



THE WILDERNESS SOCIETY

NEPA Implementation Procedures
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Dear Forest Service,

These comments are submitted in response to the Federal Register Notice on the Forest Service notice of proposed rule to move its NEPA implementing procedures to 36 CFR Part 220. Federal Register, Volume 72, No. 158, pages 45998-46009. The Wilderness Society and the undersigned organizations have always had an interest in both the management of the National Forests and Grasslands, and in the rules and regulations guiding said management. We welcome this opportunity to comment.

While we consider the move of the implementing procedures from the Forest Service Handbook (FSH) to the Code of Federal Regulations (CFR) a generally good idea, we have a number of issues, concerns and questions regarding some of the proposed changes to the Forest Service NEPA process and definitions. Overall, these new changes appear to grant to the agency discretion for analysis and action we do not believe is legally warranted. In detail, our concerns are described below.

Some aspects of this proposal continue this administration's disturbing and unfortunate trend towards undermining NEPA, from categorically excluding both forest planning and project-level decisions from NEPA analysis and documentation to the proposal to move NEPA implementation work out of local agency offices and into regional "super centers." Additionally, the current NEPA proposal not only attempts to essentially codify existing and damaging directives, but also identifies multiple new changes that could further weaken the NEPA process.

An Environmental Impact Statement Is Required For This Proposal

We believe the Forest Service has failed to follow proper procedure in proposing this promulgation of regulations without an accompanying environmental impact statement (EIS).

Major Federal Action

This proposal meets the definition of major federal action, defined in part as:

“Major Federal action” includes actions with effects that may be major and which are potentially subject to Federal control and responsibility

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies or procedures, and legislative proposals...

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedures Act....

40 CFR 1508.18

Clearly, the proposal at hand constitutes both new and revised agency rules as well as regulations. Council on Environmental Quality (CEQ) regulations further state,

Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

40 CFR 1502.4(b); emphasis added

CEQ provides further direction in its 40 Questions:

24a. **Environmental Impact Statements on Policies, Plans or Programs.** When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the

form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

The proposal at hand does have the potential to significantly affect the quality of the human environment and as such should be analyzed in an EIS. The proposed regulations substantively limit many elements of current agency NEPA analysis, especially in the area of cumulative effects analysis and the consideration of alternatives. The proposed rules also include categorical exclusions (CEs) which never were subject to environmental analysis, such as the fuel reduction and timber harvest CEs (§ 220.6(e)(10), (12-14)), and CEs related to ongoing litigation, such as the CE the agency attempted to use to revise the NFMA regulations (§ 220.6(d)(2)(vi)) and the forest planning CE (§ 220.6(e)(16)). This may be the last opportunity to analyze the many management activities with potentially significant effects under NEPA which fall under these CEs. These CEs combined with the proposed changes in environmental analysis would unleash a raft of potentially significant site-specific management actions without any, or in some cases minimal, environmental review.

Finally, the requirement for an EIS to analyze the effects of these proposed regulations is provided by the recent decision in Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059 (N.D. Cal., 2007). In this case, the Federal court ruled that the agency's planning regulations do have an effect on the environment, thus a categorical exclusion (CE) cannot be used, and documentation in an EA or EIS is necessary.

The Ninth Circuit court stated:

NEPA requires *some* type of procedural due diligence - even in cases involving broad, programmatic changes. ... NEPA does indeed contemplate preparation of EAs and EISs in the case of programmatic rules and changes.

Citizens for Better Forestry, 481 F.Supp.2d at 1085 (emphasis in original).

This direction from the court applies to both the proposed CE for forest planning and, by analogy, to these very proposed regulations as a whole. An EIS must be prepared.

Cumulative Effects: The Effect of the Proposed Removal of NEPA Analysis from Forest and Grassland Units of the National Forest System to Regional Centers or Third-Party Contractors.

The Forest Service has also erred in failing to prepare an environmental impact statement for these proposed regulations in that the Forest Service's own reasonably foreseeable future actions combined with these proposed regulations are likely to result in a significant effect on the human environment.

Even using the newly proposed definition of reasonably foreseeable future actions as described in § 220.3: "those activities not yet undertaken, for which there are existing decisions, funding, or identified proposals," these likely Forest Service actions should have been examined. Please note that we do not agree with this new definition for reasonably foreseeable future actions, as is detailed below. However, we will use this new definition in this section to show that even using the Forest Service's own proposed definition, the (likely near future) action of removing NEPA analysis from forest and grassland units of the national forest system (NFS) units to regional super centers or to third party private contractors should have been examined in combination with these proposed regulations in an EIS.

The Forest Service is currently engaged in a "transformation" effort at least partially prompted by the need to cut costs. A team of Forest Service employees has been engaged in examining potential changes in where and how NEPA analysis is performed, so funding exists for their time on this effort. Secondly, an identified proposal exists. The (redacted) copy is 68 pages long and available from the agency. It goes to great lengths to identify the possible options. A review of this document shows that the "no action" or current method of doing NEPA analysis on each NFS unit is highly unlikely to be chosen when a final decision is made. In fact, materials detailing union notification and answering employee questions indicates that at least some decisions have been made to proceed with the proposal. In summary, the proposal to move NEPA analysis off the units would appear to meet all three criteria of the new definition of reasonably foreseeable future actions.

