August 26, 2019

Chief Vicki Christiansen
United States Forest Service
Sidney R. Yates Federal Building
201 14th St SW
Washington, DC. 20227
victoria.christiansen@usda.gov

Deputy Chief Chris French
United States Forest Service
Sidney R. Yates Federal Building
201 14th St SW
Washington, DC. 20227
cfrench@usda.gov

Secretary Sonny Perdue
Department of Agriculture
1400 Independence Ave SW
Washington, DC. 20250
agsec@usda.gov

Under Secretary James E. Hubbard, Natural Resources and Environment
Department of Agriculture
1400 Independence Ave SW
Washington, DC. 20250
Jim.Hubbard@osec.usda.gov

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 Christensen, Deputy Chief French, Secretary Perdue, and Under Secretary Hubbard:

On behalf of the undersigned organizations and individuals, we are pleased to provide the Forest Service with the attached comments on the agency's proposed rule regarding National Environmental Policy Act (NEPA) compliance, 84 Fed. Reg. 27,544 (June 13, 2019), RIN 0596–AD31. Our organizations collectively represent decades of experience with the Forest Service's implementation of NEPA across the spectrum of land management actions, including forest planning, vegetation, wildlife, mineral, range, aquatic, travel, and recreation management decisions. Our organizations and members would be adversely affected by this proposal, which would immediately eliminate important procedural rights that we and other members of the public rely on. The proposal would have far-reaching effects to the places we advocate for and help to steward.

We have extensive expertise regarding the Council on Environmental Quality's (CEQ) NEPA regulations, the Forest Service's NEPA regulations and procedures, and the body of federal case law interpreting the agency's legal obligations under NEPA. Our experience in agency decision-making processes, collaborative efforts, and as plaintiffs in NEPA litigation lends us unique insight into the promises and pitfalls of the Forest Service's NEPA policies and practices.

Many of our organizations provided comments on the Advanced Notice of Proposed Rulemaking.[1] Unfortunately, it is clear from the proposed rule that the Forest Service failed to incorporate nearly all of our suggestions for efficient environmental analysis and decision-making that involves the public in decisions about how its lands will be managed. Instead, the agency has released a proposed rule that brazenly attempts to remove the public from public land management decisions, and seeks to expand the scope and scale of land management without sufficient environmental analysis: this is not the type of decision-making required by NEPA, which requires transparency, accurate scientific data and analysis, and inclusion of the public - including local communities, Tribes, local governments, scientists, and many others who use, enjoy, and rely upon the National Forests for a variety of values - in federal agency decision-making.

The proposed rule appears to be in service of the present Administration's deregulatory agenda that serves to elevate the interests of extractive industries above the interests of the public. This agenda is particularly inappropriate on the national forests, which are owned in common by all Americans, not just a privileged few. The proposed rule would drastically reduce or eliminate public involvement in the management of their national forests, curtail the role of science in land management planning, and will ultimately undermine the credibility of the Forest Service as the "expert scientists" in the eyes of the public it was created to serve.

In its environmental analysis and decision making efforts, the Forest Service created considerable momentum for positive change. This rule squanders the opportunity. The Forest Service has ignored its own analysis that concludes that funding, staffing, training, and internal personnel policies (particularly those related to promotion and staff transitions) are at the heart of inefficient planning and project implementation. It has also ignored the successful efforts of its most talented staff to accomplish more, high-quality work by accepting stakeholder contributions. Instead, it offers a rule meant to avoid accountability, with a rationale that is not supported by the information before the agency. The Forest Service simply offers no basis to believe that eliminating public input can improve the timeliness or quality of its decisions.

Because the Forest Service has failed to prepare a sufficient administrative record to support its proposed rule, we anticipate that the rule – should it be finalized – will not survive judicial review. We therefore recommend that the agency abandon this rulemaking effort and focus on immediate needs such as forest plan revision, science-based restoration, monitoring, and internal cultural changes.

---

[1] *See*, Comments on *Advanced Notice of Proposed Rulemaking, Request for Comment, National Environmental Policy Act Compliance* (83 Fed. Reg. 302, Jan. 3, 2018) submitted by The Wilderness Society, Western Environmental Law Center, Southern Environmental Law Center, et al. (Feb. 1, 2018).

With regards on behalf of the undersigned organizations and individuals,

Susan Jane M. Brown, Public Lands Director & Staff Attorney
Western Environmental Law Center
4107 NE Couch Street
Portland, OR. 97232
brown@westernlaw.org
503-914-1323

Sam Evans, National Forests and Parks Program Leader
Southern Environmental Law Center
48 Patton Avenue, Suite 304
Asheville, NC 28801
sevans@selcnc.org
828-258-2023

Alison Flint, Director, Litigation & Agency Policy
The Wilderness Society
1660 Wynkoop St., Ste. 850
Denver, CO 80202
alison_flint@tws.org
303-802-1404

TABLE OF CONTENTS

I. Introduction. 7

II. The Proposed Rule Would Profoundly Change the Forest Service's Relationship to the Public. 8

III. The Forest Service's Mission Requires A Strong Public Process. 12

A. The agency cannot meet its core obligations without strong and continuing public engagement. 12

B. Collaboration is not a substitute for the NEPA process. 15

IV. The Proposed Rulemaking Requires Preparation of an Environmental Impact Statement. 18

A. The proposed rule cannot be categorically excluded from analysis under NEPA. 18

B. An EIS is required because the proposed rule is expressly intended to increase the impact of Forest Service management. 21

C. The proposed rule would strip analysis and public participation from some Forests' entire programs of work. 25

D. The proposed rule requires an EIS because it will effectively revise forest plans across the entire national forest system. 26

E. The proposed rule must be analyzed in at least an EA to address unresolved conflicts by providing alternatives. 33

V. The Proposed Rule Requires Programmatic Consultation with the Fish and Wildlife Service. 34

VI. The Proposed Rule is Arbitrary and Capricious and Contrary to Law. 38

A. The proposed rule is not based on an accurate and complete problem identification. 38

B. The Forest Service has made no attempt to understand the differences between its own efficient and inefficient processes. 46

C. The need to avoid litigation is a reason to retain and strengthen existing procedures, not a reason to eliminate them. 49

D. The mismatch between the proposal and its stated intent shows that other, unstated factors are motivating the rulemaking. 53

VII. The Proposed Rule Fails to Demonstrate that its Existing Authorities Are Inadequate. 59

VIII. The Forest Service Should Retain and Strengthen Procedural Protections for Inventoried Roadless Areas and Potential Wilderness Areas, Including as Classes of Actions Normally Requiring Preparation of an EIS and Resource Conditions for Purposes of Determining Extraordinary Circumstances. 64

A. Background. 64

1. Roadless areas and their myriad ecological and social values warrant protection. 65

2. The Forest Service has long provided procedural protections for roadless areas. 69

3. Courts have long recognized the need for additional procedural scrutiny of projects in roadless areas. 72

4. Agencies must provide reasoned explanations for changes in position. 73

B. The Forest Service's Rationale for Removing Proposals that Would Substantially Alter the Undeveloped Character of an IRA from Classes of Actions Normally Requiring Preparation of an EIS is Arbitrary and Capricious. 74

C. The Proposals to Move Potential Wilderness Areas to the List of Congressionally Designated Areas for Purposes of Extraordinary Circumstances and to Eliminate PWAs from Classes of Actions Normally Requiring Preparation of an EIS are Arbitrary and Capricious. 79

IX. The Promulgation of New Categorical Exclusions is Arbitrary and Capricious. 81

A. The Forest Service's Overall Approach to Developing the CEs is Arbitrary and Capricious. 81

B. The Forest Service does not have the administrative record to use mitigated FONSIs to justify the CEs. 82

1. Mitigation for past actions must be included as explicit limits on new CEs. 82

2. Failure to consider project improvements. 84

3. The Forest Service lacks adequate monitoring data to show the absence of significant impacts. 85

a) Lack of monitoring data renders predictions about future on-the-ground impacts arbitrary and capricious. 85

b) Without consistent monitoring of the spread of non-native invasive species, the proposal violates Executive Order 13112. 88

4. CEs cannot lawfully be used as a programmatic, policy-level effort to significantly increase the agency's management footprint. 89

5. The Forest Service already has CEs for many restoration activities. 89

6. CEs cannot be created to cover actions that involve unresolved conflicts of the use of available resources. 90

7. Plan consistency and national BMPs are not enough to avoid significant impacts. 91

8. The Forest Service cannot create new, broader CEs without any evidence that its current CEs do not have significant impacts. 93

C. The Proposed CEs are Arbitrary and Capricious. 96

1. Proposed CE 16 (36 C.F.R. § 220.5(e)(16)) - Forest Plan Amendments. 96

2. Proposed CE (d)(11), (d)(12), (e)(3) (36 C.F.R. §§ 220.5(d)(11), (d)(12), (e)(3)) - Special Uses. 97

a) Proposed CE (d)(11). 99

b) Proposed CE (d)(12). 102

c) Proposed CE (e)(3). 104

3. Proposed CE (e)(23), (e)(24), and (e)(25) (36 C.F.R. §§ 220.5(e)(23), (e)(24)) - Road Construction, Reconstruction, and Conversion of Unauthorized Routes to System Roads or Trails. 109

a) The proposed CEs are unneeded and contrary to law and Forest Service policy. 116

b) The proposed CEs are unsupported and likely to result in individually and cumulatively significant impacts. 119
4. Proposed CE (e)(20) (36 C.F.R. § 220.5(e)(20))– Restoration and Decommissioning of System Roads and Trails. 125
5. Proposed CE (e)(21), (e)(22) (36 C.F.R. §§ 220.5(e)(21), (e)(22))– Infrastructure at Existing Sites. 126
6. Proposed CE 26 (36 C.F.R. § 220.5(e)(26)– Ecosystem "Restoration" Projects. 126
a) CE 26 is not limited to restorative actions. 128
b) Forest plans don't prevent significant impacts. 130
c) Site-specific factors matter. 131
d) The new CEs would undermine Congressionally imposed limits. 133
e) The justification for the CE is arbitrary and capricious. 135
7. Proposed CE 27 (36 C.F.R. § 220.5(e)(27)) – Other Agencies' CEs. 170

X. The Proposed Extraordinary Circumstances Regulatory Language is Arbitrary and Capricious. 171
A. The Forest Service cannot further weaken the threshold for finding extraordinary circumstances. 171
B. Specific changes to the list of resource conditions are arbitrary and capricious. 174

XI. The Application of Multiple CEs is Arbitrary and Capricious. 175

XII. Expanding Existing CEs by Removing Implicit Limitations is Arbitrary and Capricious. 176

XIII. Scoping. 179

XIV. Determinations of NEPA Adequacy are Arbitrary and Capricious. 182

XV. Condition-Based Decisionmaking is Arbitrary and Capricious. 186
A. NEPA Requires Disclosure of Site-Specific Information. 186
B. Condition-Based Management Generally Violates NEPA. 188
C. Post-NEPA Analysis and Input Cannot Substitute for NEPA. 190
D. Condition-Based Management Has Led to Significant Controversy and Litigation. 191

E. Condition-based approaches, as currently practiced, are unlawful, inefficient, or both, and they should be explicitly limited to programmatic analyses that will be followed by tiered, site-specific decisions. 193

XVI. The Change to EIS Thresholds for Mining Activities Is Unlawful 194

XVII. The Forest Service's Proposal Would Violate Public Participation Requirements Under Section 106 of the National Historic Preservation Act 197

XVIII. Recommended Changes.....199

A. The Forest Service Should Better Utilize Programmatic, Landscape-Scale Analysis and Tiering. 200

B. The Forest Service should provide better guidance on the use of collaborative project development. 203

XIX. The Proposed Rule is a "Major rule" for Purposes of the Congressional Review Act (CRA). 204

XX. The Forest Service Should Pause Efforts to Revise the Forest Service Manual and Handbook. 204

XXI. Conclusion. 205

I. Introduction.[2]

NEPA is rightfully referred to as the "Magna Carta" of environmental laws. Like that famous charter, NEPA enshrines fundamental values into government decision-making. NEPA has been a proven bulwark against hasty or wasteful federal decisions by fostering government transparency and accountability. It has ensured that federal decisions are at their core democratic, by guaranteeing meaningful public involvement. And it has achieved its stated goal of improving the quality of the human environment by relying on sound science to reduce and mitigate harmful environmental impacts.

We have seen agencies, including the Forest Service, conduct highly efficient yet robust NEPA analysis. These successes demonstrate that NEPA is inherently flexible, and the current law, CEQ regulations, and Forest Service regulations and procedures provide significant authority to conduct efficient yet meaningful analysis, including through the use of tiering, mitigated findings of no significant impact, appropriate application of existing categorical exclusions, and other tools. At the same time, we agree that many Forest Service environmental analysis and decision-making processes could be more efficient and satisfying to stakeholders and the agency. However, as we described in our comments on the ANPR and reiterated below, the primary problems with – and solutions to – the Forest Service's NEPA process lie not with the agency's NEPA regulations and procedures but with funding and

[2] There are 8 key appendices to these comments, which are identified as "Appendix [number]" and are appended to these comments. Other popularly available references are identified in footnotes by author, title, year, and electronic database address, where available. Still other references that are not popularly available are attached alphabetically.

operational and organizational culture issues that can be addressed within the scope of the agency's existing authority.

We have watched and commented on several past and ongoing legislative and administrative efforts to modify and weaken NEPA (e.g., the House Natural Resources Committee's 2005 *Task Force on Improving the National Environmental Policy Act* and the current suite of forest management bills that would alter, restrict, or obviate the application of NEPA to land management decisions and often limit public engagement in and judicial review of those decisions). Collectively, these efforts sought to constrain basic democratic principles of government accountability and public engagement. Based on misperceptions that the law prescribes overly burdensome process, analysis, and public engagement requirements, those efforts failed to identify root causes and thus implement meaningful changes to improve federal decision-making. We have learned over the years that attempts to undercut democratic principles such as those prescribed in NEPA often result in more controversy and less trust, collaboration, and efficiency in the long run.

Unfortunately, the proposed rule disregards these lessons. It ignores the problems that the agency and the public identified and, worse, weakens the structures and relationships that are needed to meet the agency's statutory mission in a time of inadequate budgets. It abandons the goal of harmonious and coordinated management of the multiple uses and creates decision processes that are incapable of distinguishing between good projects and bad projects. In so doing, it ignores common sense, on-the-ground facts, statutory obligations, and extensive case law establishing that site-specific contexts matter, especially on our beloved and contested public lands. The proposal is therefore essentially and fatally reductionist: an acre here is no different than an acre there; what need is there to weigh alternatives or consult the public?

If finalized, this proposal would no doubt result in a temporarily expedited planning process,[3] but one that would also result in an increase in litigation and public distrust of the Forest Service; as a consequence, it is dubious at best that the proposed rule will result in an increase in acres treated or the achievement of flagship targets. It would also cause unnecessary harm to wildlife and habitat, water quality, recreation, scenery, and the economies that depend on them. These harms would accumulate despite never having been disclosed to the public, subjected to science-based review, or contrasted with viable, less harmful alternatives. NEPA forbids this result.

II. The Proposed Rule Would Profoundly Change the Forest Service's Relationship to the Public.

The National Environmental Policy Act provides that "each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331(c). The Forest Service's proposal would stifle the primary way the public has contributed to the preservation and enhancement of their national forests—namely, by sharing their observations, knowledge, values, and suggestions with the agency professionals charged with

[3] It is clear from the content of the proposed rule that it is primarily designed to meet the agency's flagship targets of acres treated and board feet harvested. Consequently, our comments focus on logging and roadbuilding projects; but in many national forests, other activities such as oil and gas development, unsustainable recreation, grazing, and noncommercial vegetation removal (e.g. pinion-juniper chaining) are more common.

caring for the land. The proposal insults the public, claiming that they will *benefit* from all the time they will save when they can no longer comment on projects that will affect the places they care about: "The direct benefits of the rule are … reduced costs and time spent … by … the public engaged in the environmental analysis process." 84 Fed. Reg. at 27,550.

As a touchstone for these comments, we offer this reminder of NEPA's purpose:

> 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 Forest Service's proposal ignores and undercuts these requirements of public disclosure and accountability. The agency assures the public that its analysis will continue to be of high quality, but those assurances are empty without public scrutiny.

At turns, the Forest Service emphasizes the radical difference it wants to make on the ground as a result of this rule change, then downplays the proposed changes, asserting that the rulemaking would merely "modernize the Agency's NEPA policy by incorporating lessons learned and experience gained over the past 10 years." 84 Fed. Reg. at 27545. Apparently, while the Forest Service's stakeholders have been learning to work in collaboration with each other and local staff to help the agency provide greater ecological and economic benefits, the Forest Service's leadership was somehow learning a different lesson: that working with the public is not worth the effort. Each of the proposed rule's changes would significantly and unlawfully limit or eliminate environmental analysis of and the public's role in site-specific decisionmaking.

According to the proposal, new categorical exclusions (CEs) would likely be used for up to 3/4 of the decisions currently authorized with an environmental analysis (EA) and decision notice and finding of no significant impact (DN/FONSI). 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). In order to determine whether this estimate was plausible, we reviewed the projects relied on to support two of the more harmful CEs – proposed CEs 24 and 26.

Most of the sampled projects didn't meet the thresholds of the proposed CEs, Specifically, of the 68 projects sampled to support the 4,200-acre limitation in the proposed "restoration" CE, 50 of them (73.5%) included fewer than 4,200 acres of commercial harvest, and 48 included fewer than 4,200 acres of total harvest.[4] Even more striking, of the 10 sampled projects involving road construction, 9 (90%) fell below the new infrastructure CE's 5-mile threshold for new road construction.[5] Of the 22 projects involving road reconstruction, 16 (73%) fell below the new CE's 10-mile threshold for reconstruction.[6]

True, some of these projects included other activities outside the scope of the CE at issue, but in the future those additional activities would not preclude the use of the new CEs. That is

---

[4] *See* Appendix 1, "Re-Analysis of Restoration CE Projects."
[5] *See* Appendix 7, "Re-Analysis of Infrastructure CE Projects."
[6] *Id.*

because the proposal also encourages segmentation of projects, allowing the use of multiple CEs to approve "a single proposed action when a single category does not cover all aspects of the proposed action." 36 C.F.R. § 220.5(a)(2) (proposed).

The rule would also incentivize line officers to reframe existing projects, such as proposing smaller successive actions, in order to take advantage of the CE. In fact, experience shows that the Forest Service has done this with other authorities: In the first four years after the 2014 Farm Bill CE was created, Region 1 completed 75% of its projects (12 of 16) with the Farm Bill CE rather than with EAs, many of which had been in development already with the expectation they would be completed using an EA.[7] Accordingly, based on historical precedent and the projects sampled by the Forest Service, the estimate that 75% of EAs could become CEs is consistent with experience, and may even be too low.

Furthermore, in addition to creating new CEs, the proposal also expands the scope of existing CEs by removing implicit limitations. According to the proposal, "[a]ll categories are independently established and do not constrain or limit the operation of each other." 36 C.F.R. § 220.5(a)(2) (proposed). This assertion, dubious with respect to newly created CEs, is flatly inaccurate and unlawful with respect to CEs created in the past. Yet this re-interpretation of past CEs is already being applied in the field. For example, the contiguous George Washington and Jefferson National Forests in Virginia ("GWJNF") have recently begun using CE 6 ("Timber stand and/or wildlife habitat improvement activities") to authorize ground-disturbing commercial timber harvests at a large scale. As discussed in more detail below, CE 6 does not have an express acreage limitation, but it was not intended to cover ground-disturbing commercial harvest, which is covered instead by CE 12 (harvest of live trees up to 70 acres). To escape the 70-acre limitation in the Timber Harvest CE (as well as the .5-mile limit on temporary roads), the agency is now trying to shoehorn activities contemplated by the Timber Harvest CE into the Improvement CE. The GWJNF is currently proposing approximately 1,000 acres of commercial harvest under CE 6.[8] Many of these projects would have controversial, uncertain, or otherwise significant impacts.[9]

In the past, the overuse of categorical exclusions would have been curbed by the list of extraordinary circumstances, which function as a backstop for CEs. The proposed rule, however, would strip away extraordinary circumstances as a meaningful check on the use of CEs. As discussed in detail herein, the proposal allows projects that will affect sensitive resources to proceed under CEs so long as the line officer believes (without any analysis or

---

[7] Region 1 Implementation Strategy for Improving Forest Conditions (June 8, 2018) (hereinafter *Region 1 Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request).

[8] Examples include the following projects: Duncan Knob project; Pkin Vegetation Improvement project; Molly's Hill Thinning project; and North Zone Fire Wood Sales and Road Day-lighting project.

[9] For example, the Duncan Knob project may harm the critically endangered Rusty Patched Bumble Bee, which the U.S. Fish and Wildlife Service (FWS) concluded "is imperiled that every remaining population is important for the continued existence of the species." The Molly's Hill project could affect wood turtles, which are threatened in Virginia (as well as a Forest Service sensitive species). In addition, viewing all of the logging currently being considered across the GWJNF, the Forest Service is in danger of exceeding the amount of annual maximum timber harvest established in the Incidental Take Statements for Indiana bats on the GWJNF.

public accountability) that the effect will not be "substantial," and allows the line officer to ignore short-term harmful impacts if there are plausibly beneficial long-term effects. Together, these changes would allow the use of CEs (and, consequently, eliminate public involvement and analysis) where they could not have been used before. The proposal also completely deletes an important resource condition as an extraordinary circumstance—namely, sensitive species. As a result, it allows projects to proceed under CEs even if they would have substantial adverse effects to sensitive species that the agency has an obligation to protect under NFMA.

These new and expanded CE authorities would dramatically affect the public's right to notice and comment for site-specific decisions. Projects authorized under CEs would no longer be "scoped," and the public would therefore lose all advance notice and comment requirements. 36 C.F.R. § 220.4(d) (proposed).[10] Again, assuming (conservatively) that 3/4 of EA-level decisions will be authorized using CEs in the future, the public would lose the opportunity to comment on over 93% of all Forest Service decisions.[11] For all these decisions, the public would lose their only opportunity to raise concerns about the potential for extraordinary circumstances, cumulative impacts, or otherwise offer suggestions on how to limit or mitigate harms at the site-specific level.

In addition, the proposal would also marginalize the public from site-specific decisions through the use of Determinations of NEPA Adequacy (DNAs), discussed in greater detail infra. As relevant here, DNAs purport to allow the Forest Service to recycle old analyses for similar, but temporally and spatially distinct, actions. 36 C.F.R. § 220.4(i) (proposed). DNAs would allow line officers to determine that a new action is "essentially similar" to a prior action without site-specific analysis to support that conclusion and without public input that could reveal unique or special considerations about the new action. As a result, DNAs would plainly circumvent the public's right to participate in site-specific conversations they would have been involved with in the past.

Finally, the proposed rule would cut the public entirely from site-specific decisions on vast acreages under an approach known as "condition-based management," which is discussed in detail elsewhere in these comments. 84 Fed. Reg. at 27,550. The purpose and effect of the condition-based approach is to eliminate site-specific decisionmaking under NEPA altogether. Rather than identify *locations* for treatment, the Forest Service would identify "conditions" in its decisions, and it would later implement treatments at the site-specific level with little or no further public involvement or analysis, and no obligation to respond to any public comment that is provided. As demonstrated by the projects where this novel and unlawful strategy is already in use,[12] the approach is expected to support decisions at the landscape level, authorizing tens or hundreds of thousands of acres of treatment(s) and

---

[10] Although proposals under CEs will appear in the Schedule of Proposed Actions (SOPA), the SOPA does not require advance notice. The SOPA is defined as providing notice of "actions for which a … decision memo would be or *has been* prepared." 36 C.F.R. § 220.3 (emphasis added).

[11] Based on data provided under the Freedom of Information Act, of the roughly 30,000 decisions made by the agency between 2006 and 2016, the vast majority (80.1%) were approved using CEs; 17.6% were approved using EAs; and the remaining 2.3% of decisions were made with EISs. If 3/4 of the EAs were shifted to CEs, 93.3% of all decisions would be authorized using CEs.

[12] *See infra* Section XV.

associated road construction in a single decision. For those acres and roads, the public will not have a meaningful opportunity to raise site-specific concerns before the die is cast.

Applied across the national forest system over time, these changes together would all but eliminate public participation from site-specific decisionmaking, the requirement for science-based analysis of impacts, and the consideration of alternatives for hundreds of decisions each year. The Forest Service suggests that it will continue to conduct interdisciplinary analyses, but the rule's genesis is the desire to reduce the resources spent on analysis while attempting to increase timber outputs. *See* 84 Fed. Reg. at 27,544. Even if some superficial analysis is performed internally to support the findings in a decision memo (DM), it will not be subject to public disclosure and comment, and as a result it will not be corrected or improved based on site-specific information or preferences offered by the public. Again, the public's role will suffer the most. This is not the outcome that NEPA is designed to foster.

The Forest Service asserts that this profound change would not lead to any significant harm. According to the agency's proposed rule, public involvement and science-based analysis has little, if any, benefit on agency decisionmaking. This is an astonishing premise, and it does not withstand even casual scrutiny; and it is dramatically inconsistent with the "twin aims" of NEPA. *Price Road Neighborhood Ass'n v. U.S. Dept. of Transp*., 113 F.3d 1505, 1511 (9th Cir. 1997) ("one of the twin aims of NEPA is active public involvement and access to information"). In the remainder of these comments we explain the legal and factual deficiencies of a proposed rule that could have been prevented by simply heeding the counsel of the agency's first Chief: "It is more trouble to consult the public than to ignore them, but that is what you are hired for."[13]

III. The Forest Service's Mission Requires A Strong Public Process.

A. The agency cannot meet its core obligations without strong and continuing public engagement.

At the core of the Forest Service's mission, the multiple-use mandate cannot be satisfied without site-specific information at the project level, area-wide context at the planning level, and analysis, consideration of alternatives, and public participation at all levels of decisionmaking. Indeed, the first four "core values" of the Forest Service's national strategic plan are transparency, participation, collaboration, and accountability.[14] The Forest Service's proposed rule shows a dismaying failure to understand the importance of these basic responsibilities.

The multiple-use mandate requires the Forest Service to optimize the uses of national forest lands: to make the "most judicious use of the land," with discernment of the "relative values of the various resources in particular areas. 16 U.S.C. §§ 529, 531. In this balance, "each of these resources is by statute to be given equal consideration with the others."[15] But Congress did not tell the agency where and how to meet this mandate, nor could it. The relative values of the uses, both "tangible and intangible,"[16] will "vary locality by locality and case by

[13] Gifford Pinchot's "11 Maxims" (available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd547191.pdf).
[14] USDA Forest Service Strategic Plan: 2015-2020 (June 2015).
[15] Senate Agriculture and Forestry Committee Report Accompanying S.3044 (May 23, 1960).
[16] Senate Agriculture and Forestry Committee Report Accompanying S.3044 (May 23, 1960).

case...because of particular circumstances."[17] Accordingly, the Forest Service enjoys considerable discretion at the site-specific level, *e.g.*, *Perkins v. Bergland*, 608 F.2d 803 (9th Cir. 1979), subject to the sideboards of NFMA and other laws like the Endangered Species Act and Clean Water Act.

The agency's unambiguous duty to maximize benefits (and as a corollary, to minimize harm to competing uses) can be reconciled with its broad discretion only because of the advent of strong procedural requirements. First and foremost among them is openness to and consideration of alternatives. If the Forest Service has the discretion to choose where it will pursue a given use, but different locations for the activity would lead to different levels of harm for other, co-equal uses, then the decisionmaker needs to know what the options are. *E.g.*, *Meister v. USDA*, 623 F.3d 363 (6th Cir. 2010) (explaining that the duty to consider alternatives flows from the discretion to choose between them). Closely related, the decisionmaker needs to be able to compare the impacts of those options. *Sierra Club v. Butz*, No. 71-2514 (9th Cir. 1973) (requiring that the Forest Service establish knowledge of ecological consequences and consideration of alternatives that would have met timber goals with greater protection to other values). Third, because the statute is concerned with "relative values" that cannot be measured in objective terms, 16 U.S.C. § 529, the Forest Service must consult the public to understand their subjective preferences. And, finally, because these values vary by area, *id.*, the need for public involving is ongoing, decision by decision and at each relevant scale of decision.

The procedural duties necessitated by the multiple-use mandate are also at the center of the NEPA process. As the Forest Service itself has observed, in NFMA and NEPA "Congress sought to create mechanisms for conflict resolution, thereby obviating the need for direct congressional intervention to resolve disputes. To some degree, Congress seems to have favored a complex public process over other, more efficient management models."[18] Those more efficient models, of course, would include, on the one hand, prescriptive Congressional instructions such as a hierarchy of uses or, on the other hand, unbounded Forest Service discretion. Congress affirmatively rejected these alternative approaches.[19]

In summary, the Forest Service's duty of "harmonious and coordinated" management of the multiple uses, 16 U.S.C. § 531, is co-extensive with NEPA's objective of "productive harmony," 42 U.S.C. § 4331(a). It is no accident that both statutes require a similar procedural approach. Put simply, NEPA's goals are not a barrier to the Forest Service's work; NEPA's goals *are* the Forest Service's work.

This background also explains why many conflicts over Forest Service decisions turn on "process." The central question in reviewing a Forest Service decision to promote any specific use, by Congressional design, is whether other relevant values were fairly considered: Were there other ways to meet the goal with less harm to other values? Did the agency have the information needed to understand whether the benefits were worth the cost?

---

[17] House Agriculture Committee Report Accompanying H.R. 10572 (April 25, 1960); Senate Agriculture and Forestry Committee Report Accompanying S.3044 (May 23, 1960).
[18] USDA Forest Service, *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management* (June 2002).
[19] See *id*. at n.10 (quoting Hummel and Fleet for the proposition that broad Forest Service discretion was problematic because it "did not provide a way to surface differences, much less work through them.").

These complaints can be framed neatly using the vocabulary of NEPA, but they are also integral to the agency's responsibilities under NFMA.

For years, the Forest Service has been working to improve its processes and to therefore reduce conflict. Under the banner of collaboration, the agency invited its stakeholders to the table and asked for their help in setting priorities and developing sidebars for action. Where the public has been meaningfully involved early in the development of projects, the agency has proposed better actions and shown that it can do more and better work as a result: more benefits; fewer harms; more efficiency in meeting the agency's substantive goals. This rulemaking was an opportunity to build on those experiences and finally to make good on NEPA's promise of fostering *better decisions*, as opposed to check-box exercises that create only paperwork and gamesmanship in an effort to attempt to avoid legal vulnerabilities and judicial review. *See* 40 C.F.R. § 1500.1. It was an opportunity for the Forest Service to assume leadership among federal agencies and share collaborative innovations more broadly. It was a missed opportunity. The proposed rule will undermine all these ongoing efforts and should be abandoned.

Strong and continuing public engagement is also needed to meet NFMA's core obligation to make management decisions at two scales—planning and projects. 16 U.S.C. § 1604. The proposal would undermine forest planning in at least six different ways:

- First, as discussed further below, the proposed changes would shortcut forest plan commitments in to conduct further site-specific analysis. Most or all forest plans contain commitments to analyze some issues at the site-specific level, because they could not be fully resolved at the planning stage. Those issues would be implicated by the kinds of projects that the Forest Service now proposes to shift into CEs, which means that the plans' commitments to future public involvement and analysis will be broken.

- Second, and relatedly, the proposal's shift toward more frequent use of CEs would also put tremendous pressure on forest plans to solve every potential conflict. If conflicts cannot be punted to the project level (because there is no project-level process to resolve them), then stakeholders are unlikely to let them go, even if they would be better addressed in the context of concrete, site-specific decisions. As a result, forest planning processes will become mired in conceptual, insoluble problems and uncertain risks.

- Third, also related to the foregoing two issues, the proposal will lead to more litigation over forest plans. Under current law, issues deferred to the project level are generally unripe for challenge at the plan level. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). *Ohio Forestry*'s holding, however, is premised on the existence of additional public involvement for future logging projects. *Id.* at 729-30 (basing holding on the fact that future projects must "provide those affected by proposed logging notice and an opportunity to be heard" and "conduct an environmental analysis … to evaluate the effects of the specific project and to contemplate alternatives."). Not only would the proposal raise the stakes for forest plans, it would also give litigants the opportunity to challenge divisive issues at the plan level, because there would be no future opportunity for administrative review at the project level.

- Fourth, the proposal's reliance on CEs will prevent decision makers from supplementing outdated plan analyses at the project level. Many plans are old and stale, well behind our current understanding of conditions and relevant science—for example, with respect to climate change and rare species' population declines. This problem is unlikely to get better soon: the Forest Service clearly lacks the funding to revise plans on the schedule required by NFMA. Project analysis can help to fill the gaps in stale plan analysis, but not if projects are proceeding with CEs. This gap creates a legal vulnerability that line officers may not be aware of until a lawsuit is filed. The public comment process provided by current rules, however, provides a mechanism for identifying and filling these gaps.

- Fifth, the proposal will undermine confidence in whether projects are indeed consistent with forest plan standards and guidelines. Consistency determinations often are not black and white; they require analysis, with the clarifying role of public input, to reduce uncertainty. Without site-specific public input, it will be impossible to reliably determine that projects are meeting plan requirements.

