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Via email: nepa-procedures-revision@fs.fed.us

August 16, 2019

Dear Forest Service,

The following are the comments of the undersigned on the proposed revisions to the Forest Service's regulations, 36 CFR 220, for implementing the National Environmental Policy Act (NEPA). This proposal appeared in the Federal Register of June 13, 2019 (84 Fed Reg 27544 et seq.).

We hereby incorporate by reference our comments on the Advanced Notice of Proposed Rulemaking, dated February 1, 2018.

I. INTRODUCTION

The undersigned are all actively involved in management of our national forests. Many of us review projects on various national forests across the nation. Almost all of us visit national forests throughout the year for various forms of recreation. We are very familiar with, and regularly participate in, the NEPA process for national forest plans and projects.

We are shocked and dismayed by the proposed rule. It appears as if the agency's intent is to eviscerate NEPA, i.e., to greatly diminish NEPA's role in agency decision-making, and to cut the public out as much as possible. Application of the proposed rule, if it were to become final as currently written, would not at all allow the agency to meet its stated goal:

> to hold true to its commitment to deliver to decision makers scientifically based, high-quality analysis that honors its environmental stewardship responsibilities while maintaining robust public participation.

Rule Preamble at 27544.

A shocking example of how far the agency intends to go is evident from one of the projects it cites as one that would be documented with a categorical exclusion, or CE[1] under the proposed rule: the Summit Huts Association – Weber Gulch Backcountry Hut, on the Dillon Ranger District of the White River National Forest in Colorado. See Infrastructure Supporting Statement Appendix C.[2] The big issue raised by commenters and objectors was the likely effect of building a hut that would encourage backcountry skiing in an area of high-quality habitat for lynx, a threatened species.[3] At the time, the area received very little use.

The situation was improved slightly with measures ordered by the objection reviewing officer to monitor and attempt to reduce use in the high-quality habitat after commenters objected to the project, primarily on the grounds of possible adverse impacts to lynx. It is important to realize, however, that said objection would have never been submitted if the project had been documented with a CE because such projects would not be subject to scoping or any other comment or objection under the proposed rule. 36 CFR 218, a rule that requires comments for some projects, would not have applied.

Another example is the Escalante Forest Restoration Project on the Ouray Ranger District of the Grand Mesa Uncompahgre-Gunnison National Forest in Colorado. It had 10,525 acres of commercial harvest and another 11,625 acres of thinning and fuels reduction. See Restoration Support Statement Appendix A at 2. A project with this much treatment, especially commercial logging, would surely have considerable impacts and should never be considered for a CE.

There are other examples, like a project with 16,638 acres of commercial harvest on the Ottawa National Forest in Michigan, and a project with 24,574 acres of commercial harvest on the Apache-Sitgreaves National Forest in Arizona. It is our understanding that many of the projects cited by the Forest Service in attempts to justify the proposed rule should never be documented with a CE, in the strong opinions of parties who examined the projects and are familiar with them on the ground. Other commenters will discuss these projects in detail in their comments.

In short, the record, composed of all the projects cited by the agency in support of the rule, will not show that the types of projects or classes of actions that would be allowed under CEs in the proposed rule would not have significant impacts. This is especially the case given the proposed much higher bar in the new rule to show that extraordinary circumstances exist and CEs could not be used, as is discussed below.

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[1] Preamble at 27547 explains the process of examining already approved projects to develop the proposed CEs. See also Supporting Statements for each of three types of proposed new CEs.

[2] This entry is at unnumbered p. 17 of the Appendix document.

[3] Scientists believe that compacted snow, as would occur from frequent backcountry ski use, increases competition for lynx' prey (primarily snowshoe hare), as coyotes are better able to access the prey. Lynx would also be adversely affected by the frequent presence of humans in high-quality habitat.

The proposed rule is absolutely unacceptable and must be withdrawn.

II. THE REASONS FOR THE PROPOSED RULE ARE FLAWED AND PROVIDE NO EXCUSES FOR EVADING NEPA

The Forest Service states various reasons for changing its NEPA procedures. It wants to make the most efficient use of its personnel resources. It complains that it spends a great deal more money on firefighting than it used to do. Rule Preamble at 27544. It further believes that there is a great backlog of special use permits, and over 80 million acres of land is "in need of restoration to reduce the risk of wildfire, insect epidemics, and forest diseases". Ibid. The agency would also like to "complete project decision making in a timelier manner". Ibid.

These are not excuses for greatly weakening application of NEPA as the rule would do. In fact, the reasons cited above are actually an argument for the agency to be even more diligent in evaluating proposed projects under NEPA, as is explained in further detail below.

