

TO: Interested Parties
FR: Susan Jane Brown, Western Environmental Law Center
DT: June 2019
RE: *Forest Service Proposed Rule amending National Environmental Policy Act Procedures*
(84 Fed. Reg. 27,544)

I. Background.

On January 3, 2018, the Forest Service published an Advanced Notice of Proposed Rulemaking, and sought public comment on the issues that should be addressed in the agency's revision of its National Environmental Policy Act (NEPA) procedures. The agency received nearly 35,000 comments.

On June 12, 2019, the Forest Service released a prepublication version of its proposed changes to its NEPA regulations; on June 13, 2019 the proposed rule was published in the Federal Register. *National Environmental Policy Act (NEPA) Compliance*, 84 Fed. Reg. 27,544 (proposed June 13, 2019) (to be codified at 36 C.F.R. Part 220). The public will have 60 days to comment on the proposed rule: comments are due to the Forest Service by August 12, 2019.

The Forest Service has established a comprehensive website for the rulemaking, which is worth bookmarking: <https://www.fs.fed.us/emc/nepa/revisions/index.shtml>

The Forest Service's justification for the proposed NEPA rule is to increase efficiency and reduce the cost of compliance with NEPA. Specifically, the agency explains that it

is not fully meeting agency expectations, nor the expectations of the public, partners, and stakeholders, to improve the health and resilience of forests and grasslands, create jobs, and provide economic and recreational benefits. The Agency spends considerable financial and personnel resources on NEPA analyses and documentation. The Agency is proposing these revisions to make more efficient use of those resources.

84 Fed.Reg. 27,544. Given the amount of money spent on fire suppression, "it [is] imperative that the Agency makes the most efficient use of available funding and resources to fulfill its environmental analysis and decision making responsibilities." *Id.* Given budgetary constraints, there is also a significant backlog of special use permits that require processing; and the proposed rule is designed to address this backlog. *Id.* Overall,

The Agency's goal is to complete project decision making in a timelier manner, improve or eliminate inefficient processes and steps, and, where appropriate, increase the scale of analysis and the number of activities in a single analysis and decision. Improving the efficiency of environmental analysis and decision making will help the agency ensure that lands and watersheds are sustainable, healthy, and productive; mitigate wildfire risk; and contribute to the economic health of rural communities through use and access opportunities.

Id.

Although the contents of the proposed rule were not unexpected, they are extreme. The proposed rule would allow the Forest Service to undertake almost all aspects of national forest management through the use of categorical exclusions (CEs), which would be exempted from public comment:¹ only public notice through the (sometimes current) Schedule of Proposed Action would be required. Some of the new CEs are extremely problematic, and are likely based on inadequate evidence to support their sweeping nature. Other regulatory changes vest extreme discretion with line officers.

Rather than focusing on and addressing the actual causes of agency inefficiency in environmental decisionmaking (funding, staffing, training, and turnover), 84 Fed. Reg. 27,545, the Forest Service has targeted America's "magna carta" of environmental laws for ill-considered changes.

In sum, the proposed rule would fundamentally change the relationship of the agency to the public.

II. Major Changes.

A. Definitions (36 C.F.R. § 220.3).

There is one new definition that is relevant to the content of the proposed rule:

The proposed rule would add a definition to this section for **condition-based management**. Condition-based management is defined as a system of management practices based on implementation of specific design elements from a broader proposed action, where the design elements vary according to a range of on-the-ground conditions in order to meet intended outcomes. Condition-based management is not a new management approach for the Forest Service, but the Agency proposes to codify it based on existing practice to provide clear, consistent direction on its use, and to encourage more widespread use. Agency experience has shown that condition-based management can be useful for landscape-scale projects and analysis.

84 Fed.Reg. 27,545. The proposed rule explains that

The proposed action and any alternatives may include condition-based management. A condition-based management alternative must clearly 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. The NEPA analysis must disclose the effects of all condition-based actions, taking into account design elements that limit such actions. Such proposal or alternative must also describe the process by which conditions will be validated prior to implementation.