The reason the agency proposes to expand its authority becomes clear when considered in light of the proposal to move NEPA analysis. But they are also very troubling and point to likely significant impacts to the (human) environment. For example, we are concerned that NEPA analysis prepared far from the location where management activities would take place would be missing the necessary "reality check" provided by ground-truthing conditions as analysis indicates possible conflicts. That college students with little experience could replace professional field technicians in doing the essential field surveys, as the proposal suggests, lends greatly to our concerns about the impact of these proposed regulations and the impact to the environment.

In another example, greater authority "on the ground" (at the field unit level) combined with a NEPA process that takes longer to engage given distance, competing project priorities at the

super centers and /or additional time for contracting activities, could lead to a greater number of “emergencies” being declared. The addition of effects to “important resources” to the reasons for declaring an emergency could only make it easier for Forest Service officials to circumvent NEPA in an effort to avoid longer NEPA preparation timeframes created by the move of NEPA analysis off the forests and grasslands.

There are any number of other combinations of potential impacts when considering these proposed NEPA regulations and the proposed move of NEPA analysis. As the proposed move clearly fits even the Forest Service’s more narrowly proscribed definition of reasonably foreseeable future actions, the agency should have, and must, prepare an EIS to examine the significance of these proposed regulations.

Proposed Changes in NEPA Analysis: Alternatives

We have a number of concerns with the proposed regulations in regards to considering alternatives, as required by NEPA.

Range of Alternatives

The proposed regulations state that EAs and EISs document alternatives but “no specific number of alternatives is required or prescribed.” § 220.5(e) (re EISs); § 220.7(b)(2) (re EAs). The existing directives, on the other hand, provide that all environmental analyses: “[c]onsider a full range of reasonable alternatives. . .” (FSH 1909.15, Ch. 12.33); “develop and consider all reasonable alternatives...” (FSH 1909.15, Ch. 14); “develop other alternatives fully and impartially. Ensure that the range of alternatives does not prematurely foreclose options that might protect, restore, and enhance the environment.” FSH 1909.15, Ch. 14.2. This change suggests the agency is moving towards a more limited approach to considering alternatives, which could be impermissible under NEPA, as we explain below. Making “incremental changes” to a proposed action, as the agency proposes in § 220.5(e)(2), is no substitute for analyzing and considering a full range of reasonable alternatives to that proposal, as required by NEPA.

NEPA commands federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternate uses of available resources.” 42 U.S.C. § 4332(2)(E) (2005). This statutory requirement to study alternatives is independent of and broader than the requirement to prepare an environmental impact statement. Bob Marshall Alliance v. Hodel, 852 F. 2d 1223, 1229 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989). Therefore, consideration of a reasonable range of alternatives in environmental analyses, including in EAs, is critical to the goals of NEPA. See 40 C.F.R. § 1508.9(b) (requiring that EAs discuss alternatives as required by § 4332(2)(E));

The Council on Environmental Quality's (CEQ) regulations implementing NEPA instructs federal agencies to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e) (applicable to EAs and EISs). In addition, consideration of alternatives is "the heart of the [EIS]," 40 C.F.R. § 1502.14, and EISs "shall" "rigorously explore and objectively evaluate all reasonable alternatives," § 1502.14(a).

The courts have further explained the agency's responsibilities. The Forest Service must consider a "broad range of reasonable alternatives." Curry v. United States Forest Service, 988 F. Supp. 541, 553-54 (W.D. Pa. 1997) (citing NEPA and 36 C.F.R § 219.12(f) (1997), which directed interdisciplinary teams to "formulate a broad range of reasonable alternatives according to NEPA procedures."). The failure to consider a "viable but unexamined alternative" renders NEPA analysis inadequate. Dubois v USDA, 102 F.3d 1273, 1289 (1st Cir. 1996), cert. denied sub nom. Loon Mt. Rec. Corp. v. Dubois, 521 U.S. 1119 (U.S. 1997) (quoting Resources Ltd. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1994); Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995)).

Finally, CEQ's "40 Most Asked Questions" explained that "[f]or some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981) (emphasis added).

While it is true that NEPA does not require a specific number of alternatives, it is clear that a broad range of alternatives, indeed, all reasonable alternatives, must be considered. The proposed regulation, therefore, fails to reflect the full extent of the agency's NEPA responsibilities, and suggests a more limited view than NEPA permits, which could lead to a failure to fulfill those responsibilities, in violation of the statute. Any procedures regarding the consideration of alternatives should contain complete direction.

