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Submitted via email to: nepa-procedures-revision@fs.fed.us
Submitted via public participation portal to: https://www.regulations.gov/document?D=FS-2019-0010-0001

RE: Comments on *Proposed Rule, National Environmental Policy Act (NEPA) Compliance* (84 Fed. Reg. 27,544, June 13, 2019)

Dear Chief Christiansen and Secretary Perdue: August 25, 2019

Thank you for the opportunity to comment on the United States Forest Service's proposed rulemaking to revise its regulations implementing the National Environmental Policy Act (NEPA). As law professors with thousands of years of cumulative experience analyzing, teaching, and practicing federal administrative, environmental, and natural resources law – including NEPA – we believe our collective expertise is highly relevant to the Forest Service's rulemaking.

As you know, NEPA is one of our country's first and most important environmental laws, and is often described as the "Magna Carta" of environmental law. *See*, 40 C.F.R. § 1500.1(a) ("The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment"). NEPA is an "action forcing" statute, which "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

As the Council on Environmental Quality (CEQ) explains in its NEPA regulations binding on all federal agencies, "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. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." 40 C.F.R. § 1500.1(b). The CEQ NEPA regulations note that "[u]ltimately, of

course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). Distilling NEPA's congressional purpose, we frequently remind our students that "[o]ne of the twin aims of NEPA is active public involvement and access to information." *Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp*., 113 F.3d 1505, 1511 (9th Cir. 1997).

Unfortunately, the Forest Service appears to have run afoul of the basic premise of NEPA in its proposed rulemaking. As we understand the proposal, the Forest Service appears to believe that its NEPA processes are creating unnecessary paperwork rather than "foster[ing] excellent action." While we are sympathetic to the need to avoid process for its own sake, the proposed rule would eliminate analysis and public scrutiny of potentially significant impacts and controversial proposals—which is the very "essen[ce]" of NEPA. See 40 C.F.R. § 1500.1(b). It would also fail to promote excellent action for at least two reasons. First, the proposed rule appears to be based on a flawed premise and erroneous problem identification, which in turn led to a draft rule that is more likely to result in confusion and controversy rather than more efficient project development and implementation. Second, the substance of the proposed rule does not appear to be supported by the administrative record for the rule, and consequently suffers from a number of legal infirmities. We recommend that the Forest Service abandon this rulemaking in favor of collaborative efforts that involve the public in place-based land management decisions and maintain current NEPA procedures that support public participation, transparency, and adequate environmental review before decisions are made to approve actions with potentially significant effects on America's national forests and grasslands.

I. Purpose and Need for the Proposed Rulemaking

The preamble for the proposed rule outlines three purposes for the proposed rulemaking: 1) the increasing percentage of the agency's budget consumed by wildfire suppression requires the agency to do more work with less funding for core programs; 2) a backlog in processing of special use permits; and 3) a general need for increased government efficiency in project development and implementation. 84 Fed. Reg. 27,544. However, Congress recently enacted a "fire funding fix" designed to address "fire borrowing" and to allow the Forest Service to focus on mission critical work such as forest management, hazardous fuels reduction, while providing high-quality recreational opportunities to the public. Within the last year, Congress also provided a new authority for collaboratively developed projects to reduce fuels, reduce wildfire risk, and increase forest resilience to wildfire, consistent with the principles of ecological restoration. Therefore, the first "purpose" of the proposed rulemaking has already been addressed by Congress with the specific limitations that Congress believed were necessary to ensure that nationally important work does not unnecessarily impact local ecological and social values. There is therefore no need for the proposal's first purpose.

Concerning the second purpose, we understand the need to address the backlog of special use permit applications for authorized uses of our national forests. However, as far as we are able to discern, there is no information available in support of rulemaking on this issue: the Forest

Service has provided no information to the public demonstrating that existing tools – including the NEPA process – are the cause of the permitting backlog. Indeed, the agency already has a number of categorical exclusions that can be used to process special use permits, and the best available data indicate that approximately 95% of special use permits are already processed using these authorities. For the few remaining special use applications, the full suite of NEPA tools – including programmatic analyses to guide the streamlined processing of permits through environmental assessments (EA) and environmental impact statements (EIS) – remain available for the Forest Service under existing regulations.