84 Fed.Reg. 27,553 (proposed 36 C.F.R. 220.4(k)). Still, there is no requirement for site-specific analysis, which has been the problem with this management approach in the past.

¹ Congress has already exempted CEs from administrative review.

WELC (and others) have some experience with condition-based NEPA. *WildEarth Guardians v. Conner*, 920 F.3d 1245 (10th Cir. 2019) (upholding condition-based approach). On one hand, the concept is intriguing, and could be an efficient way to address widely-existent conditions on the ground. On the other hand, however, the Forest Service has not demonstrated its ability to do this kind of management, which necessarily requires paying more than lip service to monitoring and adaptive management. Regardless, the agency increasingly has been using this approach to manage very large landscapes.

B. Themes.

There are several thematic changes to the Forest Service’s NEPA procedures. Chief among them, the Forest Service will no longer provide a **public comment opportunity for projects documented with a CE**, and not all environmental assessments will be subject to public comment. The agency explains:

The Agency will continue to require scoping for EISs in accordance with CEQ regulations at 40 CFR 1501.7. Outside of the minimum requirements listed at (d)(1) and (2) of this section, additional public engagement is at the discretion of the local responsible official, except where specified by applicable statutes and regulations. For example, the current 36 CFR 218 regulations require public comment for EAs that are subject to the Project-Level Predecisional Administrative Review Process.

84 Fed.Reg. 27,545. The “minimum requirements” boils down to a requirement to publicize CE projects in the Schedule of Proposed Action (SOPA); but no public comment would be required. Given the proliferation of forest management activities that may be documented with a CE under the proposed rule, and the inconsistent nature of updates to forest-specific SOPAs (some forests update them regularly whereas others do not), it is particularly problematic that the public will not have the opportunity to comment on CE projects: the only option for the public to have their voice heard is to resort to the federal courts.

Importantly, and a shift from current law and policy, the Forest Service proposes to allow the **use of multiple CEs to carry out land management decisions**:

Where a proposed action consists of multiple activities, and all of the activities that comprise the proposed action fall within one or more CEs, the responsible official may rely on multiple categories for a single proposed action. This approach shall not be used to avoid any express constraints or limiting factors that apply to a particular CE. This clarification to paragraph (a) is consistent with CEQ’s definition of CEs as categories of actions that do not individually or cumulatively have a significant effect on the environment.

84 Fed.Reg. 27,546. This means that the Forest Service is giving itself the ability to “stack” multiple CEs on top of or adjacent to each other, effectively increasing the management footprint. Because this approach would invite the agency to approve larger, more complex, and

multi-faceted projects via a combination of CEs, the potential for direct, indirect, and cumulatively significant effects is greatly enhanced, thereby undermining the tool's efficacy.

An important environmental sidebar on the use of categorical exclusions is the “**extraordinary circumstances**” analysis. Under NEPA, an agency must propose extraordinary circumstances that if present,² would preclude the use of a CE. 40 C.F.R. § 1508.4 (“Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect”). Over the years, the Forest Service’s extraordinary circumstances direction has changed, from direction that precluded the use of a CE if any extraordinary circumstance was present, to current direction that states that it is not the mere presence of an extraordinary circumstance that would preclude the use of a CE, but rather “it is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.” 36 C.F.R. § 220.6(b)(2).

The proposed rule revises this direction:

The proposed rule would revise the list of resource conditions to be considered in determining whether extraordinary circumstances warrant analysis and documentation in an EA or EIS. The proposed rule would remove “sensitive species” from item (i). The Agency’s 2012 planning regulations marked a transition away from the term “sensitive species,” and retention of the term in the NEPA procedures is unnecessary. 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...

