonetheless, local government agencies provide a distinct and vital perspective that is not diminished by the fact that their views are advisory rather than decisional. It is Forest Service policy to facilitate and encourage the full involvement of local agencies in order that their views may be appropriately considered in Forest Service decisions.

Question: *Are there any state or local requirements with which the Forest Service must comply?*

Answer: The Forest Service must comply with state requirements that Congress expressly requires federal agencies to comply with such as those relating to the control and abatement water pollution under the Clean Water Act and the control and abatement of air pollution under the Clean Air Act. Additionally, the Forest Service must comply with state requirements that do not conflict with federal laws.

Question: *Is there a legal basis for granting a county's request for "coordinating status"?*

Answer: The term "coordinating status" is not used in existing authorities. Under NEPA and the CEQ regulations, a state or county/local government may be designated as a "joint lead agency" or "cooperating agency."

Question: *How can state and local governments help the Forest Service do its job while meeting their concerns?*

Answer: State and local governments can and should bring their resource management concerns to the Forest Service before plan amendments and revisions and projects are proposed, and during the public comment period. Frequent meetings to discuss state and local governments' concerns and interests will help inform the Forest Service as it applies its land management authorities to better protect the natural resources and serve the needs of the people.

Discussion:

NEPA mandates those Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. (42 U.S.C. 4331(a), 4332(2); 40 C.F.R. 1501.6, 1508.5). The benefits of 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 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. Whether state or local government participation is formal as a "cooperating agency" or informal as a source of local knowledge, such participation will help the Forest Service in its role as the federal manager of NFS resources. When the Forest Service is the lead agency, it has the responsibility as identified in FSH 1909.15(11.31b) to identify and solicit, as appropriate, potential cooperating agencies.