Concerning the third purpose, the Forest Service itself has acknowledged that the true impediments to efficient planning include the lack of sufficient congressional funding for core work, the lack of adequate training of agency staff in the NEPA process, and internal agency culture, particularly the phenomenon of regular agency transitions that disrupt the planning process and degrade relationships with stakeholders.[1] These conclusions have been validated by external academic researchers,[2] and have been echoed by the public during this rulemaking process.[3]

On this administrative record, the Forest Service's proposed rule does not appear to have a basis in fact, and consequently does not have a valid purpose and need. It is therefore likely that the proposed rule, should it be finalized, will be successfully challenged in federal court. *SEC v. Chenery*, 318 U.S. 80 (1943); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019) ("The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public").

II. Promulgation of New Categorical Exclusions

Categorical exclusions (CEs) are a type of environmental analysis documentation authorized by the CEQ NEPA regulations for "...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 (40 C.F.R § 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required*." Id.* § 1508.4. CEs are a legitimate type of NEPA analysis, but only when they are properly promulgated based on adequate information in the administrative record. *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007).

[1] USDA Forest Service, *Environmental Analysis and Decision Making: The Current Picture* (Phoenix, AZ. Sept. 2017) (noting "it's us, not NEPA").
[2] *See*, Gwendolyn Ricco & Courtney A. Schultz (2019): *Organizational learning during policy implementation: lessons from U.S. forest planning*, Journal of Environmental Policy & Planning, DOI: 10.1080/1523908X.2019.1623659, available at https://www.tandfonline.com-/doi/full/10.1080/1523908X.2019.1623659
[3] National Forest Foundation, *Regional Environmental Analysis and Decision Making Partner Roundtables - National Findings and Leverage Points* (May 2018).

The intended purpose of the proposed rulemaking is to shift the vast majority of the Forest Service's NEPA decisionmaking to categorical exclusions rather than EAs or EISs. The preamble for the proposed rule states that the Forest Service's intention is to increase the number of decisions made via CE, and estimates that up to three-quarters of its decisions would be made this way in the future. 84 Fed. Reg. at 27,550 (estimating that of its 277 annual decisions completed with an EA, up to 210 would be made with CEs if the proposed rule is finalized). In this regard, it should be noted that several of the proposed contexts for categorical exclusions -- for instance mineral and fossil fuel extraction and timber operations -- are settings in which the legal system has repeatedly identified administrative and corporate violations of environmental laws and conservation policies. As drafted, the rule would not only permit quite substantial disruption of natural systems under categorically-excluded permits that fit within the defined constraints, but also, given a documented administrative inclination toward segmentation to avoid regulatory compliance, could easily be administered so as to greatly expand the spatial areas from which environmental review of mining, fossil fuel, and timber activities is in fact removed, raising serious questions about the actual intent and agenda motivating this proposed change in Forest Service NEPA regulations. Given these considerations, it is important to evaluate whether such an expansion of the CE authority is warranted. We conclude that record shows that it is not.

First, the proposed rule seeks to create a number of new CEs as well as to recodify and modify other categories of actions that would not be subject to an EA or EIS. As with other aspects of the proposed rule, it does not appear that the Forest Service has adequately documented the need for new categorical exclusions beyond the unsupported assertion that new "streamlined" NEPA tools are necessary. For example, the proposed CE 26 for "ecosystem restoration and/or resilience activities" does not appear to be based on post-project implementation monitoring, but instead on an unscientific review of just 16 projects subjectively evaluated for significant environmental consequences by 11 Forest Service personnel.[4] Similarly, the Forest Service cannot possibly know that actions on up to 7,300 acres of national forestlands will "not individually or cumulatively have a significant impact on the environment" without preparing a more detailed environmental analysis (e.g. at least an environmental assessment). Indeed, experience suggests that these types of large projects often have significant environmental effects that require documentation in an EIS, or at least "may" have uncertain effects such that an EA is required. It is therefore arbitrary and capricious to create a CE that covers such a broad scope and scale without conclusive evidence that these activities do not individually or cumulatively have a significant effect on the environment.

Similarly, there appears to be little, if any, record justification for proposed CEs 23, 24, and 25, which would allow for road construction, reconstruction, and conversion of unauthorized routes to National Forest System roads or trails. As the Forest Service should know from the extensive record developed in connection with the Roadless Area Conservation Rule and the Travel Management Rule, road construction and use has a myriad of deleterious effects on natural resources that require close scrutiny and mitigation. These three proposed CEs would allow for

[4] *Supplementing 36 CFR Part 220: Addition of New Categorical Exclusion For Certain Restoration Projects Supporting Statement* 11-12, available at https://www.fs.fed.us/emc/nepa/-revisions/includes/docs/RestorationCESupportingStatement.pdf.

these same harms without such scrutiny and mitigation and cannot be categorically excluded from detailed NEPA review.