Alternatives in EAs and the No Action Alternative

The proposed regulation § 220.7(2)(i), regarding EAs, states that "[w]hen there are no unresolved conflicts concerning alternative uses of available resources (NEPA section 102(2)(E)), the EA need only analyze the proposed action and proceed without consideration of additional alternatives." We cannot think of a proposal for National Forest management that would be analyzed in an EA yet does not involve such unresolved conflicts. The Forest Service has long argued that multiple use management in and of itself means there will always be conflicts over potential uses of limited natural resources. The proposed NFMA planning rule goes further in creating unresolved conflicts by arguing that forest and grasslands management

plans do not make any decisions, thereby delaying the resolution of all conflicts over alternative uses of available resources until the site-specific stage of NEPA analysis - the stage where EAs are most often used. Without an appropriate application, this provision could invite improper use. Moreover, as discussed above, NEPA's requirement to consider alternatives applies to EAs as well as EISs; it is equally important for EAs to consider alternatives. See 40 C.F.R. § 1508.9(b) (requiring that EAs discuss alternatives as required by § 4332(2)(E)). Because we do not believe this provision would ever apply, it is unnecessary, and creates potential for abuse, it should be deleted.

It is also important that the proposed provision regarding consideration of the "no action" alternative not lead to decreased analysis and true consideration of "no action." As the Ninth Circuit has explained, "[i]nformed and meaningful consideration of alternatives -- including the no action alternative -- is . . . an integral part of the statutory scheme." Bob Marshall Alliance, 852 F.2d at 1228; see also 40 C.F.R. § 1502.14(d) (EISs must "[i]nclude the alternative of no action").

Proposed Changes in NEPA Analysis: Cumulative Impacts

The Forest Service seems intent on restricting the consideration of cumulative impacts in both looking backward to past actions and forward to the reasonably foreseeable future. We believe it is outside of the agency's authority to do so.

Restrictions on the Consideration of Past Actions

The proposed regulations would limit the extent to which past actions would have to be evaluated by incorporating excerpts from a 2005 Bush Administration CEQ guidance memo regarding cumulative effects analysis. The agency seeks to limit consideration of cumulative impacts to those that are:

"in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its alternatives."

§ 220.4(f)

This section appears to be a blatant effort to get around recent court rulings on NEPA requirements for evaluating cumulative effects. In 2005, the 9th Circuit Court of Appeals stated: "the general rule under NEPA is that, in assessing cumulative effects, the Environmental Impact Statement must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment." Lands Council v. Forester of Region One, 395 F.3d 1019, 1028 (9th Cir. 2005). In that case, it was not sufficient to disclose only "broad

environmental harms from prior harvesting,” because “the data disclosed would not aid the public in assessing whether one form or another of harvest would assist the planned forest restoration with minimal environmental harm.” *Id.* The court explained that, “[f]or the public and agency personnel to adequately evaluate the cumulative effects of past timber harvests, the Final Environmental Impact Statement should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment. The Forest Service did not do this, and NEPA requires otherwise.” *Id.* Given this and other rulings, the Forest Service needs to explain its rationale for trying to circumvent federal appellate court decisions.

In addition, CEQ already defined “cumulative impact” as follows,

“Cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

40 CFR 1508.7

Not only is the Forest Service’s new definition unnecessary, but it reflects an excessively narrow interpretation of the cumulative impacts that will be considered. The CEQ definition includes ongoing effects of all other past actions, regardless of the source, and explicitly contemplates the need to consider the effects of “individually minor but collectively significant” actions. The addition of the vague “significant cause and effect relationships” provision creates the risk that “individually minor but collectively significant” ongoing effects from past actions will not be considered, and that ongoing effects from actions unrelated to the kind proposed will not be considered. The proposed restrictive definition of cumulative impact analysis undermines the CEQ’s broad regulatory definition and recent case law. It should be dropped or changed to a definition consistent with both.

A Narrowing of the Definition of Reasonably Foreseeable Future Actions

The Forest Service is proposing to redefine the term “reasonably foreseeable future actions”. The proposed definition reads, “[t]hose activities not yet undertaken, for which there are existing decisions, funding, or identified proposals.” § 220.3. This definition is far too narrow to encompass the plain language meaning of reasonably foreseeable future actions. It could eliminate from consideration a host of activities on national forest system lands which are clearly reasonably foreseeable. First of all, the phrase “not yet undertaken” would seem to eliminate from evaluation those effects that have taken place in the past and will continue into the future. Continue grazing on an allotment and ongoing oil and gas development are but two types of these activities. Secondly, actions such as illegal ORV incursions onto NFS lands and incursion

of new types of wildlife and plants (especially invasives) into a previously unroaded area following road construction are reasonably foreseeable future actions that will occur even in the absence of “existing decisions, funding, or identified proposals.” These actions will have effects and must be evaluated.

The proposed language also suggests an improper focus on activities taking place primarily on NFS lands and fails to mention other agencies’ actions or activities on private land, as set forth in the CEQ definition. The potential for ignoring activities on private lands is especially troubling given the miles of boundary line NFS lands share with private land and the increasing effects of private land use, such as primary and secondary housing developments and resort communities. It is particularly important to consider the cumulative effects of private land use on the National Forests in the Southern Appalachian mountains, where the National Forests were acquired from private ownership and are fragmented by and interspersed with private lands. For example, if a vacation home development company buys a tract of land adjacent to NFS project lands it is reasonably foreseeable to think that they will be building vacation homes, despite the absence of (or Forest Service knowledge of) “existing decisions, funding, or identified proposals.” If a private campground is located adjacent to NFS lands, it is reasonably foreseeable to think that previous recreational use of the forest or grassland will continue into the future despite the fact that the activities have already been undertaken and the absence of “existing decisions, funding, or identified proposals.”