- Sixth, the changes in this proposal would undermine progress toward forest plans' desired conditions, goals, and objectives other than the "flagship targets." NFMA is based on the reality that different landscapes and social settings can and must have different goals, which are captured at the appropriate scale in forest plans. Forest plans are also created with a 10-15 year planning horizon in order to make sure that they stay current and adaptable while also remaining immune to the sometimes-volatile shifts in political priorities. Some forest plan goals are consistent with the flagship targets and easy to measure, while others are not. Progress toward those other goals depends on public input through the development of interdisciplinary, holistic projects. This proposal would instead encourage development of narrow projects to meet current national (political) priorities at the expense of the goals developed through local input during planning.

B. Collaboration is not a substitute for the NEPA process.

We are aware that some of the Forest Service's leaders believe that the current NEPA process is rigid and adds little value, while other forms of public participation (like collaboration) are yielding better processes and outcomes. However, the proposed administrative CEs, unlike recent congressionally authorized CEs under the Healthy Forest Restoration Act, do not require a collaborative process. Even the informal sideboards of loosely defined collaboration are lacking from the current proposal, demonstrating a lack of commitment to public input. More fundamentally, collaboration alone cannot substitute for the NEPA process, and the loss of the NEPA process will also disrupt and diminish collaborative efforts.

Many of the undersigned groups are active participants in collaborative groups but also recognize that, while they can be an important part of the planning process, collaboration is no substitute for concrete, predictable processes that set a minimum floor for public involvement and are more accessible to the public at large.

The proposed rule threatens to undermine existing successful collaborative efforts because collaborative groups often depend on both the process and analysis that results from a NEPA process to engage in agency decision-making. These processes have most often worked best on national forests with effective programmatic analyses, including strong protections in

place for older trees and forests and riparian areas (e.g. Northwest Forest Plan, Eastside Screens, INFISH, PACFISH, etc.). Collaboration has not yet taken root everywhere and, where it has, it exists largely because of NEPA's environmental analysis and public engagement requirements. Collaborative efforts are useful to resolve tensions, but those tensions demand attention only because they will otherwise surface in the NEPA process. For example:

- The Cherokee National Forest hosts two successful collaborative groups. The North Zone's collaborative group was founded because of several successive high-conflict projects, one of which had to be completely withdrawn. Today, the North Zone has little to no conflict. The South Zone's collaborative group was founded recently when conflicts over soil erosion were surfacing in the NEPA process. The group has already worked out sideboards that will allow projects to move forward without those conflicts.

- The Nantahala-Pisgah Forest Partnership was established after a bitter project-level appeal of the Forest's failure to consider a citizen's alternative to avoid extensive logging and road construction in an unroaded area. The group has now submitted consensus recommendations for the Nantahala-Pisgah Forest Plan Revision.

- The Blue Mountains Forest Partners in eastern Oregon was formed as a result of a litigation stalemate between conservation interests and the timber industry. Founded in 2003, that partnership is one of the most successful examples of collaborative forest restoration: it has resulted in no forest management litigation in more than 16 years, implementation of almost a million acres of science-based fire risk reduction, a stable and growing wood products infrastructure, and an improving local economic base. This work would not have occurred but for the NEPA process, which has provided a background for collaborative restoration.

- The three collaborative groups on the Mt. Hood National Forest provide recommendations to the agency throughout the project planning process. However, consensus is not always reached during the collaborative process and, even when it is, the Forest Service is under no legal obligation to follow the collaborative recommendations. In these instances, collaborative participants or organizations rely on the NEPA process to offer site-specific recommendations, alternatives, or other comments.

- The Lakeview Stewardship Group has long been a successful collaboration on a portion of the Fremont-Winema National Forest. Various stakeholder groups have come together to jointly recommendation forest and watershed restoration projects that are scientifically sound and send a very significant amount of commercial logs to the local mill. In this case, Forest Service officials incorporates the group's recommendations into the NEPA process. One does not replace the other.

- On the Fishlake National Forest (Region 4), the Monroe Mountain Working Group (MMWG), a 19-member consensus collaboration of diverse agencies and stakeholders, has met since 2010. The MMWG developed a proposal for restoration of aspen on an entire mountain; a final plan was adopted in 2015; and the ten-year restoration project that began in 2016 is being tracked and studied by the MMWG. In 2017 it won a Chief's Honor Award for Sustaining our Forests and Grasslands.

As successful as these efforts have been, they require tremendous time and resources from both stakeholders and agency specialists. True, many line officers already go above and beyond the minimum required by the current procedures. But, of course, others do not. And even those who provide additional opportunities for input typically do so because they understand that their efforts will keep projects moving smoothly. Projects that don't face public scrutiny in the NEPA process will keep moving regardless of whether they begin collaboratively. If collaborative work isn't needed to meet agency performance metrics, it won't be a priority, especially in such a budget-constrained environment.

Indeed, the Forest Service in some areas is already pulling away from collaborative efforts and shifting instead toward the use of categorical exclusions. In 2014, the George Washington National Forest and its stakeholders celebrated the successful completion of a new forest plan. The planning process had begun badly, with a draft that no one much liked. A collaborative group developed a new alternative in response, and the Forest adopted it. Implementation started strong, too, with a large collaborative project (Lower Cowpasture) that dramatically increased timber harvest levels and created the goodwill necessary to advance a Wilderness bill. Today, however, the collaborative process is on life support, held together only by the sheer dedication of its stakeholders. Rather than allocate the resources necessary to implement the large, multi-purpose collaborative projects expected by stakeholders and previously supported by the agency, the Forest has instead been shoehorning timber sales into piecemeal CEs and neglecting other values. This approach threatens to permanently undermine the collaborative work of dedicated stakeholders. The proposed rule would likely lead to similar neglect of collaborative groups nationwide.

Furthermore, this rule is likely to result in a sharp decrease in the capacity of collaborative stakeholders to participate constructively, whether line officers want their continued involvement or not. Most national forest stakeholders have both goals that they want to see promoted, and fears of harm that they want to see minimized. For example, recreation stakeholders may hope to see more trails but fear impacts to scenery and access. Ecologically focused stakeholders may want to see protective management of old growth forests but fear fragmentation by roads. Timber stakeholders may want to see more harvest volume but fear the loss of value caused by scorching from prescribed fire. Wildlife advocates may want to see more habitat creation but fear the loss of habitat for rare species.

Collaboration works by helping focus attention on "win-win" solutions, in which we can make more progress toward everyone's affirmative goals while minimizing the downsides. Accordingly, collaborative solutions are inherently more efficient. But this process can't work and projects will not move forward with activities that involve unnecessary "win-lose" tradeoffs, because those kinds of proposals put stakeholders on the defensive and in opposition to each other. Without early and iterative public involvement in project development, those kinds of win-lose tradeoffs are inevitable, and no better than the old status quo of stakeholder animosity towards each other and the Forest Service. Over time, this would create a vicious cycle in which stakeholders spend most of their time opposing actions that harm their interests, instead of developing ideas for upcoming projects that can meet many stakeholders' needs simultaneously. This will weaken the glue that holds collaborative groups together and fracture the grassroots efforts that have produced the best outcomes in recent years.

Even if collaboration could survive the changes proposed in this rulemaking, it could not and should not replace the NEPA process. To be sure, collaboration can improve the quality of proposals and smooth their path through the NEPA process, but it does not guarantee that the concerns of the public at large who are the owners of our national forests will be addressed. While collaboration can be a necessary precondition to effective project development and implementation, it alone is not sufficient.

IV. The Proposed Rulemaking Requires Preparation of an Environmental Impact Statement.

Major federal actions, including policy changes with significant impacts to the human environment, require preparation of an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18. This proposal is a major federal action, and it cannot proceed without environmental analysis and consideration of alternatives in an EIS.

At least two sections of the CEQ regulations require agencies to develop their own NEPA procedures. 40 C.F.R. §§ 1505.1, 1507.3. As the Forest Service notes, neither of these sections expressly requires analysis or documentation of the impacts of new or revised NEPA procedures. 84 Fed. Reg. at 27,550. Nor, however, do they expressly relieve the Forest Service of the duty to analyze its rules' effects under NEPA. Elsewhere, the CEQ regulations unambiguously explain that "actions" subject to NEPA include "new or revised agency rules, regulations, plans, policies, or *procedures*." 40 C.F.R. § 1508.18(a) (emphasis added). Like all agency actions, unless this one is categorically excluded from analysis, the Forest Service must comply with NEPA's analysis requirements before proceeding.

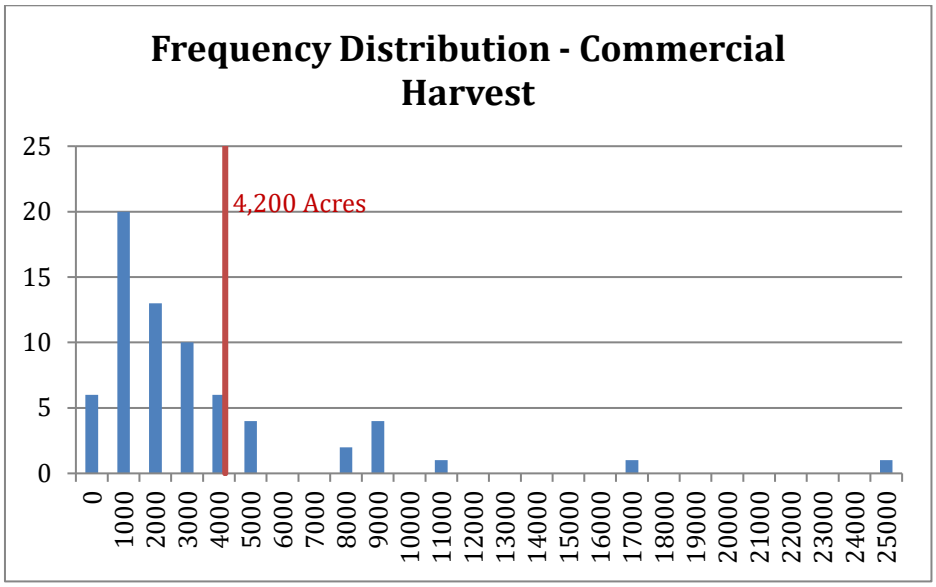
A. The proposed rule cannot be categorically excluded from analysis under NEPA.

The Forest Service cannot simply ignore NEPA's obligations. *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059, 1085 (N.D. Cal. 2007) ("NEPA requires *some* type of procedural due diligence—even in cases involving broad, programmatic changes—a fact defendants ignore …."). Consequently, if the Forest Service does not intend to prepare an EA or EIS for the proposed rule, it must at least attempt to justify the use of a CE.

Although the Forest Service fails to cite it, only a single CE could arguably apply to this total overhaul of the Forest Service's environmental analysis and decisionmaking process. 36 C.F.R. § 220.6(d)(2) ("Rules, regulations, or policies to establish servicewide administrative procedures, program processes, or instructions."). This category, however, cannot be used to authorize rules with substantive impact. *California v. USDA*, 575 F.3d 999 (9th Cir. 2009). Where, as here, a putatively procedural rule is intended to facilitate on-the-ground effects, those effects must be analyzed. *Citizens for Clean Energy v. DOI*, 2019 WL 1756296, at *8 (D. Mont. 2019) (Secretarial order replacing a moratorium on leasing with an order to expeditiously process leases could not be categorically excluded); *Shearwater v. Ashe*, 2015 WL 4747881 (N.D. Cal. 2015).

The substantive effects of the Forest Service's so-called procedural changes are concrete and readily ascertainable. Each of these proposed changes is addressed elsewhere in these comments in detail, but here we focus on their substantive effects, which demand thoughtful analysis under NEPA.

First, the Forest Service appears to have the data and documentation to quantify the aggregate effect of a shift from EAs to CEs. As noted above, the Forest Service contemplates that up to 75% of its EAs will in the future be completed with CEs. 84 Fed. Reg. 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). This estimate is consistent with the Forest Service's justification of its new "restoration" CE, which would allow up to 4,200 acres of timber harvest under a single CE decision. Of the 68 projects sampled to support the 4,200-acre limitation, 50 of them (73.5%) included fewer than 4,200 acres of commercial harvest:[20]



The Forest Service can and must quantify the substantive effects of eliminating scoping, analysis, comment, and objection for such a large number of its decisions. How have past projects changed from proposal to decision as a result of the EA process and public participation? What activities were dropped or relocated? What kinds of mitigation were added? What does monitoring show were the actual, not theoretical, impacts of these actions? Those cumulative effects must be considered, along with the effects of alternative approaches to environmental analysis and decision making (EADM) reform that would have fewer negative impacts. Similar analyses can and must also be conducted for the newly proposed CEs related to infrastructure and special uses.

The elimination of scoping for CEs is another proposed change with substantive effects that is susceptible to analysis under NEPA. Under the proposal, actions proposed under CEs will no longer be "scoped" for public comment. This will eliminate any public participation for an astonishing number of Forest Service decisions. Of the roughly 30,000 decisions made by the agency between 2006 and 2016, the vast majority (80.1%) were approved using CEs; 17.6% were approved using EAs; and the remaining 2.3% of decisions were made with EISs.[21] Assuming that 3/4 of the EAs will now be approved with CEs, approximately 93.3% of all Forest Service decisions will be made under CEs, with no advance notice or opportunity to

[20] App'x A to the Supplemental Statement in support of CE 26.
[21] Forest Service data provided to Southern Environmental Law Center in response to FOIA request 2018-FS-WO-0712-F, attached.

comment.[22] The Forest Service can and must analyze the impacts of removing public notice and opportunity to comment for these decisions. How have projects proposed under CEs changed in response to public comments at scoping? How many were dropped outright? In our experience, most CEs proceed without controversy, but occasionally there are important changes or dropped activities, such as avoiding impacts to old growth.[23] In the aggregate, those changes add up to a significant difference in on-the-ground impacts, especially when considering that several of the proposed CEs are for extractive activities that have been shown to result in individually and cumulatively significant impacts.

Yet another proposed change with significant on-the-ground impacts is codification of a novel strategy known as "condition-based management." 36 C.F.R. § 220.3 (proposed). Under this approach, which the agency is already applying to numerous large projects, the Forest Service could make a final decision authorizing logging without investigating, disclosing, or seeking public input on site-specific impacts.[24] In the sole judicial decision approving a project that used a condition-based approach, the 10th Circuit was careful to explain that the decision passed muster only because it analyzed a "worst-case" scenario—the maximum harm that it could possibly cause no matter where future activities are located. *WildEarth Guardians v. Conner*, 920 F.3d 1245 (10th Cir. 2019). However, if the Forest Service gives itself permission to cause "worst-case" impacts, it will not have any incentive to avoid those impacts in the future. Moreover, should condition-based management occur through the use of a CE, it is highly unlikely that such a rigorous analysis would be prepared; and, no alternatives or public comment would be provided to ensure that adequate environmental review occurred for such large projects.

By contrast, the traditional NEPA process, with site-specific analysis, does encourage careful and thoughtful selection of locations for treatment. With condition-based management, moreover, this important incentive to minimize impacts could be lost on a vast scale. *See* 84 Fed. Reg. 27,550 (noting that condition-based management will "increase the scope and scale of analyses and the number of activities authorized in a single analysis and decision"). Where the median size of vegetation management projects under a typical EA is 2,663.5 acres,[25] condition-based projects have already been proposed with logging in the tens and even hundreds of thousands of acres.[26]

The Forest Service must attempt to quantify the on-the-ground effects of these proposals, not only individually but cumulatively. The proposed rule's intent and effect is to circumvent public participation and environmental analysis at the site-specific level, whether by CEs, condition-based approaches, or determinations of NEPA adequacy (DNAs) that recycle old analyses for new decisions. In order to proceed with such fundamental changes, the Forest

---

[22] Although CEs will be listed in the SOPA, there is no requirement that this occur prior to authorization or implementation. See 36 C.F.R. § 220.3 (proposed) (defining SOPA as a "document that provides public notice about those proposed Forest Service actions for which … a decision memo would be *or has been prepared*") (emphasis added).
[23] E.g., Camp Branch Salvage Project, Nantahala National Forest (2017).
[24] *See infra* Section XV.
[25] Appendix 1, "Re-Analysis of Restoration CE Projects."
[26] E.g., Prince of Wales Landscape Level Analysis, Tongass NF (up to 656 million board feet of timber and 160 miles of roads); Landscape Vegetation Analysis, Medicine Bow NF (up to 320,000 acres and 600 miles of roads); Foothills Landscape Project, Chattahoochee NF (up to 90,000 acres).

Service must first describe the baseline—how public participation and analysis have improved (or not) its projects and programs over time—and disclose how its new process is likely to affect similar improvements (or not) in the future. Again, these effects can readily be determined, and far exceed the applicable threshold: a mere "*possibility* of significant effects" that may flow from the policy change. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1088, *citing California v. Norton*,311 F.3d 1162, 1168 (9th Cir. 2002).

Even if a categorical exclusion could arguably be applied to this rulemaking, it would become inapplicable because of extraordinary circumstances. For example, the proposal completely removes "sensitive species" from the list of resource conditions and changes the substantive threshold for the remaining resource conditions, allowing projects that will adversely affect those resource conditions to proceed under CEs, so long as the responsible official determines the effects will not be "substantial" or are outweighed by "long-term beneficial impacts." 36 C.F.R. § 220.5(b) (proposed). These changes, as a matter of law, will significantly affect the resource conditions currently protected as extraordinary circumstances, even if the physical impacts would not be felt until individual projects happen on the ground.

As a result, this proposed regulation cannot proceed without a traditional NEPA analysis. The effects of these proposals, like the other changes, are substantive and readily ascertainable: How many projects have been analyzed using an EA or EIS in the past because of possible harm to sensitive species? Because of impacts that "may affect, but are not likely to adversely affect" listed species? Because of short term impacts to a municipal watershed? How have those projects been improved or mitigated thanks to environmental analysis and public participation? Here, too, the effects can be quantified from documents and data already in the Forest Service's possession.

Although these substantive effects can readily be determined from the Forest Service's own data and documents, we realize that it would likely be a time-consuming task. But the required analysis is proportional to the scale and importance of the proposed changes. It is critical that the Forest Service understand the effects of its proposal so that it can compare them to other approaches it might have pursued in this rulemaking, such as the suggestions we provided in our ANPR comments.

B. An EIS is required because the proposed rule is expressly intended to increase the impact of Forest Service management.

Relying on *Heartwood v. Forest Service*, 230 F.3d 947 (7th Cir. 2000), the Forest Service asserts that no EIS is needed to establish NEPA procedures. *Heartwood*, however, merely stands for the proposition that no EIS is needed to promulgate a new categorical exclusion (CE) because CEs, by definition, cannot lead to significant impacts, either individually or cumulatively. The proposed rule, however, would do much more than create one or a few CEs, and instead covers categories of actions that have been demonstrated to have significant impacts. The rule as a whole is intended to dramatically increase the on-the-ground impact of Forest Service management. Regardless of whether, "on balance the agency believes the effect[s] will be beneficial," 40 C.F.R. § 1508.8(b), they will certainly be significant.

First, the proposal aims to increase the pace and scale of timber harvest, including commercial timber harvest. "The proposed rule is expected to increase the pace and scale of forest and grassland management operations on the ground." 84 Fed. Reg. at 27,550. In its

justification for the proposal, the Forest Service claims that 80 million acres of its 188 million-acre footprint—over 42% of the entire national forest system—are in need of active management or restoration. Despite the absence of any data supporting this astonishing figure, and despite the absence of any sideboards in the proposal that would limit "restoration" activities to those 80 million acres, the Forest Service nonetheless explains the proposal "would enable the Agency to do more … and be more responsive to requests for goods and services." 84 Fed. Reg. at 27,544.

No doubt these efforts would involve an increase in commercial timber harvest and associated road-building. In December 2018, the White House issued an Executive Order requiring that the Forest Service increase the volume of timber "offer[ed] for sale" to 3.8 billion board feet in Fiscal Year 2019[27]—an increase of 19% from the previous year and 31% from Fiscal Year 2017.[28] The Forest Service expects this target to continue growing, projecting that it will climb to 4.2 billion board feet by Fiscal Year 2022, which would be the greatest volume of timber removed from national forest lands in a quarter-century.[29] The Executive Order does not just order an increase in timber outputs, however, it also provides the mechanism: in order to meet its targets, the Secretary of Agriculture is ordered to "adher[e] to minimum statutory and regulatory time periods, to the maximum extent practicable," "us[e] all applicable categorical exclusions set forth in law or regulation," and "develop[] and us[e] new categorical exclusions to implement active management of forests, rangelands, and other Federal lands."[30] This proposed rule, although it does not cite the Executive Order, would do exactly as the EO directs.

As line officers often explain, commercial timber harvest is an important tool to accomplish this rulemaking's goals—"ensur[ing] that lands and watersheds are sustainable, healthy, and productive; mitigate[ing] wildfire risk; and contribut[ing] to the economic health of rural communities." 84 Fed. Reg. at 27,544. But increasing the use of logging will increase all of its impacts, both good and bad. A claim that dramatically increasing timber harvest will not cause significant impacts is simply not credible, and the agency has cited no law or science to support its dubious claim, rendering the proposal's rationale arbitrary and capricious. 5 U.S.C. § 706(2)(A).

The Forest Service also proposed this rule in order to increase levels of thinning and fuels reduction in order to address wildfire risks. While the impacts of such treatments may have benefits in certain frequent fire forest types, they also pose risks for facilitating invasive species, loss of wildlife habitat, and a series of other significant effects. At its best, widespread "mechanical thinning," as emphasized in the Executive Order,[31] aims to restore

---

[27] Exec. Order 13855 § 2(a)(ii)(D).
[28] Periodic Timber Sale Accomplishment Reports for Fiscal Years 2017 and 2018 (available at https://www.fs.fed.us/forestmanagement/products/ptsar/).
[29] Summary of Five Year Availability of Regional Projects (May 17, 2018) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request). *See also* Forest Service, FY 1905-2017 National Summary Cut and Sold Data and Graphs (showing 1994 as the most recent fiscal year in which more than four billion board feet were harvested from national forests), available at https://www.fs.fed.us/forestmanagement/documents/sold-harvest/documents/1905-2017_Natl_Summary_Graph.pdf (last viewed Aug. 3, 2019).
[30] Exec. Order 13855 § 3(b).
[31] Exec. Order 13855 § 2(b).

pre-suppression wildfire regimes. But these goals, even assuming that mechanical thinning can achieve them, would remake entire landscapes. Kailes and Kent 2016; Zald and Dunn 2018; Kolden 2019. Without the reintroduction of fire, either prescribed or managed natural ignitions, fire risks are likely to increase from commercial activity alone, at least for some time into the future. Furthermore, the role of thinning in effectively altering wildfire behavior is highly controversial and uncertain in many forest types, especially if fires are driven by hot dry winds. 40 C.F.R. § 1508.27 (explaining that controversial effects are more likely to be significant).

A proposal is highly controversial, mandating preparation of an EIS, when (1) "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor;" or (2) there is "a substantial dispute [about] the size, nature, or effect of the major Federal action." 40 C.F.R. § 1508.27(b)(4), *Nat'l Parks & Conservation Ass'n. v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001). A substantial dispute exists "when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency's conclusions." *Id.* The burden is placed on the agency to "come forward with a 'well-reasoned explanation' demonstrating why those responses disputing the EA's conclusions 'do not suffice to create a public controversy based on potential environmental consequences.'" *Id.* Further, where "the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an EIS." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 870 (9th Cir. 2005) (*citing* 40 C.F.R. § 1508.27(b)(5)).

Current scientific literature demonstrates that a substantial dispute exists over the nature and effect of using commercial logging to purportedly reduce future fire severity in largely undisturbed and late-successional forests, particularly those in forests that have not departed from their natural range of variability. Forest fires result from, and are driven by, a multitude of factors; topography, fuel loads, the fire history of the environment in question and most importantly, weather.[32] Because weather is often the greatest driving factor of a forest fire, and because the strength and direction of the wildfire is often determined by topography, fuels reduction projects cannot guarantee fires of less severity.[33] Reducing fuels does not consistently prevent large fires, and does not always significantly reduces the outcome of these large fires.[34] The overwhelming factors driving large blazes are drought, low humidity, high temperatures, and most importantly, high winds.

Even if it was certain that the fuels reduction will reduce the severity of a possible future fire, there is also the question of how likely it is that a fire will burn in the treated area during the time that the treatment is effective. A recent study evaluating this question concluded that "treatments cannot reduce fire severity and consequent impacts, if fire does not affect treated areas while fuels are reduced."[35] The study found that there is a 2-8% chance that a fire will actually overlap with the window in which the fuels treatment may be effective at altering

[32] Wilderness Society, 2003, Fire & Fuels: Does Thinning Stop Wildfires?
[33] Carey, H. and M. Schumann. 2003. Modifying Wildfire Behavior–the Effectiveness of Fuel Treatments: the Status of our Knowledge. National Community Forestry Center.
[34] Lydersen, J., North, M., Collins, B. 2014. Severity of an uncharacteristically large wildfire, the Rim Fire, in forests with relatively restored frequent fire regimes. Forest Ecology and Management 328 (2014) 326–334
[35] Rhodes, J. and Baker, W. 2008. Fire Probability, Fuel Treatment Effectiveness and Ecological Tradeoffs in Western U.S. Public Forests. The Open Forest Science Journal, 2008.

fire behavior.[36] Conversely, there is a 92-98% chance that the fuels treatment will not affect a fire's behavior.

Finally, the efficacy of using commercial logging to influence fire behavior and severity, particularly logging large, fire-resistant trees and mature moist forests, is highly uncertain, with peer-reviewed research showing logging may actually increase fire risk. For instance, a scientific synthesis recently found:

> The removal of larger, mature trees in thinning operations tends to increase, not decrease, fire intensity by: a) removing large, fire-resistant trees; b) creating many tons of logging "slash" debris – highly combustible branches and twigs from felled trees; c) reducing the cooling shade of the forest canopy, creating hotter, drier conditions on the forest floor; d) accelerating the growth of combustible brush by reducing the mature trees that create the forest canopy, thereby increasing sun exposure; and e) increasing mid-flame windspeeds (winds created by fire) by removing some of the mature trees and reducing the buffering effect they have on the winds associated with fires.
>
> The scientific evidence clearly indicates that, where it is important to reduce potential fire intensity (e.g., immediately adjacent to homes) this can be very effectively accomplished by thinning some brush and very small trees up to 8 to 10 inches in diameter. Removal of mature trees is completely unnecessary.[37]

Instead of increasing logging to affect fire behavior, a recent study emphasized the need to move beyond fuels reduction as the primary approach to fire management and adapt to greater fire frequency and severity through: 1) recognizing that fuels reduction cannot alter regional wildfire trends, 2) targeting fuels reduction specifically around residential communities, 3) actively managing more natural and prescribed fires for a range of severities, and 4) planning residential areas to withstand inevitable wildfires.[38]

Finally, the rule will also have the practical effect of reversing decades of Forest Service transportation and travel management policy designed to right-size the agency's oversized and fiscally and ecologically unsustainable road system. Ignoring those policies and a robust body of science documenting myriad significant impacts associated with roads and motorized uses, the rule would facilitate nearly unlimited expansion of the system via proposed CEs for construction of up to 5 miles of new Forest Service System roads, reconstruction of up to 10 miles of system roads, and conversion of unlimited miles of unauthorized routes to system roads and trails. The agency's own data definitively shows that such activities are highly likely to result in individually and cumulatively significant impacts to water quality, wildlife habitat, recreation, agency budgets, and more, as discussed in detail in Section IX.C.3-4, below.

---

[36] Id.

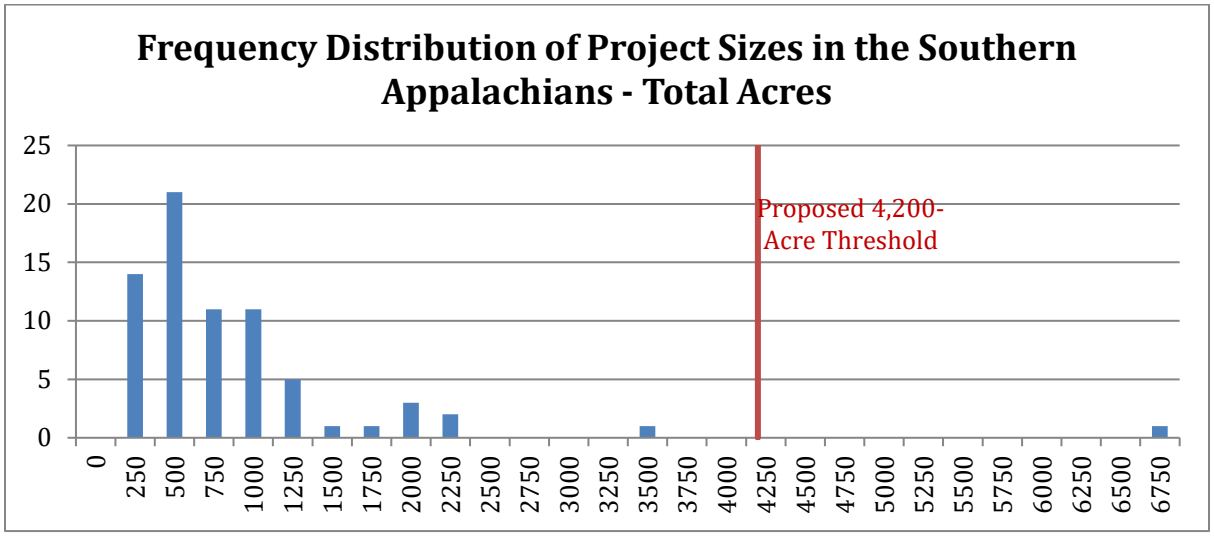
[37] Hanson, C.T. 2010. The myth of "catastrophic" wildfire: a new ecological paradigm of forest health. John Muir Project Technical Report 1. John Muir Project of Earth Island Institute, Cedar Ridge, California.

[38] Schoennagel, L., et. al. Adapt to more wildfire in Western America as climate changes. Proceedings of the National Academy of Sciences, vol. 114, No. 18, 4582-4590.

The Forest Service must analyze the impacts that it expects the proposed rule to have, both beneficial and adverse. With such an ambitious undertaking, both are reasonably foreseeable. Alternative approaches, such as requesting adequate budgets, emphasizing programmatic analysis and tiering, and providing direction on the integration of collaboration into the NEPA process, will achieve more with fewer ancillary harms.

C. The proposed rule would strip analysis and public participation from some Forests' entire programs of work.

As noted above, the Forest Service estimates that its proposal would allow up to 3/4 of projects currently analyzed under EAs to proceed without analysis or public involvement under CEs. For some Forests, however, a single CE decision could be used to cover several years' worth of timber sales. In the Southern Appalachians, only a single project completed using an EA between 2009 and 2019 would have exceeded the 4,200-acre threshold provided in proposed CE 26.[39] In other words, virtually the entire timber program of this ecologically and socially complex ecoregion could be categorically excluded from analysis and public involvement under the Forest Service's proposal.



If forest plans themselves are major federal actions requiring an EIS, *see* 36 C.F.R. § 220.7(a)(2) (proposed), then surely all the projects implemented under forest plans, taken together, must be considered to have significant impacts. These impacts take on a particular significance in the context of the smaller Eastern forests, which are on average about half the size of Western forests yet boast a tremendous ecological and social complexity.

Rather than looking solely at a sample of individual projects from across the country, the Forest Service must also consider the cumulative impacts of these changes on individual forests and regions, many of which have complexities precluding the use of such broad authorities. Where the new authorities would subsume entire programs of work for those particular forests (such as eastern national forests), the agency must explain why those programs of work have no potential for significant impacts. This is a hurdle that the proposed rule cannot clear, so it is no surprise that the agency attempts to ignore it.

[39] See Appendix 3, "Analysis of Southern Appalachian Projects."

D. The proposed rule requires an EIS because it will effectively revise forest plans across the entire national forest system.

Since at least the 1980s, Forest Plans have uniformly been conceived of as programmatic documents, and analyses of those plans have accordingly committed to further analysis and public participation for site-specific decisions. The proposed rule, however, would eschew those commitments for most site-specific decisions given the intent to move to CEs (without scoping or detailed environmental analysis), condition-based analysis without site-specific analysis, and DNAs without further analysis and speculative public engagement. Therefore, the proposal would effectively rewrite most, if not all, forest plans to remove the procedural safeguards of additional review and input.

The Forest Service Chief explained that forest plans are programmatic documents in 1988, in "landmark" appeal decisions for the Idaho Panhandle and Flathead National Forest plans. *See* 58 Fed. Reg. 19,369, 19,370 (1993). As programmatic documents, forest plans are not self-implementing. Implementation—defined as "the activity to accomplish the management direction of a forest plan"—occurs at the site-specific level. 53 Fed. Reg. 28,807, 26,836 (1988).

Under the 1982 planning rule, which provides the context for interpreting the vast majority of current forest plans, implementation begins with identification of a proposed action—a specific action in a specific location that could help to achieve the plan's goals and objectives. *Id.* The proposed action is then subject to "analysis and evaluation … to make site-specific decisions" based on "site-specific data." *Id.* The analysis is conducted by an interdisciplinary team, and it is used to determine whether the proposed action would be consistent with the plan, among other things. *Id.* While this analysis dovetails with NEPA's review and public participation process, it is separately required under NFMA to support the agency's substantive responsibilities, including consideration of other multiple use goals, potential harms, stand-level effects to residual trees, effects to site productivity and soil and water resources, and the site-dependent costs of transportation and sale administration. *Id.*; 36 C.F.R. § 219.27(b) (1982).