The proposed rule also would add wild and scenic rivers to the list of Congressionally designated areas in §220.5(b)(1)(iii), and move potential wilderness areas from (b)(1)(iv) to (b)(1)(iii) to add it to the list of Congressionally designated areas.^[3] The proposed rule would revise §220.5(b)(1)(iv) to include roadless areas designated under 36 CFR part 294, including Idaho and Colorado Roadless Areas.

In §220.5(b)(2), the proposed rule would clarify the degree of effects threshold for determining whether extraordinary circumstances exist. The proposed rule explains that extraordinary circumstances exist when there is a cause-and-effect relationship between the proposed action and listed resource conditions, and the responsible official determines that there is a likelihood of substantial adverse effects to the listed resource conditions.

84 Fed.Reg. 27,546; *see also* proposed 36 C.F.R. § 220.5(b)(2). It is this last aspect of the proposed extraordinary circumstances direction that is particularly problematic: if there is a “likelihood of substantial adverse effect” to a natural resource, then a CE is not appropriate and at least an EA must be prepared. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d

² The Forest Service’s list of extraordinary circumstances is: ESA-listed species and their designated critical habitat; USFS sensitive species; Species proposed for listing; Floodplains, wetlands, or municipal watersheds; Congressionally designated areas (Wilderness Areas, WSA, National Recreation Area, etc.); Inventoried roadless areas; Research natural areas; American Indian or Alaska Native religious or cultural sites; Archaeological sites, or historic properties or areas.

³ “Potential wilderness areas” are not congressionally designated areas: they are identified in forest plans. This statement is therefore factually erroneous.

1208, 1212 (9th Cir. 1998). The proposed rule would set the bar very high to push a project out of a CE and into either an EA or EIS, whereas the CEQ regulations and applicable case law already set this bar and tie it to the preparation of an EIS.

In addition, allowing the line officer to determine whether a proposed project has a “likelihood of substantial adverse effect” invests an incredible amount of discretion in a line officer *without the benefit of a science-based effects analysis*. Said another way, this approach predetermines the environmental consequences of an action without data to support that determination. This turns NEPA on its head and is arbitrary and capricious. *Davis v. Mineta*, 302 F.3d 1104, 1112–14 (10th Cir. 2002); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 713 (10th Cir. 2010) (“*Davis* indicates that if an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously”).

The proposed rule takes a nod at more effectively implementing **adaptive management**. The proposed rule explains that

The proposed action and any alternatives to the proposed action may include adaptive management. An adaptive management proposal or alternative must clearly identify the adjustment(s) that may be made when monitoring during project implementation indicates that the action is not having its intended effect, or is causing unintended and undesirable effects. The NEPA analysis must disclose not only the effect of the proposed action or alternative but also the effect of the adjustment. Such proposal or alternative must also describe the monitoring that would take place to inform the responsible official during implementation whether the action is having its intended effect.

84 Fed.Reg. 27,553 (proposed 36 C.F.R. 220.4(j)). This could be an improvement over the status quo, provided that the agency actually undertakes the requisite analysis. If so, this provision could be a good use of scenario planning in land management. If not, this could be a magnet for litigation.

Finally, the proposed rule borrows the concept of “**determination of NEPA adequacy**” (DNA) from the Department of Interior, which has been highly problematic particularly in the fossil fuel development context. The Forest Service explains that

The process requires the consideration of the following factors: the similarity between the prior decision and the proposed actions, the adequacy of the range of alternatives for the proposed action, any significant new circumstances or information since the prior decision, and the adequacy of the impact analysis for the proposed action.

84 Fed.Reg. 27,546. Specifically, when considering the use of DNAs, the Forest Service “shall evaluate:”

- (i) Is the new proposed action essentially similar to a previously analyzed proposed action or alternative analyzed in detail in previous NEPA analysis?

- (ii) Is the range of alternatives previously analyzed adequate under present circumstances?
 - (iii) Is there any significant new information or circumstances relevant to environmental concerns that would substantially change the analysis in the existing NEPA document(s)?
 - (iv) Are the direct, indirect, and cumulative effects that would result from implementation of the new proposed action similar (both quantitatively and qualitatively) to those analyzed in the existing NEPA document(s)?
- (2) A DNA for a new proposed action shall be included in the project record for the new proposed project or activity. New project and activity decisions made in reliance on a DNA shall be subject to all applicable notice, comment, and administrative review processes.

