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Submitted through [www.regulations.gov](http://www.regulations.gov) and  
by e-mail to: [ObjectionRegulation@fscomments.us](mailto:ObjectionRegulation@fscomments.us)  
cc: Deb Beighley: [dbeighley@fs.fed.us](mailto:dbeighley@fs.fed.us)

Objection Regulations Comments  
P.O. Box 4654  
Logan, UT 84323

Subject:       Objection Regulations: Sequoia ForestKeeper Comments

To Whom It May Concern:

Thank you for the opportunity to provide comments on the draft Objections Rule (36 C.F.R. § 218 *et seq.*), published in the Federal Register at 77 Fed. Reg. 47337 (Aug. 8, 2012).

Sequoia ForestKeeper (“SFK”) is pleased that the definition of the Objection Period at § 218.2 allows 45-days to file an objection for projects that are not subject to the HFRA. The final regulation should provide for at least this length for the objection period, which is consistent with the previous process provided under the 36 C.F.R. § 215 regulations and the Appeals Reform Act (Public Law 102–381; 16 U.S.C. 1612 note or “ARA”).

### Comments

#### I.       Categorical Excluded (CE’d) Projects Should and Must Continue to be Subject To Notice, Comment, and Administrative Review.

Whether or not CE’d projects are part of these regulations (at § 218 *et seq.*), so long as Congress does not explicitly eliminate the remaining provisions of the Appeals Reform Act (ARA), the Forest Service must subject CE’d projects to notice, comment, and administrative review under 36 C.F.R. § 215 *et seq.* As it stands, the 36 C.F.R. § 215 regulations are still relevant and must still be used by the Forest Service for all CE’d projects issued with a Decision Memo. *See Sequoia ForestKeeper v. Tidwell*, --- F.Supp. ---, 2012 WL 928703 \*8 (E.D. Cal. March 19, 2012) (“ ‘decisions documented in a Decision Memo ... are subject to appeal under this part.’ ” (quoting 36 C.F.R. § 217(a)(1) (1992), and stating that the ARA was passed in response to eliminating this provision). In effect, the preamble to the draft § 218 rule acknowledges this (*see* 77 Fed. Reg. at 47338-39), as does the direction issued by the Chief of the Forest Service. *See* Exhibit A, submitted herewith.

Regardless of the outcome of the *SFK v. Tidwell* case on appeal, the Section 428 rider does not affect the notice and comment provisions of ARA §§ (a) & (b),<sup>1</sup> and therefore the new § 218

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<sup>1</sup> This is also evidenced by the new Section 437 rider in the House’s version of the 2013 Interior Appropriations bill, which would repeal the remaining provisions of the ARA regarding notice and comment. Moreover, it specifically

regulations cannot legally eliminate CE'd projects from notice and comment, as the Forest Service suggests doing at some time in the future in § 218.23(a), unless Congress explicitly enacts legislation eliminating ARA §§ (a) & (b).

### The Regulations Should Preserve Notice and Comment Provisions for CE'd Projects

Even if Congress eliminates the remaining provisions of the ARA, we urge the Forest Service to preserve the notice and comment provisions for CE'd projects. It makes sense to do this as part of the § 218 regulations for at least the following reasons:

- (1) Current regulations and Forest Service policies still require public scoping, which is a process that is essentially identical to the one that requires notice and comment. But these scoping requirements exist under NEPA regulations (36

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discusses CE'd projects, which implies that Congress did not include these types of projects in the Section 428 rider in the 2012 Appropriations bill:

Sec. 437. Section 322 of the Department of the Interior and Related Agencies Appropriations Act, 1993 (Public Law 102–381; 16 U.S.C. 1612 note) is repealed. Section 428 of division E of the Consolidated Appropriations Act, 2012 (Public Law 112–74; 125 Stat. 1046; 16 U.S.C. 6515 note) shall not apply to any project or activity implementing a land and resource management plan developed under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604) that is categorically excluded from documentation in an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

Department of the Interior, Environment, and Related Agencies Appropriations Act (H.R. 6091) – Title IV – General Provisions

The new Section 437 rider is described as follows:

Section 437: Cutting the Public Out of Forest Service Decisionmaking – Repeals the Appeals Reform Act; excludes the public from appealing, objecting to, or even commenting on projects approved through Categorical Exclusions (i.e. projects exempted from environmental review). The Appeals Reform Act provides for appeals and notice and comment related to Forest Service projects, allowing for full public participation – this provision would completely repeal that act. This would mean that Forest Service actions, including Environmental Assessments, would be subject only to minimal and inconsistent NEPA requirements. This repeal puts Forest Service activities in a black box, out of public view, taking us back to an unfortunate past when a lack of transparency bred mistrust and ultimately litigation. It was this gridlock that led to the passage of the Appeals Reform Act in the first place. Taking it a step further, under this rider, projects approved by Categorical Exclusion from NEPA would no longer be open to appeal, objection, or even notice and comment by the public, making it nearly impossible for the public to find out about or provide input into Forest Service projects. Though last year's Forest Service appeals rider dramatically reduced the ability of the public to participate in Forest Service decision processes (Section 428 of division E of the Consolidated Appropriations Act, 2012), this new provision would cut off some projects from even a reduced amount of transparency and public input. Provisions like this continue to chip away at the processes that allow the public to participate in the management of publicly owned resources. When understood in combination with similar policy riders, the attack on public participation and the attempt to completely close off transparency is staggering.

C.F.R. § 220.4(e)<sup>2</sup> and Forest Service Handbook directives. *See* FSH 1909.15 Sec. 30.5 (“Scoping is required for all FS proposed actions, including those that would appear to be categorically excluded (ch.10, sec. 11). Scoping is important to discover information that could point to the need for an EA or EIS versus a CE as well as to inform the public.” (emphasis added)). Providing a notice and comment provision for CE’d projects in the § 218 regulations brings these regulations in line with each other.

- (2) The Forest Service should always seek input from the public to determine whether extraordinary circumstances preclude use of a CE and DM for a proposed project or activity. *See* 36 C.F.R. § 220.6; *see also* 73 Fed. Reg. 43091 (July 24, 2008) (“The responsible official relies on many sources of information in making a determination concerning extraordinary circumstances, including public comment . . . .”) (emphasis added). Before the determination is made that no extraordinary circumstances exist, it should be assumed that the project would require analysis in an EA or EIS.
- (3) NEPA regulations mandate that Federal agencies seek input into all projects and activities in an early and open process, including projects that may be CE’d:

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. . . . As part of the scoping process the lead agency shall: [] Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds) . . .

40 C.F.R. § 1501.7 (emphasis added).

Finally, it makes no sense to have an identical NEPA and FSH public scoping process for CE’d projects or activities separate from the § 218 regulations. Therefore, it would make practical sense to combine all necessary scoping (or notice & comment) provisions in the § 218 rules.

## II. The Final Regulation Must Clarify What Is Meant by Projects and Activities Not Subject to NEPA.

Without explanation, the draft rule at § 218.23(c) states that the following are not subject to notice, comment, and objection:

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<sup>2</sup> FS NEPA Regulation at 36 C.F.R. § 220.4(e):

Scoping (40 CFR 1501.7). (1) Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS (§ 220.6). (2) Scoping shall be carried out in accordance with the requirements of 40 CFR 1501.7. Because the nature and complexity of a proposed action determine the scope and intensity of analysis, no single scoping technique is required or prescribed. (3) The SOPA shall not to be used as the sole scoping mechanism for a proposed action.

Proposed projects and activities not subject to the provisions of the National Environmental Policy Act and the implementing regulations at 40 C.F.R. § parts 1500 through 1508 and 36 CFR part 220

To seek clarification, on 8/23/2012, I called and spoke with Forest Service Washington Office contact Deb Beighley, Assistant Director, Appeals and Litigation, who could not provide a good explanation of what “project and activities not subject to ... [NEPA]” included. She assumed that these projects and activities are limited to the issuance of permits, which are subject to a separate appeal process under 36 C.F.R. § 251 (or the newly proposed 36 C.F.R. § 214 regulations that will replace them). She also assumed that projects and activities under this part may include the issuance of any permits subsequent to a separate NEPA process and decision, which had already been made prior to issuance of the permit. She provided examples, including recreation Special Use Permits (SUPs) and grazing permits. Lacking, however, is a comprehensive list or explanation of what § 218.23(c) entails.

To be clear, for both agency use and public understanding, § 218.23(c) should provide either a comprehensive list of projects and activities not subject to NEPA or a reference to another regulation for a better description of what is included or excluded from this section. Without such a clear description or comprehensive list, this section is ripe for confusion (as it is now) or, worse, ripe for misinterpretation or abuse by agency officials. And if the agency official were to misinterpret this provision in application to a specific project or activity, the public would never know that the project even existed.

### III. NEPA Requires Release of a Draft Environmental Assessment (EA) or Its Equivalent to the Public for Comment Prior to and Separate From the Objection Period.