The courts have uniformly agreed with the Forest Service's longstanding interpretation of forest management as consisting of two distinct stages—programmatic planning and site-specific implementation. As the Supreme Court has summarized,

> Although the Plan sets logging goals, selects the areas of the forest that are suited to timber production, and determines which "probable methods of timber harvest" are appropriate, it does not itself authorize the cutting of any trees. Before the Forest Service can permit the logging, it must: (a) propose a specific area in which logging will take place and the harvesting methods to be used; (b) ensure that the project is consistent with the plan; (c) provide those affected by proposed logging notice and an opportunity to be heard; (d) conduct an environmental analysis pursuant to [NEPA] to evaluate the effects of the specific project and to contemplate alternatives; and (e) subsequently make a final decision to permit logging.

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729-30 (1998) (internal citations omitted);[40] *See also Idaho Cons. League v. Mumma*, 962 F.2d 1508, 1511-12 (9th Cir. 1992) (describing the "two-stage approach" and further affirming that site-specific assessment is needed for both NFMA and NEPA compliance at the project level.); *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059, 1064 (N.D. Cal. 2007) ("NFMA envisions a two-stage approach . . . . [I]mplementation of the LRMP occurs at a second stage, when individual site-specific projects are proposed and assessed.").

Consistent with these legal requirements, which have prevailed throughout the time period when current plans were adopted, forest plans across the country have been built around this two-stage decisionmaking process, expressly deferring site-specific analysis to the project level. In 2006, the Forest Service analyzed a random sample of 20 forest plans to determine whether they followed the two-stage approach.[41] Those plans, and relevant excerpts identified by the Forest Service, are listed in Table 1 of Appendix 4 to these comments.[42] Every single one of the 20 plans adopted the programmatic framework and committed to future site-specific analysis for the purposes of complying with NEPA and/or NFMA. Typical language from these plans follows:

- "This FEIS is a programmatic document…. This is in contrast to analyses for site-specific projects…. The environmental effects of individual projects will depend on the implementation of each project, the environmental conditions at each project location, and the application of the standards and guidelines in each case."[43]

- "Forest Plans are permissive in that they allow, but do not mandate, the occurrence of certain activities. Site-specific analysis of proposed activities will determine what can be accomplished."[44]

- "Land management activities on national forest lands are conducted only after appropriate site-specific NEPA analysis has been conducted. This provides opportunities to identify and minimize direct, indirect, and cumulative environmental effects that cannot be specifically determined or analyzed at the large scale of this FEIS."[45]

---

[40] For item (c) in this summary, *Ohio Forestry* cited the Appeals Reform Act, P.L. 102-381, 106 Stat. 1419, at § 322 (1993), which was repealed by the 2014 Farm Bill, P.L.113-79, 128 Stat. 649, at § 8006 (2014), and replaced with a "pre-decisional objection process" codified at 36 C.F.R. Part 218. The pre-decisional objection process continues to provide for an opportunity to comment on site-specific projects requiring analysis and contemplation of alternatives under NEPA.

[41] "The Evolution of National Forest System Land Management Planning and Results of the Review of Revised Land and Resource Management Plan Environmental Impact Statements" (May 2006). All of the sampled plans are still in effect with the exception of the Francis Marion National Forest's plan, which was again revised in 2017.

[42] Appendix 4, "Programmatic Forest Plan Excerpts."

[43] Routt National Forest Plan FEIS, Ch. 3, at 2 (1998).

[44] Arapaho-Roosevelt National Forest Plan ROD at 56 (1998).

[45] Chattahoochee-Oconee National Forest Plan ROD FEIS, Ch. 3, at 78 (2004).

- "To achieve desired conditions of the alternatives, certain probable activities may occur. Location, design, and extent of such activities generally are not known or described in a Forest Plan. That is a site-specific (project-by-project) decision. Before implementing any of these activities, a site-specific environmental analysis will be conducted."[46]

- "The Forest Supervisor will accomplish many management activities to implement the Revised Plan. Unlike the programmatic decisions listed above, these activities are site-specific and require analysis and disclosure of effects under NEPA. These site-specific analyses will be done during implementation of the Revised Plan."[47]

- "[Responsible officials] will consider many new proposed activities during the life of this plan. Site specific analyses will be done before approving these activities to insure they are compliant with the goals, objectives, and standards and guides of the revised plan."[48]

As CEQ has explained, programmatic analyses should be explicit about what decision is being made at the broad scale, and what decision space is deferred to a future project: "If subsequent actions remain to be analyzed and decided upon, that would be explained in the programmatic document and left to a subsequent tiered NEPA review."[49] Because site-specific impacts cannot be assessed at the programmatic level, as these forest plans explain, those impacts must be evaluated "when the agency proposes to make an irreversible and irretrievable commitment of the availability of resources which usually occurs following a tiered site- or project-specific NEPA review."[50]

Consistent with this guidance, forest plans and their associated NEPA documents also contain very specific descriptions of issues that are deferred to the site-specific level, with commitments to conduct further analysis of those issues, consider alternatives, and provide additional opportunities for public input. For example, deferred issues include:

- Location/site of harvest[51]

- Harvest method[52]

- Site-level determination of suitability for timber production[53]

---

[46] National Forests in Florida FEIS, Ch. 3, at 1 (1999).
[47] Routt National Forest Plan ROD at 29 (1998).
[48] Dakota Prairie Grasslands Plan ROD at 40 (2002).
[49] Memorandum from Michael Boots, CEQ, to Heads of Federal Departments and Agencies, "Effective Use of Programmatic NEPA Reviews" at 15 (Dec. 18, 2014).
[50] *Id.* at 27.
[51] E.g., National Forests in Florida Plan FEIS, Ch. 3, at 1 (1999); Chattahoochee National Forest Plan FEIS, App'x G at 7-40 (2004).
[52] E.g., Chattahoochee National Forest Plan FEIS, Ch. 3, at 545 (2004); Pisgah-Nantahala Plan EIS at II-23, App'x N at 50 (1994); Jefferson National Forest Plan FEIS at 401 (2004).
[53] E.g., George Washington National Forest, Forest Supervisor's Letter Clarifying the 2014 Revised LRMP (July 29, 2015); Jefferson National Forest Plan FEIS at 336 (2004).

- Whether to permit or conduct activities that would affect the wilderness character of a particular potential wilderness area (PWA) or other unroaded area[54]

- Site-specific transportation decisions (e.g., closure or obliteration of roads,[55] construction of new roads or related facilities,[56] or opening roads to the public[57])

- Site-specific recreation infrastructure decisions (e.g., location of trails or mitigation of project impacts)[58]

- Analysis and mitigation of proposed special uses[59]

- Site-specific water quality protection measures[60]

- Site-specific soil protection measures[61]

- Mitigation of impacts to cultural and historical resources[62]

- Survey and identification of late successional and old growth reserves[63]

- Protection of rare species through survey and proactive management[64] and mitigation of project impacts[65]

Plans developed under the 2012 planning rule are shaping up to be the same, with perhaps an even greater emphasis on plan-level flexibility and a correspondingly greater need to conduct further analysis at the site-specific level. Consider the following excerpts from selected early-adopter plans under the 2012 planning rule:

---

[54] E.g., George Washington National Forest Plan FEIS at 351-52 (2014), Forest Supervisor's Letter Clarifying the 2014 Revised LRMP (July 29, 2015).
[55] E.g., Boise National Forest Plan FEIS, Ch. 1, at 9 (2003); Payette National Forest Plan FEIS, Ch. 1, at 8-9 (2003).
[56] E.g., Chattahoochee National Forest FEIS, App'x G at 108 (2004); Pisgah-Nantahala Plan EIS, App'x N at 68.
[57] E.g., Jefferson National Forest Plan ROD at 9 (2004).
[58] E.g., Pisgah-Nantahala Plan EIS, App'x N at 2 (1994).
[59] E.g., George Washington National Forest Plan EIS at 384 (2014); Jefferson National Forest Plan FEIS, App'x J at cmt. 939 (2004).
[60] E.g., Northwest Forest Plan FSEIS at 2-71, 3&4-105 to -107 (1994); Pisgah-Nantahala Plan EIS, App'x N at 67 (1994); George Washington National Forest Plan EIS, App'x N at 59 (2014); Jefferson National Forest Plan FEIS, App'x J at 458 (2004).
[61] E.g., Jefferson National Forest Plan FEIS, App'x J at 456 (2004); Chattahoochee National Forest Plan FEIS at 3-27.
[62] E.g., Northwest Forest Plan FSEIS at 3&4-319.
[63] E.g., Northwest Forest Plan FSEIS at 3&4-320; Pisgah-Nantahala Plan EIS, App'x N at 30, 33 (1994); George Washington National Forest, Forest Supervisor's Letter Clarifying the 2014 Revised LRMP (July 29, 2015); Chattahoochee National Forest Plan FEIS, App'x G at 7-81 (2004); Cherokee National Forest Plan FEIS at 187.
[64] E.g., Northwest Forest Plan ROD at 11, 46.
[65] E.g., Pisgah-Nantahala Plan EIS, App'x J at 1 (1994); Jefferson National Forest Plan FEIS, App'x J at 490 (2004).

Table: 2012-Rule Plan Excerpts

Forest	Excerpt	Reference
Francis Marion (2017)	Future ground disturbing activities and projects will be consistent with the revised land management plan and subject to additional site-specific public involvement, environmental analysis, and pre-decisional review processes ….	ROD at 34
Inyo (2018)	Forest plan direction, as defined in the 2012 Planning Rule, does not authorize projects or activities or commit the Forest Service to take actions (36 CFR 219.2 (2)). Forest plans outline the vision (desired conditions), objectives (how the Inyo will move toward attaining desired conditions) and the framework to apply when attaining the objectives (standards and guidelines). The plans do not get at the "how" an activity would be completed; that's determined at the project level. The forest planning process is a high-level process designed to make decisions to serve as side boards to management and not designed to make site specific decisions requiring a different level of analysis that are needed to make decisions on [adding] specific [unauthorized] routes. Forest plans are intended to guide management of the national forests so they are ecologically sustainable and contribute to social and economic sustainability while providing people and communities with a range of benefits. Effects of forest vegetation treatments would be disclosed in project-specific environmental analysis. All specific proposed actions for vegetation management and mechanical treatments and their potential effects on humans and the environment would be analyzed and approved at the project level. Use of logging techniques would be determined at the project level.	FEIS Vol. 3 at cmt. 2058 FEIS Vol. 3 at cmt. 5071 FEIS Vol. 3 at cmt. 7104
Flathead (2018)	It is important to note that this plan is a programmatic plan and site specific decisions are needed to make progress towards many of the desired conditions and objectives found throughout the plan. For the forest plan, the Forest has analyzed the effects of the vegetation standards and their exceptions in a programmatic way, but additional analysis appropriately occurs at the project level, as required	FEIS at 8-41 FEIS at 8-125 to -126

	by NEPA, the National Forest Management Act, and the Endangered Species Act. Specific treatment prescriptions depend on many factors, such as stand conditions and location, and are appropriately determined at the site-specific level. The forest plan does not make site-specific travel management decisions. This analysis occurs at the project level, with decisions following site-specific NEPA. At the project level, the Forest is able to map and assess the existing cover condition that has resulted from past wildfire, timber harvest, and thinning in conjunction with the size and arrangement of specific proposed treatments. The Forest has the ability to discuss effects on wildlife in much more detail at the project level than is possible for a programmatic plan that uses a probabilistic model. Often, the "sideboards" that are needed vary because of site-specific situations and are therefore best identified at the project level. It is through this series of "staged decisionmaking" that the management requirements necessary to meet the ecological integrity and species-specific requirements of Forest Service Handbook 219.9 are addressed. It is most appropriate to assess and manage some aspects of connectivity at the project level because what is needed to achieve desired conditions varies over time and across the Forest, depending upon site-specific existing conditions, the species being considered, and the nature of the proposed action.	FEIS at 8-129 FEIS at 8-221 to -222 FEIS at 8-357 FEIS at 8-362

In sum, each and every forest plan in the national forest system is programmatic in nature, meaning that they do not resolve conflicts about site-specific actions and impacts. With varying levels of detail and clarity, forest plans therefore contain explicit commitments to conduct future analysis with public involvement. As described in planning documents, these commitments are important safeguards for forest resources. Future site-specific analysis and public participation isn't offered gratuitously, nor is it simply a matter of NEPA compliance; it is understood to be critical to meeting the requirements of NFMA and other environmental laws. These commitments to process are just as integral to tiering project-level decisions as any other standards or guidelines.

The proposed rule would disregard those commitments and undermine forest plans' procedural safeguards, which are needed to meet its substantive obligations. As a result, it would effectively rewrite forest plans across the nation by forgoing site-specific environmental analysis for projects implementing plans. With CEs, condition-based decisions, and DNAs, the rule would ensure that most site-specific decisions (and, on some

forests, practically all such decisions) are made without environmental review and without public input. If individual forest plan revisions require preparation of an EIS, *see* 36 C.F.R. § 220.7 (proposed), then a wholesale re-write of the fundamental structure of *all* forest plans certainly is entitled to that same level of review.

E. The proposed rule must be analyzed in at least an EA to address unresolved conflicts by providing alternatives.

Even where a proposal will not have significant impacts, NEPA nonetheless requires consideration of alternatives when there are "unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Under the CEQ regulations, this requirement is met through preparation of an EA. 40 C.F.R. § 1508.9(b). Categorical exclusions do not involve the consideration of alternatives, 40 C.F.R. § 1508.4; consequently, where unresolved conflicts exist, a CE is the wrong tool.

An unresolved conflict exists when the agency's objective "can be achieved in one of two or more ways that will have differing impacts on the environment." *Trinity Episcopal School v. Romney*, 523 F.2d 88 (2nd Cir. 1975). The agency must consider alternatives at the site-specific and, as here, the programmatic level. *See Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988) (requiring alternatives analysis, even though the decision was not itself an irretrievable commitment of resources, because it "may allow or lead to other activities" with environmental consequences).

The Forest Service must consider alternatives to its proposed rule, which is not the only, nor even the most effective, way to meet the Forest Service's stated goals. As explained further in Section VI, the agency's proposal will not solve the problems it has identified (nor those it has failed to explicitly acknowledge in the proposal). The Forest Service's main challenges, again, are a failure to set priorities and inadequate budget and capacity.[66]

One alternative, therefore, would be to heed the advice of the Government Accountability Office and propose to Congress an explicit framework for setting priorities and resolving conflicts between competing resource values, as opposed to devolving discretion to local officials with less public accountability.[67] Another reasonable alternative would be to seek an adequate budget to perform the work needed to meet agency goals without shortcutting legal requirements. As has long been understood, the Forest Service's conservation obligations are undermined by the substantial and increasing share of its operating funds that come from timber receipts.[68] Still another alternative would be to explore the use of regional or geographically-focused CEs to address high priority needs in the various Forest Service regions. Failing to consider these alternatives to the proposed rule undermines the rulemaking process. *Cf. United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, No. 18-1129, slip op. at 25 (D.C. Cir. Aug. 9, 2019) (Order was arbitrary and capricious because FCC failed to consider alternative approaches to its policy change that could have accomplished streamlining benefits with fewer costs to environmental and historical values).

---

[66] 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.

[67] GAO, Forest Service Decision-Making (1997) at 68.

[68] GAO, Forest Service Decision-Making (1997) at 63-65.

One of these reasonable alternatives – funding levels – is the elephant in the room. The agency's funding level may be outside its immediate control, but *requesting* such funding *is* within its control. *See NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (requiring consideration of alternatives "not within the scope of authority of the responsible official" when needed "to permit a reasoned choice"); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (finding Forest Service violated NEPA by improperly dismissing a reasonable alternative that would have required the agency to seek appropriations). As an executive agency participating in the development of the Administration's proposed budget, the Forest Service is obligated to provide the analysis needed to make a reasoned choice for its policies affecting national forestlands. The agency's current budget proposal slashes funding across the board.[69] It may well be that the Administration must choose between agency belt-tightening and accomplishing more work on the ground. The basis for that choice—and the physical and legal limits on the Administration's ability to have it both ways—must be made clear in the NEPA analysis for this proposal.

V. The Proposed Rule Requires Programmatic Consultation with the Fish and Wildlife Service.

The Forest Service must complete a programmatic consultation with both the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter jointly "Services") to identify the potential harms caused by changes in the Proposed Rule. Under Section 7 of the Endangered Species Act and its implementing regulations each federal agency, in consultation with the Services must insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a).

Agency "action" is broadly defined to include actions that may directly or indirectly cause modifications to the land, water, or air, and actions that are intended to conserve listed species or their habitat, specifically including, as here, "the promulgation of regulations." 50 C.F.R. § 402.02(b). Under the Services' joint regulations implementing the ESA, an action agency such as the Forest Service must initiate consultation under Section 7 whenever its discretionary action "may affect" a listed species or 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).

The Fish and Wildlife Service Consultation Handbook defines the "may affect" standard as "[t]he appropriate conclusion when a proposed action may pose **any** effects on listed species or designated critical habitat."[70] Courts have made clear that the "may affect" threshold is low. *See, e.g., Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) ("the minimum threshold for an agency action to trigger consultation with the Wildlife Service is low"); *Colorado Envt'l Coalition v. Office of Legacy Management*, 819 F. Supp. 2d 1193, 1221-22 (D. Colo. 2011) (holding that the action agency's conclusion that impact on a listed species was "highly unlikely" was enough to meet the "may affect" threshold, thus

[69] See Forest Service FY 2019 Budget Justification, available at https://www.fs.fed.us/sites/default/files/usfs-fy19-budget-justification.pdf.
[70] U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at xvi (Mar. 1998).

requiring consultation). A "may affect" determination is required by the Services' Joint Consultation Handbook when any "*possible* effect, whether beneficial, benign, adverse, or of an undetermined character" occurs. *Center for Biological Diversity v. BLM*, 698 F.3d 1101, 1122 (9th Cir. 2012) (emphasis added). Simply put, "may affect" includes any actual effect on an endangered species, and "no effect" means absolutely no effect on an endangered species whatsoever. As the Ninth Circuit explained in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1027 (9th Cir. 2012), "actions that have any chance of affecting listed species or critical habitat — even if it is later determined that the actions are 'not likely' to do so — require at least some consultation under the ESA."

Here, the Proposed Rule easily crosses the "may affect" threshold for a number of reasons. As noted above, a key purpose and intended effect of the proposed rule is to increase the pace and scale of logging projects, meaning more logging will occur and that it will occur sooner. This obviously has the potential for impacts to the scores of candidate, threatened, and endangered species who rely on national forests for habitat. Further, this proposal will immediately remove procedural and substantive protections for listed species and their critical habitats. The loss of those protections will likely result in direct and cumulative impacts that will cause "take" and undermine recovery efforts. *See infra* Section IX.C.

Simply put, by allowing the Forest Service to unilaterally decide when the presence of listed species is sufficiently adverse— a completely arbitrary and undefined process and standard — to trigger NEPA review and public involvement, the proposed rule clearly meets the "may affect" standard. Consequently, the Forest Service is ignoring its unambiguous obligation to consult with the Services. Although effects to individuals of listed species or their habitat would occur in the future, at the project level, consultation for this important change must occur at the programmatic level as well. *See, e.g., California ex rel. Lockyer v. U.S. Dept. of Agr*., 575 F. 3d 999 (9th Cir. 2009) (finding Forest Service violated the ESA by failing to consult on a rulemaking to replace the Roadless Area Conservation Rule with a state petition process); *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 481 F.Supp.2d 1059, 1096 (N.D. Cal. 2007) (declining to dismiss plaintiffs' claim that the Forest Service failed to consult under the ESA on a decision to amend the agency's planning rules).

First, the proposal removes public participation, which has been important in protecting species from project-level impacts. Not only the general public, but also state agencies rely on the scoping process to identify project locations that may affect Proposed, Endangered, Threatened and Sensitive (PETS) species. The Forest Service does sometimes overlook project-level impacts to listed species.

- In one particularly egregious example, the Forest Service missed the same issue twice in two successive entries to a watershed well known for its rare aquatic species. A 1980s-era project in the Citico Creek drainage of the Cherokee National Forest failed to consider impacts to the endangered Smoky Madtom and the threatened Yellowfin Madtom, even though the species are highly affected by sedimentation and the project would have drained immediately to their critical habitat. After three consecutive administrative appeals (which were all won by the appellants), the Forest Service finally disclosed the impacts in the project's fourth iteration. When the watershed was scheduled for its next entry,[71] the Forest Service cursorily mentioned that those same species were present in the analysis

[71] https://www.fs.usda.gov/project/?project=26125

area, but failed to realize that project activities were located immediately adjacent to their designated critical habitats. Environmental groups notified the Forest Service of the issue during the NEPA process (in comments on the Nov. 2010 Draft EA), which ultimately resulted in relocating project activities, mitigation, robust monitoring commitments, and, during implementation, the decision to drop some risky stands.

- Another recent example is *bombus affinis*, the rusty patched bumble bee, which was listed in 2017 due to precipitous declines. As FWS has stated, "The rusty patched bumble bee is so imperiled that every remaining population is important for the continued existence of the species."[72] When the George Washington National Forest proposed the Duncan Knob vegetation management project, the species was not known to exist in the project area. That project was proposed under a CE, and it is highly unlikely that surveys for the bee would have been conducted in advance of its implementation. Fortunately, a separate NEPA process was ongoing for the Atlantic Coast Pipeline (ACP), which overlapped the project area. A contractor for ACP found the species in near the project area. The end result: Duncan Knob stands were dropped from within the subsequently-developed "high potential zone" for occurrence of bombus affinis were dropped. Those stands would have been implemented, and "take" would likely have resulted to this highly imperiled species, but for the lucky timing of a separate NEPA process that made up for the shortcomings in the Forest Service's proposed use of a CE.

Other recent projects show just how important the public's role can be in identifying rare species generally:

- On the Welch project (Nantahala National Forest), citizen scientists found *Aconitum reclinatum* that was missed by the agency.

- On the Buck project (Nantahala National Forest), the Forest Service missed *Polygala senega* and *Geum donium*, which were found by citizen scientists.

- In the Stony Creek project (Cherokee National Forest), it was *Pyrola americana*. In that project, the stand was also identified as old growth based on citizen science, and the stand is now being managed with fire to maintain the rare species.

- The North Carolina Wildlife Resources Commission found new occurrences of Green Salamander (*Aneides aeneus*) in the Southside project (Nantahala National Forest), resulting in new buffers on those locations.

- In the Turkeypen project (Nantahala National Forest), agency staff missed red-legged salamanders (*Plethodon shermani*) which were later located by a citizen scientist.

---

72 https://www.fws.gov/midwest/Endangered/insects/rpbb/pdf/Survey_Protocols_RPBB_12April2019.pdf

- In the North Clack Integrated Resource Project (Mt. Hood National Forest) the agency surveyed for red tree voles (*Arborimus longicaudus*) protected by the Northwest Forest Plan and found 3 active vole nests. A community science team surveyed the same area and found over 60 red tree vole nests, each of which received a 10-acre buffer.

Each of these species is considered "sensitive" or "forest concern" or, under the ongoing plan revision in North Carolina, a "species of conservation concern." Their declines will lead to listing (particularly for green salamander) if not addressed quickly. The Forest Service has an important role in preventing listing of these species. They also highlight the difficulty in ensuring that rare species are actually found during surveys. These sometimes-elusive species can be overlooked simply because the survey does not occur at the right time of year. For example, the green salamanders in the Southside project were initially missed because they were in an arboreal phase of their life cycle during the survey, and Forest Service staff were looking for them in the rock crevices where they nest at other times of the year. Examples of overlooked rare plants are even more common, and for similar reasons: seasonal morphological changes can make locating and identifying rare plants excruciatingly difficult for all but the most experienced.

Losing site-specific public involvement for projects in ecologically complex areas will result in serious but uncounted harms to rare species. Already many impacts likely fall through the cracks. But the Forest Service's efforts to scale up timber harvest means less time spent by biologists and botanists on each acre. Eliminating scoping and moving projects into categorical exclusions will ensure that the public is less involved at the site-specific level and will therefore be unable to catch mistakes. This is a disastrous combination for rare species.

State and tribal wildlife biologists also depend on the NEPA process to assist the Forest Service in locating and protecting rare species. Scoping and environmental analysis are crucial for letting those state and tribal experts know where their own surveys should be located. The SOPA doesn't provide project information at the requisite level of specificity, and state and tribal biologists don't have the resources to fully survey entire analysis areas without the benefit of stand-level proposals. This proposal would frustrate the work of state and governmental partners, and that is no way to fulfill a commitment to shared stewardship.

Second, even when listed species are found in project areas, the proposal would remove substantive protections from them. The extraordinary circumstances regulation currently (at least partially) ensures that the impacts are properly understood, uncertainties eliminated, and appropriate mitigation put in place before project activities go forward. Under the proposed rule, however, projects would remain eligible for categorical exclusions unless the responsible official, without the benefit of analysis or public involvement, determines the effect would be "substantially adverse" when weighing long-term benefits against the short-term impacts. 36 C.F.R. § 220.5(b)(2) (proposed). As a practical matter, this change would result in fewer project changes and substantive mitigation commitments, and it would undermine recovery efforts by allowing minor but repeated impacts to species for which every population and every acre of available habitat matters.

We understand that the Forest Service is taking the position that its commitment to rigorous analysis will not change, even if it is not subject to public scrutiny, but that reassurance has already been shown to be hollow. The Rocky Mountain Region, we are aware, has developed

a "short form BE/BA template" for use with Decision Memos and CEs.[73] Less time in the field, less analysis on paper, and less public involvement has, at a minimum, the potential to cause adverse impacts to listed species, requiring that Forest Service consult with the Services on its proposed rule.

VI. The Proposed Rule is Arbitrary and Capricious and Contrary to Law.

Court challenges to the Forest Service's proposed rule will be reviewed under the Administrative Procedure Act, 5 U.S.C. § 706, under which agency actions are unlawful "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (summarizing judicial review under the Administrative Procedure Act).

The agency's rationale for its new policy must be clearly stated in the administrative record. *SEC v. Chenery*, 318 U.S. 80 (1943). That rationale must also be genuine: the agency cannot rely on a pretextual or contrived explanation in order to avoid legal or political accountability for its actions. *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").

Notably, agencies are entitled to deference only when they are interpreting a statute that they are uniquely responsible for administering. *Ardestani v. INS*, 502 U.S. 129, 148 (1991) ("[C]ourts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administer"). Because NEPA applies broadly to federal agencies, the Forest Service will receive no deference in the interpretation of its requirements. *United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, No. 18-1129 (D.C. Cir. Aug. 9, 2019); *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339, 341-42 (D.C. Cir. 2002) ("because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to [any one agency]," "the court owes no deference to [an agency's] interpretation of NEPA or the CEQ regulations"); *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609, 620 (10th Cir. 1987) ("deference to agency expertise is inapplicable in the NEPA context").

A. The proposed rule is not based on an accurate and complete problem identification.

We agree that the Forest Service can improve its delivery of goods and services to the American public through improvements to its environmental analysis and decision-making processes. There is no record support, however, for the proposition that the proposed rulemaking to amend the agency's NEPA procedures is a reasonable "solution" to the problem. While the Forest Service's current approach to NEPA compliance leaves room for improvement, evidence does not support the proposition that the "fault" lies with the

[73] Rocky Mountain Region Implementation Strategy for Improving Forest Conditions (June 6, 2018) (hereinafter *Region 2 Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request, 2019-FS-WO-01178-F, attached).

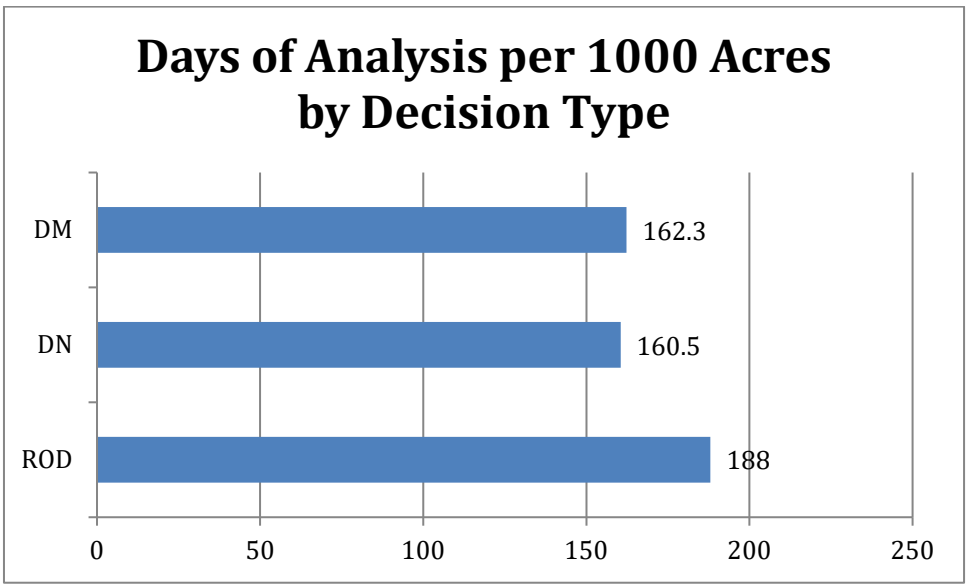
agency's NEPA regulations. This rationale has been deployed for decades, yet we are unaware of any data to support it.

In our comments on the ANPR, we requested that the Forest Service provide the public with data that supports its contention that NEPA procedures are the cause of inefficient planning and project implementation. The agency failed to do so. While partner organizations have filed Freedom of Information Act (FOIA) requests to obtain additional information upon which the Forest Service has based its proposed rule, it is unlikely that this information will be available prior to the comment deadline. Without these data, the public is precluded from providing fully informed comments on the justification for the proposed rule.

The data that *are* available, from this rulemaking and otherwise, simply do not support the conclusion that the agency's difficulty in implementing projects can be attributed to its NEPA regulations. For example, the proposal anticipates a substantial time-savings by shifting from EAs to CEs, allegedly up to 16 months saved per project. We realize that EAs take longer than CEs, and EISs take longer than EAs. The Forest Service's data illustrate this unremarkable fact. But of course EAs are also used for bigger, more complex projects than CEs, and EISs than EAs. Without relating days of analysis to the scope and nature of the decisions at issue, the Forest Service's data are out of context and therefore useless.

Data that are available show that the number of days of analysis *per acre included in the decision* do not vary greatly by decision type and, in fact, are almost identical with respect to EAs and CEs.[74] In fact, EAs offer a slight advantage over CEs. For each 1000 acres included in a vegetation management decision, it took approximately 188 days to reach that decision via an EIS, 160.5 days via an EA, and 162.3 days via a CE.

Chart: Days of Analysis per 1000 Acres Treated by Decision Type[75]



These data tell a compelling story. NEPA procedures themselves cannot be the cause of delays, because the procedures don't make a difference for how long projects take. The

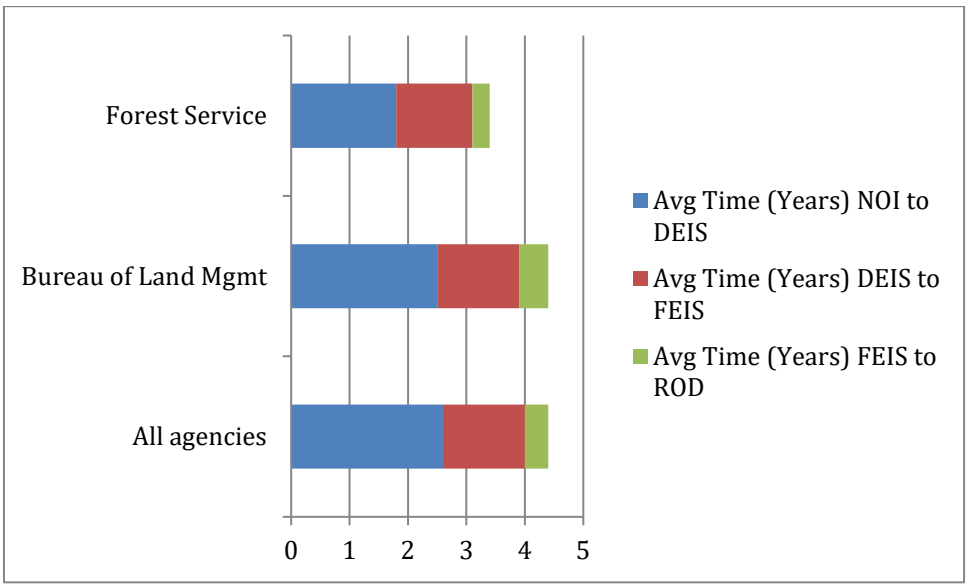
[74] Appendix 5, "Days of Analysis Per Acre by Decision Type."
[75] Id.

bottleneck instead must be the agency's capacity to do all the other work that it takes to develop a project—work that has to happen on each acre: inventories, stand exams and prescriptions, botanical and wildlife surveys, cultural surveys, etc.

The Forest Service also has diagnosed its supposed NEPA inefficiencies in a vacuum, without comparison to other agencies' procedures and outcomes. However, the available data show that the Forest Service is already better at timely decisionmaking under NEPA than other agencies. From 2010 to 2017, EIS completion time for all agencies averaged 4.5 years, with a median of 3.6 years.[76] The Forest Service was notably quicker during that timeframe, completing EISs in an average of 3.35 years and a median of 2.92 years.[77]

The Forest Service outperforms other agencies at each stage of the EIS process. The average time from a notice of intent (NOI) to a draft environmental impact statement (DEIS) for all agencies is 2.6 years; for the Forest Service, 1.8 years. The average time from the DEIS to the final environmental impact statement (FEIS) for all agencies is 1.4 years; for the Forest Service, 1.3 years. And the average time from the FEIS to the record of decision (ROD) is 0.4 years for all agencies; for the Forest Service, 0.3 years.