If activities such as these are excluded from consideration as “reasonably foreseeable future actions,” the Forest Service would be ignoring the plain language of the CEQ definition’s provision regarding “reasonably foreseeable future actions.” Without considering these effects, the analysis of cumulative effects could overlook significant impacts, in violation of NEPA. Neither the cited CEQ Guidance Memorandum of June 24, 2005, nor Forest Service efforts to give itself new authorities via narrowed definitions can negate the plain requirements of the CEQ regulation, 40 C.F.R. § 1508.7, regarding cumulative impacts. The proposed definition is too narrowly defined and must be changed.

Proposed Changes in NEPA Analysis: When to Prepare an EIS

The Forest Service seems intent on raising the bar on when an EIS is prepared. The CEQ instructs agencies to adopt procedures to supplement the CEQ regulations, including “Specific criteria for and identification of those typical classes of actions: (i) Which normally do require environmental impact statements...” 40 C.F.R. § 1507.3(b)(2) (emphasis added). The proposed classes of actions presented here (§ 220.5(a)) are from the 2005 version of the Forest Service Handbook (FSH). FSH 1909.15, Ch. 20.6. They differ from earlier versions of the Handbook in that the acreage sizes and miles used as examples have gotten larger and longer over time. We do not believe this change has reflected a higher standard for preparation of an EIS, rather an agency desire to make it appear that “significant” effects have to be larger and more dramatic in order to trigger the need to prepare an EIS.

There are plenty of examples the agency could use that are far less extreme and likely far more typical. The significance of environmental impacts is the key. The context and intensity factors are critical to the determination of the need for preparation of an EIS. We note, contrary to the Forest Service's dramatic examples, that ecological science is moving in the opposite direction, demonstrating the long-term, severe consequences of seemingly subtle, minor damage.

Proposed Changes in NEPA Analysis: the Preliminary EIS and Incremental Changes

We have a number of questions and concerns about the proposal to create "preliminary EISs" and make incremental changes. We support Forest Service efforts to increase collaboration and the exchange of information with the public, but fear these proposals could lead the agency to avoid fully examining all reasonable alternatives and preparing additional draft or supplemental EISs should alternatives change significantly over time.

We question how the public comment process would work. Would there be official comment periods for preliminary EISs? Would commenting on such an EIS give one standing to appeal? We think it should. In addition, the agency has been releasing less and less material for public comment so we would be pleased to see preliminary EISs produced.

Proposed Changes in NEPA Analysis: Post-Decision Changes

The Responsible Official

The Responsible Official is defined as "the Agency employee who has the authority to make and implement a decision on a proposed action." § 220.3. This definition should be in accordance with agency provisions for line authority. Does the definition of Responsible Official differ from the definition of Deciding Officer for NEPA decisions? Is the proposed definition of Responsible Official in accordance with the Forest Service Manual (FSM), which provides that authority "may be delegated below the Regional Forester level only in writing to a named individual and not to a position?" FSM 2400, Ch. 2404.21(1). With the addition of post-decision changes, would the person who has the authority to make a decision and the person to implement the decision be considered one and the same person?

Setting Up For Changes after the Decision

We are concerned that the ability of the agency to specify changes after the decision is made will lead to the creation of a kind of smorgasbord of analyzed boilerplate changes placed in every decision document to account for a variety of possible on-the-ground resource conditions. This could then lead to less thorough and comprehensive field survey and effects analysis before the project decision is issued, knowing that conflicts or problems discovered at the implementation

stage could be quickly changed. However, this scenario leaves the analysis of effects lacking and could lead to significant effects being discovered after the fact and potentially left unmitigated. This could undermine NEPA's requirements that agency decisionmakers consider accurate, high quality environmental information, make this information available to the public, and encourage public involvement in decisionmaking "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); see § 1500.2; Robertson v. Methow Valley Citizen's Council, 490 U.S. 332, 349 (1989).

This problem would be exacerbated by moving NEPA analysis off the NFS units where the people writing the effects section will likely not be the same people who did the field survey prior to the decision. We know the agency is under pressure to cut costs and know of instances already in which pre-decision field survey was curtailed due to lack of funds. We are not convinced that this post-decisional authority will not be exploited to the detriment of the environment.

Adjustment during Implementation and Adaptive Management

We have several concerns about the proposal to allow the post-decision "adjustment" of actions. First, critical aspects of this "adjustment" procedure are undefined. For example, when is a change an "adjustment" and when is it a "substantial change" requiring a supplemental EIS, 40 C.F.R. § 1502.9(c)(1)(i)? This provision creates the risk that substantial changes will be made improperly under the cloak of an "adjustment." Also, there is no defined process for making such adjustments, for example, how are adjustments documented? Who makes the decision? How is the public informed?

