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FOREST SERVICE AND STATE, COUNTY, AND LOCAL GOVERNMENT COORDINATION UNDER NFMA SECTION 6

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The National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600–1614, provides the framework by which the United States Forest Service manages the National Forest System. NFMA requires the Forest Service to develop and implement land management plans for the national forests and grasslands, set standards for timber sales, and create policies to regulate timber harvesting. Section 6 of NFMA provides the requirements for land and resource management plans, and requires the Secretary of Agriculture, through the Forest Service, to "*coordinate[] with the land and resource management planning processes of State and local governments* and other Federal agencies." 16 U.S.C. § 1604(a) (emphasis added). Coordination is an important requirement that is intended to ensure that States and local governments play a significant role in the planning and management of National Forest System resources.

Unfortunately, units of State and local government often are relegated to cooperating agency status under the National Environmental Policy Act (NEPA) or to providing comments on draft documents, as if they are a special interest group. This undermines the intent of Section 6 of NFMA, which recognizes that State and local governments have important land and resource planning and management responsibilities that both affect and are affected by the management of the National Forest System. Coordination offers an opportunity to develop mutual understanding, address resource management issues on a wider scale, and ensure consistency between forest plans and local plans and polices. This is particularly important in many western States, where resource management issues significantly impact local and regional economies. We submit that the Forest Service needs to reemphasize coordination with States and local governments, as Congress intended.

A. The Obligation to Coordinate with State and Local Governments.

The coordination requirement was initially provided in the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), Pub. L. No. 93-378, § 5, 88 Stat. 476 (1974),

and strengthened the state-federal cooperation that was provided by the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528–531. The MUSYA "authorized" the Secretary of Agriculture to "cooperate with interested State and local governmental agencies." 16 U.S.C. § 530. With the RPA, Congress went beyond the discretionary authority provided in the MUSYA and expressly *required* the Secretary to "coordinate"[1] Forest Service planning with State and local planning processes. The RPA provided:

> [T]he Secretary of Agriculture shall 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.

Pub. L. No. 93-378, §5(a), 88 Stat. 476 (codified at 16 U.S.C. § 1604(a)).

In its "Section-by-Section Explanation and Justification" of the RPA, the United States Senate Committee on Agriculture and Forestry described its intent:

> National Forest System plans are to be coordinated with the land use planning processes of state, local and other Federal agencies to the extent that they have such plans. This will prevent overlap and wasteful duplication. It will give the states a greater opportunity to be aware of the land use planning process within the National Forest System, and it will insure more effective coordination with this planning. Land use planning within the National Forest System is already authorized, and is being carried out under the provisions of the Multiple-Use Sustained-Yield Act of 1960. It is desirable that plans on the lands within the System give ***major consideration*** to their impact on plans developed by state or local governments.

S. Rep. 93-686 (Feb. 18, 1974) (emphasis added); *see also* 93 Cong. Rec. S14175 (Aug. 2, 1974) (statement of Sen. Humphrey) ("It is the intent of the bill that the Secretary will be free to proceed in developing management plans, but *a duty is imposed on him to consult and give careful consideration to the impact of these plans on State and local jurisdictions*." (emphasis added)).

In 1976, the RPA was reorganized and amended by the enactment of NFMA. However, the requirement to coordinate land and resource planning and management provided in the RPA was retained, unchanged, as Section 6 of NFMA. *See generally* National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976).

Section 6 of NFMA is based on settled law recognizing that the States and local governments are "free to enforce [their] criminal and civil laws on federal land so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)). Even though the public

[1] The verb "coordinate" means "to put in the same order or rank" or, alternatively, "to bring into common action, movement, or condition: HARMONIZE." Merriam-Webster's Collegiate Dictionary 255 (10th ed. 2000). In other words, the requirement to "coordinate" requires that the Forest Service treat the land use planning and management activities of State and local governments as equal in rank and harmonize the Forest Service's land and resource management planning activities with the activities of State and local governments.

lands are owned by the United States, State and local governments have the authority to plan for and regulate activities occurring on the public lands, unless such regulation is preempted by a federal law. NFMA Section 6 explicitly recognizes and protects that authority.