Chart: The Forest Service Outperforms Other Agencies in Timely NEPA Completion



Similar comparative data are not publicly available for EAs and CEs, but EISs are most instructive in understanding the advantages or disadvantages of a particular agency's decisionmaking processes because EISs have the most rigorous procedural requirements. These data strongly suggest that the Forest Service's processes allow it to more quickly and efficiently complete the NEPA process than most agencies. The Forest Service should have at

[76] CEQ, *Environmental Impact Statement Timelines (2010-2017)*, at 1 (Dec. 14, 2018) (hereinafter "EIS Timelines). These figures, moreover, include travel management planning and forest planning EISs, which can take much longer in some cases than project-level decisions.

[77] *Id.* and accompanying Excel Workbook (available at https://ceq.doe.gov/nepa-practice/eis-timelines.html).

least made an attempt to understand what makes its current processes more efficient than other agencies'.

Without such an analysis, the agency cannot disregard one possible reasonable explanation: that the Forest Service gets more timely, useful information from public engagement than other agencies. Because of the large number of decisions the Forest Service makes, and because of its strong history of public engagement, it has more sophisticated stakeholders who understand the agency's limitations and institutional needs and who can help improve projects in a way that still meet those projects' essential needs. We suspect that the best performing agencies have earlier public involvement and modify their proposals earlier in the process—features of current Forest Service procedures that this rulemaking would destroy.

To put it simply, Forest Service stakeholders are providing high-quality information about specific places and their values, and they are offering alternatives that can be used to refine projects rather than simply opposing them. The Forest Service's stakeholders are providing this information within the agency's already short commenting deadlines. Such data and information may sometimes be inconvenient to a responsible official who wants to push ahead with a project that would affect resources that are important to the public, but such data should be useful to a multiple-use agency charged with minimizing harmful impacts to competing multiple-use values and the human environment.

As the agency itself recognizes, numerous sources demonstrate that most delays in project implementation result from inadequate congressional appropriations, insufficient training of agency personnel tasked with NEPA compliance, inadequate staff qualified to undertake NEPA compliance, and the failure to leverage existing internal learning around NEPA. Other challenges include the Forest Service's institutionalized promotional policies that encourage staff to take short-term "detail" positions, resulting in high vacancy rates and turn-over or transitions.

For example, the preamble to the proposed rule explains that

> Reforming the Forest Service's NEPA procedures is needed at this time for a variety of reasons. An increasing percentage of the Agency's resources have been spent each year to provide for wildfire suppression, resulting in fewer resources available for other management activities, such as restoration. In 1995, wildland fire management funding made up 16 percent of the Forest Service's annual spending, compared to 57 percent in 2018. Along with a shift in funding, there has also been a corresponding shift in staff from non-fire to fire programs, with a 39 percent reduction on all non-fire personnel since 1995.

84 Fed. Reg. 27,544. Indeed, the Forest Service has long lamented the fact that increasingly expensive fire suppression precludes mission critical work. For example, the Forest Service's report, *The Rising Cost of Wildfire Operations: Effects on the Forest Service's Non-Fire Work*[78] details how the cost of wildfire suppression has adversely affected the agency's ability to implement mission critical work related to capital investments, road maintenance, recreational opportunities, habitat restoration, timber production, and monitoring. There is not

[78] United States Forest Service, *The Rising Cost of Wildfire Operations: Effects on the Forest Service's Non-Fire Work*, available at https://www.fs.fed.us/sites/default/files/2015-Fire-Budget-Report.pdf (Aug. 4, 2015).

a single mention of NEPA or other analysis procedures as a barrier to project implementation in this report; instead, the document focuses on the rising cost of fire suppression as the agency's number one challenge.

While the proposed rule's preamble goes on to note that the "fire funding fix" recently enacted by Congress "is welcome, the trends discussed above make it imperative that the Agency makes the most efficient use of available funding and resources to fulfill its environmental analysis and decision making responsibilities." 84 Fed. Reg. 27,544. The federal government should always strive to be efficient; but this desired outcome does not, in and of itself, demonstrate that NEPA procedures are the "cause" of the Forest Service's inability to implement land management decisions.

The preamble next observes that "the Agency has a backlog of more than 5,000 applications for new special use permits and renewals of existing special use permits that are awaiting environmental analysis and decision. On average, the Forest Service annually receives 3,000 applications for new special use permits. Over 80 million acres of National Forest System (NFS) land are in need of restoration to reduce the risk of wildfire, insect epidemics, and forest diseases." 84 Fed. Reg. 27,544. We agree that this backlog of special use permits and restoration need is problematic. But there is no evidence of which we are aware that these shortfalls are the result of the Forest Service's NEPA regulations. Indeed, the vast majority of special use permits (95%) are already processed using categorical exclusions,[79] and so the backlog cannot be solved simply by procedural hocus pocus. Again, the problem is a lack of agency resources to discern which of those acres need which treatments, analysis, or which permits should be granted or denied. NEPA is an aid to that work, not a hindrance.

Complaints and critiques of the Forest Service's decisionmaking process are nothing new. Data and analysis have long been available to show that the real problems, however, "center on inadequate monitoring, data, and public involvement."[80] Strong monitoring commitments, with accountability for follow-through, are needed to shift resources away from time-consuming and inefficient predictive analyses.[81] Data collection is needed, among other reasons, to plan the correct levels of activities and to locate those activities in the right places.[82] And public participation is needed to set priorities.[83]

To the extent that priority-setting through public engagement is difficult, it is often because the Forest Service is not receptive to changing its practices in response to the public's values. Despite the equal priority established by the Forest Service's multiple-use mandate, timber production is often considered to be the most important priority, even when it conflicts with other needs. This is due to the importance of timber receipts in funding agency operations and the significant role of timber in performance evaluations and career advancement.[84] In the Great Basin and Southwest, livestock grazing is often considered to be the most important priority, even when it conflicts with other species and uses and leads to landscape-scale vegetation treatments.

---

[79] Forest Service Response to FOIA 2018-FS-WO-0712-F, attached.
[80] GAO, Forest Service Decision-Making (1997) at 40.
[81] Id. at 41-43.
[82] Id. at 43-45.
[83] Id. at 45-47.
[84] Id. at 64-65.

The solutions to the Forest Service's decision-making problems have long been known: "these changes require nothing more than involving the appropriate parties at the appropriate times and basing decisions on sound information."[85] These solutions have been hampered, however, by "leaving their implementation to the discretion of regional offices and forests."[86] The proposed rule, of course, would dig further into this hole, removing minimum procedural requirements rather than strengthening them.

Until the Forest Service responds to our outstanding FOIA requests, the only new information of which we are aware that provides a candid assessment of the actual underlying causes of agency inefficiency in planning and implementation come from a Forest Service presentation at a workshop in Phoenix, Arizona in 2017.[87] That presentation summarizes the internal investigation the Forest Service conducted regarding its environmental analysis and decisionmaking process, and it reveals the agency's "hard truths:" that funding, staffing, training, and internal policies and procedures are the root causes of inefficient project development, analysis, and implementation.

For example, the *Phoenix EADM Presentation* reveals that since the Forest Service abandoned regular NEPA training for staff in the 1990s, it is not surprising that many staff "learn NEPA" from colleagues who themselves are not trained in how to comply with and effectively implement the law. And, although the Forest Service has been through several internal and external initiatives to "improve NEPA," the agency continues to struggle to learn from and leverage the lessons of these endeavors, no doubt in part a consequence of known capacity challenges.

Similarly, the Forest Service's own EADM roundtables[88] revealed what nearly every member of the public who comes in contact with the agency already knows:

- The major message from partner input is that transformational change for both the land and communities must begin with cultural change away from risk aversion and fear of litigation, and toward truly embracing partnerships and collaboration consistently across all levels of the Agency. The "culture of mobility" in which the USFS incentivizes frequent employee movement for career advancement interferes with EADM processes, relationships with community members, and understanding of local ecological and socioeconomic conditions. Partners expressed that these cultural changes must happen to ensure successful implementation of regulatory shifts aimed at increasing efficiency or effectiveness.

- Both USFS leadership and partners spoke to an inconsistency in how policies are interpreted, applied, and implemented at units across the country due to the cultural norms that guide how the Agency operates and how it relates to its public. The history of remote ranger stations has led to persistent autonomy at the district and forest levels, despite changes in technology and current national directives.

---

[85] Id.
[86] Id.
[87] USDA Forest Service, *Environmental Analysis and Decision Making: The Current Picture* (Phoenix, AZ. Sept. 2017) (hereinafter *Phoenix EADM Presentation*).
[88] National Forest Foundation, *Regional EADM Partner Roundtables - National Findings and Leverage Points* (May 2018).

- Partners raised concerns that cross-boundary issues like climate change, invasive species, and wildlife habitat are not well managed or planned for. With the heavy demand of staff time and funding toward fire response, other resource areas experience funding and staffing shortages.

- Partners commented on the USFS' practice of incentivizing employees to change positions and move frequently to gain breadth and depth of experience, and to gain responsibility. From the agency's perspective, this "culture of mobility" helps to: adequately prepare USFS employees to advance professionally; ensure employees are able to make unbiased and professional decisions in managing public lands; and builds consistency and shared culture across the agency. While moving employees to different units can support a transfer of good practices and new ideas, partner criticisms include that it also means that staff are on a frequent and steep learning curve to understand the relevant forest conditions, ecological systems, community interests and dynamics, as well as the USFS staff environment they are joining. Turnover, detail assignments and fire response often reduce productivity due to interruptions in project momentum and changes in project direction.

- Turnover in USFS staff has significant impacts on partners. Local relationships become fractured and have to be rebuilt.

- Partners expressed frustration that they are brought into discussions about projects after EADM has been initiated. Collaborative groups and other types of partners want to be involved before scoping begins, particularly during the project design phase. Even when collaborative groups have prioritized and developed agreement around potential projects at the district level, they often feel disenfranchised when those projects are not incorporated into planned programs of work and associated EADM.

- Participants commented they experience inconsistencies across units in USFS transparency, willingness to accept external assistance, and communications with partners. They stated that external scientific and traditional ecological knowledge is not typically accepted in EADM or broadly used by the Agency.

- Partners commented that training in project and personnel management, resource specializations, and EADM itself remains an unaddressed need throughout the USFS. Budget shortfalls and statutory mandates on funding for fire response, combined with a shortage of trained employees in areas other than fire and/or a frequent diversion of staff to emergency response or shifting priorities, hamper the ability of the Agency to make progress on other important forest and grassland resource management efforts. Moreover, the complexity of landscape-scale (e.g., climate, fuels, insects and disease) demands a high level of expertise and a deep knowledge of forest conditions at multiple levels of the Agency.

- Partners recognize that USFS staffing levels are not adequate to meet the current demand for EADM. One example of this is the large backlog of special-use permits and long timeframe for processing. EADM timelines are often lengthened due to the need for hiring or on-boarding additional staff, including "holes" in interdisciplinary team specialist representation. The USFS also dedicates minimal human and funding resources to monitoring.

- Small EADM projects seem to be managed similarly to larger ones, and partners commented that staff capacity does not appear to be deployed for efficiency.

- Partners expressed a desire for more and better analysis so that they can trust proposed actions. While this reaction seems contradictory to the frustration with lengthy documents, it stems from the perception that the USFS is not focused on the right analysis. It also is a reaction to the bias of existing EADM processes toward the Agency operating in a closed and insular manner, rather than being open and transparent. Units rarely share "current thinking," and instead prefer to release fully developed documents.

- Monitoring is considered expendable, and there is a lack of data upon which to base adaptive management decisions or to influence future project design.

- The USFS lacks common measurements or metrics across forests and projects to assess change.

These operational and organizational culture issues – funding, staffing, and training – are wholly unrelated to the agency's NEPA regulations. Instead, these factors are chronic issues faced by all federal agencies; although in the Forest Service they are exacerbated by systemic management practices that, for example, encourage frequent relocation. This practice results in numerous "acting" employees that may not be an appropriate fit, and in turn often stalls NEPA analysis on critical project-level work, sometimes for months or years. Inadequate agency budgets and hiring freezes also mean that many positions remain vacant for months or even years.

In short, these are not "NEPA problems" that can be remedied by amending the Forest Service's NEPA regulations. Until the Forest Service grapples with and addresses these issues, its attempts to alter its NEPA regulations will be arbitrary and capricious because its rulemaking will be based on "factors Congress did not intend it to consider." *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983) (decisions that "entirely fail to consider an important aspect of the problem" are arbitrary and capricious); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (record must demonstrate that the agency considered the relevant factors).

As summarized simply in one of the agency's so-called "hard truths," "*It's us, not NEPA.*"[89] Before proceeding with any proposed rule, the Forest Service must conduct an accurate and complete problem analysis that clearly articulates the operational and organizational culture hurdles to effective and efficient environmental analysis and decision-making that are reflected in its own data. Such an analysis would not point the agency to change its NEPA procedures, but would instead show the need for a strategy, along with an action plan, to address those identified issues, and reflect the strategy in its budget requests and program direction.

Finally, we note that consultation with expert federal agencies is a required element of Forest Service environmental analysis and decision-making. With respect to consultation requirements under federal laws such as the Endangered Species Act and National Historic

[89] *Phoenix EADM Presentation*.

Preservation Act, we believe there are structural challenges, including inadequate staffing and funding, that can lead to delayed or inefficient decision-making. Because the expert consulting agencies such as the U.S. Fish and Wildlife Service, NOAA-Fisheries/National Marine Fisheries Service, and state and federal Historic Preservation Offices are also underfunded and understaffed, the consultation process can often take longer than the prescribed timeline, which further delays project implementation. Again, these are not "NEPA problems" and cannot be addressed by changes to the Forest Service's NEPA regulations.

B. The Forest Service has made no attempt to understand the differences between its own efficient and inefficient processes.

Within the Forest Service, there is also considerable variation in the efficiency of decisionmaking processes. Both efficient and inefficient implementation come from the same NEPA procedures. Many of our organizations provided examples of both in comments on the ANPR.[90] The Forest Service's proposal, however, makes no attempt to understand the differences between them. This failure demonstrates the bias evident in this rulemaking process: the Forest Service begs the question by assuming that its rules are responsible for perceived inefficiencies (despite its own observation – "It's us, not NEPA" – to the contrary), so it overlooks the overwhelming data pointing elsewhere.

This bias is even more astounding because the Forest Service has known for a long time that leaving public participation to individual line officer discretion is one of the chief causes of its inefficiencies. In 1990, the agency synthesized its understanding of the problem:

> Forest managers need to engage in meaningful dialogs and build effective working relationships with our publics and other agencies, ranger district by ranger district, national forest by national forest, and region by region; then, after all concerned have been heard, they need to think through carefully, articulate, and communicate the decisions made and the rationale behind them.
>
> Leadership by regional foresters, forest supervisors, and district rangers is crucial. Many line officers have done very well, but we have found a lack of consistency. Some have carried out only a minimum of public involvement and have experienced difficulties. Others have struggled to build a consensus among conflicting interests when none was possible.[91]

Rather than attempt to help line officers design better processes consistently across the agency, this proposal actually removes the requirements that provide a minimum level of consistency and predictability. If the Forest Service had been interested in understanding why some projects under its current regulations are efficient while others are not, in order to promote the use of best procedural practices, it could have looked to the examples provided in prior comments, which demonstrate that efficient project-level processes share some common characteristics:

[90] See, e.g., Comments of the Southern Environmental Law Center, et al. (February 5, 2018).
[91] USDA Forest Service, Critique of Land Management Planning, Volume 1 at 13 (1990).

Table: Common Characteristics of Efficient versus Inefficient Processes

Successful and Efficient Processes	Unsuccessful and Inefficient Processes
Early public involvement (for example, through collaborative processes) shapes the project proposal.	Vetting by the public does not occur until after the project is concrete, when changes would "waste" staff investments in developing the actions (e.g., stand exams, prescriptions, and resource surveys).
Transparency and inclusivity are emphasized throughout development and analysis.	Projects avoid transparency with defensive analysis and boilerplate.
Projects focus on high-priority work and avoid making investments in low-priority or controversial work.	Projects threaten unnecessary harm to other values, despite the availability of better locations for action, because the responsible officials prefer to advance their own priorities without sharing decision space with the public.
Processes free up stakeholder capacity to contribute to "big picture" or programmatic efforts by removing immediate threats that would otherwise put those stakeholders on the defensive. Working together programmatically creates a virtuous cycle.	Stakeholders are unable to effectively contribute to productive dialogues because their capacity is consumed by defense—opposing immediate threats to their values. Without their input for future priorities, successive projects reproduce similar threats and create a vicious cycle.
Responsible officials are open to alternatives because the public is involved early enough to suggest locations or types of action before the investment of site-specific exams and surveys. This encourages win-win collaboration between stakeholders.	Responsible officials are not open to alternatives because of "sunk costs" in a concrete project. As a result, decisions revolve around "either/or" alternatives and thereby reify zero-sum tradeoffs, discouraging collaboration.
Projects build trust over time by focusing agency and stakeholder energy on the areas of greatest shared priority and/or setting conservative sideboards to reduce risk.	Projects undermine trust over time by focusing agency and stakeholder energy on the areas of greatest conflict or on issues where there is most uncertainty regarding risk.

Each project is part of a broader program of work that is making tangible progress toward the goals and objectives that are important to all stakeholders.	Successive projects repeatedly focus on the same limited set of goals, marginalizing stakeholders who care about other values.
Projects make effective use of tiering, with sideboards around competing values that increase confidence that those values will be protected over time, despite occasional harms.	Projects are developed ad hoc then shoehorned into the minimum NEPA process. Without effective tiering to set sideboards around competing values at broader spatial and temporal scales, stakeholders may believe they must oppose every harm, even small ones, to ensure those values are protected in the long term.
Analysis is available for public comment before decisions at each relevant scale—big picture analysis and comment for big picture decisions, and site-specific analysis and comment for site-specific decisions.	The timing and/or scale of decisions is not synchronized with the public's opportunity to comment.
Conflicts are daylighted early in the process, when they can still be addressed collaboratively.	Processes minimize opportunities for public involvement in order to minimize the visible symptoms of conflict.
Where project impacts are uncertain, the agency follows through with monitoring and feeds that information back into successive projects.	The agency fails to monitor outcomes or ignores monitoring results, increasing distrust and necessitating defensive analysis (which can be either excessive or dismissive).

Unfortunately, the Forest Service has ignored these lessons in developing this proposal. Each of the proposed changes, in combination with the other pressures on agency decisionmakers, would incentivize a shift toward the kinds of analyses and decisions that experience has shown are least efficient over time.

For example, removing scoping requirements for CEs and EAs would eliminate early public involvement for affected projects. A shift to the use of CEs for the majority of vegetation management projects not only would eliminate early public involvement, but also it would eliminate public involvement altogether. Such a shift would also foreclose the consideration of alternative locations for action, and it would encourage ad hoc decisionmaking: doing the things that are easy to approve rather than the things that would make progress toward all of a forest plan's desired conditions. Condition-based decisions and DNAs would deprive the public of a meaningful chance to comment on impacts unique to a specific site or suggest alternative locations for the action.

The rulemaking is therefore a missed opportunity because, as we explained in prior comments, the Forest Service could have done much more to help ensure that the agency's procedural best practices become more widespread. In addition to internal operational, cultural, and training improvements, those changes should also have included regulatory direction for: (1) the use of programmatic analysis, including a periodic review of decisions to determine whether duplicative analysis could be addressed programmatically; (2) collaboration and other public engagement during the pre-scoping phase; (3) compliance with the Federal Advisory Committee Act for working with informal collaborative groups; (4) explicitly allowing line officers to refine a project's purpose and need in response to public feedback; (5) creation of a post-scoping checkpoint to ensure that public comments were fully understood before beginning to draft analysis; (6) clarifying the requirement to consider alternatives that could accomplish project goals with less harm; and (7) cleaning up remnant inconsistencies with other regulations and laws.

C. The need to avoid litigation is a reason to retain and strengthen existing procedures, not a reason to eliminate them.

Litigation is also often portrayed as a reason for inefficient environmental analysis and decision-making, particularly with respect to "vegetation management" (i.e., timber sale, including "salvage") projects. To be sure, litigation is probably the least efficient or effective way to make decisions. It is important to note that Forest Service decisions are already judicially reviewed under very deferential standards. Where those decisions are challenged, it is because the agency has at least arguably acted arbitrarily and capriciously or in violation of other laws. 5 U.S.C. § 706. It is inappropriate to blame "fear of litigation" for uninformed decisionmaking, when uniformed decisions are instead the cause of litigation.

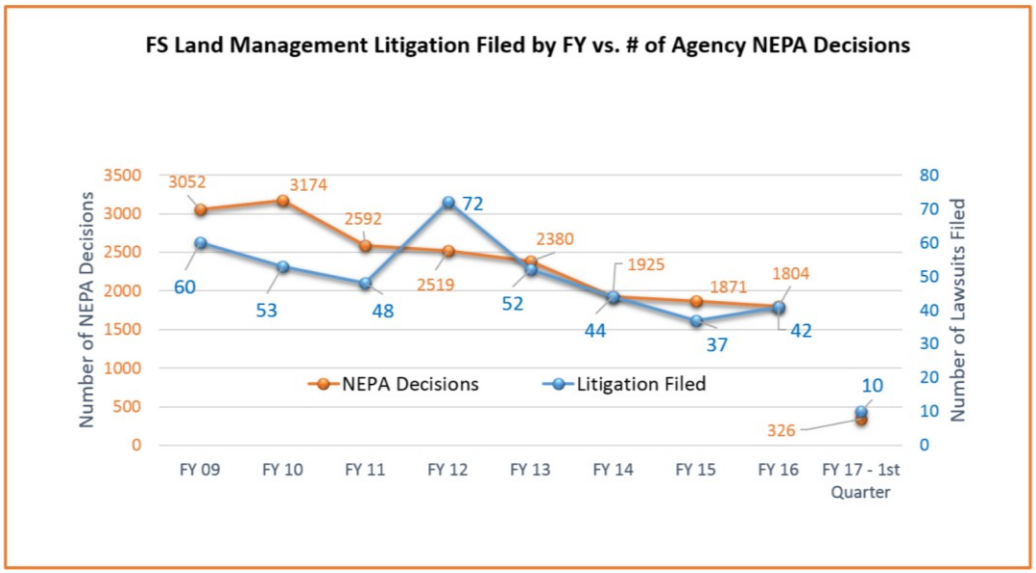
Inadequate process, in turn, is the cause of poor decisions. While the agency may be tempted to avoid stakeholder complaints by pursuing CEs, ignoring alternatives offered by the public, limiting projects to an overly narrow scope, or failing to forthrightly disclose impacts, these shortcuts often results in poorer quality NEPA analysis that makes the underlying decision more vulnerable to litigation. In our experience, the Forest Service's procedural requirements are not difficult to meet, but they are often ignored because the responsible official does not want to take the heat for a project's impacts or take the time to avoid them; Gifford Pinchot's maxims come to mind here as well.

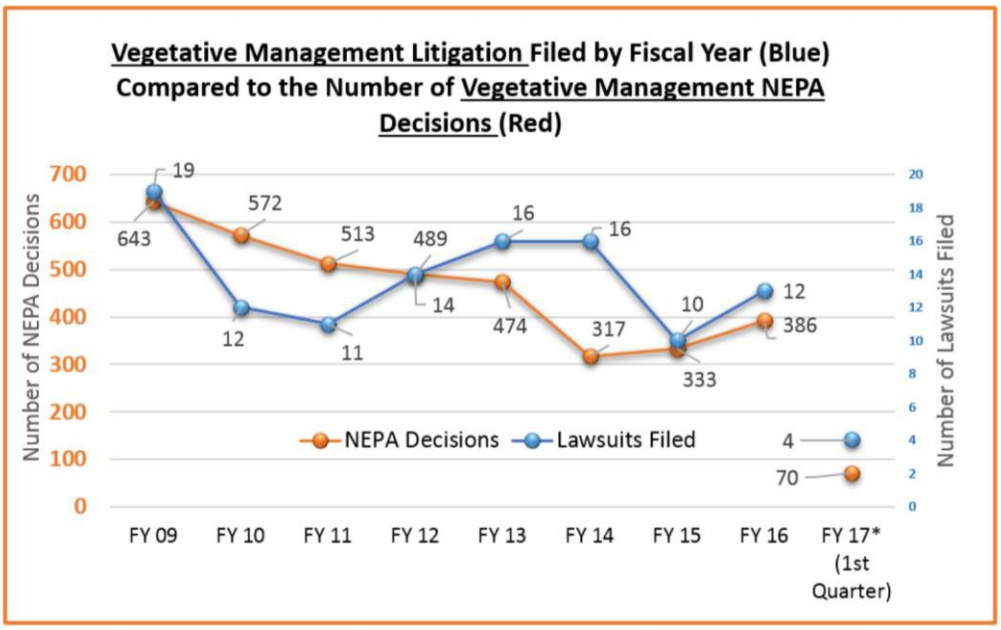
There are ways to develop projects with less work and with fewer impacts. For example, as described in detail infra, the agency should improve its programmatic decision "funneling," setting landscape-scale priorities at the plan level or an appropriate mid-scale and adopting conservative project sideboards that can prevent the need for extensive site-specific mitigation. Unfortunately, this rulemaking fails to provide guidance to help responsible officials improve their decisions.

The scapegoating of litigation is belied by the agency's own data, which demonstrates that very few NEPA decisions generally, or vegetation management decisions specifically, are ever challenged in court. As illustrated below, only 2% of all Forest Service decisions are challenged, and only 3% of vegetation management decisions are challenged: [92]

[92] *Phoenix EADM Presentation*.

Percentage of NEPA Decisions Challenged by Region FY 2009 – FY 17, 1st Quarter			
Region	No. Lawsuits	No. NEPA Decisions	% NEPA Challenged
1	91	2112	4%
2	33	2440	1%
3	46	1600	3%
4	51	1784	3%
5	64	2629	2%
6	55	2512	2%
8	26	3091	<1%
9	18	2755	<1%
10	10	730	1%





% of Regional Vegetation Management NEPA Decisions Challenged in Litigation From FY09 - FY17 (1st Quarter)			
Region	No. Lawsuits	No. Veg Mgmt. NEPA Decisions	% Veg. Mgmt. Decisions Litigated
1	43	321	13.4%
2	5	285	1.8%
3	2	181	1.1%
4	3	251	1.2%
5	38	576	6.6%
6	17	652	2.6%
8	0	1004	0.0%
9	0	435	0.0%
10	6	92	6.5%

Even fewer projects are enjoined by court order such that project implementation does not occur. The Forest Service wins 52.5% of cases, and loses or settles 47.5% of cases.[93] In other

[93] Miner et al., *Twenty Years of Forest Service Land Management Litigation*, 112 J. FOR. 32 (2014). Miner et al. show a 53.8% "win" rate for the agency with n=1,125. However, 30 of those wins resulted from stipulations for voluntary dismissal, which presumably were often the result of out-of-court settlements. Excluding these 30 cases (n=1095), the agency has a slightly lower win rate (52.5%).

words, fewer than 1% of all Forest Service decisions, and about 1.4% of vegetation management decisions, are halted by litigation. Many of those decisions, furthermore, are rebooted after removing problematic portions of the activity. The agency has provided no rationale arguing that this rate is unreasonable, or that another, lower, percentage is legally required.

NEPA is designed to help the agency avoid litigation, by conducting transparent, collaborative decision-making processes that result in higher stakeholder satisfaction. Forest Service officials often complain, especially with respect to NEPA, that conservation groups will find something to sue over if they don't like a project. If that is true, then the low litigation rate is even more remarkable. True, vegetation management projects can often be controversial, but existing Forest Service procedures (including site-specific public involvement, analysis and project refinement, and administrative review) prevent litigation in all but a tiny fraction of them. The Forest Service has not yet done so in connection with this rulemaking, but it should compare its low litigation rates to the vastly greater percentage of vegetation management projects that receive public comments seeking changes. The large delta between high commenting rates and comparatively low litigation rates demonstrates the importance of existing procedures as an outlet to resolve conflict.

Not surprisingly, given these low litigation rates, scholarly and governmental analysis concludes that litigation, while often acutely felt by those involved, has little commensurate effect on project implementation.[94] Moreover, in our observation and experience, agency attempts to "bulletproof" its NEPA analysis to avoid litigation generally results in lengthier documents but does not improve the quality of the analysis. This, too, is an issue of adequate training, funding, and staffing, as skilled NEPA practitioners can efficiently and effectively address analysis requirements, develop projects that are better for the environment, and more effectively achieve project objectives with fewer words.

Finally, it is worth noting that the Forest Service administers a sizeable portion of the federal estate, with vast national forests and grasslands and innumerable terrestrial, aquatic, and atmospheric resources entrusted to its care. The public cares deeply about those lands and resources, which are a unique part of our natural heritage. Because the trust relationship based on land and resource stewardship is different than the relationship that other federal agencies maintain with the public and stakeholders, it should not be surprising that the Forest Service experiences NEPA in a way that is qualitatively and quantitatively different than other federal agencies. Thus, the Forest Service should not presume, without applicable data, that the NEPA procedures of other federal agencies are appropriate for the stewardship of our national forests and grasslands. The Forest Service and the lands it manages are special, and deserve special recognition and treatment in the NEPA process. *Cowpasture River Pres. Ass'n v. Forest Service*, 911 F.3d 150, 173 (4th Cir. 2018) ("NEPA requires particular care when the environment that may be damaged is one that Congress has specially designated for federal protection, such as national forests.") (internal quotations omitted).

---

[94] Miner et al., *Twenty Years of Forest Service Land Management Litigation*, 112 J. FOR. 32 (2014); Government Accountability Office, Forest Service: *Information on Appeals, Objections, and Litigation Involving Fuel Reduction Activities*, Fiscal Years 2006 through 2008 (2010); Jacqueline Vaughn & Hanna J. Cortner, *George W. Bush's Healthy Forests: Reframing the Environmental Debate* (2005).

D. The mismatch between the proposal and its stated intent shows that other, unstated factors are motivating the rulemaking.

The Forest Service's proposal is premised on an asserted need to reduce the resources spent on NEPA analyses and documentation. 84 Fed. Reg. at 27,544. To that end, as described at length in these comments, the agency proposes a number of changes that would reduce the agency's obligation to share analysis with the public and take feedback. In an Orwellian (and arbitrary and capricious) turn, the agency claims that removing requirements for transparency will somehow lead to "more transparency," 84 Fed. Reg. at 27,551, but, to the contrary, we believe it will undermine public confidence in the agency's work. Ultimately, the changes proposed will erode the social license that the agency needs to meet the goals described by this rulemaking.

As math teachers everywhere understand, if you want others to have confidence that you understand a problem, it's important to show your work. In this rulemaking, the Forest Service rejects that elementary proposition, but reassures the public that it will continue to do the same work behind closed doors: "Forest Service proposed actions, including those authorized with a CE, are developed using an interdisciplinary approach to identify design features to limit adverse environmental effects; ensure consistency with land management plans; and take into account applicable plan goals, objectives, and desired conditions, and other applicable laws, regulations, and policies." 84 Fed. Reg. at 27,547. The agency also notes that line officers will have the "discretion" to conduct additional public engagement, and it "encourages early and ongoing engagement with the public … that is not limited to a single NEPA process." *Id.* at 27,545-46. But the proposed rule offers no replacement for the public input it takes away. In other words, the Forest Service argues that it can handle the multiple-use balancing act without requisite public involvement, a remarkable dismissal of the utility of public participation for an agency that claims fidelity "to NEPA's intent of informed decision making." 84 Fed. Reg. at 27,545.

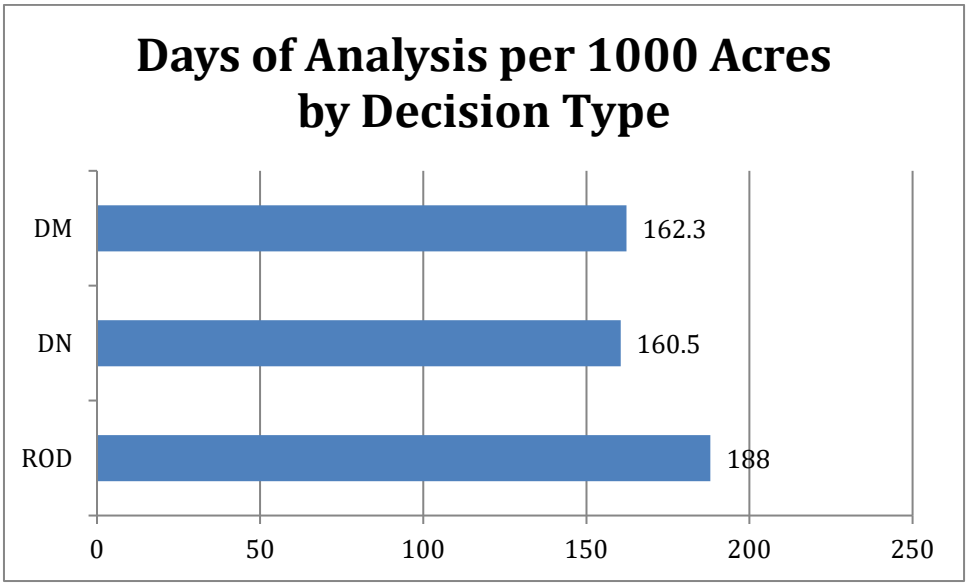
Without public accountability, we doubt that the Forest Service will actually retain the same level and quality of analysis currently undertaken. If that were indeed the expectation, then this rulemaking could not possibly meet its stated objectives. Resources and time spent on project development are not largely consumed by public engagement, but rather by the scientific analysis needed to actually prepare projects with thoughtfulness and care. Indeed, buried in the proposed rule is a damning admission—that public participation does not slow the agency's work to any quantifiable degree: "[U]nder existing scoping practices, other work on a project often continues during scoping and not every day is actively spent working on a project." 84 Fed. Reg. at 27,551.