The current draft of the rule could allow the agency to short-change the NEPA process for projects analyzed in EAs because agency officials would be allowed to move from scoping directly to an objection period without meaningful review and input regarding the environmental analysis. *See* 36 C.F.R. § 218.24(a)(2) (allowing the responsible official to determine the most effective timing of the official notice providing an opportunity to comment on a proposed project or activity). This means that the rule, as currently written, would allow the agency to avoid public comment on a draft EA or its equivalent. But, by law, a draft EA or its equivalent must be disclosed to the public and present sufficient information about environmental effects and alternatives to inform public comment.

“Federal agencies shall to the fullest extent possible: ... (d) encourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2. Similarly, “agencies shall ... (d) solicit appropriate information from the public ...” *Id.* at § 1506.6. Moreover, “Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” *Id.* at § 1501.2. Also, alternatives “are the heart of the environmental impact statement.” *Id.* § 1502.14 (also required for EAs). Agencies must “Devote substantial treatment to each alternative considered in detail

including the proposed action so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(b). All these provisions apply equally to EAs.

As Federal Court decisions have explained,

the agency must offer significant pre-decisional opportunities for informed public involvement in the environmental review process by releasing sufficient environmental information about the various topics that the agency must address in the EA, such as cumulative impacts, before the EA is finalized.

*Sierra Nev. Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 992 (E.D. Cal. 2005); *see Citizens for Better Forestry v. United States Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003) (“We have previously interpreted the[] [CEQ] regulations to mean that that ‘the public must be given an opportunity to comment on draft EAs and EISs.’ ” (quoting *Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir. 2002))); *see also Town of Rye v. Skinner*, 907 F.2d 23, 24 (2d Cir. 1990) (per curiam) (NEPA is satisfied when the agency received written comments on draft EA and circulated its preliminary analysis of the EA for comment); *Hanly v. Kleindienst*, 471 F.2d 823, 836 (2d Cir. 1972) (“Before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency’s threshold decision.”).

The *Weingardt* court further noted that while the requirements from the NEPA regulations could be satisfied in some ways short of circulating an EA for public comment, “to be on the safe side, the agency can never go wrong by releasing a draft EA, and supporting documents ....” *Weingardt*, 376 F.Supp at 991.

The law requires that the public be given a fair chance at review during the NEPA process, and must be given a comment period on a draft EA or its equivalent, separate from the objection period. Without this separate comment period, the regulation will likely lead to more objections and litigation, and thus cause further delays. To be safe, the regulations for EAs should operate just like a comment period on a draft EIS, allowing the public to provide meaningful review and comment at the draft EA stage. *See* 36 C.F.R. § 218.5(a) (draft rule allowing comments on the draft EIS).

Scoping generally provides only basic information about the project, and does not allow the public to review and comment on the requisite environmental analysis and proposed alternatives. Precluding public comments on the potential environmental effects and alternatives in a draft EA would therefore short-circuit NEPA.

Moreover, a process without comment on a draft EA or its equivalent could entirely preclude an objection if the agency official were to determine that “[n]one of the issues included in the objection are based on previously submitted written comments ....” 36 C.F.R. § 218.10(a)(4). Even if the objection issue arose after the objector provided comments during scoping, this process allows too much discretion to the agency to conclude otherwise. Further, such a process

would not lead to informed decision-making, and the agency could avoid this problem with an additional comment period on a draft EA.

Therefore, the final regulations should include a specific requirement that agency officials circulate a draft EA or its equivalent for comment for 30 days separate from the objection period.

IV. The Agency Must Make the Project Record Available to the Public Prior to the Beginning of the Objection Period.

The public should be able to access the project record prior to the start of the objection period to provide an adequate objection. SFK suggests that the regulations should require Forest Service to make all specialist reports and other supporting documents available for download from a Project Web Page, even if in draft form. This is current practice with some forests, but it should be standard practice for all projects and activities subject to these regulations. Moreover, the *Weingardt* court suggests that any supporting documents be released with the draft EA. See 376 F.Supp at 991 (suggesting release of “a draft EA, and supporting documents....”).

The rule therefore must require that all relevant information concerning a project or activity governed by the rule is readily available prior to the start of the objection period.

V. The Regulations Should Limit “Emergency Situations” to True Emergencies, Which Should Not Include Losses in Commodity Values.

SFK has serious concerns about the proposed definition of an “emergency situation” which includes:

A situation on National Forest System (NFS) lands for which immediate implementation of a decision is necessary to ... avoid[] a loss of commodity value sufficient to jeopardize the agency’s ability to accomplish project objectives directly related to resource protection or restoration.