As we pointed out in our comments on the Advanced Notice of Proposed Rulemaking (ANPR comments, dated February 1, 2018), the purported need for the proposed rule is really an argument for a bigger budget. But even with its limited funds, the agency can do a better job in applying NEPA. We find that many District and even Supervisor's offices do not have people, or enough people, trained in how to implement NEPA. Some projects do not get approved in a timely matter not because of NEPA requirements, but because of personnel being called to fight fires, or transferring to different duty station, e. g., after a promotion.

If the Forest Service is short-staffed altogether, then it should propose fewer projects, but do them well, rather than trying to get many projects approved by minimizing or evading NEPA, and input from the public.

In any case, the law must be followed, regardless of the agency's desires or budgets. The proposed rule would certainly violate the spirit of NEPA, our national environmental charter, if not also the letter:

> it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

NEPA, Declaration of National Environmental Policy, 42 U.S.C. 4331. And from NEPA's implementing regulations:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

40 C.F.R. § 1500.1(b).

The nation is more focused than ever on the importance of its national forests lands. There is an increasing realization of the need for connected habitat for species like lynx, grizzly bear, northern goshawk, and many other species which would have little to no habitat if it weren't for national forest land. Watershed protection continues to be very important, especially in the western portion of the country, as much of the water used for municipal, residential, and agricultural uses originates on national forests. Recreation use keeps increasing at a high rate, and population continues to grow, placing increased demands on all the resources found on national forests and grasslands. Climate change will likely exacerbate impacts to most national forest resources.

Given the high interest in national forest lands and their great value to our country, it is more important than ever for the Forest Service to carefully consider the impacts of any project or activity it intends to fund and/or implement, to carefully consider ways of minimizing impacts, and to fully involve the public in decisions to approve, not approve, or modify proposed projects, and in designing mitigation measures to minimize impacts.

Failure to adequately analyze the potential impacts to resources from proposed projects, and to propose design features and mitigation measures to minimize impacts, can lead to problems during implementation. Impacts can be greater than expected from a project being implemented where there was an inadequate consideration of impacts, requiring a redesign during implementation to reduce the impacts. This decreases the agency's efficiency in work accomplishment. The public feels ignored, and becomes angry when their favorite hunting or hiking area, for example, is adversely affected by vegetation management.

It is much better for the agency to do a thorough job of considering the impacts of projects up front, i. e., before a project is approved, rather than trying to fix it later. As is sometimes said about designing projects, "do it right the first time or do it over later". Thus using CEs, i. e., doing less analysis of impacts, may not be a more efficient use of personnel resources, contrary

to the agency's claim in the Preamble (27544), and in the Supporting Statement for Restoration Projects (p. 1).

The cure for the agency's problems in staffing, training, and budgets cannot be a scheme to severely weaken or evade NEPA.

III. PUBLIC ENGAGEMENT FOR MANY AGENCY PROJECT PROPOSALS COULD ALMOST DISAPPEAR WITH APPLICATION OF THE PROPOSED RULE

The undersigned have all participated in the NEPA process for many projects and activities. We believe very strongly that this process is very important for engaging the public in national forest management. It also helps the agency's decision-maker understand the issues more thoroughly and in some cases, to help him/her decide what NEPA document needs to be prepared.

Projects are often improved through NEPA.[4] Projects fully vetted with the public generally have fewer objections and lawsuits. On the other hand, restricting public input by limiting NEPA, as the proposed rule would do, generates suspicion and resentment, making it harder for the public to trust the agency and to work with it on future projects. Thus the agency should have full NEPA processes for proposed projects and activities, other than those demonstrated to have at most a very minor impact.

However, the proposed rule would take the agency's NEPA process in entirely the wrong direction. As is discussed below in section III, many, probably most, vegetation management projects and special use permit proposals, as well as some other types of projects, would be eligible for categorical exclusions (CEs), under which no EA or EIS would be prepared, and no scoping would be required. This would greatly reduce or even eliminate public involvement in these projects.

The Preamble states that each of the seven new CEs is expected to be used one to 30 times per year, "potentially resulting in 7 to 210 decision memos being completed [per year] in lieu of a decision notice." This is out of 277 decisions made with EAs on average per year for fiscal years 2014 through 2018[5]. Preamble at 27550-27551. In other words, with the proposed new rule in force, the agency would seldom prepare an EA, and most projects would be documented with a CE. Since scoping is not required for projects to be documented with a CE, most project proposals would have little or no opportunity for public input. (See detailed discussion below.)

[4] One example of this is described in section I of these comments.

[5] 277 projects documented annually with an EA, over more than 100 national forest units (i. e., one or more national forests and/or one or more national grasslands under one Forest Supervisor), is not very many EAs per unit. It would quite a stretch to say that the agency is overburdened with preparing EAs.

Agencies are required in their NEPA procedures to incorporate various provisions of the CEQ Regulations. 40 CFR 1507.3(b)(1). This includes 1506.6(e), under which

> Agencies shall: …
>
> Explain in its procedures where interested persons can get information and status reports on environmental impact statements and other elements of the NEPA process.