The Forest Service states that between 2014 and 2018, an average decision with an EA and DN/FONSI took 687 days.[95] If project timelines are slowing down, the agency can and must correlate the slowdown with the portion of its budget available for project development. Still, even taking this figure as a given, the agency fails to show that the slow timeframe has anything to do with public participation. Of the time that it takes to complete an average decision with an EA and DN/FONSI, only 30 days are currently required for public comment, assuming that the agency combines the scoping and draft EA comment periods. In addition,

[95] 84 Fed. Reg. at 27,550. This number appears to be cherry picked, because EAs and DN/FONSIs took an average of 580 days for all projects between 2006 and 2016 (data provided to the Southern Environmental Law Center in response to a FOIA request).

in order to provide a minimally iterative process that may avoid objections, many districts routinely offer two separate 30-day comment periods. If specific substantive comments are received, there is another 45 day window for objections. That's a maximum of 105 days of public participation, during which other work on the project can carry on. The longer average timeline for EAs is therefore not attributable to public engagement; it is caused instead by EAs' greater size and complexity, as compared to projects developed under CEs of narrower scope and with acreage limitations. This is illustrated by the relationship between days of analysis and acres per decision:

Chart: Days of Analysis per 1000 Acres Treated by Decision Type[96]



As noted above, the time spent "in NEPA" has very little influence on the time spent per acre. Removing public participation alone, therefore, cannot be expected to reduce the length of the NEPA process by up to 16 months on average, as the agency claims it will, because only 105 days – at most – are spent in consultation with the public. 84 Fed. Reg. at 27,551. Taking away the opportunity to comment costs the public a lot, but it gains the agency nothing.

If the agency hopes to save any substantial time and staff resources in this effort, it will only be because it expects to spend less time and effort *per acre treated*. Cutting out public participation is apparently a necessary step in that direction according to the Forest Service, because public engagement typically focuses on site-specific concerns, requiring agency investigations and responses at the same scale. Indeed, without increasing budgetary and staff resources, there is no possible way that the Forest Service can meet its expected 45% increase in timber volume by FY 2022 without its specialists spending appreciably less time on each project and each stand or acre treated.[97] As Region 4 recently explained to the Washington Office, "In order to increase our pace and scale of restoration, we need to ensure we have the

[96] Appendix 5, "Days of Analysis Per Acre by Decision Type."
[97] See Periodic Timber Sale Accomplishment Report for FY 2017; Summary of Five Year Availability of Regional Projects (May 17, 2018) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request).

workforce to plan, prepare, sell, and carry out the work that is identified."[98] This admission candidly highlights one of the real bottlenecks to project implementation, and yet the proposed rule does not even attempt to address it.

Notably, the agency has not proposed a budgetary increase commensurate with its climbing timber goals. To the contrary, its FY 2019 budget proposal would drop nearly 10% from FY 2018, and the FY20 budget is no more robust.[99] Funding for timber production and vegetation management would drop by 7.6% and 11.2% respectively, a reduction of 157 full time employees for those categories of work alone.[100] The Forest Service must explain how it expects to achieve the stated benefits of the rule without reducing the time its specialists have per acre "to identify design features to limit adverse environmental effects; ensure consistency with land management plans; and take into account applicable plan goals, objectives, and desired conditions, and other applicable laws, regulations, and policies." 84 Fed. Reg. 27,547.

In addition, the agency fails to disclose the proposed rule's costs. Below, we will detail the costs of specific components of the rule, but here it is worth noting that the sum effect of the rule will be to dramatically curtail the process that discerns between good and bad actions in specific locations, catches mistakes, and ensures compliance with applicable laws. Without that process, unintended effects will proliferate and mistakes will be much more costly. As the Government Accountability Office has explained, "Although compliance with planning and environmental laws is costly and time-consuming, noncompliance is also."[101] These costs include both harm to environmental resources and, if the mistakes are caught in time, financial liability for canceled timber contracts.[102]

To put it simply, if the agency was truly concerned about its capacity to do effective, legally compliant, environmentally protective, and transparent work, it wouldn't eliminate free capacity provided by the public and stakeholders. The Forest Service's stakeholders provide valuable information and analysis that often results in beneficial project changes. In addition, failing to incorporate information from the public will result in increased friction over time, as unintended harms alienate stakeholders and reinforce zero-sum tradeoffs between resource values. This sort of friction is not necessarily connected to any particular decision, but it imposes a tax on every decision.

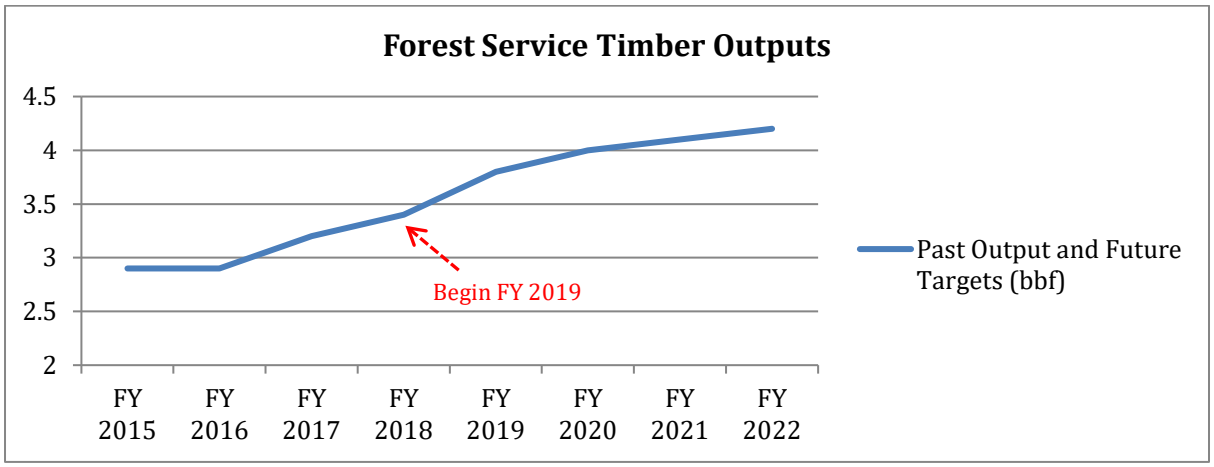
We know that the Forest Service is not unaware of these realities. But by overstating the benefits of the rule and disregarding the costs, the proposed rule runs counter to the evidence before the agency during the rulemaking process and suggests that other factors are motivating the proposed changes. In internal documents we received in response to a FOIA request, the Forest Service provides a candid assessment of the internal dilemmas behind these radical changes. At the root of the problem is the pressure to increase timber volume outputs.

---

[98] Intermountain Region Implementation Strategy for Improving Forest Conditions (June 8, 2018) (hereinafter *Intermountain Region Implementation Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request).
[99] USDA Forest Service, FY 2019 Budget Justification (Feb. 2018).
[100] Id.
[101] GAO, Forest Service Decision-Making (1997).
[102] Id.

Agency personnel are feeling this pressure from the top down and from the bottom up. From the top, the Administration has ordered the agency to reach an output of 3.8 billion board feet in FY 2019.[103] As shown in the figure below, we are approaching the steepest portion of the projected increase, which must be met by September 30, 2020.

Chart: Forest Service Timber Outputs – FY 2015 to FY 2022[104]



The pressure is equally strong from the bottom up. The Forest Service is facing a crisis of funding for basic tasks like road maintenance. As noted by Region 6, "[t]he decreasing road allocation...(a nearly 50% decrease since 2010) has resulted in a critical need for additional roads and engineering support related to [K-V] timber sales and stewardship contracts."[105] The lack of funding for roads is frustrating the agency's already challenging task of identifying the minimum road system, because the agency simply cannot meet all prongs of the definition—"the road system determined to be needed to meet resource and other management objectives adopted in the relevant land and resource management plan … , to meet applicable statutory and regulatory requirements, to reflect long-term funding expectations, and to ensure that the identified system minimizes adverse environmental impacts …." 36 C.F.R. § 212.5(b)(1). Protecting environmental quality within funding expectations would require drastic cuts to land management objectives in forest plans, so Forests are increasingly reliant on timber receipts to "kick the can down the road" for particular roads.

---

[103] Exec. Order 13855 § 2(a)(ii)(D) (Dec. 2018). Note that the Forest Service's May 2018 target was slightly smaller, at 3.7 bbf. Summary of Five Year Availability of Regional Projects (May 17, 2018) (hereinafter *Five Year Summary*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request 2019-FS-WO-01178-F, attached). It is not clear whether the Forest Service has yet revised its targets to match the Order.

[104] Past outputs are taken from Periodic Timber Sale Accomplishment Reports (PTSARs). FY 2019 value is 3.8 bbf as ordered by Exec. Order 13855 in Dec. 2018 rather than 3.7 bbf as projected by USFS in May 2018. Other future targets are from the *Five Year Summary*.

[105] Letter from James Pena to Deputy Chief Weldon, "Pacific Northwest Regional Strategy for Improving Forest Conditions" at Exec. Narrative p.1 (June 13, 2018) (hereinafter *Region 6 Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request2019-FS-WO-01178-F, attached).

In the last two years, the Forest Service has already increased its timber outputs substantially. In Fiscal Years 2016 and 2017, the agency sold approximately 2.9 billion board feet. In Fiscal Year 2018, the agency met its 3.2 billion board feet target. And in the current fiscal year, the agency has set its sights even higher, at 3.4 billion board feet. The past two years' increases, however, have drawn down the agency's "shelf stock," that is, the agency's stock of projects already approved and NEPA-compliant.[106] For example, "[t]he Southern Region has depleted much of its shelf volume over the last 2 years of increasing timber outputs. As a result, the majority of forests have about 6-9 months of shelf volume remaining."[107] Other Regions tell a similar story: Region 5 reports, "Our shelf ready NEPA is dwindling."[108]

These pressures are exacerbated by the physical limitations of many forests and regions to keep up the pace at which they have been operating at in recent years. Region 5, for example, is accelerating its salvage operations, but this opportunistic output will peak in 2021, after which overall outputs will start to decline as "volume per acre yield" begins to fall, whereas the Region's timber target will continue to grow.[109] Region 5's answer to the problem: "treating more acres."[110] Similarly, Region 4 notes that its near-term focus on salvage creates an "output anomaly," with volume decreasing substantially in some forests in coming years,[111] and Region 2 notes that its "elevated timber volume outputs" will decline "rapidly" because beetle mortality has already run its course.[112]

Despite its "flat budgets,"[113] "dwindling" shelf stock[114] and declining opportunities for salvage, the agency expects to reach 4.2 billion board feet by FY 2022—a 45% increase over FY 2017 levels, and the highest harvest level on the National Forest in 25 years.[115] The agency's immediate goal, which Regional leaders are feeling with urgency, is to move projects quickly through the NEPA process in order to replenish and increase its stock of harvest-ready timber. For example, in June 2018, Region 9 set a goal of putting two years' worth of projects on the shelf by the end of the year.[116]

---

[106] *Five Year Summary*.
[107] Letter from Ken Arney to Deputy Chief, National Forest System, "Region 8 Implementation Strategy for Improving Forest Conditions" (June 8, 2018) (hereinafter *Region 8 Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request2019-FS-WO-01178-F, attached).
[108] Pacific Southwest Region Five Year Vegetation Management Business Plan (hereinafter *Region 5 Business Plan* (June 8, 2018) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request2019-FS-WO-01178-F, attached).
[109] *Region 5 Business Plan*.
[110] Id.
[111] *Intermountain Region Implementation Strategy*.
[112] Rocky Mountain Region Implementation Strategy for Improving Forest Conditions (June 6, 2018) (hereinafter *Region 2 Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request2019-FS-WO-01178-F, attached).
[113] *Intermountain Region Implementation Strategy*.
[114] *Region 5 Business Plan*.
[115] *Five Year Summary*. The targets for FY 2019 and beyond have not officially been assigned to Regions yet, but they are based on "projected national targets."
[116] U.S. Forest Service Eastern Region Improving Forest Conditions Strategy (June 8, 2018) (hereinafter *Eastern Region Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request2019-FS-WO-01178-F, attached).

To move projects faster, Regions are looking for shortcuts in the NEPA process.[117] They are asking to loosen strings around existing authorities[118] and attempting to shoehorn existing projects into faster moving authorities.[119] This proposal would provide even more tempting shortcuts for an agency already stretched too thin to do its job well.

Because of inadequate budgets and intense pressure to perform, the Forest Service has confused outputs with outcomes, and it is now focused on increasing the former at the expense of the latter. The emphasis on timber outputs has also already resulted in the loosening of environmental protections. For example, Region 4 reports that it has begun to "streamline and/or waive policies," such as forest-level limitations on sawtimber diameter, to make projects commercially viable.[120]

Shortcuts cause mistakes. Despite good intentions, the Forest Service makes mistakes in many of its projects. During the existing NEPA process, these mistakes can often be caught by an engaged public. Indeed, the Forest Service's own data show that projects change substantively in response to public input more than 63% of the time.[121] This is how NEPA is supposed to work. But Forest Service mistakes or inadequate analysis almost always cause projects to be cut down in size, because the agency lacks the capacity to find ways to avoid or otherwise resolve questions about site-specific impacts. In order to keep pace with is growing targets, therefore, the Forest Service needs to increase the percentage of proposed actions that make it through to a final decision. Instead of a rulemaking focused on decreasing the number of mistakes by working with the public to propose better actions, this proposal would eliminate the public's role in catching mistakes—to ensure that stands that should have been dropped along the way will instead make it into final decisions. This will lead to both unnecessary harmful impacts and inefficient litigation.

Imagine if the Forest Service told the truth about this rulemaking, to wit: "We have been ordered to increase timber volume, but we've also been prevented from seeking the budgets we need to do so responsibly, and we don't have time for front-loaded processes that would allow the public to help us develop better and bigger project proposals. As a result, we're proposing to cut the public out of the process. We're hoping not just to avoid the minimal costs and delays of public engagement, but also to cut corners in analysis, overlook site-specific impacts, and ignore less harmful alternatives that could meet our goals."

---

[117] E.g., *Region 8 Strategy* (explaining that the Region is "actively working in an improved efficient manner to prepare future [NEPA] documents").

[118] *Eastern Region Strategy* (seeking modification of the insect/disease factors and maps that limit use of the new Omnibus authority to areas designated under the 2014 Farm Bill authority).

[119] *Intermountain Region Implementation Strategy* ("We are actively reviewing current and future projects to assess eligibility for use of the new CE authorities."); *Eastern Region Strategy* (noting "creative" use of authorities, including 2014 and 2018 authorities); USDA Forest Service Southwestern Region Five-Year Implementation Strategy For Improving Forest Conditions (June 8, 2018) (hereinafter *Southwestern Region Strategy*) (provided to Southern Environmental Law Center pursuant to a Freedom of Information Act Request2019-FS-WO-01178-F, attached) (noting strategy to reevaluate ongoing projects for use of new CE authorities).

[120] *Intermountain Region Implementation Strategy*.

[121] See Appendix 1, "Re-Analysis of Restoration CE Projects."

The public simply would not stand for it.

Unfortunately for the Forest Service, even if the proposal is finalized, it will not lead to the hoped-for increase in outputs for timber and fuels reduction. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998) ("Although we now impose the "snag" that the Forest Service feared but the law requires, the Forest Service has largely succeeded in its strategy"). Although the proposed rule may initially result in more planned acres, these projects are very likely to be challenged in federal court, because that will be the only outlet for stakeholders who disagree with the agency's proposed action since administrative avenues to clarify issues and resolve disputes will no longer exist. Furthermore, an increase in planned acres is unlikely to result in an increase in acres treated, absent an increase in implementation staff, such as contracting officers, grants and agreements specialists, etc.

Finally, given the pressure to meet timber output targets without adequate staffing, the nature of the work accomplished is likely to favor commercial removal alone, without seeing reductions in fire risk, let alone achievement of broader restoration goals. What gets measured gets done, especially if there isn't the funding to do anything else. Decades of scientific research have demonstrated that a singular focus on resource extraction depletes natural resources and eviscerates the public's trust in the Forest Service.

We are not unsympathetic to the agency's dilemma, but it cannot have it both ways. The Forest Service's efforts to increase outputs without commensurate increases in capacity will cause unlawful outcomes. Rather than explain its dilemma, the Forest Service employs sleight of hand and faults the public for its desire to engage in the management of the public lands it owns. But the agency may not offer a disingenuous rationale for its policies in order to avoid legal or political accountability. *Dep't of Commerce*, *supra*.

VII. The Proposed Rule Fails to Demonstrate that its Existing Authorities Are Inadequate.

The Forest Service has not shown why its existing authorities are not adequate to meet the rulemaking's stated purposes. In other words, it has not shown why the backlog in restoration treatments, wildfire risk mitigation, and special use permit applications is attributable to its lack of streamlined authorities as opposed to its lack of capacity.

For example, Congress recently enacted two large-scale legislative categorical exclusions that allow treatments for forest health and wildfire risk mitigation. The agency has not yet begun using these new authorities to their full potential.[122] Several Regions recently reported that they are either beginning to use these authorities, planning to use them, or developing new training programs to better utilize them.[123] None reported that they were fully utilizing

[122] Although only a few years in existence, the CEs authorized under the 2014 Farm Bill have been used by the Forest Service. As of March 2017, 81 projects have been proposed using the Farm Bill Insect and Disease provisions, with 68 of those projects utilizing the new CE. The 81 projects span 40 national forests and 18 states. *Forest Service Briefing Paper on the Status of Implementing 2014 Farm Bill Insect and Disease NEPA Tools* (Mar. 2017).

[123] *Eastern Region Strategy*, *supra* (training for use of 2014 and 2018 CE authorities); *Region 6 Strategy*, *supra* (noting that new authorities will "fit into ongoing discussions" about how to provide efficiencies); *Region 5 Business Plan*, *supra* (beginning to use new authorities with

existing authorities, although at least two Regions report that these authorities can support quicker project decisions and meet the needs described in this rulemaking. Region 2, for example, reported it expected to complete 10 vegetation management projects using the Farm Bill CE within 20 weeks, and Region 1 reported that its Farm Bill projects were taking only 6 to 9 months on average.[124]

If the agency's two highest-profile authorities are underutilized, it is likely that other authorities are even less consistently utilized. For instance, the following, non-exhaustive chart catalogues the existing streamlining authorities that we are aware of that apply to various land management activities.

Major Forest Service Categorical Exclusion Authorities Related to Vegetation Management, Restoration, and Fuels Reduction (not exhaustive)

Authority	Description	Purpose
Administrative Categorical Exclusions, 36 C.F.R. § 220.6(d) and (e)	At least seven CEs apply to activities related to vegetation management, wildlife management, and specific restoration activities that have been deemed not to individually or cumulatively have a significant impact on the human environment, as long as no extraordinary circumstances apply to the proposed activities. Use of a CE for most covered restoration activities requires a decision memo.	Eliminate the requirement to prepare an EA or EIS for project categories that the agency has demonstrated are not significantly impactful.
Programmatic NEPA and tiering, 40 C.F.R. § 1502.20; FSM 1950.3(2)(d); FSH 1909.15, ch. 10, § 11.41	Authorizes agencies to tier their EISs or EAs to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each scale of environmental review. Subsequent environmental analyses need only summarize the issues discussed in the broader programmatic analysis and can concentrate on the issues specific to the subsequent action at the appropriate scale.	Eliminate redundant analyses, and focus the level of analysis at the appropriate scale. When done well, results in better planning at multiple sales.

help of strike teams); *Intermountain Region Implementation Strategy*, *supra* (reviewing current and future projects to assess eligibility); *Southwestern Region Strategy*, *supra* (Forests "intend" to reevaluate where new authority could be used).

[124] *Region 2 Strategy*, *supra*; *Region 1 Strategy*, *supra*.

Adoption and joint preparation of NEPA statements, 40 C.F.R. § 1500.5(h); FSH 1909.15, ch. 10, § 11.42	Authorizes an agency to adopt the environmental analysis of another federal agency. An agency may also jointly prepare an environmental analysis with state, local, and other federal agencies to reduce duplication.	Eliminate duplicative analyses and reduce delay.
Healthy Forest Restoration Act § 404(d), 16 U.S.C. § 6554(d)	Establishes special NEPA procedures for EAs or EISs prepared for authorized hazardous-fuel- reduction projects, including limited alternatives analysis and modified judicial review for specific projects. Establishes a CE for "applied silvicultural assessment" up to 1,000 acres.	Expedites decision-making and subsequent implementation of certain hazardous fuel reduction projects; minimizes the consideration of alternatives in project development.
Healthy Forest Restoration Act § 603, 16 U.S.C. § 6591b	Establishes a CE for treatment of up to 3,000 acres within lands identified by State Governors to be experiencing or at risk of experiencing "declining forest health" or where "the risk of hazard trees poses an imminent risk to public infrastructure, health, or safety." Projects carried out in qualified areas to reduce the extent of or increase the resilience to insect and disease infestation, subject to certain limitations, are considered authorized projects eligible for limited NEPA and judicial review provisions under HFRA.	Eliminates environmental analysis for specific types of insect & disease remediation projects.
Section 8006 of Public Law 113-79	Establishes a pre-decisional objection process that enables the agency to consider and rule on objections before issuing a final decision. Eliminates post-decision appeals.	Expedite project approval and implementation.

50 C.F.R. part 402, subpart C	Inter-agency regulations authorize alternative Endangered Species Act consultation requirements for activities conducted in support of the National Fire Plan.	Enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for Fire Plan Projects.
Good Neighbor Authority, Public Law 113-79	Allows the Forest Service to enter into cooperative agreements or contracts to allow States to perform watershed restoration and forest management services on National Forest System lands.	Create efficiencies and leverages technical and financial resources.
Stewardship End Result Contracting, 16 U.S.C. § 6591c	Allows agency to enter into long-term contracts (up to 10 years) to meet land-management objectives (e.g., to reduce wildland fire risk and improve forest and rangeland health). Allows forest products to be exchanged for ecological restoration services, which may include thinning and removing brush.	Encourage longer-term stewardship projects.
Legacy Roads and Trails Program, authorized annually since 2008 via appropriations act	Drives urgently needed road decommissioning, road and trail repair and maintenance, and removal of fish passage barriers. Emphasizes areas where Forest Service roads may be contributing to water quality problems in streams and water bodies that support threatened, endangered, and sensitive species or community water sources.	Drive the restoration of lands and waters disturbed by damaging roads and trails through targeted funding and leveraging of third party funding and collaboration.
Collaborative Forest Landscape Restoration Program, Public Law 111-11	Provides competitive funding to support science-based landscape-scale collaborative restoration programs in fire-adapted landscapes.	Drive the establishment of multi- year collaborative landscape-scale restoration plans and projects to increase pace and scale of restoration, along with community support and participation.

The Joint Chiefs' Landscape Restoration Partnership	Establishes a multi-year partnership between the Forest Service and Natural Resources Conservation Service to facilitate cross- boundary restoration through interagency and community collaboration. The primary goals of the initiative are to work across public and private lands to reduce wildfire threats to communities, protect water quality and supply, and improve habitat quality for at-risk or ecosystem surrogate species. Provides up to three years of funding for projects through a competitive process managed internally by the NRCS and Forest Service.	Increase effectiveness and efficiency of restoration and fuels reduction projects by leveraging technical and financial resources on private and public lands.

These and other existing tools – some of which are discussed in more detail in the following sections – provide ample authority and mechanisms for the Forest Service to increase its land management footprint and otherwise increase the pace of project implementation. Notably, many of our organizations oppose the use of these tools, and have challenged their use in federal court. Regardless, the agency may be under-utilizing or ineffectively utilizing existing authorities, and, in some instances, even abusing existing streamlining tools in an attempt to bypass necessary and important environmental analysis.

Prior to creating new authorities, the Forest Service should have analyzed its current use of these and any other authorities that it believes are designed to make environmental analysis and decision-making "more efficient."[125] That analysis should have documented the frequency with which each tool is used, identify trends around the use of each authority (e.g., used more or less frequently for certain types of projects or in certain geographies) and cited the rationale for using or not using the tool. It should have identified where and how current tools can be better utilized, and where certain tools may be being used inappropriately. It should have also identified gaps, if any, where the existing authorities do not permit efficient environmental analysis and decision-making, and it should have clearly articulated a rationale for any proposed alterations or additions to existing authorities. Finally, and most importantly, it should have established that the use of these tools is not having significant impacts, individually or cumulatively, before proposing larger and broader authorities with even greater potential impacts.

Unfortunately, the proposed rule does not appear to have been developed as a result of any of this rational analysis. Indeed, the preamble and proposed rule do not mention or cite to any kind of analysis of existing authorities that the agency undertook prior to issuing the proposed rule, indicating that the agency does not have a rational basis for its rulemaking. 5 U.S.C. § 706(2)(A).

[125] Importantly, we do not agree with the Forest Service that many of these existing authorities are appropriate. Indeed, any authority or process that deprives the public of a meaningful voice in the management of their public lands, and an avenue to administratively resolve disputes prior to judicial review, is undemocratic by definition.

To conclude, if this rulemaking were about working collaboratively to protect communities from wildfire risk, then it would be unnecessary. Congress has already given the agency the authority to address fuels, wildfire risk, and restoration (e.g., the Collaborative Forest Landscape Restoration Act) at scale on national forest system lands, but this authority is underutilized or not utilized at all by some units. Indeed, if the agency proceeds with this rulemaking, those authorities will never be fully utilized, because the new authorities would be broader and would have fewer strings attached. The breadth of the new authorities, indeed, show what this rulemaking is really about: expanding line officer discretion to develop projects, including projects with potentially significant impact, but eliminating or reducing the public participation and analysis that NEPA requires for the exercise of such discretion.

VIII. The Forest Service Should Retain and Strengthen Procedural Protections for Inventoried Roadless Areas and Potential Wilderness Areas, Including as Classes of Actions Normally Requiring Preparation of an EIS and Resource Conditions for Purposes of Determining Extraordinary Circumstances.

The Forest Service's NEPA regulations currently provide important and necessary procedural protections for roadless and wilderness-eligible lands. First, the regulations list "inventoried roadless areas" (IRAs) and "potential wilderness areas" (PWAs) as resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS.[126] Second, the regulations include "proposals that would substantially alter the undeveloped character of an [IRA] or a [PWA]" within the "classes of actions normally requiring [EISs]."[127]

We strongly object to the proposed rule's narrowing or elimination of these two important procedural safeguards. As described below, these national forest wildlands possess exceptional ecological and social values that should continue to be recognized and carefully evaluated in the NEPA process. The Forest Service's incomplete and unsupported rationales for proposing to weaken procedural protections for these areas are arbitrary and capricious. The agency should retain and strengthen existing protections for IRAs, PWAs, and other roadless and wilderness-eligible areas.

A. Background.

Inventoried Roadless Areas (IRAs) are an administrative designation that applies to the undeveloped roadless lands protected under the Roadless Area Conservation Rule, 36 C.F.R. part 294. The Forest Service developed state-specific rules for Colorado and Idaho to protect inventoried roadless lands within those states, with those designated areas properly referred to as Colorado Roadless Areas and Idaho Roadless Areas, respectively.[128] Collectively, IRAs, Colorado Roadless Areas, and Idaho Roadless Areas provide significant ecological and social functions:

> [IRAs] provide large, relatively undisturbed blocks of habitat for a variety of terrestrial and aquatic wildlife and plants, including hundreds of threatened,

[126] 36 C.F.R. § 220.6(b)(1)(iv).
[127] *Id.* § 220.5(a)(2).
[128] 77 Fed. Reg. 39576 (July 3, 2012) (Colorado Roadless Rule); 73 Fed. Reg. 61456 (Oct. 16, 2008) (Idaho Roadless Rule).

> endangered, and sensitive species[,] . . . function as biological strongholds and refuges for a number of species, and . . . play a key role in maintaining native plant and animal communities and biological diversity.[129]

Potential Wilderness Area (PWA) is a term defined in the 2007 version of the Forest Service's land management planning handbook, Forest Service Handbook (FSH) 1909.12, ch. 70, addressing the wilderness evaluation process. However, the agency has been administratively identifying PWAs since at least the early 1990s.[130] In short, PWA is a term that has long been utilized to describe lands inventoried by the Forest Service and identified to have wilderness characteristics, making them suitable for potential future inclusion in the National Wilderness Preservation System. The 2015 version of the handbook, which corresponds with the 2012 planning rule, no longer uses the term PWA. The product of the Forest Service inventory and evaluation – often referred to as the "Chapter 70" process – is now called "areas that may be suitable for inclusion in the National Wilderness Preservation System." Some Forests may refer to areas identified under the new directives as "wilderness inventory areas," or WIAs. While areas inventoried under the 2012 planning rule are not referred to as PWAs, they are comparable to PWAs in terms of their social and environmental qualities. Similarly, areas referred to as "newly inventoried roadless areas" like those in the White Mountain National Forest were also delineated for the same undeveloped characteristics. Regardless of label, these areas encompass lands with wilderness characteristics that would be suitable for designation as wilderness by Congress – or for designation as recommended wilderness or other special management in a forest plan. Furthermore, under NEPA, it is the on-the-ground facts about an area that matter, not its administrative label. If an undeveloped area would be eligible for inventory, even if it has not previously been inventoried under Chapter 70, it is still entitled to the same consideration in the NEPA process. *E.g.*, *Lands Council v. Martin*, 529 F.3d 1219, 1230 (9th Cir. 2008).

Scientists, the public, the Forest Service, and federal courts have long recognized the need for enhanced procedural scrutiny under NEPA of actions that would threaten the undeveloped character and associated ecological and social values of IRAs, PWAs, WIAs, and other roadless and wilderness-eligible areas.

1. Roadless areas and their myriad ecological and social values warrant protection.

As the Forest Service has long recognized, undeveloped natural lands provide numerous ecological benefits. They safeguard biodiversity, enhance ecosystem representation, facilitate connectivity, and provide high-quality or undisturbed water, soil, and air resources.[131] They

---

[129] Roadless Area Conservation Rule, Final Environmental Impact Statement, Summary, p. 17.

[130] *See* FSH 1909.12 WO Amendment effective 8/3/92, Chapter 7: Wilderness Evaluation ("This chapter describes the process for identifying and evaluation *potential wilderness* in the National Forest System" (emphasis added)).

[131] USDA Forest Service 2016; Loucks *et al.* 2003; USDA Forest Service 2001; Crist *et al.* 2005; Wilcove 1990; The Wilderness Society 2004; Strittholt and DellaSala 2001; DeVelice and Martin 2001, Anderson *et al.* 2012; DellaSala *et al.* 2011 (full references to scientific articles cited in this section can be found in our ANPR comments).

also serve as ecological baselines to facilitate better understanding of our impacts to other landscapes.[132]

Forest Service roadless lands, in particular, are heralded for their conservation values. Those values are described at length in the preamble of the 2001 Roadless Area Conservation Rule[133] and in the Final Environmental Impact Statement (FEIS) for the Rule.[134] They include: high-quality or undisturbed soil, water, and air; sources of public drinking water; diverse plant and animal communities; habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land; primitive, semi-primitive non-motorized, and semi-primitive motorized classes of dispersed recreation; reference landscapes; natural appearing landscapes with high scenic quality; traditional cultural properties and sacred sites; and other locally identified unique characteristics (e.g., uncommon geological formations, unique wetland complexes, exceptional hunting and fishing opportunities). As the Forest Service has recently summarized in its science-based assessments, roadless areas:

> provide large, relatively undisturbed blocks of habitat for a variety of terrestrial and aquatic wildlife and plants, including hundreds of threatened, endangered, or sensitive species[,] . . . function as biological strongholds and refuges for a number of species, and . . . play a key role in maintaining native plant and animal communities and biological diversity.[135]

Numerous articles in the scientific literature similarly recognize the contribution of roadless and undeveloped lands to biodiversity, connectivity, and conservation reserve networks. For example, Loucks *et al.* (2003) examined the potential contributions of roadless areas to the conservation of biodiversity, and found that more than 25% of Inventoried Roadless Areas (IRAs) are located in globally or regionally outstanding ecoregions[136] and that 77% of IRAs

---

[132] Arcese and Sinclair 1997.
[133] 66 Fed. Reg. 3243, 3245-47 (Jan. 12, 2001).
[134] Final Environmental Impact Statement, Vol. 1, 3–3 to 3–7, *available at* http://www.fs.usda.gov/roaddocument/roadless/2001roadlessrule/finalruledocuments.
[135] Carson National Forest, *Final Assessment Report of Ecological/Social/Economic Sustainability Conditions and Trends*, at 485 (September 2015), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd475212.pdf.
[136] Loucks *et al.* utilized an ecosystem ranking system developed by Ricketts *et al.* (1999):

> Ricketts *et al.* (1999) classified the biological importance of each ecoregion based on species distribution, i.e., richness and endemism, rare ecological or evolutionary phenomena such as large- scale migrations or extraordinary adaptive radiations, and global rarity of habitat type, e.g., Mediterranean-climate scrub habitats. They used species distribution data for seven taxonomic groups: birds, mammals, butterflies, amphibians, reptiles, land snails, and vascular plants (Ricketts *et al.* 1999). Each category was divided into four rankings: globally outstanding, high, medium, and low. The rankings for each of the four categories were combined to assign an overall biological ranking to each ecoregion. Ecoregions whose biodiversity features were equaled or surpassed in only a few areas around the world were termed "globally outstanding." To earn this ranking, an ecoregion had to be designated "globally outstanding" for at least one category. The second-

have the potential to conserve threatened, endangered, or imperiled species. Talty *et al.* (*in revision*) looked at the degree of human modification, or "wildness" – a finite resource that cannot be regained once lost – and compared mean wildness data for all IRAs to wildness across the contiguous U.S. They found that of 2,348 IRAs in the lower 48, 96% are wilder than half of the entire contiguous U.S., with 21% of IRAs in the top 10% of wildest places in the lower 48. Arcese and Sinclair (1997) highlighted the contribution that IRAs could make toward building a representative network of conservation reserves in the United States, finding that protecting those areas would expand eco-regional representation, increase the area of reserves at lower elevations, and increase the number of large, relatively undisturbed refugia for species. Crist *et al.* (2005) looked at the ecological value of roadless lands in the Northern Rockies and found that protection of national forest roadless areas, when added to existing federal conservation lands in the study area, would: (1) increase the representation of virtually all land cover types on conservation lands at both the regional and ecosystem scales, some by more than 100%; (2) help protect rare, species-rich, and often-declining vegetation communities; and (3) connect conservation units to create bigger and more cohesive habitat "patches."