§ 218.2. The language appears to be more benign than that which exists in the § 215 regulations; however, a clarification from Forest Service Washington Office contact Deb Beighley does not bear this out. As Ms. Beighley explained over the phone, the justification for the “emergency situation” determination (ESD) is tied back to the purpose and need for the project. Thus, the Forest Service can narrowly tailor its purpose and need and then use any definition it has previously used for “resource protection or restoration” to qualify for the ESD, even if it includes vague objectives, such as “forest health” or other silvicultural objectives that are not centered on achieving “ecological” protection or restoration.

In the past, the vast majority of ESDs have been issued to facilitate post-fire salvage logging. And, according to Ms. Beighley, the new language would still make determinations of “emergency situations” available for post-fire salvage logging, even though these practices have been proven to be ecologically destructive to wildlife and can cause serious problems with watersheds and water quality. SFK strongly objects to the use of these ESDs in the case of post-

fire salvage logging because project objectives for salvage logging (or euphemistically-termed “post-fire restoration” projects) are inconsistent with “resource protection or restoration.”

Ms. Bleighley also stated that the definition of “emergency situation” with regard to “loss of commodity value” was designed to be broad so that it could encompass as many projects and activities as possible so as not to limit its application. SFK strongly objects to this approach, which is an invitation for misinterpretation and abuse.

SFK suggests that the definition be rewritten to limit its application to true emergencies when quick action is needed to prevent imminent harm to the public. This should be a rare event, since the Forest Service already has the authority to limit public access in the case of safety concerns.

Finally, the regulation, as written, allows the agency to make its “emergency situation” determination even prior to public input during the comment period. *See* § 218.24(b)(3) (requiring the legal notice to state that “it has been determined that an emergency situation exists for the proposed project or activity as provided for in § 218.21.”). This is unfair, and does not allow the public to provide input to the Chief or his Associate regarding whether or not he or she should make the determination to begin with. Instead, § 218.24(b)(3) should be limited to state only that “[w]hen applicable, a statement that the responsible official is requesting an emergency situation determination.” The last phrase thereafter should be dropped.

#### VI. The Final Rule Should Be Used to Improve the Noticing Procedures.

The current and proposed notice process is archaic and does not provide adequate notice, given technological advances and ease of use of electronic mail, the internet, and Project Web Sites. We would encourage the agency to improve the noticing procedures by providing more than the minimum legal notice in the newspaper of record or Federal Register notice as the exclusive means for calculating the time to file an objection. *See* §§ 218.7(c)(2)(iii), 218.6(c), 218.24(c)(2), 218.26(a) and 218.32(a). This process deliberately makes it difficult for prospective commentors or objectors to determine the date comments or objections are due.<sup>3</sup>

The Preamble to the rule even acknowledges this difficulty:

Not all appellants have ready access to the newspaper of record used for the project decision they are interested in and, even if access is available, it can be a burden to keep close watch on the legal notices section of a paper for the appearance of a notice announcing the decision for a particular project.

77 Fed. Reg. at 47339.

This problem could be easily resolved by requiring the agency to post a copy of the legal notice to the Project Web Site, and to mail or e-mail a copy to anyone who requests it. We suggest that the letter seeking comment or notifying those who submitted comments should include the

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<sup>3</sup> In addition, requiring each individual prospective commentors or objectors to continuously purchase the newspaper of record in order to participate in the public involvement process is not only expensive for the public but costly in terms of energy consumed and trees sacrificed just to communicate by this archaic method.

following statement, to be added to the end of §§ 218.6(c), 218.24(c)(2), 218.7(c)(2)(iii), 218.26(a) and 218.32(a):

Within 2 days of publication, the agency shall post a copy of the federal register notice or legal notice from the Newspaper of Record to the appropriate Project Web Site. The statement shall include a Project Web Site URL where the notice is available, and that the notice will be promptly provided by electronic or regular mail to anyone who requests it.

In this way, prospective commentors or objectors will have access to the notices, and should be able to determine the objection due date without need to seek out the Newspaper of Record. It will also avoid the problem of agency personnel giving incorrect dates to people who request the dates.

Moreover, the regulation should also state that any federal register or legal notice shall provide the appropriate Project Web Site URL in the notice.

These provisions will greatly improve the process and make it easy for the agency to provide the necessary information to those who don't have access to a Newspaper of Record.