Under the proposed rule, compliance with this would be questionable. Interested persons would have trouble receiving information on proposed projects in time to comment on them, as is detailed below.

Projects to be documented with a CE would not have to have notice and comment. Under the current rule, scoping is required, even for projects to be documented with a CE:

> 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.

Existing rule at 220.4(d). The current rule also states.

> If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS.

Id. at 220.5(c).

Under these provisions of the current rule, the public gets a chance to provide input suggesting the level of significance a proposed project might have, which helps the responsible official determine what type of NEPA documentation needs to be prepared for a given project or activity. We feel this is an important part of the agency's NEPA procedures and must be retained. A project that the responsible officials believed would have insignificant impacts might be shown by interested parties to have considerably more impact, leading to a more thorough consideration of its impacts, and probably better public acceptance of the project.

But these provisions would be <u>removed</u> by the proposed rule, which would require scoping <u>only</u> for projects and activities to be documented in an EIS. Proposed rule at 220.4(d)(2). Otherwise, only a listing in the schedule of proposed actions (SOPA) would be required. Id. at 220.4(d)(1).

The Preamble makes it clear by implication that scoping would not be required for projects to be documented with a CE:

> The proposed rule would revise § 220.5(c) to clarify that in addition to the § 220.4(d) requirements for public notice in the Schedule of Proposed Actions, the responsible official may choose to conduct additional public engagement activities to involve key stakeholders and interested parties.

Preamble at 27546.

The Preamble even touts the benefits of eliminating scoping: "There is potential for some time and cost savings by removing formal scoping periods for some EAs and CEs." Id at 27551.

Requiring public notification of projects only in the SOPA for projects to be documented with a CE would be woefully insufficient public engagement. The SOPAs are updated only once every quarter, i. e., four times per year. That means a project to be documented with a CE could be proposed right after a SOPA was published, and the comment period would expire before the next SOPA was published. In other words, projects done with a CE could be approved before interested parties saw a notice in the SOPA, if one was ever published at all prior to project approval.

Note that the definition of Schedule of Proposed Actions is

> A Forest Service document that provides public notice about those proposed Forest Service actions for which a record of decision, decision notice, or decision memo would be or has been prepared.

Proposed rule at 220.3, emphasis added. This is the same as the existing rule at 220.3.

The Forest Service might defend the provision requiring notice only in the SOPA for CEd projects because of the following requirement:

> The local responsible official shall ensure the SOPA is updated and notify the public of the availability of the SOPA.

Proposed rule at 220.4(d)(1). But note that the existing rule has almost identical language (id. at 220.4(d)), yet that has not caused Forests/Grasslands units to update their respective SOPAs more often than four times per year. The Pike-San Isabel National Forest/Comanche-Cimarron Grasslands in Region 2 have been particularly and persistently deficient with updating its SOPA.

Despite repeated complaints from us, it continues to publish SOPAs every quarter with way-outdated information, even listing personnel who no longer work for the unit as project contact people. Plus, if the SOPA lists projects already approved in decision memos, per the definition (quoted above) in 220.3, "updating" would still not give timely notice to parties who wish to comment. The SOPA cannot be used as the sole means of informing people of proposed projects and activities.

Interestingly, the existing rule says exactly that: "The SOPA shall not to be used as the sole scoping mechanism for a proposed action." Existing rule at 220.4(e)(3). There is a similar provision in the proposed rule at 220.7(b). However, there is no requirement to do any other form of scoping. The responsible official would have the option, but not be required, to conduct additional public involvement activities.

> Public involvement. In addition to public notice in the SOPA, as required at 220.4(d), the responsible official may choose to conduct additional public engagement activities to involve key stakeholders and interested parties. This additional involvement shall be conducted commensurate with the nature of the decision to be made.

Proposed rule at 220.5(c); emphasis added. See also Preamble at 27546, quoted further above in this section. Thus the proposed rule is contradictory: it says that the SOPA shall not be the "sole scoping mechanism" but makes optional, and does not require, any other mechanism for scoping.

We believe it is unlikely that responsible officials would choose to do additional public involvement for most projects or activities proposed for documentation with a CE under this provision. The "nature of the decision to be made" would be on a proposed project or activity the agency had already predetermined (we believe in many cases inaccurately) to be one that supposedly would have little impact, and certainly not a significant impact, and could thus be approved quickly. So why would any responsible official be motivated to do "additional" (i. e., any at all) public involvement?

In any case, scoping for projects to be documented with a CE would still not be required. As discussed below in section III, the proposed rule would greatly expand the use of CEs. Combined with the weak, if not almost non-existent, requirement for public involvement for these projects and the very high bar for demonstrating that extraordinary circumstances exist (see section IV below), implementation of the proposed rule as written would mean the elimination or minimization of public input on many of the projects and activities proposed on national forests and grasslands.