Roadless lands are also responsible for higher quality water and watersheds. Recent estimates are that 48 million Americans receive their drinking water from IRAs.[137] Anderson *et al.* (2012) assessed the relationship of watershed condition and land management status, and found a strong spatial association between watershed health and protective designations. DellaSala *et al.* (2011) found that undeveloped and roadless watersheds are important for supplying downstream users with high-quality drinking water, and that developing those watersheds comes at significant costs associated with declining water quality and availability. The authors recommend a light-touch ecological footprint to sustain healthy watersheds and the many other values that derive from roadless areas.

Federal land management agencies recognize that protecting and connecting undeveloped areas is an important action agencies can take to enhance climate change adaptation. For example, the Forest Service National Roadmap for Responding to Climate Change establishes that increasing connectivity and reducing fragmentation are short- and long-term actions the agency should take to facilitate adaptation to climate change.[138] The National Park Service also identifies connectivity as a key factor for climate change adaptation, along with establishing "blocks of natural landscape large enough to be resilient to large-scale disturbances and long-term changes."[139] The agency states:

> The success of adaptation strategies will be enhanced by taking a broad approach that identifies connections and barriers across the landscape.

---

highest category, or continentally important ecoregions, were termed "regionally outstanding," followed by "bioregionally outstanding" and "nationally important" (Ricketts *et al.* 1999).

[137] Talty, M.J., K. Mott Lacroix, G.H. Aplet, and R.T. Belote. *In revision*. The conservation value of Inventoried Roadless Areas. *Ecosphere* XX: xxx-xxx (attached).
[138] USDA Forest Service 2011b.
[139] National Park Service, Climate Change Adaptation webpage, http://www.nps.gov/subjects/climatechange/adaptation.htm (last visited Dec. 20, 2016).

> Networks of protected areas within a larger mixed landscape can provide the highest level of resilience to climate change.[140]

Similarly, the Climate Adaptation Strategy adopted by a partnership of governmental agencies including the U.S. Fish and Wildlife Service calls for creating an ecologically connected network of conservation areas.[141] The Forest Service's 2012 planning rule sanctions this reserve design and landscape connectivity approach, requiring the Forest Service to formulate "plan components, including standards and guidelines, to maintain or restore [the] structure, function, composition, and connectivity" of terrestrial and aquatic ecosystems and watersheds, taking into account stressors such as climate change. However, with only a dozen or so forests revising their plans under the 2012 rule, consideration of the importance of roadless areas for climate adaptation, reserve design, and landscape connectivity will need to be accomplished piece-meal via project design and NEPA analysis for years to come. Forest Service roadless areas play a key role in accomplishing these large-landscape protection objectives, with IRAs contributing to the size and connectedness of protected areas such as National Parks and Wilderness.[142]

*Un*inventoried roadless areas often provide the same values and deserve the same protection as inventoried areas. Again, it is not the areas' labels, but the facts on the ground that matter. A recent study of the uninventoried "Mountain Treasures Areas" in North Carolina revealed that nearly all of them ranked more highly in biodiversity than 95% of IRAs, and over half of them had a wildland conservation score greater than 95% of all

---

[140] *Id*. *See also* USDOI National Park Service (2010) (Objective 6.3 of agency's Climate Change Response Strategy is to "[c]ollaborate to develop cross-jurisdictional conservation plans to protect and restore connectivity and other landscape-scale components of resilience").

[141] National Fish, Wildlife and Plants Climate Adaptation Partnership 2012. Relevant goals and strategies include:

> Goal 1: Conserve habitat to support healthy fish, wildlife, and plant populations and ecosystem functions in a changing climate.
>
> > Strategy 1.1: Identify areas for an ecologically-connected network of terrestrial, freshwater, coastal, and marine conservation areas that are likely to be resilient to climate change and to support a broad range of fish, wildlife, and plants under changed conditions.
> >
> > Strategy 1.2: Secure appropriate conservation status on [high priority areas] to complete an ecologically- connected network of public and private conservation areas that will be resilient to climate change and support a broad range of species under changed conditions.
> >
> > Strategy 1.4: Conserve, restore, and as appropriate and practicable, establish new ecological connections among conservation areas to facilitate fish, wildlife, and plant migration, range shifts, and other transitions caused by climate change.

[142] Talty *et al. in revision*. Finding that IRAs contribute to a 60% decrease in isolation of protected areas. Without IRAs, the average nearest neighboring protected area is 31.3 kilometers; with IRAs, the average nearest neighboring protected area is 12.5 kilometers.

IRAs.[143] Many of the Mountain Treasures Areas have now been included in the Chapter 70 inventory for the Nantahala-Pisgah's ongoing plan revision, but many similar uninventoried areas on other Forests remain without any administrative protection or recognition, despite their conservation significance and vulnerability to development with timber harvest and associated roadbuilding.

2. The Forest Service has long provided procedural protections for roadless areas.

CEQ regulations require agencies to promulgate "[s]pecific criteria for and identification of those typical classes of action: (i) [w]hich normally do require environmental impact statements."[144] Since at least 1992, the Forest Service has complied with this requirement by including unroaded and undeveloped areas among the classes of actions normally requiring an EIS. While the Forest Service has periodically revised its policies in response to various factors, it has never weakened its procedural protections for unroaded lands. Far from it, each subsequent iteration of the agency's NEPA regulations have resulted in stronger protections for roadless areas. This has paralleled developments in public opinion and scientific consensus, both of which favor increased protections for these essential areas.

The Forest Service's NEPA regulations have long recognized the importance of providing additional procedural scrutiny for projects in roadless and other undeveloped areas. Indeed, the agency first identified actions occurring in roadless areas as an extraordinary circumstance making application of a CE inappropriate nearly thirty-five years ago, in 1985.[145] The agency further expanded protections for roadless areas in its 1992 NEPA rule, where it identified "proposals that would substantially alter the undeveloped character of roadless areas as a class of actions normally requiring [an EIS]."[146] The Forest Service

---

[143] Belote and Irwin, *Quantifying the National Significance of Local Areas for Regional Conservation Planning: North Carolina's Mountain Treasures*, published in LAND (2017) (attached).
[144] 40 C.F.R. § 1507.3(b)(2)(i).
[145] *See* 50 Fed. Reg. 26081 (June 24, 1985) ("In unusual circumstances, an action that normally could be categorically excluded may have a significant environmental effect. Unusual circumstances might include areas involving threatened and endangered species; critical habitat; floodplains; wetlands; and specially designated areas, such as wilderness, wilderness study areas, or roadless areas designated for further planning.").
[146] The 1992 rule stated:

> *Class 3:* Proposals that would substantially alter the undeveloped. character of an inventoried roadless area of 5,000 acres or more (FSH 1909.12). Examples include;
>
> a. Constructing roads and harvesting timber in a 56,000-acre inventoried roadless area where the proposed road and harvest units impact 3,000 acres in only one part of the roadless area.
>
> b. Constructing or reconstructing water reservoir facilities in a 5,000-acre unroaded area where flow regimens may be substantially altered.

explained that it was implementing these protections in response to "the increased concern people have expressed regarding the environmental effects of actions within inventoried roadless areas."[147]

Despite these important procedural protections, logging and road-building remained rampant in roadless areas throughout the 1990s and it became increasingly clear that more substantive protections were warranted to preserve remaining roadless areas and their myriad ecological and social benefits. To that end, the Forest Service promulgated the Roadless Area Conservation Rule on January 12, 2001.[148] The Roadless Rule generally prohibits road building and commercial logging across nearly 59 million acres of designated "Inventoried Roadless Areas" or "IRAs." While the Roadless Rule provided critical and much-needed protections, it did not represent a panacea to the threats facing roadless areas. The Rule contains exceptions to the prohibition on road building and logging[149] and does not regulate other intensive activities such as motorized recreation, trail construction, mineral exploration activities, parking lots, right-of-way clearing, and certain restoration projects that can diminish the undeveloped character of IRAs. The Colorado and Idaho Roadless Rules contain even more exceptions for mining and other activities.[150] Despite these limitations, the Roadless Rule enjoys broad public support, including from 75% of Americans in a 2019 poll.[151]

Recognizing the ongoing and increased need for scrutiny of proposed actions in IRAs, the Forest Service's 2008 NEPA rule – which is currently in place – further strengthened procedural protections for IRAs by eliminating the acreage requirement included in the 1992 rule and adding PWAs.[152] The current regulatory language reads:

---

c. Approving a plan of operations for a mine which would cause considerable surface disturbance over 700 acres in a 10,000 acre roadless area.

57 Fed. Reg. 43125, 43200 (Sept. 18, 1992).

[147] 57 Fed Reg. at 43182 ("The majority of the 68 comments received on this chapter addressed the classes of actions requiring EISs listed in proposed section 20.6. Some reviewers said that considerations of proposed actions in areas with wilderness potential and larger than 5,000 acres should require an EIS. Others said that the acreage criterion was too small or totally inappropriate. The direction in [the Proposed Rule] states that a proposed action would have to "substantially alter the undeveloped character of an inventoried roadless area of 5,000 acres or more" to require an EIS. This direction allows the Responsible Official, with appropriate public involvement, to determine whether or not an EIS would be required for a specific proposed action. The area criterion is intended to alert agency officials of the increased concern people have expressed regarding the environmental effects of actions within inventoried roadless areas greater than 5,000 acres. An action within a roadless area less than 5,000 acres could also require an EIS, if the proposal may result in significant environmental effects.").

[148] 66 Fed. Reg. 3243 (Jan. 12, 2001) (codified at 36 C.F.R. part 294).

[149] 36 C.F.R. §§ 294.12(b) & 294.13(b).

[150] *See, e.g.*, 36 C.F.R. §§ 294.23 & 294.25(e)(1) (Idaho Rule exceptions); 36 C.F.R. §§ 294.43(c)(1) & 294.46 (Colorado Rule exceptions).

[151] *See* The Pew Charitable Trusts *U.S. Public Lands Roadless Rule Survey Memo Report* (March 2019) (attached).

[152] 73 Fed. Reg. 43084 (July 24, 2008).

> (2) Class 2: Proposals that would substantially alter the undeveloped character of an inventoried roadless area or a potential wilderness area. Examples include but are not limited to:
> (i) Constructing roads and harvesting timber in an inventoried roadless area where the proposed road and harvest units impact a substantial part of the inventoried roadless area.
> (ii) Constructing or reconstructing water reservoir facilities in a potential wilderness area where flow regimens may be substantially altered.
> (iii) Approving a plan of operations for a mine that would cause considerable surface disturbance in a potential wilderness area.[153]

Notably, the 2008 rule removed any size constraints on the affected IRA to address concerns that the procedural protections for roadless areas did not go far enough to protect this crucial resource:

> Acreages were removed from the Class 2 examples in the proposed rule section 220.5(a) in response to concerns that the examples of actions for which EISs would normally be required represent extreme cases. The word "substantial" replaces the acreage in the first example (220.5(a)(i)) in the final rule to be consistent with the description of Class 2. The following new language has been included in the final rule at section 220.5(a): "Examples include but are not limited to:" To emphasize that the stated examples are not all-inclusive. The Department feels that the examples reflect Forest Service experience implementing NEPA and provide the context for each class.[154]

With respect to the addition of PWAs to the classes of actions normally requiring an EIS, the Forest Service reasoned that once the PWA inventories were completed, the identification of PWAs would be "a more contemporary inventory than the previously-conducted roadless area inventory."[155] In other words, because IRAs are based on inventories conducted often decades ago, the mandatory inventory to identify undeveloped, wilderness-quality lands as part of land management planning provides important contemporary information and often encompasses lands not included in earlier inventories (due to, for example, changes on the ground or acquisition of private inholdings). The 2008 rule also added PWAs to the list of resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant an EA or EIS.[156]

The current requirement to prepare an EIS for proposals that would substantially alter the undeveloped character of an IRA provides a critical procedural analogue to the substantive protections of the Roadless Rule. Those procedural protections are not redundant or unnecessary and instead provide important procedural safeguards where a proposed project may impact the undeveloped character of an IRA. As described further below, Forest Service data shows that such projects are often authorized in IRAs. Thus, promulgation of the Roadless Rule did not alleviate the need for additional procedural scrutiny of projects occurring in IRAs, and, in many ways, strengthened the need for it to ensure that projects

---

[153] 36 C.F.R. § 220.5(a)(2).
[154] 73 Fed. Reg. at 43089.
[155] *Id.*
[156] *Id.* at 43084.

comply with the Rule's conservation requirements and that the public is able to participate in a meaningful manner.

The requirement to presumptively prepare an EIS for projects that would substantially alter the undeveloped character of an IRA also represents part of a coherent regulatory scheme designed to maintain roadless areas in their undeveloped and natural state. This scheme is multifaceted and relies on necessary procedural protections to ensure that the letter and spirit of the Roadless Rule(s) are upheld. These procedural protections include the current NEPA regulations which require the presumptive preparation of an EIS, as well as listing IRAs and PWAs as resource conditions for purposes of determining whether extraordinary circumstances preclude use of a CE.[157] Collectively, these provisions represent the evolution of a trend towards increased scrutiny of proposed activities within roadless areas, with the Forest Service consistently strengthening its commitment to take a hard look at actions that may degrade these essential wildlands since 1985.

3. Courts have long recognized the need for additional procedural scrutiny of projects in roadless areas.

Federal courts have long held that the unique attributes of roadless areas have independent environmental significance that warrant enhanced scrutiny under NEPA and that intensive activities in unroaded areas generally have significant, irreversible effects on those unique attributes. In this way, the courts have acknowledged the same truth as the Forest Service – that unroaded areas have inherent values and that any activity likely to diminish those values should by fully and thoroughly examined by the agency and the interested public.

In a seminal case, *Smith v. U.S. Forest Service*, the Ninth Circuit held that the Forest Service improperly failed to consider the impact of a proposed timber sale on a more than 6,000-acre roadless parcel of land in the Colville National Forest.[158] The court held that "the decision to harvest timber on a previously undeveloped tract of land is an irreversible and irretrievable decision which could have serious environmental consequences." *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1078 (9th Cir. 1994) (internal quotations and citations omitted). This was true even where the lands in question had previously been released for non-wilderness uses. The court further held "that the agency's obligation to take a 'hard look' at the environmental consequences of the proposed sale and consider a no-action alternative require it, at the very least, to acknowledge the existence of the [greater than] 5,000 acre roadless area." *Id.* at 1079. Such activity, would, by its nature, substantially alter the undeveloped character of the land. Accordingly, the Ninth Circuit held that the agency failed to comply with NEPA because it did not afford adequate procedural scrutiny prior to approving an intensive activity in a roadless area.

In *Lands Council v. Martin*, the Ninth Circuit affirmed *Smith* and held that logging in roadless areas is *per se* environmentally significant. Like *Smith*, *Martin* involved a claim that the agency violated NEPA by failing to consider the impact of a proposed intensive activity (there a post-fire salvage logging operation) on a roadless expanse comprised of both IRAs and un-inventoried roadless areas. The *Martin* court held that the undeveloped quality of IRAs (and uninventoried roadless areas) is itself of independent environmental significance:

---

[157] 36 C.F.R. § 220.6(b)(1)(iv).

[158] The parcel of land was comprised of 4,246 acres of uninventoried roadless land, as well as approximately 2,000 acres of inventoried roadless land.

> In *Smith*, we held that there are at least two separate reasons why logging in roadless areas is environmentally significant, so that its environmental consequences must be considered. First, roadless areas have certain attributes that must be analyzed. Those attributes, such as water resources, soils, wildlife habitat, and recreation opportunities, possess independent environmental significance. Second, roadless areas are significant because of their potential for designation as wilderness areas under the Wilderness Act of 1964....

Lands Council v. Martin, 529 F.3d 1219, 1230 (9th Cir. 2008).

The current regulatory requirement to prepare an EIS where a project would substantially alter the undeveloped character of an IRA is consistent with this line of cases finding that agencies must take a hard look at the impacts of their proposals to the independently significant ecological and social values inherent in our National Forest roadless areas. As Congress has explicitly recognized, the "stock" of inventoried lands that may one day be added to the National Wilderness Preservation System is finite, and the importance of those lands will only continue to grow as population pressures increase.[159]

4. Agencies must provide reasoned explanations for changes in position.

Under the Administrative Procedure Act, an agency action that constitutes a policy change is arbitrary and capricious where the agency fails to provide a reasoned explanation for the change. The requisite explanation requires acknowledgment of the change, a showing that there are good reasons for the new policy, and an examination of the facts and circumstances that underlay or were engendered by the prior policy. *E.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (*citing FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) ("When an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.' But the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.' In explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.' 'In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'")[160]

As explained below, the proposals to eliminate actions that would substantially alter the undeveloped character of an IRA or PWA from the classes of actions normally requiring preparation of an EIS and to remove the "extraordinary circumstances" safeguard from nearly all PWAs constitute significant changes in position for which the Forest Service has provided no reasoned explanation.

---

[159] *E.g.*, Eastern Wilderness Areas Act, Public Law No. 93-622 (1975).

[160] The requirement that the agency provide a rational explanation for its new policy applies equally to the entirety of its proposed rule, not just to its new approach to roadless areas discussed in this section.

B. The Forest Service's Rationale for Removing Proposals that Would Substantially Alter the Undeveloped Character of an IRA from Classes of Actions Normally Requiring Preparation of an EIS is Arbitrary and Capricious.

The Forest Service's proposed rule would revise the list of classes of actions normally requiring an EIS by removing actions that would substantially alter the undeveloped character of an IRA.[161] The agency offers a single sentence as its rationale for this significant change in agency position and reversal of a decades-long trend of strengthening protections for roadless areas:

> 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.[162]

This cursory explanation in no way provides the reasoned justification required by law – particularly where the change in position would unwind a key component of the cohesive regulatory scheme developed over decades to ensure adequate substantive and procedural protections for IRAs - including adoption of the current provision in 2008, 7 years after promulgation of the Roadless Rule.

As an initial matter, the Forest Service's rationale is incomplete. It states that the proposal is "in part" due to the protections offered by the Roadless Rule, but makes no effort to explain what, if anything, forms the remainder of its justification. To better understand the agency's rationale, The Wilderness Society (TWS) submitted a Freedom of Information Act (FOIA) request to the Forest Service on June 28, 2019 for "[a]ll information relied upon to support the proposed elimination of Inventoried Roadless Areas from the classes of actions normally requiring environmental impact statements and any records or correspondence regarding that proposal."[163] The agency's statutory deadline to provide a final determination on the request was July 26, 2019. As of the comment deadline, TWS has received no responsive records. The agency's failure to provide a timely response to the request has further frustrated the public's ability to review and comment on important information related to the proposed rule.

In addition to being incomplete, the agency's rationale is arbitrary and capricious because it falls far short of the reasoned explanation that the law requires. The Forest Service provides no support for its claim that the Roadless Rule and state specific roadless rules address "the activities that have the greatest potential to affect the roadless character of these lands." In fact, the agency's own data shows otherwise, with intensive activities routinely proposed and approved in IRAs, either through exceptions to the Roadless Rule, or where the Rule does not govern the proposed activity. TWS obtained data from Regions 1, 3, 4, and 6 in response to January 31, 2019 FOIA requests for tracking charts, lists, or logs of all proposed and/or approved projects in IRAs.[164] An excel spreadsheet compiling and summarizing the FOIA

---

[161] 84 Fed. Reg. at 27549. The parallel proposal to remove PWAs is addressed in the following section.
[162] *Id.* (emphasis added).
[163] Appendix 6, "Projects in IRAs FOIA Review," attached.
[164] Identical requests to the U.S. Department of Agriculture (the Department has not provided a tracking number), the Forest Service Washington Office (agency tracking no. 2019-FS-

responses we received is attached to these comments as Appendix 6.[165] The data we analyzed from the agency includes at least 423 projects across the four regions, dating back to 2009 and impacting over a half-million acres of IRAs. While not comprehensive, the data in the spreadsheet demonstrates that activities with potential to affect roadless character – including timber harvest and road-building activities that by their nature substantially alter the undeveloped character of IRAs – are routinely proposed and approved in IRAs, in spite of the important protections of the Roadless Rule. According to our analysis of the data Regions 1, 3, 4, and 6 provided in response to our FOIA request, significant acreage of IRAs is impacted by projects that include timber harvest, road construction, and other intensive activities:

- In Region 1 forests in Montana, 72/112 projects (64%) involved timber harvest that impacted nearly 43,000 acres of IRAs, with an average harvest area in IRAs of nearly 600 acres. Another 10 projects (9%) involved road construction, reconstruction, or maintenance, totaling over 55 miles.[166]

- In Regions 1 and 4 forests in Idaho, 87/196 projects (44%) involved timber harvest that impacted nearly 87,000 acres of Idaho Roadless Areas, including 61 projects affecting nearly 12,000 acres with commercial timber harvest. Another 36 projects (18%) involved road construction or reconstruction, totaling over 103 miles.

- In Region 3, 6 projects utilizing Roadless Rule exceptions affected over 54,000 acres of IRAs.[167]

- In Region 6, 11/56 projects (20%) utilized Roadless Rule exceptions and affected 29,085 acres of IRAs.[168]

Indeed, according to a Forest Service chart provided by Region 4 to The Wilderness Society separately from the FOIA response, in Utah alone, the agency has utilized Roadless Rule exceptions to authorize projects impacting undeveloped character 82 times since 2013.[169] These include, for instance, the recently authorized "Canyons Project" that would include logging of up to 15,490 acres and construction of 1,418 miles of haul roads and skid trails across eight IRAs on the Manti-La Sal National Forest, subject to a highly questionable application of the Roadless Rule's exception for logging to maintain or restore the characteristics of ecosystem composition and structure.[170] Regardless of whether the

---

WO-02099-F), Region 2 (agency tracking no. 2019-FS-R2-01917-F), Region 5 (agency tracking no. 2019-FS-R5-01938), and Region 10 (agency tracking no. 2019-FS-WO-02099-F) remain unanswered over six months after they were submitted. This data should be provided to TWS and the public expeditiously, included in the project record, and fully analyzed and considered by the Forest Service.

[165] We were unable to fully analyze the FOIA data from Region 4 forests outside of Idaho by the comment deadline, due to non-standard features in a Forest Service service chart provided to us, so included in Appendix 6.

[166] Appendix 6, "Projects in IRAs FOIA Review" (sheet entitled "R1 USFS Chart Montana").

[167] *Id.* (sheet entitled "Region 3").

[168] *Id.* (sheet entitled "Region 6").

[169] *See* Appendix 7, "Projects in Utah IRAs" (chart of Projects in Utah IRAs – summary table from R4).

[170] *See* Canyons Project project page, *available at* https://www.fs.usda.gov/project/?project=52899; *see also* Brian Maffly, "Forest Service

Roadless Rule exception was properly applied, the vast scale and scope of the intensive restoration activities proposed in the Canyons Project will *per se* substantially impact the undeveloped character of a significant acreage and number of IRAs. Regardless of the restoration merits of the project, when it is complete, stumps will remain where trees once stood, and skid trails will mark a previously undeveloped landscape. Yet the Forest Service only prepared an EA, which did not even acknowledge the current requirement to normally prepare an EIS for projects that substantially impact the undeveloped character of an IRA, much less explain why that provision was not triggered.

Just because a project may be subject to a Roadless Rule exception does *not* mean that it would not substantially impact the undeveloped character of the IRA. On the contrary, many restoration and other projects substantially impact the undeveloped character of the affected IRAs. As just one example, a recent purported restoration project and associated timber sale on an IRA in the Klamath National Forest resulted in large old-growth trees being cut within twenty feet of the Pacific Crest National Scenic Trail, as depicted in the following photos (credit Luke Ruediger, Klamath Forest Alliance).[171]

unveils plan for Utah's largest logging project in years to clear out beetle-ravaged trees," Salt Lake Tribune (June 4, 2019), https://www.sltrib.com/news/environment/2019/06/04/forest-service-unveils/ (attached).

[171] *See* Seiad-Horse Risk Reduction Project project page, *available at* https://www.fs.usda.gov/project/?project=52933. In fact, this project is a post-fire salvage logging project located in a Late-Successional Reserve and is under judicial review in the Ninth Circuit Court of Appeals.

These sorts of projects affecting the undeveloped character of IRAs are not unique to western forests. For instance, the Green Mountain National Forest recently authorized its "Early Successional Habitat Creation Project" via EA/FONSI, which authorizes logging across 4,000 acres and nearly 10 miles of new roads in 8 different IRAs, including some that have been proposed for Wilderness designation.[172]

Our review of Forest Service data for projects in IRAs suggests that the agency routinely ignores the current provision at section 220.5(a)(2) to presumptively prepare an EIS for intensive projects in IRAs. For instance, among the 6 projects in IRAs that Region 3 provided in its FOIA response, the Forest Service did not prepare a single EIS; in Region 6, it prepared an EIS for only 6 out of 56 projects – about 10%; and in a subset of projects reviewed from Region 1, it prepared an EIS for 7 out of 54 projects – about 13%.[173] For the remainder of projects in IRAs authorized via CE or EA/FONSI – including those involving road-building and logging – we did not find any explicit references to section 220.5(a)(2) or explanation of why the requirement was not triggered. In short, it appears that there is widespread failure to comply with the existing requirement to prepare an EIS for projects that would substantially impact the undeveloped character of an IRA.

The Forest Service should prepare a data-driven analysis of its current compliance with section 220.5(a)(2). Such an analysis is a necessary prerequisite to any proposal to eliminate the provision, and we anticipate that it would show a need to improve on compliance with the current regulation. To that end, the Forest Service's NEPA policies should require the

[172] *See* Early Successional Habitat Creation Project project page, *available at* https://www.fs.usda.gov/project/?project=53629.
[173] *See* Appendix 6, "Projects in IRAs FOIA Review" (sheets "Region 3," "Region 6," and "R1 Separate from USFS Chart").

responsible official to include in any scoping notice: (a) if the proposed action is located in an IRA, (b) the acreage potentially affected, (c) any anticipated use of exceptions to the Roadless Rule, and (d) a preliminary determination of whether the project would substantially alter the undeveloped character of the IRA. This would ensure that line officers are considering potential impacts to roadless values early in the environmental analysis and decision-making process and allow the public to weigh in on the specific issue, thereby increasing compliance with necessary procedural protections for IRAs.

Forest Service data also shows that public engagement and robust environmental analysis in such projects is crucial in project development and decision-making. For instance, the Medicine Bow National Forest recently withdrew its draft Record of Decision for its Landscape Analysis Vegetation (LaVA) Project, which would have authorized logging across 123,000 acres - comprising 54% - of 25 different IRAs. Public input throughout the EIS process provided crucial information regarding the numerous significant impacts to IRAs and related forest resources that ultimately informed the Forest Service's decision to withdraw the draft ROD, in part "to address citizen concerns."[174] The Forest Service has even proposed activities in IRAs without realizing that it was doing so. For example, the Cherokee National Forest proposed to add an unauthorized historical route to the road system within an IRA in the Stoney Creek project, but failed to disclose that fact in the EA.[175] There, public involvement prevented an impact that the Forest Service would have overlooked entirely.

Nor has the Forest Service even attempted to show if or how the facts and circumstances that led to increased procedural protections for IRAs in the 1992 and 2008 rulemakings have changed such that those protections are no longer warranted or necessary. To the extent there are changed circumstances, they weigh in favor of retaining and strengthening those protections. First, the importance of protecting IRAs as components of a reserve network of large, connected, undeveloped landscapes has increased significantly as climate change intensifies. Second, the significant number and scope of projects in IRAs – and the trend towards liberal use of Roadless Rule exceptions for restoration projects that include logging and other elements that degrade the undeveloped character of IRAs – requires additional scrutiny by the public, scientists, and agency decisionmakers of the impacts of such projects. Third, approval of exceptions to the Roadless Rule is increasingly ad hoc and decentralized following a 2012 delegation of the authority from the U.S. Department of Agriculture to the Chief of the Forest Service, and a further delegation from the Chief to Regional Foresters in October 2018.[176] The trend towards decentralization is likely to lead to more inconsistent application of the exceptions, making public scrutiny and environmental analysis of projects in IRAs increasingly important. And finally, the Roadless Rule itself is under significant threat – including through another Forest Service rulemaking to develop an Alaska-specific roadless rule focused on the Tongass National Forest,[177] as well as a pending petition by the

---

[174] *See* News Release, "Medicine Bow Landscape Vegetation Analysis Project to undergo clarification, new Draft Decision will be issued" (June 21, 2019), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd639815.pdf.
[175] See Environmental Assessment, Stony Creek Project (2013) (available at https://www.fs.usda.gov/project/?project=40528).
[176] *See* October 24, 2018 Memorandum to Regional Foresters, Station Directors, and WO Directors Re Approval of Exceptions to the 2001 Roadless Area Conservation Rule (attached).
[177] *See* Alaska Roadless Rule project page, *available at* https://www.fs.usda.gov/roadmain/roadless/alaskaroadlessrule.

State of Utah for another state-specific roadless rule.[178] Both efforts are designed to substantially reduce or even eliminate protections for IRAs.

Particularly in light of these factors, the current belt-and-suspenders approach of providing substantive protections through the Roadless Rule and procedural protections through the agency's NEPA policies is of critical importance, and the Forest Service's asserted rationale that the Roadless Rule renders unnecessary the current regulatory requirement to presumptively prepare an EIS is arbitrary, capricious, and unsupported by the record.

The Forest Service should abandon its proposal to remove actions that would substantially alter the undeveloped character of an IRA from the classes of actions normally requiring preparation of an EIS. Instead, the agency should focus on how to strengthen procedural protections for IRAs, starting with a data-driven analysis of agency compliance with the current section 220.5(a)(2). Given the widespread failure of the agency to even acknowledge the current regulatory requirement or explain in its EAs or FONSIs for projects in IRAs why the requirement to prepare an EIS was not triggered, the Forest Service's NEPA policies should require the responsible official to include in any scoping notice: (a) if the proposed action is located in an IRA, (b) the acreage potentially affected, (c) any anticipated use of exceptions to the Roadless Rule, and (d) a preliminary determination of whether the project would substantially alter the undeveloped character of the IRA. This would ensure that line officers are considering potential impacts to roadless values early in the environmental analysis and decision-making process and allow the public to weigh in on the specific issue. Consistent with our ANPR comments and the Forest Service's proposed revision to the list of resource conditions for determining whether extraordinary circumstances warrant an EA or EIS, the regulatory language for classes of actions normally requiring preparation of an EIS should also be clarified to include all roadless areas designated under 36 C.F.R. part 294, including Idaho and Colorado Roadless Areas.

C. The Proposals to Move Potential Wilderness Areas to the List of Congressionally Designated Areas for Purposes of Extraordinary Circumstances and to Eliminate PWAs from Classes of Actions Normally Requiring Preparation of an EIS are Arbitrary and Capricious.

The Forest Service proposes two significant changes with respect to procedural protections for Potential Wilderness Areas (PWAs). First, the proposed rule would move PWAs into a subcategory of "congressionally designated areas," thus eliminating the extraordinary circumstances safeguard for the vast majority of PWAs that are not congressionally designated.[179] The Forest Service does not explain the reason for or potential impact of this significant change. Second, similar to IRAs, the proposed rule would remove classes of actions that would substantially alter the undeveloped character of a PWA from the list of classes of actions normally requiring an EIS.[180] The agency offers a single sentence to explain this significant change: "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."[181] This

[178] *See* https://publiclands.utah.gov/current-projects/roadless-rule/.
[179] 84 Fed. Reg. at 27546 (proposed section 220.5(b)(1)(iii)).
[180] *Id.* at 27549 (proposed section 36 CFR § 220.7(a)).
[181] *Id.*

rationale is arbitrary, and the agency has failed to offer any reasoned explanation for its changed position.[182]

As described at length above, the term PWA is commonly understood to refer to *administratively* identified PWAs, which the Forest Service has been identifying since at least the early 1990s. By contrast, congressionally designated PWAs are extremely limited on National Forest System lands. A search of the U.S. public laws identified just one statute designating PWAs on Forest Service land, the 2009 Omnibus Public Lands Act, which designated two PWAs: the 349-acre Kimberling Creek PWA in the Jefferson National Forest and the 900-acre Roaring River PWA in the Mount Hood National Forest.[183] In both cases, the PWA designation was temporary and the areas were subsequently added to the National Wilderness Preservation System. Indeed, we are unaware of *any* congressionally designated PWAs on National Forest System lands at present. Thus, there are no statutory requirements in place regarding management of non-existent congressionally-designated PWAs, and the Forest Service's rationale that such hypothetical statutes eliminate the need for presumptive preparation of an EIS is arbitrary.

