

Contact:

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Eureka County Background and Justification for SB 77

As noted to the Interim Public Lands Committee at their work session where they brought forward the request that has resulted in SB 77, our intent is to provide for better opportunity for engagement with federal agencies on NEPA processes by implementing an Open Meeting Law process for deliberative and pre-decisional non-public meetings and to also achieve consistency with the federal Freedom of Information Act (FOIA) Exemption 5.

According to the Dept. of Justice FOIA Guide, "FOIA Exemption 5 (deliberative process privilege) applies to inter-agency or intra-agency records where there is a work product that is in draft format or documents that contain deliberations between parties leading up to a decision (including what to publish or not to publish in one of our products). The purpose of the privilege is to: Encourage open, frank discussions on matters of policy between subordinates and superiors; Protect against premature disclosure of proposed policies before they are adopted or draft publications/products before they are published; and Protect against public confusion that might result from disclosure of reason and rationales that were not, in fact, ultimately the grounds for a bureau's action."

County commissions and other public bodies are often stifled in their ability to effectively participate in NEPA processes due to federal regulations and policies requiring non-disclosure agreements during the deliberative and pre-decisional cooperating agency process (due to the agencies wanting to preserve FOIA Exemption 5). It becomes cumbersome, at best, and against the intent of even being a cooperating agency when full participation is precluded due to OML requirements. It is paradoxical that OML actually diminishes the role of local and state public bodies in NEPA processes.

Creating an OML non-public meeting process to allow full engagement by public bodies in NEPA processes would not undermine "Government in the Sunshine." The NEPA product (i.e., EIS or EA) becomes public in draft form and is provided for public comment and revisions occur due to public comment. Once the EIS or EA becomes final and a decision is signed, the Administrative Record that is part of the NEPA process and what the federal agency considered in making their decision is available to the public as well.

Our intent is not to advocate for public bodies, like County Commissions, to make final decisions on their position behind closed doors. We are advocating for full public bodies, or quorums of public bodies, to be able to meet and exchange information with federal agencies only when they are an official cooperating agency (not meetings whenever they want without some formal process). Federal agencies simply will not have these meetings under OML where the agenda is posted 3 days in advance, the meeting is recorded, minutes are developed, and public comment is required.

Under SB 77, we believe, and it is our intent, that the public body would still have to disclose and discuss, in a public OML meeting, their view and official position, and official comments, on any federal project once the public draft is made available by the federal agency. This is similar to the current OML exemption for

meetings with legal counsel. The public body still has to vote in public on their decision to enter into some type of legal process (i.e., appeal, etc.). The intent is to find a way to make sure our entire public bodies are informed so that they can have the necessary conversations about what's going on with the public they represent, especially when the public draft NEPA document becomes available.

We believe it is important to note the various types of NEPA reviews we have recently been engage in and how the current OML requirement has the opposite of its intended effect by chilling involvement of public bodies in federal decision making. Most of the recent NEPA we have been cooperating agencies on include the BLM/USFS Sage Grouse Land Use Plan Amendments EIS, Navy Fallon Range Training Complex EIS, BLM Programmatic EISs for Fuels Breaks and Rangeland Restoration, and BLM Targeted and Prescribed Grazing EA. It is also worth mentioning the checks and balances in place due to the broad range of special expertise of other state and federal cooperating agencies. For instance, in each and every BLM NEPA process we have been involved in as a Cooperating Agency, there have been the following other Cooperating Agencies: USEPA, NDOW, USFWS. On some projects, the State SETT and DOI NPS have also been cooperating agencies. None of these NEPA analyses are completed in secret or without diverse agency interests at the table. These conversations amongst agencies are already occurring during all NEPA processes with or without full public bodies at table and from diverse state and federal agencies. Those agencies are having the non-open meetings regardless of a public body under OML being there.

Below are some federal regulations and policies we are up against that hamstringing the process without an OML exception.

DOI Regulations; 43 CFR 46.225(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.”

Forest Service Handbook (FSH) 1909.15 Chapter 11.31b - Cooperating With Other Agencies – “Agencies are encouraged to document the cooperating agency agreements. Identify specific expectations, roles and responsibilities, and include issues such as preparation of analysis, schedules, availability of pre-decisional information and other issues. Cooperating agencies are normally expected to fund their activities, but to the extent possible the lead agency should fund major activities or analyses (40 CFR 1501.6(b)(5)). Consider CEQ’s guidance for determining whether to invite, decline, or end cooperating agency status (CEQ Memorandum, 1/30/2002, Attachment 1).”

Council on Environmental Quality, Memorandum for Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (2002) –

Page 4, Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status – “Does the agency release predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents?”

BLM “A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners” (2012)–

Page 11, “An MOU must be used in the case of non Federal agencies and must include a commitment to maintain the confidentiality of documents and deliberations to the extent legally permissible during the period before the bureau’s public release of any planning and/or NEPA document, including drafts.”

Page 30, “Termination of the CA relationship. Under what circumstances may a CA relationship be terminated? Factors Supporting Termination of the CA Relationship; The cooperating agency releases predecisional information (including working drafts) in a manner that undermines the agreement to work cooperatively before publishing draft or final analyses.”

Finally, below are excerpt from various NEPA process MOUs that have controlled this matter when Eureka County has been a cooperating agency. There is also a letter below showing a circumstance where Eureka County was admonished by BLM for disclosing pre-decisional information at a county commission meeting.