Any NEPA procedures rule must require scoping for projects to be documented with an EIS, EA[6], and a CE. Allowing official comment on an EA is important because the possible impacts of a project or activity are an important aspect of the public's perception of national forest management. Under the current rule, comment on a project for which an EA will be prepared is usually allowed only during scoping. The public is thus deprived of an opportunity to comment on the impacts, and the adequacy of the impact analysis. Any agency NEPA procedures rule should require a minimum 30-day scoping comment period for projects to be documented with a CE or EA.

The proposed rule would absolutely not achieve "right-sizing public engagement opportunities". Preamble at 27551. There would not be any "[b]enefits (or cost reductions) derived from the opportunities for public engagement to more fully address public concerns". Id. at 27550. The proposed rule would greatly reduce opportunities for public involvement. The public involvement provisions, or really the lack thereof, in the proposed new rule are absolutely inadequate and must be withdrawn.

IV. THE PROPOSED GREATLY EXPANDED USE OF CATEGORICAL EXCLUSIONS IS NOT JUSTIFIED, AND IS INAPPROPRIATE AND UNACCEPTABLE

The proposed rule would considerably expand the use of categorical exclusions (CEs), which means there would be many more projects that would not be documented in an EA or EIS, and thus much less public involvement, as discussed above.

We see no reason to expand the use of CEs, especially to projects that are likely to have more than minor impacts. Also, thanks in part to the 2014 Farm Bill, which allows CEs for projects up to 3000 acres in some circumstances, and the existing rule, which allows post-fire rehabilitation activities on up to 4200 acres[7], the agency already has many CEs it can use.[8] Indeed, the agency is already well-using its existing CEs. According to the Preamble, the average number of projects documented annually with a CE was 1590, versus 277 for EAs in fiscal years 2014 through 2018. Id. at 27550. Again, the agency is clearly not overburdened with preparing EAs.

[6] We recognize that the Project-Level Predecisional Administrative Review Process Rule (at 36 CFR 218.22(a)) requires comment opportunities for project to be documented in an EA. However, we believe the agency's NEPA rule should also require comments on projects documented with EAs, to avoid any confusion. Note that the notice and comment provision only applies to projects that will not be authorized under the Healthy Forest Restoration Act (HFRA). It does not apply to HFRA-authorized projects. See 218, subpart C.

[7] Existing rule at 36 CFR 220.6(e)(11). It is at 220.5(e)(11) in the proposed rule.

[8] The undersigned do not agree with many of these CEs. But the fact that many questionable CEs can now be used is a strong argument for not expanding the list with even worse ones like proposed CE 26. See further discussion below.

Under the Council on Environmental Quality Regulations implementing NEPA, CE is defined as follows:

> "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in Sec. 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 CFR 1508.4. Some of the CEs in the existing rule should never have been established, as they cannot be reliably said to have no significant effects. These CEs include: 220.6(e)(11) (4200 acres of post-fire rehabilitation); id. at (e)(13) (250 acres of salvage cutting); and id. at (e)(17) (for surface use plans of operation for oil and natural gas, up to one mile new road construction, one mile of reconstruction, three miles of pipelines, and four drill sites). It is a stretch, probably past the breaking point, that projects like this would never have significant impacts and can thus be reasonably documented with CEs.

CEQ Guidance on formulating CEs[9] contained the following cautionary note:

> If used inappropriately, categorical exclusions can thwart NEPA's environmental stewardship goals by compromising the quality and transparency of agency environmental review and decision-making, as well as compromising the opportunity for meaningful public participation and review.

Id. at 3. The Forest Service needs to heed this warning considering its existing CEs, but it proposes instead to go the opposite way in by greatly expanding the use of CEs.

One of the most egregious parts of the proposed rule is proposed **CE e 26**, which would allow projects up to 7300 acres, 4200 of which could be logging, for "restoration and/or resilience activities" to be approved with a categorical exclusion (CE), i. e., without full analysis of potential impacts. These acreage figures are 11.4 and 6.6 square miles, respectively! Does the agency really believe all projects covering that large of an area would never have significant impacts? It is extremely hard to imagine that significant impacts would never occur from any project in which 4200 acres were commercially logged. Logging at this scale involves:

[9] Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, November 23, 2010.

degradation and destruction of wildlife habitat, compaction and displacement of soils, impacts to watersheds, degradation of scenery, etc. At a minimum, such projects should be evaluated in an EA, and in most cases, an EIS would be warranted.

What if a number of projects used this CE on a ranger district, in a watershed, or even on the whole of a small national forest unit in the eastern U. S.? It is easy to envision this CE being abused by units so that they would never have to prepare EAs or EISs.[10] In such cases, cumulative impacts would occur and never be analyzed as required by NEPA (CEQ Regulations at 40 CFR 1508.7, 1508.25(a)(2)) because each individual project would be approved with a CE.