NFMA Section 6 also reflects the recommendations of the Public Land Law Review Commission. In its seminal report to the President and to the Congress, *One Third of the Nation's Land*, the Commission explained that State and local units of government "represent the people and institutions most directly affected by Federal programs growing out of land use planning." *One Third of the Nation's Land* 61 (1970).[2] The Commission felt so strongly about the need to involve State and local governments in the planning and management of the public lands that it recommended the following:

> To encourage state and local government involvement in the planning process in a meaningful way, as well as to avoid conflict and assure the cooperation necessary to effective regional and local planning, the Commission believes that consideration of state and local impacts should be mandatory. To accomplish this, *Federal agencies should be required to submit their plans to state or local government agencies*. . . .
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> The coordination [between federal agencies and State and local governments] which will be required if the Commission's recommendations are adopted is so essential to effective public land use planning that it should be mandatory. . . . *The Commission recommends, therefore, that Congress provide by statute that Federal action programs may be invalidated by court orders upon adequate proof that procedural requirements for planning coordination have not been observed*.

Id. at 63 (emphasis in original).[3]

B. The Forest Service's Planning Rules.

In order to implement NFMA's mandate to develop land and resource management plans, the Forest Service has promulgated a series of planning rules. The first generation of management plans issued pursuant to NFMA were issued under the 1982 Planning Rule, codified at 36 C.F.R. part 219 (1982). In accordance with NFMA Section 6, the 1982 Planning Rule contained detailed requirements for coordination with State and local governments, and provided:

> (a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.

[2] Available at https://archive.org/details/onethirdofnation3431unit (last visited Aug. 28, 2017). The Public Land Law Review Commission was established as an independent federal agency by an act of September 19, 1964 (78 Stat. 982). Its function was to review the federal public land laws and regulations and recommend a public land policy. For more background, see National Archives, Records of the Public Land Law Review, available at http://www.archives.gov/research/guide-fed-records/groups/409.html (last visited Aug. 28, 2017).

[3] The effectiveness of State and local government coordination continued to be a concern, as reflected in the *Critique of Forest Planning*, U.S. Forest Serv., vol. 6 (1990).

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the State Clearinghouse for circulation among State agencies as specified in OMB Circular A-95. The same notice shall be mailed to all Tribal or Alaska Native leaders whose tribal lands or treaty rights are expected to be impacted and to the heads of units of government for the counties involved. These notices shall be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures (40 CFR 1501.7).

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local governments, and Indian tribes. The results of this review shall be displayed in the environmental impact statement for the plan (40 CFR 1502.16(c), 1506.2). The review shall include—

(c)(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies;

(c)(2) An assessment of the interrelated impacts of these plans and policies;

(c)(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(c)(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

36 C.F.R. § 219.7 (1982).

Beginning in 1997, the Forest Service began efforts to revise the 1982 Planning Rule, culminating in revised planning rules being published in 2000, 2005, and 2008. Each of these planning rules was challenged, and federal courts found each one to be legally insufficient on various grounds. Consequently, federal courts vacated each of the 2000, 2005, and 2008 planning rules, resulting in the 1982 Planning Rule remaining operative. Although the 2000, 2005, and 2008 planning rules were set aside, their treatment of State and local government coordination is instructive in reviewing Forest Service policy.

Beginning with the 2000 Planning Rule, the Forest Service began eliminating much of the detail provided in Section 219.7 of the 1982 Planning Rule. *Compare* 36 C.F.R. § 219.7 (1982) *with* 36 C.F.R. § 219.14 (2000). Despite the lack of detail, the 2000 Planning Rule acknowledged the requirement to provide "early and frequent opportunities for State and local governments to: (a) Participate in the planning process, including the identification of issues; and (b) Contribute to the streamlined coordination of resource management plans or programs." 36 C.F.R. § 219.14 (2000). Importantly, neither the 2000 Planning Rule nor any of its supporting documents expressed any intention to depart from the coordination requirements in the 1982 Planning Rule. *See* 65 Fed. Reg. 67,514, 67,536 (Nov. 9, 2000) ("[T]he Department has strengthened section 219.14 of the final rule to provide 'early and frequent' opportunities for state and local governments to be actively involved in the planning process. In addition, the Department has also included language in section 219.14(b) of the final rule that acknowledges the need to coordinate resource management plans and programs with state and local governments. The final rule directs the continued building and fostering of these relationships."). Instead, the lack of detail was the result of the Forest Service's efforts to streamline its regulations and make them more readable, and not a change in agency policy to weaken NFMA's coordination requirement.

The 2005 Planning Rule restructured and rephrased the NFMA coordination requirement, providing:

> The Responsible Official must provide opportunities for the coordination of Forest Service planning efforts undertaken in accordance with this subpart with those of other resource management agencies. The Responsible Official also must meet with and provide early opportunities for other government agencies to be involved, collaborate, and participate in the planning for National Forest System lands. The Responsible Official should seek assistance, where appropriate, from other State and local governments, Federal agencies, and scientific and academic institutions to help address management issues or opportunities.