VII. The Written Objection Decision Must Provide an Explanation of the Reasons for Decision.

It would be arbitrary and capricious to provide no reason for why the reviewing officer has decided an issue as part of an objection resolution, as provided in proposed § 218.11(b). Without a "point-by-point" or issue-by-issue response, the Forest Service not only avoids resolution of difficult issues, but it likely invites more litigation. If the reviewing officer provides the objector with a rational explanation for why the law or Forest Service policy favors a certain outcome on an issue raised by an objector, it is more likely that that issue will have been satisfactorily resolved, without resort to litigation.

Therefore, the final written decision should include as much detail as possible about why the appeal reviewing officer made his or her decision on the issue, and this written decision should address all issues raised by each objector. The same should apply to objections of HFRA projects.

VIII. Final Decisions Must Not Be Substantially Different From Proposed Decisions.

The regulation must include a prohibition on making substantial changes to the project or activity without additional public comment, which could result from a negotiated objection. A substantial deviation from proposed action to a final decision without additional public input would violate NEPA and the APA. *See California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982); *cf. Citizens for Better Forestry v. United States Dep't of Agric.*, 481 F. Supp. 2d 1059, 1076 (N.D. 2007) ("USDA was required to afford interested parties the opportunity to comment on the changes, and its failure to do so violated the APA.").

Therefore, if the agency wishes to make a substantially change to a project or activity from what was proposed, it must allow a new comment period and a new objection period.

The regulations should state a threshold for what constitutes a substantial change, which should be based on whether an adverse environmental consequence would be either greater than (even slightly) or of a different type than what the agency disclosed in the draft EA or draft EIS. In addition, if the adverse environmental consequence of the change is uncertain, then the agency should also be required to provide a new comment and objection period.

IX. There Should be No Page Limits on Objections or Exhibits Thereto.

The Forest Service has invited comments on whether it should impose page limits for objections. 77 Fed. Reg. at 47339. SFK opposes any page limits because the objection process is an informal administrative process and not a court of law. Most objectors are not attorneys but lay persons, and are not trained to focus their arguments based on page limitations. The IBLA process is not a fair comparison to this objection process because the IBLA has independent administrative law judges, whereas the Forest Service process is much more informal and arbitrary with decisions made by agency officials with a built-in bias. This bias already unlevels the playing field, so the agency should not erect additional hurdles in its favor.

Moreover, it would be impossible to enforce page limits. Even if the Forest Service were to ignore certain issues after imposing an arbitrary page limit, a court of law would not have to do so. So long as objectors have raised the issue and exhausted their administrative remedies on the issue, the court could address it in its review. Moreover, pages limits would not foster informed decision-making, and would likely invite more litigation.

X. Comments and Objections Should be Allowed to Incorporate Legal and Scientific Documents by Reference.

The regulations impose limitations on incorporating documents by reference with certain exceptions. *See* § 218.8(b). Those exceptions should be expanded to include additional documents the agency must consider to comply with other laws and regulations, including:

A. Legal Decisions with Citations to Case Law

Section 218.8(b)(1) is unclear with regard to what “[a]ll or any part of a Federal law or regulation” means. If it includes Federal Court decision, then it should explicitly state that these legal decisions can be incorporated by reference by citation to published decisions or any decisions published by WestLaw or Lexis.

B. Published Scientific Articles and Reports Cited with URLs

Other Forest Service regulations require the agency to use and consider the best available scientific information. *See* 36 C.F.R. §§ 219.3 (2012); § 219.9(c) (2012) § 219.14(a)(4) (2012); *see also* 36 C.F.R. § 219.35(a) (2001); 69 Fed. Reg. 58,057 (Sept. 29, 2004)). Moreover, NEPA requires the Forest Service ensure the scientific accuracy and integrity of their analysis. 40

C.F.R. §1502.24 (“Methodology and scientific accuracy”); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150-1151 (9th Cir. 1988) (applying requirement to EAs); *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992), *aff’d*, *Seattle Audubon Soc. v. Espy*, 998 F.2d 699 (9th Cir. 1993) (the agency may not “rely on conclusory statements unsupported by data, authorities, or explanatory information.”).

Because the law imposes these requirements, the Forest Service must seek out and sufficiently consider the science presented by objectors. *See Ecology Center v. U.S. Forest Service*, 451 F.3d 1183, 1194, n. 4 (10th Cir. 2006) (requiring the Forest Service to “seek out and consider all existing scientific evidence relevant to the decision and it cannot ignore existing data. . .”).

For that reason, objectors should not have to provide the actual scientific documents, so long as the article has been published in a scientific journal, and the objector has provided sufficient identification of the scientific article in a list of references at the end of the objection, or has provided a URL that provides a link where the article can be downloaded for review.

Please contact the undersigned with any questions.

For Sequoia ForestKeeper,



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