84 Fed.Reg. 27,553 (proposed 36 C.F.R. 220.4(i)).

Although the proposed rule states that DNAs will be subject to notice, comment, and administrative review (provided they aren't documented with a CE, in which case only public notice via SOPA will be required), it is far from certain whether in fact this will be the case in practice. Given that DNAs are not contemplated by NEPA, CEQ, or any other regulations (just in DOI/BLM guidance), it is entirely unclear whether there are any "applicable" requirements. Based on past experience with Interior DNAs, BLM has often provided no notice, comment, or administrative review of actions authorized via DNAs. Moreover, a fair reading of this provision in concert with the new scoping and public notice provision – which only requires notice for actions approved via EA, EIS, or Decision Memo – is that because DNAs do not require a decision memo, they are not subject to the new notice requirements.

More analysis is required, but regardless, DNAs are extremely problematic because of the lack of environmental analysis for subsequent projects, which may rely on highly speculative programmatic analysis.

C. Categorical Exclusions.

The Forest Service proposes to add 7 new CEs (net) while expanding and reorganizing others. The agency estimates that up to 3/4 of decisions that currently receive public input could proceed under CEs in the future. 84 Fed.Reg. 27,550. A crosswalk of current and proposed CEs is in preparation and will be distributed when it is available. Supporting documentation for the new CEs is available at <https://www.fs.fed.us/emc/nepa/revisions/index.htm>, and is worth a read.

The following narrative addresses several of the proposed and revised CEs, presented in chronological order. The focus below is on CEs that require the preparation of a decision memo.

1. 36 C.F.R. § 220.5(e)(3): approval, modification, or continuation of special uses that require less than 20 acres of NFS lands.

This CE would allow such activities as "approving the use of land for a one-time group event." 84 Fed.Reg. 27,555. In the past, this CE was limited to 5 acres of land, so the scope of this CE is

larger. In WELC's experience, this special use permit has been used to authorize "predator derbies" that allow the public to hunt and kill predators such as coyotes.

This CE also would be allowed for "approving the use of land for a 40-foot utility corridor that crosses four miles of a national forest." 84 Fed.Reg. 27,555. For those of us dealing with utility corridors (including natural gas pipelines), this could have a dramatic impact on natural resources.

2. 36 C.F.R. § 220.5(e)(16): plan amendments developed in accordance with 36 C.F.R. part 219 *et seq.* that provide broad guidance and information for project and activity decisionmaking in a NFS unit.

This CE goes on to note that "Proposals for actions that approve projects and activities, or that command anyone to refrain from undertaking projects and activities, or that grant, withhold or modify contracts, permits or other formal legal instruments, are outside the scope of this category and shall be considered separately under Forest Service NEPA procedures." 84 Fed.Reg. 27,556.

This CE is actually existing authority, but is highlighted here because of the forest plan revisions and amendments occurring in our region. The language of this CE appears to indicate that forest plan amendments would still require either an EA or EIS, as required by the 2012 Planning Rule and the 2016 Amendment to the 2012 Rule. More research on the reach of this CE is required, because its scope and intent are unclear.

3. 36 C.F.R. § 220.5(e)(23): converting a non-NFS or unauthorized trail or trail segment to an NFS trail.

This CE allows the Forest Service to add illegally-created trails to the NFS trail system. Because "trail" often includes motorized trails, roads, or routes, this CE may be used to grandfather illegal motorized routes into the transportation system. Because illegal routes are often located in places where they should not be, and therefore create resource damage, this CE has the effect of sanctioning illegal actions without environmental review. And here you thought two wrongs don't make a right!