In addition to projects of the size that would be allowed under CE 26 being too large for CEs (see arguments above and below in this section), we do not understand how the agency could conclude that such projects would not have any significant cumulative impacts. The agency selected 68 projects at random for this analysis (Restoration Supporting Statement at 10, 11), but it does not appear that projects in close proximity to one another were analyzed for possible cumulative impacts. Therefore, a conclusion that significant cumulative impacts would never occur is unwarranted.

The fact that this CE involves "restoration"[11] and/or resilience activities does not justify exempting projects with these goals from NEPA analysis. Restoration as used in practice by the agency often involves commercial timber harvest, road construction,[12] and other impacting activities. We are very skeptical that any project using commercial timber harvest can accurately be called "restoration". Such activity would likely move the affected ecosystems to an unnatural seral stage condition, one dominated by human impact. Even projects designed for "[h]azardous fuels reduction and/or wildfire risk reduction", which would also allowed under the CE (see 26(i)(E)), can involve cutting standing dead and live trees, with a potentially significant impact.

With CE e 26, the Forest Service is attempting to give itself carte blanche to approve large, impacting projects across landscapes with no disclosure of impacts and no accountability to the public. It must be withdrawn.

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[10] The CEQ Regulations specifically prohibit avoiding significance by "breaking it down into small component parts". 40 CFR 1508.27(b)(7). However, CE 26 would make it much more difficult to comply with this requirement, as large areas could be treated with a presumed finding of non-significance.

[11] Restoration is defined as follows:
"the process of assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed. Ecological restoration focuses on reestablishing the composition, structure, pattern, and ecological processes necessary to facilitate terrestrial and aquatic ecosystems sustainability, resilience, and health under current and future conditions. Functional restoration focuses on the underlying processes that may be degraded, regardless of the structural condition of the ecosystem." 36 CFR 219.19, as cited at p. 11 of the Supporting Statement for Restoration Projects.

[12] Indeed, commercial timber harvest would specifically be allowed under this CE. 220.5(e)(26)(i)(H), as would some road construction and reconstruction (id. at (ii)(A-C)).

Proposed **CE e 24** would allow five miles of road construction and 10 miles of reconstruction. It would also allow reconstruction of "associated parking areas, shoulder widening, and bridge repair or replacement". In other words, it would allow significant new road construction and upgrading of existing roads and infrastructure.

Five miles of new road could allow greatly increased human access, including motorized access, to new areas, with concomitant impacts to wildlife habitat effectiveness and connectivity, soil quality, water quality, etc. The same could occur for 10 miles or less of road reconstruction, which could, e. g., turn a high clearance, four-wheel drive vehicle road into one that was traversable by regular passenger cars, greatly increasing human access and the concomitant impacts, including: human-caused wildland fires[13], soil erosion, sedimentation of streams, fragmentation of wildlife habitat, damage to cultural and historic resources, and introduction and spread of noxious weeds.

Just the road impacts alone from projects fitting within this proposed CE should require at least an EA, and the increased human use would increase the type, severity, and persistence of the impacts. Projects like this should definitely not be excluded from NEPA review in an EA or EIS. This CE must be withdrawn.

One of the examples of how this CE might be used ((24)(ii)) is: "[c]onstructing an NFS road to improve access to a trailhead or parking area". Why would construction, as opposed to reconstruction or relocation, be needed to access a trailhead? Presumably, the trailhead already exists, and thus has some road access, so it would not need a new road.

Two other examples under this CE could be easily accomplished under existing CEs: "[r]econstructing an NFS road or parking area to address deferred maintenance (24(i)), and "[m]odifying the surface of an NFS road" (26)(iii)).

Proposed **CEs e 23 and e 25** would allow conversion of an unlimited mileage of non-system trails and roads, respectively, to system trails and roads. The proliferation of non-system routes is a major problem on national forest lands and grasslands throughout the nation. Users, including mountain bicyclists and off-road motor vehicle enthusiasts, frequently create new routes by illegally traveling off of designated routes. Use of this CE would encourage this illegal and unethical behavior, as perpetrators would know that any routes they create illegally could become legal routes with little or no public involvement or consideration of the impacts of such routes on wildlife, soils, water quality, conflicts with other recreationists, etc.

[13] Research indicates that humans have caused more than 85 percent of recent wildfires. See: https://www.nps.gov/articles/wildfire-causes-and-evaluation.htm.

These CEs likely could violate Executive Orders 11644 and 11989, which require that trails and areas be closed to off-road vehicles that are causing or will cause damage to soils, vegetation, wildlife or habitat, and cultural and historic resources "until such time as [the agency head] determines that such adverse effects have been eliminated and that measures have been implemented to prevent future recurrence". Section 9(a) of the combined E. Os.