Second, the adjustment proposal is predicated on the concept of adaptive management. The promise of adaptive management, however, generally has not been fulfilled. We continue to be concerned with the agency's intention to use "adaptive management" to seemingly solve all problems. Adaptive management is meaningless without monitoring and evaluation to inform adaptation, and without disclosure through reporting. These are all areas where the Forest Service has historically fallen short. Moreover, to avoid successful legal challenges to the failure to follow through on monitoring commitments, many of the recently completed forest and grasslands management plans have greatly limited the amount and extent of monitoring required. The agency has moved monitoring plans and requirements out of land management plans and off into (as yet uncompleted) monitoring implementation plans in an attempt to avoid legal responsibility to actually complete any monitoring. In addition, many of these same plans have stipulated that the monitoring, evaluation and reporting that is required will only be done if there is enough money. Given the lack of requirements and competing demands for a shrinking set of funds, it is hard to believe that the Forest Service can actually complete the kind of monitoring envisioned by adaptive management, let alone complete sufficient evaluation and reporting. The picture doesn't look any better at the post-project monitoring phase with funds seemingly having dried up when it comes to doing much of the monitoring and mitigation stipulated in NEPA decisions. We are concerned that, without monitoring and evaluation to inform adaptive

“adjustments,” changes to NEPA decisions will be made “on the fly” without sufficient information and accountability. We will be watching closely to see that adaptive management as it is practiced by the Forest Service includes all of the elements of effective monitoring.

The Decision Is a Moving Target

The lack of agency accountability for monitoring and mitigation and the potential move of NEPA analysis off NFS units increase our concern over the proposal for authority to adjust management actions during implementation. The changes made during the implementation phase must be documented all along the line in order to be meaningful (and accurate) as past actions in the analysis of cumulative effects for subsequent projects. Given the time lapse that often occurs between decision and implementation and the potential distance between NEPA practitioners and the actual project areas it is easy to see that changes to the decision made at the implementation phase would get lost in the shuffle and never actually recorded. This then removes a critical link in the adaptive management cycle.

Post-decision implementation changes also raise questions. When is a decision really final? Who actually makes the decision? The responsible official who signs the NEPA decision document? The technician or sale administrator who is most likely to be on the ground when any changes are made? The contractor who may be given a choice of activities? How would proper and accurate documentation of changes be assured under these scenarios? How would accountability be ensured?

Categorical Exclusions and Environmental Analysis

NFMA Regulations CE: § 220.6(d)(2)(vi) and the Forest Planning CE: § 220.6(e)(16)

While the Forest Service claims that it is proposing no changes in current categorical exclusions (CEs) from NEPA, the draft rule includes two previously proposed and very controversial CEs: one for revising NFMA regulations (Sec. 220.6(d)(2)(vi)) and one for revising forest plans (Sec. 220.6(e)(16)).

The Forest Service seems to be getting ahead of itself. As stated above, an EIS is required prior to the adoption of new agency programs or regulations. Further, the Ninth Circuit Court ruled in Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059 (N.D. Cal., 2007) that an EIS is required. The agency seems to have agreed with this in that it is currently analyzing the proposed planning rule under the National Forest Management Act (NFMA) in an EIS. That EIS is considering the procedures that will be necessary to establish, amend, or revise land management plans.

One of our many concerns is that the proposed regulations presented here seem to indicate that the decisions being considered in the Planning Rule DEIS have already been made.

Alternatively, one could argue that these two proposed CEs are not ripe for decision in these proposed NEPA regulations as they are currently being considered in a separate NEPA decision. The proposed CE for revising forest plans (Sec. 220.6(e)(16)) requires preparation of a project or case file and decision memo. Yet this requirement is also under consideration in the Proposed NFMA Planning Rule DEIS.

This regulation proposal and the NFMA Planning Rule proposal currently in its DEIS comment period seem to be at odds with each other. The Forest Service needs to either drop these CEs from this proposal pending a decision on the NFMA Planning Rule or end the charade of the Planning Rule EIS and disclose that the agency has already made a decision outside of the NEPA process.

Hazardous Fuels Reduction Using Prescribed Fire or Mechanical Treatments

Under proposed section 220.6(e)(10), up to 4,500 acres of land for prescribed burning would be exempted from disclosure in an EA or EIS. The burn acreage total is much too large. Prescribed burns are an important tool to manage a forest. However, despite the laudable goals of prescribed burning, these burns can significantly alter the area in which the treatment is applied. Even a small burn proposal can be controversial to people living nearby for a variety of reasons. Any actions that significantly alter an area should be subject, at the very least, to an EA.

Additionally, 1,000 acres of mechanically treated land to reduce hazardous fuels could be exempted from NEPA disclosure requirements. Mechanical treatment of 1,000 acres means that areas approximately 1.5 square miles could essentially be cleared of vegetation without the impacts of such activity being analyzed or disclosed. Similar to a large burn, the effects of such a project would be significant and controversial.

Another problem is that multiple large projects adjacent to each other or in the same watershed could cause significant cumulative impacts without sufficient analysis under NEPA. For example, currently in Colorado, massive logging projects have taken place to reduce hazardous fuel problems using CEs. Given the uncertainty of impacts from these projects, the almost certain controversial nature of possible impacts, and the likelihood (at least eventually) of cumulative impacts, projects of the size allowed under this proposed CE would likely meet the test for significance under NEPA. See 40 CFR 1508.27(b). This CE must be either removed from the regulation or the acreage limits must be significantly lowered.