4. 36 C.F.R. § 220.5(e)(24): construction or realignment of up to 5 miles of NFS roads, reconstruction of up to 10 miles of NFS roads and associated parking areas, opening or closing an NFS road, and culvert of bridge rehabilitation or replacement along NFS roads.

Yes, this CE would allow for the new construction of up to 5 miles of roads, and reconstruction of up to 10 miles of roads. This is problematic for all of the reasons that roads are problematic.

5. 36 C.F.R. § 220.5(e)(25): converting a non-NFS or unauthorized road to an NFS road.

Similar to CE 23, this CE would more expressly allow the Forest Service to convert illegal roads to legal roads without environmental analysis. In general, the road-building and travel

management related CEs are contrary to decades of Forest Service travel and transportation management policy designed to make more ecologically and fiscally sustainable the agency's bloated transportation system and ensure that the significant impacts of motorized recreation are minimized. So, yes, apparently two wrongs do make a right!

6. 36 C.F.R. § 220.5(e)(26): ecosystem restoration and/or resilience activities.

Because this CE is new and expansive, citing it in full is appropriate:

(26) Ecosystem restoration and/or resilience activities on NFS lands in compliance with the applicable land management plan, including, but not limited to the plan's goals, objectives, or desired conditions. Activities to improve ecosystem health, resilience, and other watershed conditions cannot exceed 7,300 treated acres. If commercial/non-commercial timber harvest activities are proposed they must be carried out in combination with at least one additional restoration activity and harvested acres cannot exceed 4,200 of the 7,300 acres.

(i) Restoration and resilience activities include, but are not limited to:

- (A) Terrestrial and aquatic habitat improvement and/or creation,
- (B) Stream restoration, aquatic organism passage, or erosion control,
- (C) Road and/or trail decommissioning (system and non-system),
- (D) Control of invasive species and reestablishing native species.
- (E) Hazardous fuels reduction and/or wildfire risk reduction,
- (F) Prescribed burning,
- (G) Reforestation,
- (H) Commercial harvest, and/or
- (I) Non/pre-commercial thinning,

(ii) Road and trail limitation. A restoration/resilience activity under this category may include:

- (A) Construction of permanent roads up to 0.5 miles.
- (B) Maintenance or reconstruction of NFS roads and system trails, such as relocation of road or trail segments to address resource impacts.
- (C) Construction of temporary roads up to 2.5 miles. All temporary roads constructed for a project under this category shall be decommissioned no later than 3 years after the date the project is completed.

The Forest Service describes this as its "restoration CE," and while science-based restoration can include timber harvest, it is clear that this CE is directed at helping the Forest Service achieve its flagship targets of acres treated and board feet. Also problematic is the fact that the agency believes that logging + logging = restoration by including commercial, precommercial, and hazardous fuels reduction in the list of "restoration and resilience activities."

Some may view it as positive that the agency is attempting to force the inclusion of noncommercial restorative activities alongside commercial activities, and that the "harvested acres" cannot exceed 4,200 acres (although there is a question of whether hazardous fuels reduction would be considered to be "harvested acres"). However, there is no limitation on

harvest method, so at its upper limit this CE could be used to authorize 6.6 square miles of logging with no public input, and the restorative activities that facially appear to not involve logging in fact could do so: for example, “wildlife habitat improvement” is often code for logging. Moreover, existing legislative CEs that Congress has adopted for similar projects (the insect and disease CE in the 2014 Farm Bill and the collaborative restoration project CE in the 2018 Omnibus/Fire Funding Fix) are limited to 3,000 acres total (vs. 7,300 acres in this proposed rule), and the proposed restoration CE lacks the legislative environmental sideboards.

This CE also authorizes up to half a mile of permanent road construction, and 2.5 miles of temporary road. However, because CEs would be “stackable,” as explained above, a separate CE could be used to authorize much more new road mileage for a given project.