In contrast, administratively designated PWAs are ubiquitous and warrant the additional procedural scrutiny offered by the Forest Service's current NEPA regulations. PWA is not a vestigial term: numerous forests that conducted planning under the 2007 version of Chapter 70 or earlier policies have PWAs – and will continue to have them until their next plan revision. For instance, the Forest Service identified 378,229 acres of PWAs in a 2014 revised forest plan for the George Washington National Forest.[184] Those PWAs include 239,784 acres of IRAs, as well as an additional 138,445 acres of roadless, wilderness-quality lands that are not IRAs.[185] Until the plan is revised again, the Forest Service will manage the George Washington PWAs in accordance with the current plan, which allows a range of multiple-use activities that could impair the PWAs' wilderness characteristics. Indeed, the Forest Service recognized that the characteristics that make PWAs special "remain relevant to project-level planning," because even plans that *allow* development of PWAs do not *commit* to developing them, and appropriate analysis (including consideration of alternatives) is needed to avoid and mitigate the impacts of development.[186] Proposed projects in these areas should continue to receive heightened NEPA process and scrutiny: their largely undisturbed and sensitive character (the context for the proposed action) means that projects are more likely to have significant impacts.

---

[182] The Wilderness Society's June 28, 2019 FOIA request mentioned above also sought information relied upon to support the proposed revisions to regulatory language addressing PWAs. Given the lack of any meaningful explanation regarding PWAs in the proposed rule's preamble, the requested records are critical to the public's ability to review and comment on the proposal.

[183] *See* Pub. L. 111-11 §§ 1103 & 1202(c)(1).

[184] *See* George Washington National Forest Plan Revision FEIS, Appendix C– Potential Wilderness Area Evaluations, p. C-1, Nov. 2014 ("The PWA inventory includes 26 standalone potential areas and 11 potential additions to existing Wildernesses for a total of 37 areas containing 378,229 acres.").

[185] *See id.* at pp. C-2 to C-3.

[186] *See* USDA Forest Service, George Washington & Jefferson National Forests, Resolution of Appeal Agreement (July 22, 2015) (Exhibit 7).

The same is true for newly inventoried areas – "lands that may be suitable for inclusion in the National Wilderness Preservation System" – identified under the 2015 version of Chapter 70. Both the 2007 and 2015 processes were designed to capture similar environmental qualities. Thus, impacts to the areas – regardless of what they are called – will be similar in terms of context, with project-level impacts affecting those qualities likely to be significant. Notably, providing more robust forest plan direction – and corresponding programmatic NEPA analysis – for these wilderness-suitable lands can greatly streamline project-level NEPA analysis. For instance, forest plan allocation of lands included in the wilderness inventory to an appropriate management area with corresponding plan components designed to safeguard their wilderness characteristics is an efficient way to ensure that future project activities will not require additional EIS-level analysis. In other words, if the management allocation precludes activities that would substantially impact the particular area – taking into account its unique characteristics and values – then future projects consistent with the forest plan will not require further EIS-level analysis. If, on the other hand, the plan contemplates activities that might substantially impact the particular area, then further EIS-level analysis may be needed if and when such projects are proposed.

The Forest Service should abandon its proposal to remove classes of actions that would substantially alter the undeveloped character of a PWA and should retain PWAs and other wilderness-eligible lands in the list of resource conditions to be considered in determining whether extraordinary circumstances preclude use of a CE. In other words, regardless of the label used, activities that would substantially alter the character of wilderness-eligible lands should continue to be categorized as a class of actions normally requiring an EIS and as inappropriate for use of a CE. To accomplish that, the term PWA in the existing regulatory provisions should be revised to refer to "areas that the Forest Service has identified as potentially eligible for future inclusion in the National Wilderness Preservation System."

IX. The Promulgation of New Categorical Exclusions is Arbitrary and Capricious.

A. The Forest Service's Overall Approach to Developing the CEs is Arbitrary and Capricious.

Vastly broadening the kinds of activities that the Forest Service may categorically exclude from analysis and public input to include controversial and potentially harmful actions that the agency has previously understood could not be categorically excluded (such as ground-disturbing harvest more than 70 acres, in the case of live trees, and 250 acres, in the case of dead and dying trees) is arbitrary and capricious. The agency has failed to justify why the harms that it previously understood made larger categories inappropriate would be any different now. *See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, No. 18-1129, slip op. at 22 (D.C. Cir. Aug. 9, 2019) (holding FCC order was arbitrary and capricious where it swept away review that the Commission had previously concluded was necessary); *Organized Vill. of Kake v. U.S. Dep't of Agric*., 795 F.3d 956, 966–70 (9th Cir. 2015) *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005); *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009).

Identification of new CEs must comply with the requirements identified by the Ninth Circuit Court of Appeals in *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007). First, the Forest Service must conduct scoping to determine the range of potential issues and impacts related to the activities covered by the contemplated CE. See *id.* at 1027 ("The determination that a categorical exclusion was the proper path to take should have taken place after scoping,

reviewing the data call, and determining that the proposed actions did not have individually or cumulatively significant impacts.”). The Forest Service also must analyze whether the impacts of the actions encompassed by the CE will individually or cumulatively have a significant environmental impact. *See id*. at 1027-1028, 1026 (stating that the proper question is “whether the evidence supports the Forest Service’s determination that the identified category of actions in the [challenged] CE do not individually or cumulatively have a significant impact on the environment,” *and citing* Mandelker, NEPA Law & Litigation § 7:10 for the proposition that“[t]he effect of this method of defining categorical exclusions is to apply the same criteria for determining whether an impact statement is necessary to the categorical exclusion decision”).

The determination of significance must be made in light of the same context and intensity factors that are implicated in evaluating individual actions. *Bosworth*, 510 F.3d at 1030-1031. The agency cannot evade such analysis by asserting that the analysis of cumulative impacts is impractical or infeasible, because the use of a CE is improper where such impacts cannot practically or feasibly be assessed. *See id*. at 1028. Nor can the agency satisfy that obligation with conclusory assertions. *Id*. at 1030; *see also Heartwood, Inc. v. U.S. Forest Serv*., 73 F. Supp. 2d 962, 975 (S.D. Ill. 1999) (CE was arbitrary and capricious where “FS did not provide any rationale for why [the] magnitude of timber sales [under the CE] would not have a significant effect of the environment” and record lacked “any evidence … to support the [new increased] limit, except to refer to the FS’ expertise and prior experience with timber sales having ‘these characteristics.’”).

Further, any new CE must be written with sufficient specificity to distinguish between actions likely to have significant impacts and those properly covered within a CE. *Bosworth*, 510 F.3d at 1032-33 (“The Service must take specific account of the significant impacts identified in prior hazardous fuels reduction projects and their cumulative impacts in the design and scope of any future Fuels CE so that any such impacts can be prevented.”).

Despite our comments on the ANPR to the contrary, the proposed rule purports to create several new CEs and to expand the scope and scale of existing CEs, without adequately demonstrating that the proposed categories of actions do not individually or cumulatively have a significant effect on the human environment *and which have been found to have no such effect*. 40 C.F.R. § 1508.4. These changes are arbitrary and capricious for the following reasons.

B. The Forest Service does not have the administrative record to use mitigated FONSIs to justify the CEs.

The Forest Service argues that many or most of the projects currently analyzed using EAs can instead be approved with CEs because the agency routinely arrives at FONSIs for those projects. There are numerous methodological problems with this rationale.

1. Mitigation for past actions must be included as explicit limits on new CEs.

We are concerned that the Forest Service fails to appreciate the difference between an EA and a CE. It is true that most EAs result in the preparation of a decision notice and finding of no significant impact (DN/FONSI). However, these EAs and DN/FONSIs are appropriately categorized as “mitigated EAs and FONSIs:” that is, the Forest Service is able to justify its

finding of no significant impact (and therefore proceeds without preparing an EIS) only because it has employed mitigation measures (often dozens or more) to reduce the impact of the proposed action below the threshold of significance. In fact, at least one Forest has anticipated that *all* its vegetation management projects will be mitigated FONSIs: the Cherokee National Forest explains, "All timber harvest activities are analyzed in an environmental assessment where mitigation measures are included."[187]

CEs are defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. Mitigated EAs and DN/FONSIs are decidedly not such a category of action. In fact, these types of vegetation management projects may have an individual or cumulative effect on the environment, but those effects have been minimized to the point of non-significance by the utilization of mitigation measures. Had it not been for preparation of an EA, the measures may never have been developed in the first place. Site-specific mitigation measures are often added by Forest Service specialists during interdisciplinary project review, but they are also frequently developed through engagement with the public during preparation of the EA and/or consultation with the expert federal agencies, a process unlikely to occur with use of a CE under the proposed rule.

Because mitigation measures are used to reduce a project's impacts below the significance threshold, there is no factual basis to conclude that the scope of work proposed in a mitigated EA is appropriate for a CE. As CEQ has explained, "[c]are must be taken to ensure that any mitigation measures during the EA process are an integral component of the actions considered for inclusion in a proposed categorical exclusion."[188] Proposing to get rid of the EA process based on the lack of impact from prior projects that were avoided because of the EA process itself is inherently circular. *See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, No. 18-1129, slip op. at 25 (D.C. Cir. Aug. 9, 2019) (holding that FCC's elimination of review for certain small cellular sites was arbitrary and capricious because, although the Commission "found that adverse effects are rare," it did not consider "how that rarity depends on the very review it eliminates, which forestalled adverse effects that otherwise would have occurred"). Indeed, as quoted in the D.C. Circuit's opinion in *United Keetoowah Band*, "[t]he lack of significant impact should be a testament to the value of the review process in these instances, not negate its necessity." *Id.*, slip op. at 26.

Significant issues addressed through project refinement, alternatives analysis, expert agency consultation, and mitigation include old growth, access, inventoried roadless areas, potential wilderness areas, and other undeveloped areas, soil erosion, sedimentation of waters, state-designated natural areas, threatened and endangered species and critical habitats, cultural and social impacts, and ecological restoration.

Access, in particular, is a significant issue that is inextricably related to vegetation management. Using CEs to implement vegetation management would hide the cumulative impact of projects with respect to this significant issue, making it impossible to systematically address the urgent need to move toward a more ecologically and fiscally sustainable road system. The haphazard approach to road-building in previous eras is the

---

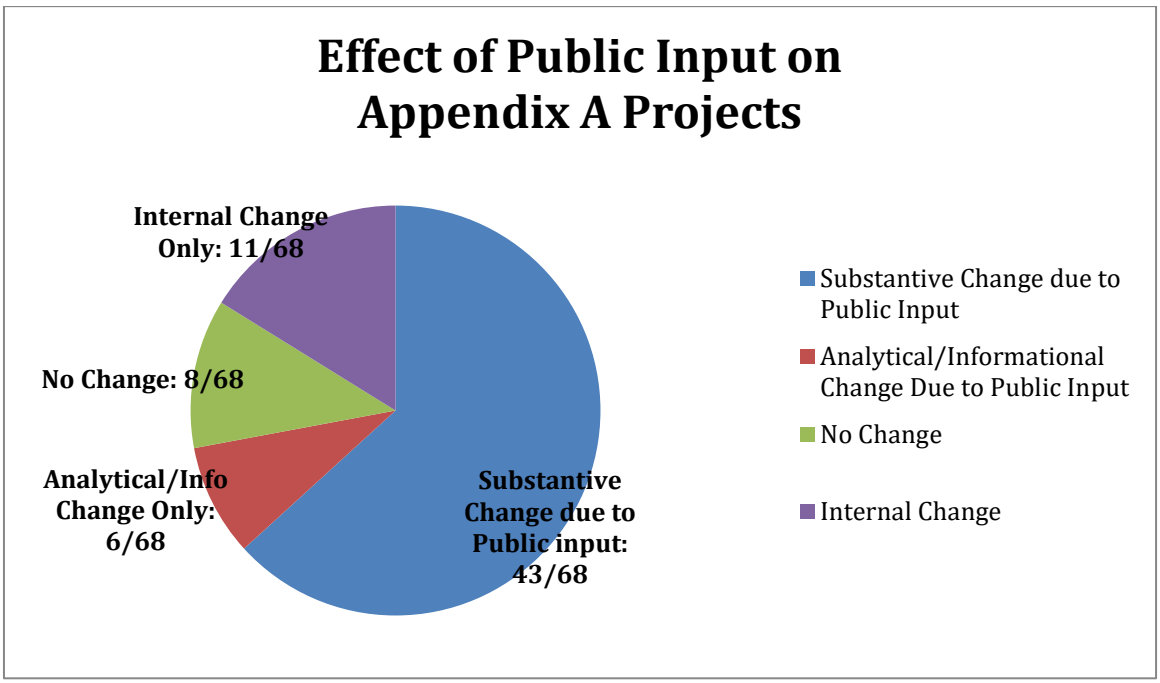
[187] Cherokee National Forest Plan FEIS, Response to Comments at 7-341 (2004).
[188] Memorandum from Nancy Sutley, CEQ Chair, to Heads of Federal Departments and Agencies, "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act" (Nov. 23 2010) (hereinafter "CEQ CE Memorandum").

cause of the road system's unplanned proliferation and unsustainable costs. Returning to such an approach would be inconsistent with agency policy requiring progress toward an ecologically and fiscally sustainable road system. See, e.g., 36 C.F.R. § 212.5(b) (road system management); 36 C.F.R. § 219.1(g) (land management planning).

2. Failure to consider project improvements.

In our review of the 68 projects included in Appendix A to the Supporting Statement for CE 26, we found that public comment is by far the most common reason that a project is modified. Projects were 4 times more likely to be improved due to public input than internal review. Public comments resulted in substantive modifications to 43 of the 68 projects included in Appendix A. Only 11 projects were changed solely due to internal review. An additional 6 projects received additional analysis or comparison of alternatives and provided additional information to the public but did not appear to change substantively. Finally, 8 of the 68 projects did not appear to change at all between proposal and decision.[189] This result is similar to our analysis of the 55 projects the agency used to develop its proposed infrastructure CEs.[190]

Chart: Relative Effect of Public Input on Appendix A Projects (n=68)



The project improvements were varied. Many involved reducing the number of acres, reducing mileage or changing locations of permanent or temporary roads, changing harvest types, or changing harvest locations. The degree of changes varied too, from small adjustments to large swings in the thousands of acres. While most changes resulted in activities being dropped, they were sometimes relocated, and activities were occasionally added in response to public comment too. Many of the changes involved the addition of mitigation measures, which were also quite varied including, for example, retention of old

[189] See Appendix 1, "Re-Analysis of Restoration CE Projects."
[190] See Appendix 2, "Re-Analysis of Infrastructure CE Projects."

trees, avoidance of temporary roads in unroaded areas, restrictions on herbicides, and project-specific measures to protect rare species.

If these 68 projects are representative, then more than half of the projects that shift to CEs will have greater impacts than they would have had under the mitigated EA process. This fact alone renders the Forest Service's rationale arbitrary and capricious: the absence of past significant negative impacts cannot be used to justify removal of the procedural safeguards that prevent such impacts in the first place.

Closely related, the Forest Service's rationale is suspect because it fails to acknowledge that many projects are abandoned without reaching a decision. By sampling from projects that reached a final decision, the Forest Service ignores projects that may have been abandoned because their benefits would not have been worth the harm. The agency has not made data available to the public to show how frequently this occurs with EAs, but the Forest Service abandoned 4% of its EISs between 2010 and 2017 (11 out of 276).[191] Since EISs signal a high level of agency investment, it is reasonable to assume the rate of abandonment for other, lower-investment decisions is higher than 4%. As discussed in connection with the "restoration" CE below, poorly-conceived projects are often dropped because of public scrutiny, and generally only after public comments necessitate additional analysis demonstrating the questionable benefits of the project.

3. The Forest Service lacks adequate monitoring data to show the absence of significant impacts.

a) Lack of monitoring data renders predictions about future on-the-ground impacts arbitrary and capricious.

To identify a new category of CE, the Forest Service must demonstrate that the activity will not individually or cumulatively have a significant environmental impact. 40 C.F.R. § 1508.4; *Sierra Club*, 510 F.3d at 1027-1028. The Forest Service has not proffered data demonstrating that the categories of action described in its new CEs would have no significant individual or cumulative effects. To justify a determination that work usually undertaken with an EA is appropriate for a CE, the Forest Service must analyze whether projects analyzed with EAs did in fact have no significant direct, indirect, or cumulative impacts on the environment. We are aware of no such analysis, rendering the agency's proposed rulemaking arbitrary and capricious. 5 U.S.C. § 706(2)(A).

A FONSI is a prediction. The Forest Service may get away with a weakly supported prediction in an individual project, but its burden here is more rigorous. The agency must show that those predictions have been reliable and that the projects have in fact had no significant impacts on the ground. In our experience, however, the mitigation measures required by mitigated EAs and DN/FONSIs are often ineffective at reducing the environmental impacts of vegetation management projects. Thus, a proposed CE that required measures utilized in past mitigated EAs and DN/FONSIs would need to be supported by an analysis demonstrating that the required mitigation measures are likely to be effective in reducing individual and cumulative impacts below the significance threshold. Because many mitigation measures are either not implemented in the field or are only

[191] CEQ, EIS Timelines, supra (underlying data sorted for USFS decisions).

partially effective (or not effective at all), we anticipate that it will be difficult for the agency to make such a showing.

For example, gates, tank traps, and other methods to block "closed" roads used for logging activities can be ineffective in prohibiting resource damage to soils, vegetation, and wildlife. Other mitigation measures such as treating hazardous fuels in logged areas with prescribed fire to reduce logging-created fuels, are only partially implemented, or not implemented in a timely fashion, which increases the fire risk in those areas. Forest Service monitoring reports (when they are prepared) do not consistently address the outcomes associated with implementation of mitigation measures and often indicate that measures designed to protect terrestrial and aquatic resources are ineffective. Because mitigation measures are not consistently effective, it is inappropriate for the agency to presume that activities undertaken with mitigated EAs and DN/FONSIs are appropriate for a CE. *Cf. Klamath-Siskiyou Wildlands Ctr. v. Forest Service*, 373 F. Supp. 2d 1069 (E.D. Cal. 2004) (impacts were significant because the data did not show use of a seasonal restriction that had been committed to in the EA).

In addition, some forests are more complex than others, and monitoring project impacts and mitigation implementation and efficacy is even more important. The broad-brush and untailored nature of the proposed regulations ignores the variability of the national forests. For example, CEs for large-scale projects (for example, proposed CE 26) could very well overwhelm smaller national forests, particularly those in the East. Given the vast dearth of monitoring that occurs post-project, we would be surprised to learn that the agency has carefully analyzed this issue; and indeed it appears that the Forest Service has not done so. In this rulemaking, the Forest Service selected "a sample of 68 projects from over 718 projects completed under an EA from fiscal years 2012 to 2016," reviewed those DN/FONSIs, and then

> To obtain information related to implementation and monitoring of these projects, USFS personnel on national forests across the U.S., who were familiar with the projects, responded to a questionnaire intended to verify whether the observed effects of these implemented projects were consistent with the NEPA analysis, and if not, examine how they differed. Twenty of the 68 projects were subject to additional review through the questionnaire. Five of the projects either had not been implemented yet or no response was received from the national forest where it was located. For the 16 projects listed in Appendix A that received survey responses, respondents indicated that the effects were not more intense or substantial than predicted in the EA, DN, and FONSI. The respondents also described how effects were observed or documented following project implementation. None of the environmental analyses for the projects reviewed for this proposed CE predicted significant environmental effects on the human environment.

United States Forest Service, *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 (July 3, 2019) (hereinafter CE 26 Supporting Statement).

This statement reveals that the proposed CE 26 was based on the subjective opinions of unnamed Forest Service personnel of only ***16 projects over a 4 year period***. There is no indication that this sampling method is scientifically valid, particularly because it relies on

unknown "monitoring" methods. Indeed, Appendix D to the CE 26 Supporting Statement only lists 3 "sample monitoring of restoration activities," which the agency fails to demonstrate are linked in any way to the 16 projects for which it claims it had adequate data to develop CE 26 (i.e., there is no indication that the 16 projects were monitored using any of the 3 monitoring documents).[192]

One example may illustrate the Forest Service's failure to adequately monitor impacts assumed to be not significant following an EA. The Apache-Sitgreaves National Forest in Arizona in August 2017 issued a FONSI for the West Escudilla Restoration Project, which the agency had analyzed with an EA.[193] The Forest Service approved the Little Creek timber sale as part of the project. One of the members of the Four Forests Restoration Initiative (4FRI) stakeholders group discovered that in implementing the Little Creek sale, significant numbers of large and old trees - which the stakeholders, including the Forest Service, had proposed to protect - had been logged. This came as an unwelcome shock to members of the 4FRI stakeholders group who had supported the project:

> The West Escudilla Environmental Assessment (EA) explicitly incorporated language from the first 4FRI Environmental Impact Statement (EIS) concerning retention of large and old trees. However, our observations on-site and post-treatment monitoring data collected by a stakeholder (Center for Biological Diversity [CBD]) showed extensive harvest of these trees, a portion of which were dated to between 200 and 300 years old. According to Forest staff, the rationale for removal was reducing the proliferation of dwarf mistletoe. However, pre-harvest stand exam data obtained by CBD indicated that *only a tiny fraction of large/old trees had levels of mistletoe infection that would warrant removal under the thinning prescription for these stands*. The post-harvest monitoring data also showed that targets for basal area reduction could have been met without harvesting large/old trees. This treatment approach is of great concern, being i*nconsistent with current restoration science, in violation of the 4FRI stakeholder "Old Growth Protection and Large Tree Retention Strategy," contrary to prior recommendations of the SHG [stakeholders' group] regarding management of dwarf mistletoe, and, as noted during the discussion, having the potential to create significant controversy inside and outside the 4FRI arena*.[194]

---

[192] These "monitoring documents" themselves are also problematic. One document was prepared in 2014, only 1 year after the implementation of the Collaborative Forest Landscape Restoration Act (CFLRA) project based in Colorado that it purports to monitor; a second document purporting to monitor only CFLRA projects on the Nez Perce-Clearwater National Forest in Montana between 2010 and 2014 (note: CFLRA projects were first chosen in 2012, so this document at most captures 2 years of implementation); and the third document is a technical guide for how to develop water quality best management practices nationally and does not appear to include any actual monitoring results from any national forest. This information does not support the agency's proposed rule because it contains very little if any relevant data suitable to the development of such a sweeping categorical exclusion.

[193] *See* Forest Service, West Escudilla project page, https://www.fs.usda.gov/-project/?project=47631 (last viewed Aug. 3, 2019).

[194] *See* letter of Jason Whiting, Chair, 4FRI Stakeholder Collaborative to Steve Best, Forest Supervisor, Apache-Sitgreaves National Forest (2018) (emphasis added).

Arizona's state game and fish department also criticized the Forest Service's failure to ensure the protection of large and old trees.[195] The Supervisor later admitted to the media: "My intent is that it would be very, very rare that we cut a big old tree, and it seems like we cut more than we were planning on doing."[196] The Forest Service's failure to monitor this sale, or its willful decision to permit old growth logging in violation of prescriptions, led to the destruction of old growth forest despite its commitments in the EA and to stakeholders. It also contravened the Forest Service's conclusion of no significant impact. And if this impact occurred with respect to a highly visible project subject to great public scrutiny, it is likely that such violations also occur for less scrutinized projects.

NEPA is a forecasting law designed to predict environmental impacts. But only post-implementation monitoring can determine whether the predicted effects were the actual effects of an action, or whether other, unforeseen effects in fact occurred. And because the Forest Service lacks a budget to sufficiently monitor and adaptively manage the national forests, it is unlikely that the agency can rationally conclude that its vegetation management actions can appropriately be documented with the use of a CE.

b) Without consistent monitoring of the spread of non-native invasive species, the proposal violates Executive Order 13112.

One issue of particular importance related to monitoring is the spread of non-native invasive species (NNIS). Under Executive Order 13112 (1999), agencies have a duty to "monitor invasive species populations accurately and reliably." The Forest Service must also identify projects that "may" spread NNIS, and it is prohibited from "authoriz[ing] … actions it believes are likely to cause or promote the introduction or spread of invasive species."

Many of the Forest Service's projects do in fact contribute to the spread of invasive species. As shown by research cited elsewhere in these comments, Forest Service roads are commonly vectors for such a spread. The removal of pinyon and juniper is associated with the spread of cheatgrass. In the Southeast, logging roads are vectors for microstegium and many others. The Forest Service often addresses concerns about the spread of NNIS dismissively, concluding in NEPA decisions that its control practices will be effective. Yet its NEPA analyses seldom grapple with the reality that management practices both transport seeds and other invasive plant materials and create favorable conditions in treated stands for the establishment of new invasive plant populations. The Forest Service does not have the monitoring data to show that its control practices effectively mitigate this risk. To the contrary, the spread of NNIS over time is directly correlated to the location of management practices that involve roads and equipment, soil disturbance, and changing light conditions.

Many of the projects that would move into CEs under this proposal are the same projects that include these risky management practices. Because the agency has not met its duty to monitor populations of NNIS accurately and reliably or to identify which management practices contribute to (and which mitigation measures actually prevent) the spread of NNIS, it may not blithely exclude these risky activities from analysis in a CE. The cumulative effect of

[195] Letter of Chris Bagnoli, Pinetop Regional Supervisor, Arizona Game & Fish Department to Steve Best, Forest Supervisor, Apache-Sitgreaves National Forest (Sep. 14, 2018).
[196] S. Buffon, Az. Daily Sun, *Old growth trees cut in violation of 4FRI mission* (Nov. 14, 2018), available at https://bit.ly/2SMNnJP (last viewed Aug. 3, 2019).

spreading NNIS over time is significant, requiring site-specific analysis, public involvement, and consideration of alternatives, including the no action alternative, which may often be the only alternative capable of preventing a violation of the Executive Order.

While the Executive Order forbids the thoughtless spread of NNIS by acting without monitoring and risk assessment, it is not intended as a straightjacket on agency action. If management benefits are important enough to move ahead despite knowledge that they will, cumulatively, result in the spread of NNIS, the Executive Order makes allowances for a programmatic approach, which involves the public, to determine which actions should go forward despite the risk, and what measures will be required to mitigate that risk. Exec. Order 13112 § 2(a)(3). Without an umbrella analysis and adequate prescriptive sideboards in place, the Forest Service has left its duties to the site-specific level, which means that cumulative impacts analysis and public involvement continue to be required. However, the proliferation of CEs under the proposed rule would neglect this analysis.

4. CEs cannot lawfully be used as a programmatic, policy-level effort to significantly increase the agency's management footprint.

Over the past decade or more, the Forest Service has expressed its desire to increase its management footprint on the national forests and grasslands by arguing that projects need to be bigger in order to have the desired effect on the landscape. Usually this justification stems from the desire to reduce the risk of wildfire and its impacts on western national forests and grasslands. The agency's intent with this management approach admittedly is to have a "more significant" impact on the composition, structure, and function of these forests.

The problem with using a CE to implement this work is one of scale. CEs are intended to be used for "small," "insignificant," and "routine" projects, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007), not large landscape-level projects that alter fire regimes, vegetation classes, or watershed condition class. The latter effects are substantial, and likely have direct, indirect, and/or cumulative effects – as they should, because that is the stated purpose and need of the project. If the Forest Service wants to increase the pace and scale of land management (or restoration), then using a "small" tool like a CE, independent of a larger programmatic plan and analysis, is by definition the wrong tool. Instead, the agency should make more use of programmatic NEPA analysis and tiering, as described elsewhere in these comments.

Indeed, proliferating use of CEs to do the bulk of the agency's work will undermine the programmatic planning approach required by Congress in NFMA. Creation of overbroad CEs encourages ad hoc project development—pursuit of projects that can move quickly to meet goals and targets set outside of forest planning—rather than deliberate progress toward a forest's desired conditions through interdisciplinary project development and public comment.

5. The Forest Service already has CEs for many restoration activities.

Existing agency and Departmental CEs applicable to the Forest Service are at 36 C.F.R. § 220.6(d) & (e) and 7 C.F.R. § 1.b3, and, along with relevant statutory CEs, are compiled in Forest Service Handbook 1909.15, ch. 30, § 32. In total, the Forest Service has over three dozen CEs that apply to a wide range of actions, including numerous restoration activities and special use permitting.

As explained in more detail above, the Forest Service's existing CEs already encompass many vegetation management and fuels management activities, which can be used for restoration purposes. *E.g.*, 36 C.F.R. § 220.6(e)(6) (CE for timber stand or wildlife habitat improvement); *id.* § 220.6(e)(10) (CE for hazardous fuels reduction activities); *id.* § 220.6(e)(11) (CE for post-fire rehabilitation activities); *id.* §§ 220.6(e)(12)-(14) (CEs for various tree cutting activities, including salvage logging and insect and disease control); Healthy Forests Restoration Act (HFRA) § 603 (CE for insect and disease projects in designated areas, CE for hazardous fuels treatments); HFRA § 404 (CE for silvicultural assessments and treatments). Other CEs are focused on aquatic restoration. *E.g.*, 36 C.F.R. § 220.6(e)(7) (CE for aquatic habitat improvement); id. § 220.6(e)(18) (CE for aquatic restoration activities).

These authorities already cover the types of actions that the Forest Service cites as reasons for this rulemaking. The new authorities, therefore, can only be seen as efforts to authorize other kinds of actions—including controversial actions that would not be broadly supported as high-priority ecological restoration. These more controversial actions, often with uncertain effects and high risk for harms, are not appropriate as CEs.

6. CEs cannot be created to cover actions that involve unresolved conflicts of the use of available resources.

Different areas of the national forests are different, and the same actions in different areas will have different effects. 16 U.S.C. § 529; *New Mexico v. BLM*, 565 F.3d 683, 706 (10th Cir. 2009) (the "location of development greatly influences the likelihood and extent of habitat preservation. Disturbances on the same total surface area may produce wildly different impacts on plants and wildlife depending on the amount of contiguous habitat between them"). For example, fuels treatments aren't effective at reducing wildfire risk unless they're located in the right places.[197] A clear-cut in old-growth forests is not equivalent to a clear-cut in a third-growth plantation forest.

The Forest Service enjoys considerable discretion in the location of management activities. Forest plans do not commit to actions in specific locations; that discretion is deferred to the project level. Plans simply do not, generally, commit to site-specific impacts. Those decisions, significant or not, are left to the project level. As a result, the exercise of discretion to locate forest management activities at the site-specific level inherently involves an unresolved conflict of available resources. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1507.2(d).

Where alternative locations or methods for harvest would have different environmental impacts, NEPA requires the agency to weigh those alternatives. *See EPIC v. Forest Service*, 234 F. App'x 440 (9th Cir. 2007). Some forest management activities will not involve "unresolved conflicts," because the agency will lack the legal discretion or the practical ability to choose. For example, issuance of a temporary road closure order to meet water quality requirements would not require consideration of alternatives. Similarly, if a forest's

[197] *See generally* Vaillant and Reinhardt, "An Evaluation of the Forest Service Hazardous Fuels Treatment Program—Are We Treating Enough to Promote Resiliency or Reduce Hazard?" 115 Journal of Forestry 300 (July 2017) (noting that because "[i]t is neither realistic nor necessary to do fuel treatments on every acre …, it is important to prioritize when, where and how to treat wildland fuels").

plan requires it to conduct a sanitation harvest to prevent the spread of bark beetles, there would not be any unresolved conflicts in conducting such a harvest. In either case, the decision space has already been narrowed by external legal requirements. This is not true, however, for most vegetation management projects. On most forests, timber harvest occurs for a variety of purposes—both ecological and economic. The Forest Service enjoys broad discretion to balance the benefits of timber harvest against its site-specific impacts. Within any given analysis area, the Forest Service can choose any number of stands for harvest. The same is true of road locations, and indeed the Forest Service often relocates road alignments during project development based on public feedback.

Because of that broad discretion, and because of the wide variety of environmental differences between potential locations for timber harvest, the Forest Service is obligated to consider alternatives. Categorical exclusions do not require consideration of alternatives, *Mahler v. Forest Service*, 927 F. Supp. 1559, 1573 (S.D. Ind. 1996), and they are therefore the wrong tool for the vast majority of vegetation management projects. And even if the agency were prepared to consider alternatives internally for a CE, it would not be enough because the public must be involved in the process of suggesting alternatives and providing feedback on their respective impacts. *Ayers v. Espy*, 873 F. Supp. 455 (D. Colo. 1994).

7. Plan consistency and national BMPs are not enough to avoid significant impacts.

The proposed rule relies heavily on the legal requirement of plan consistency. The agency considers itself "uniquely" well suited to develop broad CEs for its work because forest plans "must provide for social, economic, and ecological sustainability" and projects cannot violate the plans.[198] Likewise, the supporting statements rely on the existence of mandatory national best management practices.[199] These external limitations, while important, do not prevent significant impacts.

Forest plans simply do not prevent significant impacts. If they did, there would be no need at all for the Forest Service to provide procedures for project-level EAs and EISs. Many Forest Service proposals have potentially significant impacts, which explains why so many Forest Service decisions are made as mitigated FONSIs (see above). Forest plans also do not prevent significant impacts from permitted activities, such as pipeline and utility rights of way, which could be authorized under the new CEs.