Post-Fire Rehabilitation

Under proposed section 220.6(e)(11), projects implementing post-fire rehabilitation on up to 4,200 acres would be exempted from NEPA documentation. As with the CE for burning and mechanical treatments to reduce hazardous fuels, this acreage is simply too much. The landscape in this situation is very sensitive to treatment, and must undergo complete environmental analysis. This CE should be eliminated or the acreage severely reduced. Any

immediate action that was truly needed in larger areas could be undertaken if identified by the Responsible Official as an emergency due to direct and immediate harm.

Salvage of Dead and Dying Trees

Proposed § 220.6(e)(13) would allow salvage on up to 250 acres with up to one-half mile of temporary road construction. As with some other CE categories, this one suffers from being too large and failing to consider possible cumulative impacts of a number of such projects being implemented in the same vicinity. One of the listed examples (subsection ii), which would allow “[h]arvest of fire-damaged trees”, is troubling. The post-fire landscape is very sensitive. Major activity such as logging can cause a delay or even reversal of vegetative recovery in logged sections of the landscape. Additionally, salvage logging activities, in general, are very controversial. This example must be eliminated, or at the very least reduced in size.

Commercial and Non-Commercial Sanitation Harvest

Similar to proposed section 220.7(e)(13), proposed section (e)(14) would allow logging “to control insects or disease” on up to 250 acres with up to one-half mile of temporary road. It would allow “removal of infested/infected trees and adjacent live uninfested/uninfected trees as determined necessary to control the spread of insects or disease.” Using Colorado as an example once again, there are areas where trees are insect-infested that span more than 250 acres, including healthy adjacent trees that are susceptible to infestation. Clearcuts of 250 acres could easily occur under this CE directive, which would exceed the limitations on clearcut size found in the Planning Directives implementing the National Forest Management Act at FSM 1920.12e.¹ These limits do not apply to “areas harvested as a result of natural catastrophic condition,” but could apply to any live trees cut, depending on how “adjacent” they were to infested or infected trees.² Any silvicultural activities of this magnitude should have impacts analyzed in an EA or EIS.

The application of this rule in the Southeast is also of particular concern. Outbreaks of the southern pine beetle have spread in the southern part of the region. The gypsy moth has partially defoliated a number of areas in Virginia forests and appears likely to expand its range. This CE (and the CE above) could expedite salvage harvests of trees threatened or damaged by insects and “sanitation” harvests to control insects, accelerating timber sales across the region. A region-wide undertaking to log timber affected by insects would have significant cumulative effects. These harvests would further fragment forests, adversely affecting both wildlife and recreational resources. Even with road construction limited to a half-mile of temporary road per project,

¹ Under NFMA, limits on clearcut size by “geographic areas forest types or other classifications” are supposed to be in regulations promulgated by the Secretary of Agriculture. 16 U.S.C. 1604(g)(3)(F)(iv). They were in fact in the previous set of Planning Regulations at 36 CFR 219 (1982), but they were removed and placed in the Directives system under the 2005 Planning Regulations.

² For example, if some trees in a stand were infested with dwarf mistletoe, logging would not be appropriate more than 60 feet away from the nearest infested tree, as that is the maximum distance mistletoe can shoot out to infect another tree.

increased logging and road-building would exacerbate erosion and sedimentation in the region. These projects, both individually and cumulatively, could have significant impacts on the environment.

The Forest Service should fully consider, with public involvement and comment, the need to log insect-damaged timber and alternatives to doing so. In many instances, the Forest Service should leave these trees in place to naturally regenerate, keeping the nutrients in the forest and creating natural openings without the adverse effects of logging and road-building.

Construction and Reconstruction of Trails

Under proposed section 220.6(e)(1), trail construction and reconstruction would qualify for a CE. This CE category could easily be abused to allow many miles of new trail construction, resulting in a whole new use into an area, such as motorcycle and/or all-terrain vehicle use into areas currently having no motorized use. Such impacts would need to be identified in an EA or EIS. The language of the category itself proposes no limitations and could lead to projects that could clearly cause impacts. The solution: there must be a limit on mileage for this CE. We recommend no more than one-half mile of new construction, and one mile of reconstruction, and even lower limits if construction or reconstruction opens a trail to a new type of use or newly opens an area to motorized use.

“Minor” Special Uses

Under proposed section 220.6(e)(3), the approval, modification, and continuation of minor special uses using no more than five contiguous acres of land would qualify for a CE. The example “[a]pproving the use of land for a 40-foot utility corridor that crosses one mile of a National Forest” is inappropriate (subsection iv). In some cases, changes to a landscape of that size would have more than a “minor” impact on soils, wildlife habitat fragmentation, introduction and spread of invasive plant species, etc. This example should be removed, and the category description modified to ensure that an appropriately sized description without obvious significant effects is provided.

