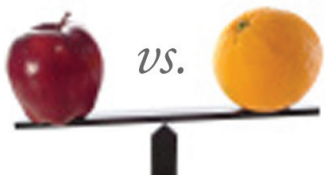
Cooperation  Coordination

Nine Reasons for Avoiding Cooperating Agency Status

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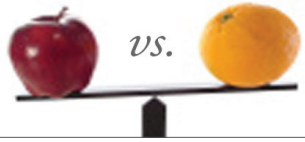
Cooperation vs. Coordination



Coordination Works | June 15, 2010

Rarely does a week go by where we are not faced with explaining the difference between "cooperating agency" and "coordination." Yet, there are extraordinary differences between these two, and inevitably local governments asserting coordination will be confronted with this issue.

Why? Because the agencies favor cooperation over coordination. That should be your first clue that cooperation is a road you do not want to take.

The coordination process works by giving local governments a meaningful seat at the table when federal and state agencies plan to implement a regulatory process such as endangered species listings, forest plan revisions, wilderness plans, transmission lines and super corridors, to name a few. The agencies literally must sit down with each local government during their planning process and continue doing so all the way through actual implementation.

Coordination is a mandate set forth by Congress to ensure that the local position is taken into account before actions are taken that harm the area. Best of all, coordination is not optional. If a local government asserts their coordinate position, the agency must work to make its plans consistent with the local plans.

The five criteria of coordination are found in the Federal Land Management and Policy Act (FLPMA).

These are:

1. Local governments must be given prior notice of agency activities;
2. Agencies must keep apprised of local plans;
3. Agencies must consider local plans;
4. Local governments must be meaningfully involved;
5. Agencies must make their plans consistent with local plans.

Congress set forth this criterion for coordination. The Department of Justice has referred to this as the way for local governments to be involved in the planning process. It is the minimum criteria to be used under every statute where Congress directs the agencies to coordinate with local government.

Cooperating Agency Status is all together different originating in the federal regulations, which are issued by the agencies. The Council on Environmental Quality (CEQ) regulations that implement the National Environmental Policy Act (NEPA) set forth the cooperating agency process. These were devised to provide authority for multiple agencies to be involved in a NEPA environmental study, such as an Environmental Impact Statement or EIS. (For more information on NEPA.

In this Cooperating Agency process, there is a "lead agency" in charge of the overall development of the study and then there are the "cooperators," who provide additional expertise. Under the regulations, cooperators may also be required to provide staff and funding to help prepare the analysis.

For example, a transportation agency preparing an environmental impact statement studying the impact of a superhighway would want to have other agencies with oversight responsibilities for issues such as endangered species and wetlands involved in the preparation of the study. They may even want to jointly prepare the study because of their specific agency duties. They would then share the cost and staff necessary to prepare the document. This arrangement creates a good working agreement between the various agencies.

But, it wasn't until 1999, that CEQ Chairman George Frampton, appointed by President Bill Clinton, issued a memo urging agencies to allow local governments to be included as "cooperating agencies." When Frampton's successor took over, he issued a second "official memo" on this topic making

clear that local governments may be designated as "cooperating agencies" at the discretion of the lead agency. It was also made clear that their input may be considered.

Key to understanding the difference between coordination and cooperation is that the latter is optional or permissive, unlike coordination which is mandatory. To be designated a "cooperating agency," you must have permission from the lead agency. Typically, a Memorandum of Understanding (MOU) is signed between the two entities setting forth the terms of the agreement by which local governments may cooperate.

A typical provision of the MOU is a confidentiality clause that prohibits public disclosure, which includes preventing the local government's consultant from reporting the discussions and outcomes of the cooperating meetings back to the entity that hired him. You can pay to have a representative sit at the table, but he cannot tell you what is being discussed.

This is only one of many examples of what some entities have signed away in these agreements because they believed there was no other way they could have input into the process.

In essence, if you agree to be a cooperating agency in an environmental study, you must first get the lead agency's permission, agree to the terms of the MOU they set forth, and agree to help fund, staff and prepare analysis for the study, if requested. After you have done all this, there is no assurance that the agency will take your position into account. They can ignore everything you bring to the table.

If you disagree with the final conclusions of the study, you can always litigate (unless you give this option away in the MOU, which we have seen done), but understand, since you are one of the entities that helped developed the study, courts are less likely to consider your grievances.

In contrast, when your local government asserts coordination, the burden to prepare and fund the analysis, study all reasonable alternatives, and resolve your concerns, is wholly on the federal agency. And, they have to sit at the table with you while doing so. This is not optional.

One more important point, coordination is available to local governments whenever the agency is involved with "land use inventory, planning, and management activities." That pretty much means everything they do should be coordinated with local governments. Cooperating Agency status is only available when the agency is preparing an environmental study under NEPA.

Now that you know the difference between coordination and cooperation, is there any doubt as to why Agencies would prefer local governments request cooperation instead of assert coordination?

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