36 C.F.R. § 219.9(a)(2) (2005). Again, neither the 2005 Planning Rule nor its supporting rulemaking documents expressed any intent to depart from the guidance provided in the 1982 Planning Rule. *See* 70 Fed. Reg. 1023 (Jan. 5, 2005). The 2008 Planning Rule continued the language of the 2005 Planning Rule with no significant commentary regarding the NFMA coordination requirement. 36 C.F.R. § 219.9 (2008); 73 Fed. Reg. 21,468 (Apr. 21, 2008).

After its attempts to revise the 1982 Planning Rule in 2000, 2005, and 2008, the Forest Service issued its 2012 Planning Rule. Although the 2012 Planning Rule was challenged in federal

court, the court dismissed the challenge based upon standing grounds. *Federal Forest Resource Coalition v. Vilsack*, 100 F. Supp. 3d 21, 47 (D.D.C. 2015) ("Plaintiffs have failed to show that the 2012 Planning Rule threatens an injury-in-fact that is imminent, or particularized."). Accordingly, the 2012 Planning Rule is the current operative rule, and, after 30 years, the 1982 Planning Rule is no longer in effect.[4]

Insofar as it pertains to the requirement to coordinate Forest Service management with State and local governments, the 2012 Planning Rule provides:

> Coordination with other public planning efforts. (1) The responsible official shall coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments.
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> (2) For plan development or revision, the responsible official shall review the planning and land use policies of federally recognized Indian Tribes (43 U.S.C. 1712(b)), Alaska Native Corporations, other Federal agencies, and State and local governments, where relevant to the plan area. The results of this review shall be displayed in the environmental impact statement (EIS) for the plan (40 CFR 1502.16(c), 1506.2). The review shall include consideration of:
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> (i) The objectives of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments, as expressed in their plans and policies;
>
> (ii) The compatibility and interrelated impacts of these plans and policies;
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> (iii) Opportunities for the plan to address the impacts identified or contribute to joint objectives; and
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> (iv) Opportunities to resolve or reduce conflicts, within the context of developing the plan's desired conditions or objectives.
>
> (3) Nothing in this section should be read to indicate that the responsible official will seek to direct or control management of lands outside of the plan area, nor will the responsible official conform management to meet non-Forest Service objectives or policies.

36 C.F.R. § 219.4(b). Accordingly, the 2012 Planning Rule returns much of the detail present in the 1982 Planning Rule. *Compare* 36 C.F.R. § 219.7 (1982) *with* 36 C.F.R. § 219.4 (2012); *see also* 77 Fed. Reg. 21,162, 21,196–21,197 (Apr. 9, 2012) ("Many of the coordination requirements of the 1982 planning rule have been carried forward into § 219.4(b)(1) and (2) of the final rule.").

[4] Provisions to the 2012 Planning Rule not relevant to this discussion were amended in 2016. 81 Fed. Reg. 90,723 (Dec. 15, 2016). Because those amendments did not affect the NFMA coordination requirement, those amendments are not discussed here.

Further, the 2012 Planning Rule details two distinct concepts: coordination under NFMA's Section 6 mandate (36 C.F.R. § 219.4(b)), and cooperating agency status under NEPA (*id.* § 219.4(a)). This conclusion is supported by the environmental impact statement prepared in support of the 2012 Planning Rule, which stated:

> Section 6 of NFMA requires land management planning to be "coordinated with the land and resource management planning processes of State and local governments and other Federal agencies" (16 U.S.C. 1604 (a)). State, local, or tribal governments may request, or be invited, to be a cooperating agency [under NEPA] *as well*.

Final Programmatic Environmental Impact Statement, National Forest System Land Management Planning 262 (Jan. 2012) (emphasis added). This statement reflects the fact that NEPA cooperating agency status is in addition to, and not in substitution of, NFMA Section 6 coordination. *See also* Forest Service Handbook 1909.12 § 44.2 (Jan. 30, 2015) (explaining that NFMA coordination is distinct from NEPA cooperating agency status).

C. Section 6 Coordination Is Required at All Stages of Land Management.

Some Forest Service field and regional offices have asserted that NFMA's coordination requirement is only triggered during forest plan revisions, and not during the implementation of a forest plan (*i.e.*, not during that approval process of individual projects taken pursuant to a forest plan). This view is misplaced, however.