Timber Stand and Wildlife Habitat Improvement

Under proposed section 220.6(e)(6), activities that improved wildlife habitat or timber stands would be exempt from documentation, as long as there was no use of herbicides and there was construction of no more than one mile of low standard road. Again, without a limit on the acreage to which this CE could be applied, it could too easily be abused. Notably, the two examples cited (subsections iii and iv), would allow prescribed burning without limitation. For example, this CE frequently is used to burn tens of thousands of acres annually in the Southern Appalachian mountains. While burning is favorable in many cases, the effects should nonetheless be carefully evaluated before this activity is approved.

Short-Term Mineral, Energy and Geophysical Investigations

Under this CE category (proposed section 220.6(e)(8)), construction of less than one mile of road, clearing vegetation, and various invasive methods of mineral investigation would be allowed. In addition, there is no guidance on adjacent investigation sites. Several very small areas adjacent to each other could be subject to several “exploration” CEs, resulting in a large cumulative area thus causing significant environmental harm over a large area. Finally, vibroseis is included in the types of exploration activities. This is a terribly invasive procedure that could potentially degrade archaeological, cultural, and environmental resources.

Reserved CE

Proposed section 220.6(e)(4) is reserved as was the same location in the Forest Service Handbook. Please explain the reason for this reservation.

Approval of a Surface Use Plan of Operations

Proposed section 220.6(e) stipulates that a project or case file and decision memo are required for “the categories of action in paragraphs (e)(1) through (e)(16) of this section”. This leaves section 220.6(e)(17) without any stated requirements for NEPA documentation. Subsection (e)(17) covers “approval of a Surface Use Plan of Operations for oil and natural gas exploration and initial development activities, associated with or adjacent to a new oil and/or gas field or area, so long as approval will not authorize activities in excess...”; it then goes on to list condition restrictions. Was the statement at the beginning of 220.6(e) a typo? Should the section have said “paragraphs (e)(1) through (e)(17) of this section?”

If so, we question whether the Forest Service can say categorically that this has no significant effects. Where is the research and documentation that shows this to be the case? On its face, these activities would appear to be outside the bounds for which a decision memo would be acceptable and to require an EA. The section itself stipulates that the activities may be adjacent to a new oil and/or gas field, which calls into question the significance of cumulative impacts. Please disclose the documentation of the analysis of effects that caused the agency to find these activities suitable for inclusion as a CE. Absent this evidence we believe these activities are not suitable for a CE, the subsection should be dropped and the effects of such activity should be analyzed in an EA or EIS. Please also clarify the level of NEPA documentation the agency is proposing.

Repair and Maintenance of Roads and Trails

Under proposed section 220.6(d)(4), “Repair and maintenance of roads, trails, and landline boundaries” would be exempt from NEPA documentation. As with trail construction and reconstruction, repair and maintenance of roads and trails could change their use. A very rough road could be upgraded via “maintenance” to the level passable by passenger vehicles or the

widening of a narrow hiking trail might make it passable for OHVs. In both examples, significant environmental impacts would not only occur during the implementation phase, but also over the longer term. Roads are a leading cause of soil damage and effects to water quality.

Road repair and maintenance are important activities to mitigate the negative impacts of roads. And, in some cases, the use of a CE for road repair and maintenance may be appropriate. However, this particular exemption from NEPA could easily be abused by application to a large number of miles of roads and/or trails. Indeed, abuse of this CE, currently in the FSH, has already been attempted. On June 29, 2007 the Medicine Bow-Routt National Forest issued a scoping notice for a project that, if approved, would allow standing dead and dying trees to be removed from a 200 foot wide corridor on both sides of any roads on the Forest. Clearly, such a proposal cannot be categorically excluded from NEPA documentation.³ We recommend mileage limits for this CE, language clearly casting “ancillary” activities (such as the removal of trees cited above) as outside the bounds of the CE and repair and maintenance activities limited to maintaining the same service level.

Sale or Exchange of Land

Under section 220.6(d)(7), the following would qualify for a CE: “[s]ale or exchange of land or interest in land and resources where resulting land uses remain essentially the same.” Unfortunately, the Forest Service cannot ensure that tracts of land for sale or exchange would result in “essentially the same” land uses, unless environmental review is undertaken. In this case, a project or case file and decision memo are not required. In addition, no acreage limit is provided in this category. This category should be dropped, or at a minimum, provided with an acreage limit and moved to section 220.6(e) so that a project or case file and decision memo are required.

Conversion of Permits to Easements or Leases

Section 220.6(d)(10)(ii) proposes to allow conversion of existing special use authorizations to new types of special use authorizations without need of a project or case file or decision memo (or by extension, public notification). The example given is converting a permit to a lease or easement. We object to this proposal. Special use permits, leases and easements are all very different legal instruments. We do not believe they are interchangeable.

As recreational and non-forest product uses of the national forests and grasslands increases, the request for permits, leases and easements will only increase. This will be exacerbated by the move to privatize many Forest Service functions and services, ostensibly to save on costs. The increasing use of these legal instruments is likely to result in conflicts over use (yet another manifestation of the conflicts and competing resource uses and values in a multiple use mandated environment). In order to protect full public use of federal lands, this example should be

³ As of this writing, this proposal has not been approved.

dropped from the subsection. The conversion of permit types should require analysis under NEPA and full public disclosure.