The fact that under CE 23, conversions must be "consistent with applicable land management plan direction, travel management decisions, trail-specific decisions, and other related direction" is good, but it does not justify an exclusion from NEPA, especially since an unlimited mileage of non-system trails could be converted to system trails. Considerable impacts could still occur with projects approved under these CEs, including human-caused wildland fires.

There is no requirement to follow travel management decisions for CE 25.

The Preamble correctly observes that "unauthorized trails that have been created over time by users do not meet technical or environmental protection standards". Id. at 27548. The same is true for unauthorized roads. It also states that national forest lands have "over 370,000 miles of roads and 13,000 road and trail bridges". Ibid. The agency cannot manage this road system. As the Preamble for the Roadless Area Conservation Rule noted:

> there presently exists a backlog of about $8.4 billion in deferred maintenance and reconstruction on the more than 386,000 miles of roads in the Forest Transportation System. The agency estimates that at least 60,000 miles of additional unauthorized roads exist across National Forest System lands.
>
> The agency receives less than 20% of the funds needed annually to maintain the existing road infrastructure. As funding needs remain unmet, the cost of fixing deteriorating roads increases exponentially every year. Failure to maintain existing roads can also lead to erosion and water quality degradation and other environmental problems and potential threats to human safety.

66 Fed Red 3245, January 12, 2001. It is highly likely the maintenance backlog and the mileage of non-system roads have increased since then, probably by a large magnitude. In any case, deteriorating roads is still a major issue, as the Preamble to the proposed rule states. Id. at 27548.

The Preamble also states that the proposed CEs "would help the Forest Service more efficiently address some of these growing concerns". Id. at 27549. However, the opposite is more likely to be the case. Allowing quick legalization of illegally created routes might not ensure that proper engineering and design standards would be applied. It would also not ensure that other issues, such as the impacts from use of the route(s), and whether the route(s) should be authorized at all

would be adequately, if at all, considered. At a minimum, it would reduce and minimize public input into the important decisions about what vehicles should be allowed during what time of year and where routes should be located on national forests and grasslands.

CEs e 23 and e 25 must be withdrawn.

We approve of the proposed change to CE e 20, adding system roads and trails to those that can be restored, rehabilitated, and/or stabilized to a natural state.

The Forest Service, in an apparent attempt to reassure the public, states at various places in the proposed rule and its Preamble that all projects and activities to be documented with CEs must comply with the applicable forest plan. That's true (in fact, it's a no-brainer), but it is irrelevant. Forest Plans do not prevent projects with significant impacts from occurring, nor do they disclose the impacts of any such projects. Having all projects be consistent with the forest plan does not give the agency license to evade or violate NEPA.

V. THE PROPOSED RULE WOULD SET THE BAR FOR EXTRAORDINARY CIRCUMSTANCES IMPOSSIBLY HIGH

The proposed rule would change what resource conditions the agency must consider as possible extraordinary circumstances (ECs), i. e., resource conditions that indicate use of a CE is not appropriate, and an EA or EIS needs to be prepared. See further discussion below.

Determination of ECs is important because this also determines whether a CE can be used:

> Listing a category of actions as categorically excluded in the USFS's NEPA regulations does not constitute a conclusive determination regarding the appropriate level of NEPA review for a specific proposed action. Rather, the listing creates an initial presumption that a CE rather than an EA or an EIS is typically appropriate for the listed actions. As indicated in 36 CFR 220.5, this presumption is rebutted when there are extraordinary circumstances related to the proposed action that indicate the potential for significant environmental effects.

Restoration Supporting Statement at 7. Given the importance of the resources conditions listed, such as wetlands, Congressionally-designated areas, roadless areas, archaeological sites, etc., the presumption should be that at least an EA should be prepared. But it would be much more difficult under the new rule to rebut the presumption that a CE is appropriate.

The proposed rule would change the standard by which the responsible official determines whether ECs exist. The current rule states:

> It is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

Existing rule at 220.5(b)(2). But the proposed rule would greatly increase the threshold for the determination of ECs:

> Extraordinary circumstances exist when there is a cause-and-effect relationship between a proposed action and listed resource conditions and the responsible official determines that there is a <u>likelihood of substantial adverse effects</u> to the listed resource conditions.

Proposed rule at 220.5(b)(2); Preamble at 27456; emphasis added.

This sets the bar way too high for determining that ECs exist. The terms "likelihood" and "substantial" are not defined in the proposed rule. Given the importance of each of the resource conditions, any effects of a project should not have to have a "likelihood of <u>substantial</u> adverse effects" before at least an EA is prepared for the project. Indeed, this is higher than the threshold for preparing an EIS![14] In other words, unless there was near-absolute certainty that a project needed an EIS, it could be documented with a CE. That clearly contradicts the intent and spirit of NEPA.