The Forest Service's three-phased planning framework of assessment, plan development, amendment and revision, and monitoring is fully contemplated in the coordination requirement. Section 6 of NFMA unambiguously requires an on-going coordination effort between the Forest Service and State and local governments. 16 U.S.C. § 1604(a) ("the Secretary of Agriculture shall *develop*, *maintain*, and, as appropriate, *revise* land and resource management plans . . . coordinated with the land and resource management planning processes of State and local governments" (emphasis added)). Maintenance, *i.e.*, monitoring,[5] of a forest plan expressly requires coordination. *Id.* Accordingly, NFMA Section 6 coordination is not a one-time effort, it is intended to be an ongoing relationship between the Forest Service and State and local governments. *See* 36 C.F.R. § 219.7(f) (1982) ("A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest . . . under the jurisdiction of local governments.").

Additionally, implementation of individual projects pursued under a forest plan falls squarely into the *maintenance* of a forest plan. "Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." *Id.* § 1604(i). The Forest Service's review of a project proposal for consistency with a forest plan is not one-way. If, during that review, it becomes apparent that an

[5] 36 C.F.R. § 219.12 requires the development of monitoring programs to "enable the responsible office to determine if a change in plan components or other plan content that guide management of resources on the plan area may be needed."

amendment to the forest plan is necessary, a plan amendment is prepared concurrently with the analysis and approval of the proposed project. This necessarily entails coordination.

Moreover, principles of statutory construction require effect to be given to each word or phrase in a statute. *See United States v. Menasche*, 348 U.S. 528, 538–539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation omitted)). Thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected. If the Forest Service's interpretation were correct, and coordination was only required during plan development or revision, the word "maintain" would be rendered ineffective. This result is strongly disfavored, and must be rejected. Therefore, canons of construction support the plain reading of the statute, *i.e.*, that coordination is an ongoing duty and must be conducted at all stages of forest plan development, implementation, monitoring, and revision.

D. While Consistency with State and Local Government Plans and Policies Is Not Always Possible, Consistency Is the Goal of Coordination.

Although Section 6 of NFMA does not define "coordination," forest service planning rules and the Federal Land Policy and Management Act (FLPMA) are instructive. Though not binding on the Forest Service, FLPMA, which was enacted on October 21, 1976—one day before NFMA was enacted—contains a detailed coordination requirement, including plan consistency review. *See* 43 U.S.C. § 1712(c)(9). FLPMA requires that BLM land use plans be "consistent with State and local plans to the maximum extent [BLM] finds consistent with Federal law and the purposes of this Act." *Id.* In doing so, BLM is to consider State and local land management plans and policies, assist in resolving any inconsistencies between BLM and State or local land management plans and policies, and document the results of the consistency review. *Id.* Consistency between BLM, State, and local land use plans and policies is the overarching goal, although FLPMA acknowledges that consistency may not be possible in all circumstances and provides a mechanism through which federal, State, and local land managers are to work together to resolve, to the maximum extent possible, these inconsistencies.

The 1982 Planning Rule contained detailed instructions regarding coordination that are very similar to the principles of the consistency review mandated by FLPMA. Specifically, the 1982 Planning Rule required that the Forest Service consider the objectives of State and local governments, assess the interrelated impacts of State and local plans and policies, determine if there was conflict with any State and local plans and policies, and work with State and local officials to resolve such conflicts. 36 C.F.R. § 219.7(c) (1982). This consistency review was to be documented in the environmental impact statement prepared in association with the forest planning process. *Id.* Notably, this planning rule was developed shortly after NFMA was enacted, and remained in effect for 30 years.

The 2012 Planning Rule contains similar guidance regarding coordination. It requires the Forest Service to review the planning and land use policies of State and local governments, assess the compatibility and interrelated impacts of State and local land use plans and policies, and work to resolve or reduce conflicts between the forest plan and State and local government plans and policies. 36 C.F.R. § 219.4(b) (2012). Further, this compatibility review is to be documented in the environmental impact statement. *Id.*

The Forest Service has asserted that any "consistency review" would violate the Property and Supremacy Clauses of the United States Constitution by requiring the Forest Service to yield land management authority to the State and local governments. This contention is erroneous, however. First, the Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. Thus, the Property Clause entrusts regulation of federal land to *Congress*, not to executive branch agencies. Pursuant to this authority, Congress has enacted the RFA and NFMA, which direct how the national forests are to be managed, including coordination with State and local governments.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, provides that federal laws generally takes precedence over State laws. The obligation to coordinate, including consideration of State and local land use plans and policies, is derived from federal law, namely NFMA Section 6. There will be times when a federal law preempts a State or local land use policy. But the Forest Service has been granted discretion in the development and implementation of its forest plans, and is required by NFMA Section 6 to exercise that discretion to minimize conflicts with State and local plans and policies, just as the BLM is required by FLPMA to minimize such conflicts in the development and implementation of that agency's land use plans. This obligation is consistent with the Supremacy Clause because it is based on federal law.