Contents of a Decision Memo

We suspect this is an inadvertent omission. Proposed section 220.6(f)(4) describing findings required by other laws, requires “consistency with forest land and resource management plans.” We believe that line should read “consistency with forest and grassland land and resource management plans.”

Emergencies

Authority Shifted to the Forest Service Is Too Broad

We recognize the agency’s need to move quickly to respond to emergencies, but we are concerned that this definition is too broad and therefore creates the potential for abuse.

Section 220.4(b)(2) proposes,

“The responsible official may take emergency actions necessary to control the immediate impacts of the emergency to mitigate harm to life, property, or important resources.”

Emphasis added.

This category is missing a number of critical definitions that would provide guidance to Responsible Officials, likely reduce the number of arbitrary and capricious decisions and actions, and provide some degree of consistency to agency decisions. As proposed it conveys an incredible degree of authority to responsible officials. Given agency efforts to devolve decisionmaking authority to lower and lower levels of the organization and the huge number of “actings” (temporary placement of agency employees in positions until that position is permanently filled) in decisionmaking positions, this is worrisome.

First of all, the responsible official has the authority to determine that an emergency exists. How does that official determine what an emergency is? By looking to the definition above. As proposed, an emergency is something that causes harm to life, property or important resources. But what is an “important resource” and what degree of “harm” constitutes an emergency? That term is undefined and so left to the responsible official to decide. Given the proposed authority that follows the declaration that an emergency exists, this term should be defined to provide agency consistency.

Once an emergency was declared, the regulations would allow actions to be implemented before an EA or EIS was prepared. § 220.4(b)(1). This is appropriate in cases involving harm to human life, and may be appropriate in cases of harm to property. But allowing emergency authority for “important resources” without any definition of the term represents a very broad loophole that could be used to justify any number of activities that should undergo environmental review prior to action. This authority to short-cut NEPA procedures in the event of “emergencies” is especially worrisome since the Forest Service has begun classifying post-fire salvage logging as “economic emergencies” pursuant to its recently amended appeal regulations at 36 CFR 215.

The concept of emergencies will bear close scrutiny as the Forest Service “transforms” itself. The agency is pursuing a serious effort to move NEPA analysis off the Forests and to regional super centers or out to private contractors. As the timeline for completion of NEPA analysis got lengthened, as it inevitably would when dealing with off-site coordination or third-party contractors, there would be great interest in whether the number of “emergencies” went up and if (as proposed) “important resources” were cited as the reason for emergency action.

The “important resources” clause must be removed from the regulations or clarified. At a minimum, the circumstances which would justify an emergency declaration based on a threat to resources, as well as the types of “important resources” must be narrowly defined. The narrow definition should not include responding to special use permit requests, as we’ve seen happen in the past. The Forest Service must not use emergency authority to escape NEPA analysis either to circumvent review of controversial projects, deal with short time frames due to late permit requests or in an effort to deal with the time delays it would create for itself in moving NEPA analysis off individual forest and grassland units.

Effects on Public Participation

Overall, we fear the proposed regulations as well as the reasonably foreseeable future action of moving NEPA analysis off the NFS units will serve to further limit effective public participation rather than enhance it. We hope the agency will remember that national forests and grasslands belong to all of the people and will seek ways to expand online and long-distance participation for those whose favorite places are far from their everyday geographic location. At the same time, with a move to Regional Centers for NEPA analysis, we hope that the Forest Service doesn’t lose sight of the need to involve local communities and residents of the region.

The Collaborative Process

We support the recent Forest Service trend towards seeking greater collaboration with environmental and other groups, and many of us are engaged in such efforts on various National Forests and Grasslands. The proposed provisions regarding preliminary drafts, incremental changes to alternatives and adjustments during implementation seem to reflect the agency’s

desire for flexibility to respond to the collaborative process and to needs identified by monitoring. While such flexibility facilitates collaboration and adaptive management, they also can be misused, as discussed above. We believe that the existing NEPA process already contains much of the desired flexibility.⁴ It is important that the agency integrate collaboration and adaptive management into the established NEPA process, rather than attempting to implement some new framework that replaces the NEPA process yet lacks its safeguards.

Overall, the Forest Service seems intent on narrowing the scope of its responsibilities under NEPA. New definitions and changes in how NEPA analysis would be conducted which would severely restrict environmental impact analysis and public disclosure are proposed. The agency attempts to assign to itself authority it does not possess in order to make changes which undermine statutory language and case law, unfortunately opening the agency to ongoing controversy. These efforts, along with agency plans to move NEPA analysis off the individual national forest system units, are troubling.

We've detailed the sections we believe should be changed. Overall, the requirement for preparation of an EIS for these proposed regulations should dictate the next agency steps. We look forward to continued discussion of this proposal.

Should you have any questions or need clarification on these comments, please contact Mary Krueger at the Wilderness Society and / or Sarah Francisco at the Southern Environmental Law Center. Thank you for your time and consideration.

Sincerely,

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⁴ For example, during the recent revision of five forest plans in the Southern Appalachian mountains in Region 8, the agency focused on a "rolling alternative" during the planning process that was supposed to reflect points of consensus among participants. In the end, however, the "rolling alternative" got stuck.

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