With the large number of CEs in the proposed rule and with some of them encompassing a considerable amount of likely impact (see section III above), it is especially important to have a relatively low bar for when resource conditions constitute ECs. Otherwise, the result of implementing many projects with CEs allowed under the new rule would be degradation of the listed resources from individual projects as well as from cumulative impacts.

The proposed language at 220.5(b)(2) must be withdrawn. Replace it with the following:

> Extraordinary circumstances exist when there is a cause-and-effect relationship between a proposed action and listed resource conditions, and the responsible official determines there is a reasonable chance of more than minor and discountable impacts to any of the listed resource conditions.

[14] NEPA requires that an EIS be prepared for "actions significantly affecting the quality of the human environment". 42 U.S.C. 4332 2(C).

Retain sensitive species as a possible resource condition for extraordinary circumstance. The current rule at 220.6(b)(i) lists Forest Service sensitive species as a possible extraordinary circumstance. The proposed rule would remove sensitive species and replace it with species of conservation concern (SCC), per the 2012 planning rule. Proposed NEPA Rule Preamble at 27456. Both types of species should be included under extraordinary circumstances. Many units will not revise their plans for some time, and thus will not have SCC until then. Removing the requirement to consider sensitive species as a possible extraordinary circumstance removes protection for those species, as their needs might not be considered in evaluation of projects.

The Preamble states:

> All land management plans have direction to provide for the diversity of plant and animal communities and support the persistence of native species in the plan area. All Forest Service projects must comply with relevant land management plans; therefore, it is not necessary to include sensitive species in the list of resource conditions.

Id. at 27456. The first part of the above is true to some extent, but plans do not generally contain direction on how to do NEPA for projects that might affect various species. Thus it is important to include sensitive species as one of the resource conditions for possible extraordinary circumstances.

Retain roadless areas as a resource condition for possible extraordinary circumstances. Roadless areas (RAs) are a very important resource on national forest lands. The 2001 Roadless Area Conservation Rule, which protects these areas to some degree, has strong and widespread public support. Certainly, impacts to RAs must be carefully considered before projects affecting them are approved. Thus we are happy to see that RAs would be retained as a resources condition for determining CEs. 220.5(b)(1)(iv).

Projects in roadless areas should be presumed to require an EIS. However, the proposed rule would remove substantial impact to roadless areas as a category of actions generally requiring an EIS. The current rule states that an EIS should normally be prepared for "[p]roposals that would substantially alter the undeveloped character of an inventoried roadless area or a potential wilderness area." Existing rule at 220.5(a)(2). The Preamble to the proposed rule states the reason for removing this presumption:

> The Agency proposes this change in part because the activities that have the greatest potential to affect the roadless character of these lands are addressed separately by

> the Roadless Area Conservation Rule and state-specific roadless rules at 36 CFR part 294.

Preamble at 27549.

The Colorado Roadless Rule does require an EIS for "[p]roposed actions that would significantly alter the undeveloped character of a Colorado Roadless Area". 36 CFR 294.45. However, we do not find comparable provisions, or any provisions at all concerning NEPA documentation, for projects that might affect roadless areas in either the Idaho Rule (36 CFR 294.20 et seq.) or the national rule (Roadless Area Conservation Rule at 36 CFR 294.10 et seq.).

And given the proposed rule, especially with proposed CE 26 (discussed above), one must wonder: would the agency ever consider <u>any</u> proposed project inside a roadless area to have a "likelihood of substantial adverse effects" and/or potentially cause a significant alteration of its undeveloped character? Because of the extreme nature of the proposed rule, the answer would seem to be a loud NO.

We believe strongly that proposals to alter any national forest roadless area anywhere in the nation should be presumed to require documentation in an EIS. Roadless areas are a very important resource. Any alteration of the undeveloped character of such areas is a concern.

We are glad to see "<u>wild and scenic rivers</u>" added to 220.5(b)(1)(iii) as resource conditions for determining ECs. This should be expanded as follows, probably with its own separate subparagraph:

> wild, scenic, and recreational rivers designated under the Wild and Scenic Rivers Act, and study rivers and those river segments found eligible or suitable for such designations.

VI. REMOVE DETERMINATION OF NEPA ADEQUACY

The new rule would allow determination of NEPA adequacy (DNA) to see if "NEPA analysis performed for a previous proposed action can suffice for a new proposed action." Proposed rule at 220.4(i). Unless a previous NEPA document specifically covered a later proposed project, such as in a programmatic analysis that subsequent projects are later tiered to, an analysis done for another project simply cannot "satisfy NEPA's requirements for a subsequent proposed action". Ibid. Thus previous NEPA must not be used for different projects not covered in the original NEPA.