In short, NFMA Section 6 acknowledges the government-to-government relationship between federal, State, and local governments, and seeks to achieve, to the maximum extent possible, consistency with land use plans at all levels. It does not require the Forest Service to always align its forest plans with State and local plans and policies. Where consistency is not possible, Section 6 and the 2012 Planning Rule provide a process by which the public can assess any unresolved conflicts. This is the "major consideration" that was originally mandated in the RPA and carried forward into NFMA and FLPMA. *See* S. Rep. 93-686 (Feb. 18, 1974).

E. Cooperating Agency Status Is Not a Substitute for Effective Coordination.

Despite the Forest Service's recognition that coordination is a distinct and separate obligation under NFMA Section 6, Forest Service officials sometimes refuse to acknowledge their obligation to coordinate. Instead, in the face of agency guidance to the contrary, the Forest Service has asserted that cooperating agency status under NEPA satisfies the agency's coordination obligations under NFMA. This is erroneous.

NEPA, when applicable, requires federal agencies to complete a particular process prior to acting, including the preparation of an environmental impact statement prior to undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). However, NEPA does not impose any substantive requirements on federal agencies or override the laws that the agencies administer. The Supreme Court has explained:

> [I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on

> federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (citations and footnote omitted); *see also Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (*en banc*) (NEPA "does not impose any substantive requirements on federal agencies—it exists to ensure a process." (quoting *Inland Empire Pub. Lands Council v. U.S. Forest Serv*., 88 F.3d 754, 758 (9th Cir. 1996)).

Despite NEPA's unique role in agency decision-making, the Forest Service has used the NEPA process as a way to avoid complying with its obligations under NFMA Section 6. This is accomplished by inviting State and local governments to participate in the NEPA process as cooperating agencies. Under NEPA, cooperating agencies work under the direction of the lead agency—here, the Forest Service—to satisfy the procedural requirements imposed by NEPA. *See, e.g.*, 40 C.F.R. § 1501.6(b) (describing the duties of cooperating agencies); James Connaughton, Council on Environmental Quality, Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (the Connaughton Memorandum) (discussing factors to consider in determining whether State or local governments are capable of participating in the NEPA process as cooperating agencies and the circumstances under which they may be terminated). The Connaughton Memorandum cautions that "cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage in other governmental entity in a consultation or *coordination* process . . . ." *Id*. at p. 1, n. 1(emphasis added).

The Connaughton Memorandum also contains a list of factors to be used in determining whether to invite, decline or end cooperating agency status. These factors include:

- Does the cooperating agency understand what cooperating agency status means and can it legally enter into an agreement to be a cooperating agency?

- Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

- Can the cooperating agency provide resources to support scheduling and critical milestones?

- Does the cooperating agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses?

- Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

Thus, it is apparent that the role and duties of a cooperating agency differ significantly from, and cannot be used as substitute for, the coordination requirements imposed by NFMA Section 6.

Moreover, the Forest Service's use of cooperating agency status as a substitute for meaningful coordination under NFMA Section 6 places an unfair burden on local governments. Some local governments may be unable to fulfill the obligations of a cooperating agency and decline to become a cooperating agency. In that case, the Forest Service would be excused from coordinating, which would violate NFMA Section 6. NFMA Section 6 does not require State and local governments to become a cooperating agency before the Forest Service's obligations to coordinate are triggered.

For these reasons, it is improper to combine coordination under NFMA Section 6 with the NEPA process. Certainly, State and local governments that wish to participate in the NEPA process as cooperating agencies should be invited to do so in accordance with the Council on Environmental Quality's guidance and the Forest Service's regulations. But participation in the NEPA process as a cooperating agency is not a substitute for meaningful government-to-government coordination under NFMA Section 6. Regardless of whether a State or local government elects to participate in the NEPA process as a cooperating agency, the Forest Service must independently satisfy its obligation to coordinate with that unit of government in accordance with NFMA.

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