Second, of particular concern to us is proposed 36 C.F.R. § 220.5(a), which would allow for the use of multiple CEs to be applied to one proposed action to address several types of land management activity, essentially stacking these CEs together. The NEPA case law addressing segmentation of actions and the cumulative effects of multiple actions in time and space is robust, and is clear that segmentation is not permitted and that the cumulative effects of multiple actions must be considered in a single (usually) environmental impact statement. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Daly v. Volpe*, 514 F.2d 1106, 1109-11 (9th Cir. 1975); *Northwest Resource Info. Ctr. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995). CEQ has been clear that "When developing a new or revised categorical exclusion, Federal agencies must be sure the proposed category captures the entire proposed action. Categorical exclusions should not be established or used for a segment or interdependent part of a larger proposed action. The actions included in the category of actions described in the categorical exclusion must be standalone actions that have independent utility."[5] The proposed rule is inconsistent with this body of case law as well as CEQ guidance on CE promulgation.

In addition, the proposed rule (proposed 36 C.F.R. § 220.5(e)(27)) would allow the Forest Service to use the CEs promulgated by other agencies, which is also inconsistent with applicable CEQ guidance.[6] CEs must go through normal administrative process, which normally entails Section 553 notice and comment rulemaking. It is in this process that the information is set out that a particular activity would in almost no circumstances rise to the level of a "major federal action significantly affecting the quality of the human environment. Adopting other agency CE's wholesale is a violation of administrative process as well as a violation of NEPA itself.

Moreover, the Forest Service is congressionally tasked with a multiple-use mandate that differs from other federal agencies' mandates, even other agencies with multiple-use obligations. There is no indication in the proposed rule that the Forest Service's mission or program of work is identical to that of other federal agencies, including other land management agencies, which undermines the proposal reliance on those agencies' CEs for decisions on national forestlands. As a result, the Forest Service lacks the administrative record to show that its use of other agencies' current and future CEs would not cause significant impacts.

Finally, it appears that the Forest Service is proposing to dramatically alter the situations in which CEs are used by changing the definition of "extraordinary circumstances." Proposed 36 C.F.R. § 220.5(b)(2) would allow line officers to authorize the use of a CE only if there is a

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[5] Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act, 5 (November 23, 2010), available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov-232010.pdf.

[6] Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act, 9 (November 23, 2010), available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov-232010.pdf (stating that "A federal agency cannot rely on another agency's categorical exclusion to support a decision not to prepare an EA or an EIS for its own actions").

"likelihood of substantial adverse effects" after considering "whether long-term beneficial effects outweigh short-term adverse effects." This proposed change not only begs the question of how a line officer could make such a determination without environmental analysis and public comment, but also undermines the settled nature of environmental analysis under NEPA. If there is a "likelihood" of adverse effects, NEPA demands the preparation of an EA, if not an EIS. Under such circumstances, a CE – limited to categories of action without individual or cumulative significant effects – is wholly inappropriate for such an activity. Whether the effects are short- or long-term, or substantial or insubstantial, is irrelevant: for the purposes of NEPA, the operable question is whether an action *may* have a significant environmental effect; and if so, an EIS must be prepared. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

Moreover, the proposed alteration to the extraordinary circumstances regulation appears to violate the Endangered Species Act (ESA). The trigger for the initiation of formal consultation under Section 7 of the Act is when a project "may affect" a listed species or its critical habitat. 50 C.F.R. § 402.14(a); *see also Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). However, the proposed rule would allow the responsible official – not wildlife experts with the consulting agencies – to determine whether there is a "likelihood of substantial adverse effect" as a result of the project. "Likelihood of substantial adverse effect" is not the correct legal standard when it comes to evaluating the effects on listed species and their designated critical habitat.

III. Scoping

Proposed 36 C.F.R. § 220.4(d) would eliminate scoping for all CEs as well as most EAs.[7] 84 Fed. Reg. 27,553. We find this proposed rule change to be particularly problematic, not only because the agency is proposing to undertake most of its decisionmaking through CEs, but also because eliminating public comment on the majority of Forest Service decisions is inconsistent with the basic tenets of NEPA outlined above.