Even if the new action is "substantially similar" to previous ones and the impacts ("both quantitatively and qualitatively") would be similar to those of a previously analyzed action or alternative (220.4(i)(1)(i) and (iv)), the later proposed action is in a different location, and thus impacts will likely be different from those of the previous one. If previous NEPA covered a later proposed project, it should be obvious, and no DNA would be necessary.

The Preamble (at 27546) states that the DNA portion of the new rule is modelled after the Bureau of Land Management's procedure. Our experience with BLM is that that agency too often defers to analysis done for its resource management plans as constituting sufficient NEPA analysis for proposed projects. There is usually little analysis of site-specific impacts. The Forest Service would likely be tempted to do the same if the DNA proposal became final.

The Preamble (ibid.) also states that the DNA procedure would

> provide the Agency an opportunity to be more efficient by reducing redundant analyses of substantially similar proposed actions with substantially similar impacts…

We believe that there are very few redundant analyses. If previous NEPA truly covered a subsequently proposed project, it would be obvious, and no DNA would be necessary. Thus the agency would waste its time looking for redundancy instead of performing NEPA as required by the CEQ Regulations for projects at hand. Indeed, the DNA provision would provide another avenue for the agency to try to avoid doing NEPA analysis for some projects, a path it should not have.

<u>The DNA provision should be deleted</u>. If it is retained, the language should have a written presumption that new NEPA needs to be done, i. e., that previous NEPA documentation is not sufficient for the project at hand. This would help reduce the abuse of a DNA provision by discouraging it use in most cases.

If the DNA provision is retained, it must specifically require opportunity for public comment and objection under 36 CFR 218. We recommend adding the language (underlined) to 220.4(i)(2):

> New project and activity decisions made in reliance on a DNA, <u>including the DNA itself</u>, shall be subject to all applicable notice, comment, and administrative review processes.

VII. DO NOT ALLOW MULTIPLE CEs TO BE USED FOR ONE PROJECT.

The proposed rule would allow multiple CEs to be used for any individual project:

> Multiple categories [of categorical exclusions] may be relied upon for a single proposed action when a single category does not cover all aspects of the proposed action.

220.5(a).

This indicates that responsible officials could use two or more CEs in an effort to avoid preparing an EA or EIS, even if impacts of the full project could be significant. It would give license to units to avoid considering cumulative impacts[15]. Parts of almost any national forest project could fall under a CE, and many projects could be totally covered by several CEs but implementation of an entire project could still have significant impacts.

Use of the proposed provision would be similar to "breaking [proposed projects] down into small component parts" to avoid significance. This is expressly forbidden by 40 CFR 1508.27(b)(7). This authority to use multiple CEs on any given project must be removed from the proposed rule.

VIII. PROBLEMS WITH CONDITION-BASED MANAGEMENT

Under the proposed rule, the agency would give itself the authority to

> identify the management actions that will be undertaken, and any design elements that will be implemented, when a certain set or range of conditions are present.

Proposed rule at 220.4(k).

We understand the desire for flexibility, especially in light of fires, insect and disease attacks, and climate change. However, there are problems with this approach. Condition-based management would not allow a determination of wildlife impacts because occupied habitat would not be identified. Identifying potential habitat is important, but it doesn't tell the decision-maker or the public where rare species might be, such as rare plant populations. Also, this type of management would not be sufficient for identifying effects to cultural and historic resources

[15] Note that cumulative impacts are defined 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.

under the National Historic Preservation Act (16 U. S. C. 470) and its implementing regulations (36 CFR 800). Both types of impacts require disclosure of site-specific impacts, not just condition-based ones. Others may as well, such as impacts to watersheds and recreation.

If condition-based management is retained in the final rule, the Forest Service must ensure that impacts, such as to wildlife and plants and cultural/historical impacts are required to be disclosed, and that public input must be sought prior to project approval. Possible effects on these resources, including an evaluation of site-specific impacts, must be considered in the decision to use a CE, EA, or EIS to approve a project. The proposed rule does not have a provision for this.

CONCLUSION

The proposed rule is absolutely unacceptable. It would cut the heart out of NEPA for a sizable percentage of projects proposed on the national forests and grasslands. It would greatly reduce public involvement. It would likely violate at least the spirit of NEPA and its implementing (CEQ) regulations, if not also the letter of each. It must be withdrawn.

The reasons cited for its justification are either untrue or greatly exaggerated. The agency has problems with staffing, training, and budgets, the cure for which cannot and must not be a decimation of NEPA and associated public engagement.

If the agency wishes to improve efficiency, it should dedicate and train more people to adequately apply NEPA. It should concentrate its limited appropriated dollars on a smaller number of well-designed projects whose impacts are carefully evaluated, disclosed, and mitigated, and on which the public has had ample opportunities to provide input prior to approval.

Sincerely,

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