One might – and should – ask how the agency arrived at its acreage limitations. The proposed rule preamble answers this question:

The Forest Service reviewed recently implemented actions to develop this proposed CE by randomly selecting a sample of 68 projects from over 718 projects completed under an EA from fiscal years 2012 to 2016. The average of commercial and non-commercial harvest activities from the 68 sampled EAs was 4,237 acres, and the average of total project activities was 7,369 acres. Further information on these projects is available in the supporting statement for Certain Restoration Projects and its associated appendices.

84 Fed.Reg. 27,549. The supporting information for this CE indicates that the agency surveyed 11 Forest Service employees, and consulted 3 monitoring documents (1 from CO, 1 from MT, and the USFS’s water quality BMPs), to arrive at the acreage limitations. Of the 68 projects “surveyed,” the agency received information regarding environmental effects on 16 of them from the 11 agency employees. So, this new CE is based on informal, qualitative, subjective “data” from 16 projects across the entire national forest system. It is unlikely that this kind of data is sufficient to support this new CE.

7. 36 C.F.R. 220.5(e)(27): adoption of other Federal agencies’ CEs.

This CE states:

A Forest Service action that will be implemented jointly with another Federal agency and the action qualifies for a categorical exclusion of the other Federal agency. If the Forest Service chooses to use another Federal agency’s categorical exclusion to cover a proposed action, the responsible official must obtain written concurrence from the other Federal agency that the categorical exclusion applies to the proposed action.

84 Fed.Reg. 27,557. In particular, this new CE authority is likely to be coupled with any number of BLM CEs to facilitate split estate management (e.g., fossil fuel and hard rock mineral development).

D. Environmental Assessments.

The proposed rule also addresses environmental assessments. In particular, the proposed rule would eliminate the requirement for scoping for EAs. 84 Fed.Reg. 27,553 (proposed 36 C.F.R. §220.4(d) (scoping only required for EISs)). While a line officer may elect to conduct scoping on a CE or EA, s/he is not required to do so by regulation. *Id.* at 27,558 (proposed 36 C.F.R. § 220.6(c)).

E. Environmental Impact Statements.

Currently, impacts to Inventoried Roadless Areas and Potential Wilderness Areas require preparation of an EIS; and there is substantial case law in the Ninth Circuit outlining this requirement. The proposed rule removes this requirement. The agency explains that:

The proposed rule would remove classes of actions that would substantially alter the undeveloped character of an inventoried roadless area or a potential wilderness area. 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. Potential wilderness areas are a class of Congressionally designated lands where management must conform with the establishing statute's requirements, and therefore presumptive preparation of an EIS is not required. The responsible official would continue to prepare an EIS for proposed actions where impacts may be significant.

84 Fed.Reg. 27,549.

Under the proposed rule, the only activities presumed to require an EIS are: 1) Proposals to carry out or to approve aerial application of chemical pesticides on an operational basis; 2) Development of a new land management plan or land management plan revision as provided for in 36 C.F.R. 219.7; and 3) Mining operations that involve surface disturbance on greater than 640 acres over the life of the proposed action.⁴ 84 Fed.Reg. 27,558 (proposed 36 C.F.R. §§ 220.7(a)(1)-(3)). The CEQ NEPA regulations would still inform the need to prepare an EIS for other activities.

III. Conclusion.

The Forest Service's proposed NEPA regulations are designed to dramatically reduce public involvement in federal land management decisions, and will have the net effect of increasing extractive activities without the benefit of scientific input. Rather than increasing efficiency, it is likely that litigation and general public dissatisfaction and distrust of the Forest Service will increase.

⁴ This limitation suggests that mining operations that occur on 639 acres – 1 acre shy of a square mile – do not have significant environmental effects. There is no information provided in the proposed rule that would support this conclusion, and experience indicates that mineral development on much smaller acreage can and often does have a significant environmental impact requiring the preparation of an EIS.

For those who are interested in participating in the development of conservation community coalition comments on the proposed rule, or if you have any questions, please contact Susan Jane Brown at brown@westernlaw.org; 503-914-1323.