The Forest Service manages more than 190 million acres of cherished national forests, an asset that is owned in common by all Americans. Failing to allow public involvement into how those lands are managed not only is inconsistent with NEPA's obligation to make environmental information available to the public before decisions are made and action taken, 40 C.F.R. § 1500.1(b), but also is inconsistent with the Forest Service's motto of "Caring for the land and serving people." We fail to see the need for shielding the majority of land management decisions from public view, and the Forest Service has not shown that it is "impracticable" to do so. This

[7] The proposed rule would eliminate the requirement to consider alternatives in an EA when the line officer, in his/her discretion, determines that there are no "unresolved conflicts concerning alternative uses of available resources." 36 C.F.R. § 220.6(b)(2)(i) (proposed). However, it will be difficult if not impossible for the Forest Service to know whether there are unresolved conflicts without consulting with the public and others through the comment process. Excepting EAs from public comment also appears to violate the CEQ NEPA regulations, which require the agency "to involve...the public, to the extent practicable, in preparing assessments...." 40 C.F.R. § 1501.4(b).

proposed change will only encourage more discord and litigation of Forest Service decisions. What is instead needed is transparency in agency decisionmaking, which the proposed rule would undermine.

The Forest Service's use of early scoping is an advantage that hews more closely to the CEQ's instruction to "[e]ncourage and facilitate public involvement" "to the fullest extent possible." 40 C.F.R. § 1500.2. Such practices should be retained and strengthened through collaborative and public engagement innovations, not discarded.

IV. Condition-Based Management

The proposed rule would institutionalize "condition-based management" on national forests. 36 C.F.R. § 220.5(c). We have watched with some dismay as the Forest Service has embraced this concept, a corruption of tiering or programmatic analysis, which are important existing NEPA efficiencies. As opposed to tiering and programmatic NEPA analysis, which involve an overarching general analysis followed by subsequent site-specific analysis (each with attendant public engagement and comment), condition-based management appears to authorize only a generic broad analysis with little or no site-specific effects analysis. As any first year property law student knows, location is critical: each parcel of land is unique, with distinct considerations regarding its management. An assessment of the local impacts of a land management decision is essential to ensuring that NEPA's mandates of informed decisionmaking and public engagement. 42 U.S.C. §§ 4321, 4331.

V. Determinations of NEPA Adequacy (DNAs)

Finally, we are concerned about the Forest Service's intention to embrace "determinations of NEPA adequacy," or DNAs. Like the proposal to implement condition-based management, the use of DNAs – an authority contemplated by neither Congress nor CEQ – turns the intention of NEPA on its head. Rather than considering the site-specific effects of a proposed action, a determination of NEPA adequacy necessarily relies on another, earlier, usually broader analysis that did not consider the local environmental consequences of agency action. There is no indication that Congress or CEQ intended this result. *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1212 (D. Idaho 2018); *Friends of Animals v. BLM*, 2015 WL 555980 (D. Nev. 2015).

The Bureau of Land Management has employed DNAs for fossil-fuel development projects, inappropriately in our view, to sidestep a hard look at the consequences of such development on global climate change and the effects of a changing climate on public natural resources. Given the Forest Service's different legal and policy framework, we question whether DNAs – a tool invented by the BLM – is appropriate for the Forest Service. *See, Triumvirate LLC v. Bernhardt*, 367 F. Supp. 3d 1011 (D. Alaska 2019). DNAs are an end-run around NEPA's requirement that site-specific analysis precede site-specific decisions. At best, they are an unlawful paraphrase of CEQ-approved procedures and are likely to cause confusion, misuse, and project-level mistakes. 40 C.F.R. § 1507.3 ("[Agency] procedures shall not paraphrase these regulations.").

VI. Conclusion

In sum, the Forest Service has not undertaken the requisite fact-finding necessary to justify its proposed rule to revise its NEPA procedures, and in many cases has overstepped the role that Congress prescribed for federal agencies in implementing the Act. As law professors with decades of experience, including with past attempts to "streamline" environmental analysis and public engagement, we recommend that the Forest Service withdraw its proposed rule and focus on addressing internal agency issues that are the root cause of inefficient planning and implementation. Attempting to move forward with implementation of the proposed rule will result in increased controversy and soured relationships with the public and stakeholders, which will ultimately compromise the Forest Service's ability to effectively manage our national forests.

Sincerely,

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