NAS-Fallon FRTC MOU:

The Cooperation Agency agrees to participate in an official effort related to the process of developing the FRTC EIS and associated project/studies. As a result of this participation, the Cooperating Agency will have access to information that is considered by the Navy to be sensitive and non-public in nature and must therefore maintain the confidentiality of the documents and deliberations during the period prior to public release by the Navy of any project related work products, including, but not limited to baseline reports and other EIS related documents. (Such sensitive information may include information prepared by non-Navy entities in conjunction with other proposals or planning efforts, and which is being provided to the Navy and other participants in this Agreement because of its relevance to the FRTC EIS process. Such non-Navy sensitive information includes, but is not limited to, Bureau of Land Management [BLM] Carson City District Resource Management Plan documents and associated data. Please note that any BLM GIS data must be acquired directly from the BLM. [POC – Colleen Sievers, csievers@blm.gov, 775-885-6168.] It is the intent of the Navy to prevent unauthorized access to, and disclosure of, this information, and to avoid public confusion, damage or other serious consequences to the Navy.

Mt. Hope EIS MOU:

6. Eureka County and its agents will, prior to publication of Draft and Final analyses, maintain the confidentiality of pre-decisional work products, proprietary information, sensitive resource data and locations, baseline reports, draft reports, and shall not distribute, share and/or discuss with any entity besides BLM and Enviroscientists.

3-Bars Landscape Restoration EIS:

4. The public comment period for the formal Draft EIS and the Final EIS, beginning with the publication of the Notice of Availability in the Federal Register, will remain consistent with 40 CFR § 1506.10(c) timing of agency action. Respond to comments on the Draft EIS that pertain to Eureka County or areas of recognized special expertise within 15 business days and advise BLM if the findings of the EIS do not support Eureka County's local plans, policies, controls, or decision-making needs. Commit to maintain the confidentiality of the documents and deliberations, to the maximum extent allowed under Nevada open meeting and sunshine laws, during the period prior to public release by BLM of any NEPA related document, including drafts.

Battle Mountain BLM RMP EIS:

4. The public comment period for the formal Draft EIS and the Final EIS, beginning with the publication of the Notice of Availability in the Federal Register, will remain consistent with 40 CFR § 1506.10(c) timing of agency action. Respond to comments on the Draft EIS that pertain to Eureka County or areas of recognized special expertise within 15 business days and advise BLM if the findings of the EIS do not support Eureka County's local plans, policies, controls, or decision-making needs. Commit to maintain the confidentiality of the documents and deliberations, to the maximum extent allowed under Nevada open meeting and sunshine laws, during the period prior to public release by BLM of any NEPA related document, including drafts.

Targeted Grazing EA:

g. **Exchange of Information/Confidentiality.** All records or information requested of either party by the other will be reviewed by the releasing party prior to release. To the extent permissible under law, any recipient of proprietary and/or pre-decisional information agrees not to disclose, transmit, or otherwise divulge this information without prior approval from the releasing party. Any breach of this provision may result in termination of this MOU. The BLM and Eureka County recognize that applicable public records laws will require release of non-exempt documents.

Solar Programmatic EIS:

F. Management of information.

The Cooperating Agency acknowledges that all supporting materials and draft documents may become part of the administrative record and may be subject to the requirements of the FOIA and other federal statutes. The Cooperating Agency agrees not to release these materials to individuals or entities other than the Parties to this MOU.

Confidentiality. The Cooperating Agency agrees to maintain the confidentiality of information and documents shared between the Cooperating Agency and the co-lead agencies pursuant to the preparation of the Solar PEIS/RMP amendments. These confidentiality provisions apply to all communications, including email messages, "notes to file," meeting notes, letters, reviews, evaluations, and to all documents created or shared as part of the collaboration established by this MOU.

2015 BLM/USFS Sage Grouse RMPA:

g. Exchange of Information/Confidentiality. All records or information requested of either party by the other will be reviewed by the releasing party prior to release. To the extent permissible under law, any recipient of proprietary and/or pre-decisional information agrees not to disclose, transmit, or otherwise divulge this information without prior approval from the releasing party. Any breach of this provision may result in termination of this MOU. The BLM and Eureka County recognize that applicable public records laws will require release of non-exempt documents.



United States Department of the Interior

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Leonard J. Fiorenzi, Eureka County Commissioner
Eureka County Board of Commissioners
P.O. Box 677
10 South Main Street
Eureka, NV 89316

Dear Mr. Fiorenzi:

The Bureau of Land Management (BLM) has received a copy of an article published in the Eureka Sentinel (attached) on November 11, 2009. This article is titled "Commission learns Eureka Moly's water pumping will have great-than-told-effects". Information in this article discloses information contained within the Mount Hope Project's Hydrology Model Report which is a preliminary and pre-decisional baseline report prepared by Eureka Moly, LLC (EML).

The information contained within this report is considered draft and should not be shared with entities other than BLM, EML, Enviroscientists and the Cooperating Agencies (Eureka County, National Park Service, and Nevada Department of Wildlife). According to the Memorandum of Understanding (MOU), MOU-3809-NV062-0804, between the BLM Battle Mountain District, and the Board of Eureka County Commissioners the disclosure of this information by the Commissioners to the public is not acceptable. The MOU clearly states in Responsibility #6 that "Eureka County and its agents will, prior to publication of Draft and Final analyses, maintain the confidentiality of pre-decisional work products, proprietary information, sensitive resource data and locations, baseline reports, draft reports, and shall not distribute, share and/or discuss with any entity besides BLM and Enviroscientists."

This newspaper article suggests that the County violated this section of the MOU by discussing pre-decisional baseline report information with entities other than BLM and Enviroscientists. The BLM respectfully requests that the County refrain from disclosing pre-decisional and draft information related to the Mount Hope Project until such time that this information is available. If there are additional questions or concerns please contact Angelica Rose, Planning and Environmental Coordinator, or Stephen Drummond, Mining Engineer at (775) 635-4000.

Sincerely,

Douglas W. Furtado
Field Manager
Mount Lewis Field Office