Furthermore, forest plans change. They are revised periodically, and their changes can carry significant consequences for particular areas through the impacts of future projects. For example, a forest plan revision could shift the management direction for an unroaded area from backcountry to a more intensive management classification. Such a change would not commit that area to be developed but it would allow development through future projects, *see Ohio Forestry*, *supra*, with impacts that would be significant. *See, e.g.*, *Lands Council v. Martin*, 529 F.3d 1219, 1230 (9th Cir. 2008).

Making matters worse, forest plan consistency cannot reliably be determined without public involvement. The Forest Service often proposes projects that are inconsistent with the Forest Plan, as a review of the case law for challenges to Forest Service decisions will quickly

[198] 84 Fed. Reg. at 27,546-47.
[199] Supporting Statement for CE 26 at 12-14.

reveal. *See generally,* Amanda M.A. Miner et al., *Twenty Years of Forest Service Lands Management Litigation*, 112 J. FOR. 32 (2014) (analyzing litigation rates and the statutes most frequently at issue in judicial review). The agency may argue that it routinely makes determinations of plan consistency in DMs, but the public does catch mistakes in those determinations during scoping, even without the opportunity to review the agency's analysis in an EA. For example, the Camp Branch Salvage CE project (Nantahala National Forest, 2017) proposed to log within a plan-protected patch of future old growth, but was revised based on public input.

The North River Forest Stand Improvement Project (George Washington National Forest, 2017) proposed management in forest plan prescriptions that would prohibit it. Similarly, the draft Decision Memo for the Eastern Divide Highlands Prescribed Fire Project (Jefferson National Forest, 2019) proposed an annual volume of prescribed fire that would exceed what was analyzed in forest planning, as well as limits established in the Plan-era Incidental Take Statement for Indiana bats.

Even if the Forest Service always correctly evaluated plan consistency for projects proposed under its existing CEs, it lacks the administrative record to show that it can do so for a large and complex vegetation management project, transportation decision, or right of way permits. Forest plan consistency can be violated on paper or on the ground. A project may proceed with the *prediction* that it will not violate forest plan requirements, but during implementation the prediction may prove false. For example, in the recent Hogback and Courthouse Creek projects (Cherokee and Pisgah National Forests, respectively), predictions about soil protection were not accurate. In one project, drought and weak soils left steep slopes vulnerable to erosion. In the other, wet conditions and fragile soils were the culprits. In both cases, however, the Forest Service predicted *on paper* that the project would meet plan standards for the protection of soil and/or water, but those standards were violated *on the ground*. All this to say, evaluating forest plan consistency for large projects is not a legal checklist that can be done effectively in a Decision Memo. It can be complicated and uncertain, and it will always require the consideration of site-specific risks and benefits with input from the public.

These same concerns apply with equal force to the Forest Service's reliance on national BMPs. National-level BMPs are vague to the point of uselessness at the project level. For example, the agency points to the following BMPs in support of CE 26:

- Fire-2: "Avoid, minimize, or mitigate adverse effects of prescribed fire and associated activities on soil, water quality, and riparian resources that may result from excessive soil disturbance as well as inputs of ash, sediment, nutrients, and debris."

- Veg-1: "Use the applicable vegetation management planning processes to develop measures to avoid, minimize, or mitigate adverse effects to soil, water quality, and riparian resources during mechanical treatment activities."

- Road-7: "Locate and design roads to avoid, minimize, or mitigate adverse effects to soil, water quality, and riparian resources."

These BMPs can hardly be considered prescriptive. By their own terms, BMPs acknowledge the potential for impacts associated with prescribed fire, vegetation management, and roads,

and they require responsible officials to avoid, minimize, and mitigate those impacts at the project level.

In sum, the Forest Service should not presume that a category of action documented with an EA is appropriate for a CE simply because the action is one that is regularly undertaken. To rationally support new or expanded CEs for those activities, the Forest Service must document – with data – that the category does not have significant individual or cumulative effects. Because the agency so far has failed to do so, its proposed rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

8. The Forest Service cannot create new, broader CEs without any evidence that its current CEs do not have significant impacts.

To our knowledge (and from our review of the materials offered in support of the rulemaking), the Forest Service has not conducted any systematic review of its existing CE authorities to determine whether they have significant impacts. CEQ has explained that agencies should review their existing CEs at least every 7 years.[200] While failure to do so does not invalidate the category, it is certainly relevant to whether the Forest Service is acting arbitrarily and capriciously by attempting to promulgate new, broader authorities while turning a blind eye to the impacts of its existing authorities.

The Forest Service has a large number of CEs spanning a wide variety of actions, and it has used them in numerous different contexts. From 2006 to 2016, the Forest Service made 23,830 decisions using CEs—2,166 decisions per year.[201] Between 15% and 20% of those decisions were for vegetation management and fuels.[202] Yet the Forest Service has made no attempt to understand the cumulative effects of these decisions over time. For example, are the CEs being used repeatedly in the same geographical areas? Have they had impacts not expected when the DM was signed? Neither the public nor the Forest Service know.

Another important question that the Forest Service has failed to ask: have changed conditions and new research shown that prior assumptions about a category's impacts were unreliable? For example, how have the realities of climate change (both our better understanding of carbon stocks and information about drought, flooding, and saltwater intrusion for example) affected what forest professionals should be doing on the ground? These are programmatic questions, but they will never be answered if the relevant impacts are hidden from the public and decisionmakers.

A deeper dive into just one of the existing CEs shows why this retrospective is important. The Forest Service proposes to retain the CE for approval of the use of national forestland on which to pasture commercial, non-native, honeybee apiaries, except the proposed rule would no longer require public notice or comment. 36 C.F.R. § 220.5(d)(8)(ii) (proposed). And yet non-native honey bee apiaries pose a significant environmental risk, including potential extinction, to local native bee populations and the native plants they pollinate. There are more than 1,500 native bee species in California, 1,300 in Arizona, and 1,000 in Utah and Nevada, and they have evolved as pollinating partners of our native flora. As the most important

---

[200] CEQ CE Memorandum.
[201] Data provided to the Southern Environmental Law Center pursuant to a FOIA request, 2018-FS-WO-01712-F, attached.
[202] *Id*.

pollinators in North America, bees are keystone species because they pollinate the food upon which National Forest wildlife depend.

The scientific evidence is overwhelming that large numbers of non-native honey bees (*Apis mellifera*) outcompete and displace many native bees.[203] Bees, including bumblebees, are declining in the U.S.[204] Several bumblebees are either listed as endangered under the Endangered Species Act or are under current petition for listing (e.g., *Bombus affinis, B. occidentalis, B. franklini*). Each commercial hive can contain 10,000-80,000 non-native honey bees and an apiary typically contains 40-100 hives. Cane and Tepedino (2016)[205] estimated that a 40-hive apiary with 33,000 bees/hive pastured for 3 months on FS land extracts enough pollen to rear 4 million native bees. Dwarfing that, the nation's largest commercial honey bee company recently requested a permit for forty-nine 100-hive apiaries on the Manti-La Sal NF[206], and 50 apiaries of unknown size on the Fishlake NF for four months in a year.[207] In addition there is increasing evidence that honey bees transmit diseases to native bees and vice versa.[208]

---

[203] Hung K-LJ, Kingston JM, Albrecht M, Holway DA, Kohn JR. 2018 The worldwide importance of honey bees as pollinators in natural habitats. *Proc. R. Soc. B* 285: 20172140; Henry, M. and Rodet, G., 2018. Controlling (Cameron et al. 2011). the impact of the managed honeybee on wild bees in protected areas. *Scientific Reports*, *8*: 9308; Portman, Z.M., Tepedino, V.J., Tripodi, A.D., Szalanski, A.L. and Durham, S.L., 2018. Local extinction of a rare plant pollinator in Southern Utah (USA) associated with invasion by Africanized honey bees. *Biological Invasions*, *20*(3), pp.593-606; Valido, A., Rodríguez-Rodríguez, M.C. and Jordano, P., 2019. Honeybees disrupt the structure and functionality of plant-pollinator networks. *Scientific Reports*, *9*(1), p.4711; Geslin, B., Gauzens, B., Baude, M., Dajoz, I., Fontaine, C., Henry, M., Ropars, L., Rollin, O., Thébault, E. and Vereecken, N.J., 2017. Massively introduced managed species and their consequences for plant–pollinator interactions. In *Advances in Ecological Research* (Vol. 57, pp. 147-199). Academic Press; Mallinger RE, Gaines-Day HR, Gratton C (2017) Do managed bees have negative effects on wild bees?: A systematic review of the literature. *PLoS ONE* 12(12): e0189268.

[204] Cameron, S.A. Lozier J.D., . Strange, J.P., Koch, JB, Cordes, N., Solter, L.F. Solter, and Griswold, T.L. 2011.Patterns of widespread decline in North American bumble bees. *Proc. National Academy of Sciences* 108 (2) 662-667

[205] Cane, J.H. and Tepedino, V.J., 2017. Gauging the effect of honey bee pollen collection on native bee communities. *Conservation Letters*, *10*(2), pp.205-210.

[206] U.S. Forest Service. Updated Proposed Action. Memo from Lay, Daniel – FS. Sent Thursday, December 14, 2017 3:30 PM to Jewkes, Jessica – FS

[207] U.S. Forest Service. 2018. Adee Honey permit requests for (a) Manti-La Sal NF and Fishlake National Forest.

[208] Alger SA, Burnham PA, Boncristiani HF, Brody AK (2019) RNA virus spillover from managed honeybees (*Apis mellifera*) to wild bumblebees (*Bombus* spp.). *PLoS ONE* 14(6):e0217822; Tehel, A., Brown, M.J. and Paxton, R.J., 2016. Impact of managed honey bee viruses on wild bees. *Current Opinion in Virology*, *19*, pp.16-22; McMahon, D.P., Fürst, M.A., Caspar, J., Theodorou, P., Brown, M.J. and Paxton, R.J., 2015. A sting in the spit: widespread cross-infection of multiple RNA viruses across wild and managed bees. *Journal of Animal Ecology*, *84*(3), pp.615-624; Ravoet, J., De Smet, L., Meeus, I., Smagghe, G, Wenseleers, T, and de Graaf, D.C. 2014. Widespread occurrence of honey bee pathogens in solitary bees. *J Invertebr Pathol.*; Furst, M.A., McMahon, D.P., Osborne, J.L. Paxton, R.J., and Brown, M.J.F. 2014. Disease associations between honeybees and bumblebees as a threat to wild pollinators *Nature* 506**:**364–366; Singh, R., Levitt, A.L., Rajotte, E.G., Holmes, E.C.,

The Forest Service cites the need for efficiency as a reason for excluding public notice and comment,[209] but knowledge of native bees on NFS lands is both technically difficult and time-consuming to gather, and most of the knowledge resides with independent bee specialists and interested, knowledgeable members of the public. In the absence of public comment on honey bee apiary permitting, the Forest Service is incapable of making "scientifically based, high-quality analysis that honors its environmental stewardship responsibilities." *See id.* The vast majority of Forest Service personnel have no or next to no information as to: (1) which native bees are in an area commercial honey bees would be using; (2) which native bees are uncommon and might be extirpated from the area due to honey bee competition; (3) which native plants are dependent upon specialized native bees and are not pollinated or sufficiently pollinated by honey bees[210] and thus might be extirpated from the area; or (4) the cumulative impact to native bees that are already in decline in the area due to land disturbance, livestock consumption of flowers, pesticide use, and/or drought and other elements of climate change. This understandable lack of native bee knowledge residing within the budget- and personnel-depleted Forest Service means that all the significant impacts to native bees resulting from the permitting of honey bee apiaries on NFS land would be unknown, undocumented, and invisible, despite their inevitability and severity.

Thus, placement of commercial honey bee apiaries on NFS lands constitutes inevitable, adverse environmental impact on native bees; the impacts would be significant; could result in extirpation or extinction of native bees; and could result in the extirpation or extinction of rare native plants. To exclude knowledgeable members of the public from notice or comment regarding the parking of commercial honey bee apiaries, as per the Forest Service's proposed regulations, compounds Forest Service ignorance of the damage their permits would be causing. This situation is compounded by the fact that this special use permit would be approved without the preparation of a project or case file and decision memo.

This one example demonstrates the arbitrary and capricious nature of the proposed rule. Eliminating public comment on CEs like this one without systematically reviewing its existing CE authorities to determine whether they are having significant impacts is unreasonable and not in accordance with law. So too is the creation of new, broader authorities without data showing that existing, narrower authorities are not having significant impacts.

Ostiguy, N., Lipkin, W.I., Toth, A.L. and Cox-Foster, D.L. 2010. RNA viruses in hymenopteran pollinators: evidence of inter-taxa virus transmission via pollen and potential impact on non-*Apis* hymenopteran species. *PloS One*, *5*(12), p.e14357; Genersh, E., Yue, C., Fries, I., and de Miranda, J.R.. 2006. Detection of *Deformed wing virus*, a honey bee viral pathogen, in bumble bees (*Bombus terrestris* and *Bombus pascuorum*) with wing deformities. *J. Invert. Path.* 91:61–63.

[209] 84 Fed. Reg. at 27,544.

[210] De Luca and Vallejo-Marin 2013.

C. The Proposed CEs are Arbitrary and Capricious.

1. Proposed CE 16 (36 C.F.R. § 220.5(e)(16)) - Forest Plan Amendments.

The Forest Service should clarify the intent and application of proposed CE 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."[211] While the 2012 Planning Rule and 2016 Amendment to the 2012 Planning Rule are clear that an amendment to a forest plan may be so minor as to only require a CE for implementation, it is not clear whether this CE is limited to those rare circumstances.

Instead, it appears that this CE may be a relic of prior, invalidated planning rules. The 2005 planning rule included a CE for forest plan development, revision, or amendment, 70 Fed. Reg. 1,062, *National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion, Notice of proposed National Environmental Policy Act implementing procedures; request for comment* (Jan. 5, 2005), but that planning rule was invalidated by the courts and subsequently abandoned. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 2006 WL 1072043 (N.D. Cal. 2006). We ask that the Forest Service provide clarification about the origin of this proposed CE.

The scope of this CE is also not clear. The proposed rule states 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."[212] This language appears to be clarifying that site-specific projects ("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…") require site-specific NEPA analysis, and would be subject to whatever level of analysis was required for the underlying site-specific project. The language is not a model of clarity, however, so we remind the agency that while a CE may be appropriate to document a plan amendment in rare circumstances, an EA or EIS is likely to be the more appropriate and usual tool.[213]

By seeming to exempt programmatic plan amendments from analysis, while requiring analysis for narrower project-specific amendments, this CE also creates a paradoxical result: why would line officers go to the trouble of crafting a narrow project-level amendment when they could more easily amend the plan more broadly? Such a result would be arbitrary and capricious.

Finally, if the Forest Service intends to keep this CE in the final rule, it must reinstate scoping or another similar comment period for the CE. Plan amendments that are not specific to a single project require *at least* a 30-day comment period. 36 C.F.R. § 219.16(a)(2) ("For an amendment for which a draft EIS is not prepared, the comment period is at least 30 days."). *See also* 36 C.F.R. Part 219, Subpart B (providing that plan amendments are subject to a pre-

[211] 84 Fed. Reg. 27,556.
[212] 84 Fed. Reg. 27,556.
[213] 81 Fed. Reg. 90,725, 90,728 *Forest Service, National Forest System Land Management Planning, Final Rule* (Dec. 15, 2016); 36 C.F.R. § 219.13(b)(3).

decisional objection process, which entails the opportunity to submit comments during analysis).

We request that the Forest Service clarify the scope and applicability, and continued viability, of this proposed CE. If the CE is retained, it must be accompanied by a public comment period of at least 30 days. If the final rule contains a CE for plan amendments, it should specifically recognize that amendments to add measures that protect the environment (such as standards and guidelines) would never be likely to have a significant adverse environmental impact and therefore they would warrant a CE. On the other hand, amendments to remove protective measures would have adverse effects that must be evaluated and disclosed, in accordance with *Citizens for Better Forestry v. USFS*.[214] As currently written, however, the proposed CE is arbitrary and capricious.

2. Proposed CE (d)(11), (d)(12), (e)(3) (36 C.F.R. §§ 220.5(d)(11), (d)(12), (e)(3)) - Special Uses.

The Forest Service proposal would expand two existing categorical exclusions and add a third new categorical exclusion for the issuance and administration of special use authorizations:

- Proposed section 220.5(d)(11) combines two existing categorical exclusions, one of which currently requires a decision memo and one of which does not, into a single categorical exclusion that does not require a decision memo. This CE is for issuance of new special use authorizations to replace existing or expiring authorizations, when the action is clerical to account for administrative changes.

- Proposed section 220.5(d)(12) is a new categorical exclusion that does not require a decision memo. It would allow the agency to issue or amend a special use authorization for activities that occur on existing roads and trails, in existing facilities or in areas where activities are consistent with the applicable land management plan.

- Proposed section 220.5(e)(3) allows the approval, modification, or continuation of special uses that require less than 20 acres of NFS lands.

In our comments on the ANPR, we discussed the need for the agency to more effectively use programmatic NEPA review and tiering to administer its special use authorization program. We continue to believe that these tools are underutilized. The Forest Service should encourage programmatic forest or district-wide environmental reviews of recreational special uses such as outfitting and guiding in advance, before specific requests are submitted. Doing so would increase efficiency, lower processing costs, and produce better and more consistent environmental reviews and public engagement. Such an approach would allow the identification of areas that are under capacity or over capacity, and the types of uses within particular areas that could reasonably be expected to have no more than a *de minimis* impact.

The Forest Service's proposal is extremely broad in scope. Special use permits are not a single type of *action*; they are a type of *approval* that may be issued for many different kinds

[214] Note that this case also invalidates (d)(2)(vi); there should be no CE for "Establishing procedures for amending or revising forest land and resource management plans," because they may have significant effects.

of actions with just as many impacts, some of which are well understood but others which are infrequent or which may not have even been proposed yet. The variety of different contexts in which all these special uses might occur are equally diverse. Consequently, there is an almost infinite number of possible effects from authorizing special uses. The record does not (indeed, could not) support a reasoned conclusion that these possible authorizations would not have significant impacts, individually or together.

Instead of encouraging better use of existing tools, the proposed rule proceeds directly to a CE-based solution. It opens up existing CEs to significantly more use, and also creates a new CE. Although they contain some limiting principles, the proposed CEs must be significantly narrowed in their scope to pass muster and ensure they are utilized for categories of actions that will not have individually or cumulatively significant impacts.

As we said in our comments on the ANPR, we believe there is room for improvement in the existing CEs for certain recreational special uses, as well as the potential for a carefully crafted CE with appropriate sideboards for those recreational special uses. However, we continue to believe it is important for the Forest Service to carefully and clearly identify the problems it is trying to solve before it undertakes the task of modifying the existing CEs and proposing new CEs. The proposed rule and supplemental materials do not appropriately define the problem to be solved. As a result, the proposed CEs are overly broad and lack appropriate sideboards. In addition, they have not been adequately justified by the agency.

The one problem worthy of consideration for a new CE is outfitter-guide recreational special use authorizations. Currently, USFS rules require the agency to complete an EA or EIS for new outfitter-guide permits in nearly all circumstances, including situations in which the proposed recreational activity will take place on existing recreational infrastructure or in existing recreational facilities. The agency may be able to justify the promulgation of a new CE for outfitter-guide permitting if the CE contains appropriate limitations and sideboards. We discuss this in more detail in relation to proposed section 220.5(d)(12) below. Unfortunately, the special uses CEs contained in the proposed rule go far beyond outfitter-guide permitting. They encompass a wide range of land use and recreational special use authorizations of which there are more than 180 types.[215] This includes everything from outfitting and guiding to spring water bottling, pipeline rights-of-way, power line corridors and communications sites.

Thus, instead of carefully defining the problem to be solved and crafting a narrowly tailored solution, the proposed CEs treat all special use authorizations the same. Such an approach is arbitrary and capricious. For instance, establishing power line corridors and communications sites requires the alteration of a significant portion of NFS lands. These alterations have a much greater impact on the human environment than a guided recreational activity that makes use of existing recreational infrastructure. They cannot be addressed using the same CE.

Another type of recreational special use authorization is for recreation events. These events often involve large numbers of people using a concentrated area of the forest for a specific recreation activity. Such an event has a much greater impact on the forest than a guided backpacking trip that uses existing trails and campsites. Furthermore, some special use

[215] *Forest Service Administration of Special Use Program*, U.S. Department of Agriculture Office of the Inspector General Audit Report 08601-55-SF (June 2011) (attached).

authorizations for recreation events and outfitting and guiding involve motorized use of roads and trails. A large body of research has demonstrated that motorized uses have much greater adverse impacts on NFS resources than non-motorized uses.[216] The agency cannot ignore these impacts when promulgating a recreational special use CE.

Despite the need for narrowly-tailored solutions, the proposed rule makes broad generalizations about special use authorizations without adequately describing the wide range of authorized activities that would be categorically excluded under the proposed rule. A much more surgical approach is needed. For these reasons and others we explain below, we urge the agency to withdraw these proposed CEs and develop a new, carefully-crafted proposal that is adequately justified by the record.

a) Proposed CE (d)(11).

Proposed section 220.5(d)(11) combines two existing CEs into a single CE that would allow the agency to issue new special use authorizations without environmental review or public input when the authorization replaces an existing or expired authorization and is a clerical action to account for administrative changes. This CE could be used when there is no change in the scope or intensity of the proposed activities and the applicant has complied with the terms and conditions of the expired authorization. Significantly, the newly combined CE would be located in section 220.5(d)(11), which means no decision memo would be required.

We have concerns about the lack of public notice that would result from the elimination of the decision memo requirement combined with the proposed revisions to section 220.4(d)(1) regarding scoping. Currently, the issuance of a new special use authorization under section 220.6(e)(15) is subject to the scoping requirement and must be documented in a decision memo. Under the proposed rule, because of the changes in the scoping and notice requirements at proposed section 220.4(d)(1) and the relocation of section 220.6(e)(15) to section 220.5(d)(11), there will be no scoping, no public notice, and no documentation of the decision to issue a new special use authorization under this CE.

As explained in the introduction to this section, this CE would be available for reissuance of any type of special use authorization. While it might be appropriate to reissue recreational special use authorizations in some circumstances, this CE would apply to all 180+ types of special uses. The result would be that the agency could reissue a permit for a highly impactful use such as a power line corridor or a transmission line without providing the public with notice or an opportunity to comment on the reissuance. This would effectively make the authorization permanent, and the lack of a notice requirement would eliminate any opportunity during the term of the permit for the public to provide input on the ways in which the authorized activity is having a significant or newly emerging impacts. This would also frustrate the ability to improve permit conditions to better protect resources based on new information and circumstances.

By eliminating public involvement, this CE makes the agency entirely dependent on its own ability to ensure compliance with the sideboards laid out in the CE. To ensure compliance with the CE, the agency will be required to evaluate the scope of the authorized activities and

[216] *See generally* T. Adam Switalski & Allison Jones, "Off-road Vehicle Best Management Practices for Forestlands: A Review of Scientific Literature and Guidance for Managers," *Journal of Conservation Planning* 8:12-24 (2012) (attached).

enforce the terms and conditions of existing authorizations. This may seem like a simple matter. However, the agency's track record on monitoring and enforcing the terms and conditions of special use authorizations is mixed at best. In June 2011, the Department of Agriculture's Inspector General released a report on the Forest Service's administration of special use authorizations. The findings in the report cast significant doubt on the agency's ability to ensure that use of this CE will remain within the stated sideboards. Among the findings:

- The Forest Service "lacks the resources it needs to properly manage the special uses program."

- The Forest Service "lacks the timely access to specialized personnel it needs to perform certain required reviews—such as National Environmental Policy Act (NEPA) reviews and communication site management plans for communication relays—which are important for ensuring that authorization holders are not harming the forests."

- "Due to inadequate resources for the Special Use Program, FS could not inspect the sites of its special use authorizations, as required. Of the 128 special use land authorizations we sampled, we found that 9 ranger districts had not inspected the sites of 106 authorizations, or 83 percent. Without performing these inspections, FS faces an increased risk that users might violate the terms of their authorization, which could result in environmental damage and unpaid fees."[217]

Given the agency's difficulty in monitoring and enforcing the terms and conditions of its special use authorizations, it is unreasonable to completely eliminate public involvement in the reissuance of special use authorizations. The public can, among other things, help the agency determine whether a holder has complied with the terms and conditions of an expired authorization. Likewise, the public can provide valuable input on whether a new authorization is likely to result in a change in the scope or intensity of an authorized activity. In short, public participation is vital to the administration of this CE.

Finally, the agency asserts that the two existing CEs should be combined to eliminate confusion as to which CE applies in a particular situation. We understand the need for clarity. However, the agency should not sacrifice public involvement in order to clarify the rule. If clarification is needed, then the agency should revise the regulatory language to eliminate the confusion *and* ensure that public involvement is preserved. There is no reason to choose clarity over transparency.

As stated elsewhere in our comments, we believe the entire proposed rule should be abandoned. However, to the extent that the agency does proceed to a final rule, it should modify this proposed CE so that the public continues to receive notice of new issuance for most types of special use authorizations.

In addition to the lack of public participation, we are concerned about the scope of this CE. Proposed CE 220.5(d)(11) extends to all special use authorizations, including things like

[217] *Forest Service Administration of Special Use Program*, U.S. Department of Agriculture Office of the Inspector General Audit Report 08601-55-SF, Executive Summary at pp.1-2 (June 2011) (attached).

utility corridors, oil and gas transmission lines, and roads for accessing private lands. We see significant problems in lumping all types of special use authorizations together in a CE that allows the issuance of a long-term authorization without any environmental review or public input.

At a minimum, the agency needs to provide a more detailed justification for its decision to categorically exclude reissuances of some of the types of special use authorizations covered by this CE. The justification provided is minimal. The Supporting Statement for this CE states that "[t]he USFS reviewed over 1,500 actions associated with existing CE #15 from fiscal years 2012- 2016. This review indicated that CE #15 is being used as intended and within its limiting factors." The Appendix lists two previously implemented actions relevant to proposed CE(d)(11). Both actions involved recreation-related special use authorizations. The first *("Transitional Special Uses Permit")* involved the conversion of transitional recreational special use permits to priority use permits. The second *("Casa Loma Recreation Residence Permit Renewal")* involved renewals of permits for several recreation residences. The proposed rule and supplemental materials provide no further explanation.

What is missing from the proposed rule and supporting materials is a review of the appropriateness of categorically excluding more impactful types of special uses from environmental review. An oil and gas transmission line has a very different environmental impacts than the reissuance of a recreational special use permit. Transmission lines require the removal of trees and excavation along a corridor that may extend through a forest for many miles. These corridors can be seen for long distances, and the removal of trees can increase erosion and adversely affect water quality in nearby streams.

In contrast, reissuing a permit for a group backpacking trip that uses existing trails and campsites usually has little or no impact on the forest. Even larger scale commercial recreation activities like whitewater rafting and horse packing can minimize their impacts by adopting leave-no-trace practices (as many have done) and remaining on well-established recreation infrastructure like boat launch facilities and designated campsites.

Instead of making these important distinctions, the CE treats all of these uses the same and assumes they all have similar, non-significant impacts. The range of activities that are considered special uses is just too broad to draw this conclusion.

If the agency's intention is to use this CE primarily to renew recreational special use authorizations, it should say so in the CE and delete the examples in proposed 220.5(d)(11)(i) and (ii) that pertain to other uses. However, if the agency intends to apply this CE more broadly, it must provide a detailed justification for how those other types of special uses will not result in individually or cumulatively significant impacts - a showing the agency likely cannot make, given the intensive nature of many of those uses.

The proposed CE 220.5(d)(11) is limited to issuances that are "a purely clerical action to account for administrative changes, such as a change in ownership of authorized improvements or expiration of the current authorization." Similar language exists in the current regulation concerning "purely ministerial action" regarding ski area special use permits. 36 C.F.R. 220.6(d)(9) (proposed). The CE provides two examples (change in ownership and expiration of the current authorization). *Id*.

In concept, this is an important limitation on the scope of the CE. However, the meaning of the phrase "purely clerical action to account for administrative changes" needs to be defined further for this language to serve as a meaningful sideboard.

For the reasons we discuss in other sections of this comment letter, we urge the Forest Service to withdraw the proposed rule. To the extent the Forest Service proceeds with the proposal, it must do the following to ensure that it has written an appropriately narrow CE and supported it with the necessary data analysis:

- Preserve the public notification and engagement requirement for issuance of new special use authorizations, as required by current section 220.6(e)(15).

- Limit the scope of proposed section 220.5(d)(11) to recreation-related special use authorizations.

- Clarify the types of changes in a special use authorization that will be considered administrative changes subject to the CE.

b) Proposed CE (d)(12).

Proposed section 220.5(d)(12) is an entirely new CE. It would allow the "issuance of a new authorization or amendment of an existing authorization for activities that occur on existing roads or trails, in existing facilities, or in areas where activities are consistent with the applicable land management plan or other documented decision."

As we noted above and in our comments on the ANPR, we believe that a new CE that allows the agency to issue certain types of outfitter-guide permits may be warranted, so long as it includes appropriate sideboards and a robust record to support the new CE. Proposed section 220.5(d)(12) is too broad as written and not adequately supported.

From the examples listed, proposed section 220.5(d)(12) appears to be targeted at recreation. All five examples listed in the proposed rule are a form of recreational special use. However, the language of the proposed CE is much broader. It covers any authorization for activities "that occur on existing roads or trails, in existing facilities, or in areas where activities are consistent with the applicable land management plan or other documented decision." It is not limited to recreation activities. As such, the CE could be used to authorize, without environmental review, a wide range of non-recreational uses, including those described above. This could include land uses that have much greater environmental impacts than recreation.

For example, the language of the CE could be read to allow the agency to issue a special use authorization to lay a pipeline under an existing road without further environmental review. Likewise, the agency could use this CE to authorize a communication site if that site will be located on an "existing facility." This would allow the agency to authorize the placement of a communication site in a developed campground.

Pipelines and communications sites have very different impacts than recreation activities, and yet this CE would allow the agency to authorize both. Rather than run the risk of allowing environmentally significant non-recreational activities to be authorized under this CE, the CE

should be expressly limited to recreational special uses on existing recreational infrastructure that is open to the public.

This proposed CE contains modest limits on its applicability. The proposed rule would allow the use of the CE in any of three situations:

- When the proposed activity would take place on existing roads or trails;
- When the proposed activity would take place in existing facilities; or
- When the proposed activity would take place in any area where activities are consistent with a land management plan or documented decision.

There are several problems with this approach. First, *all* project level decision-making must be consistent with the governing land management plan, so the use of "or" improperly suggests that activities on existing roads or trails or in existing facilities need not be consistent.

Second, it also has the effect of rendering meaningless the first two sideboards, since, on its own, consistency with the governing land management plan provides virtually no limitations on use of the CE. Most forest plans provide only general direction on recreational or other special uses and do not serve as a substitute for environmental review of specific recreational special uses. In particular, consistency with forest plan statements about desired recreation conditions - which are intended to guide, but not substitute for, project-level decisionmaking - are insufficient to justify the use of a CE.

The phrasing of the third sideboard makes it even more meaningless, referring generally to "activities . . . in areas where activities are consistent with the applicable land management plan or other documented decision." The "activities" that must be "consistent" are not specified. This language should be revised to reflect "areas where the <u>proposed</u> activities are consistent with the applicable land management plan or other documented decision."

Other sideboards are also necessary. In our comments on the ANPR, we recommended that any new or expanded CE related to outfitter-guide permitting include the following limitations to ensure that excluded actions will not have individually or cumulatively significant impacts on the human environment:

- The CE should only cover non-motorized use of established recreational infrastructure such as trails, campsites, and roads in areas that are open to the general public for recreational use;
- The CE should only cover uses that are the same or substantially similar to an existing permissible use of the covered area;
- The CE should only cover uses that are consistent with applicable plans (e.g., land management plan, programmatic recreation plan, or wilderness management plan);
- The CE should only be available for proposed activities that do not substantially increase the scope or intensity of overall use in the targeted area, taking into account both general public use and use under existing special use permits; and

- The CE should only be used to issue permits of limited duration.

These limitations provide important sideboards to ensure the special use authorizations do not have individually or cumulatively significant impacts. Despite this fact, they are not included in the proposed rule.

For the reasons we discuss in other sections of this comment letter, we urge the Forest Service to withdraw the proposed rule. To the extent the Forest Service proceeds with the proposal, it must do the following to ensure that it has written an appropriately narrow CE and supported it with the necessary data analysis:

- Limit the scope of proposed section 220.5(d)(12) to recreation-related special use authorizations.

- Revise the rule to make it clear that the CE applies only to proposed activities that will take place on existing recreation infrastructure *and* are consistent with the land management plan.

- Incorporate the other four sideboards listed above into the CE.

c) Proposed CE (e)(3).

Proposed section 220.5(e)(3) would establish a CE for "Approval, modification, or continuation of special uses that require less than 20 acres of NFS lands." Examples include:

- Approving the construction of a meteorological sampling site;

- Approving the use of land for a one-time group event;

- Approving the construction of temporary facilities for filming of staged or natural events or studies of natural or cultural history;

- Approving the use of land for a 40-foot utility corridor that crosses four miles of a national forest;

- Approving the installation of a driveway or other facilities incidental to use of a private residence;

- Approving new or additional telecommunication facilities, improvements, or use at a site already used for such purposes;

- Approving the expansion of an existing gravel pit or the removal of mineral materials from an existing community pit or common-use area;

- Approving the continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed.

Proposed section 220.5(e)(3) makes several significant changes to the existing CE found at section 220.6(e)(3). The proposed rule deletes the word "minor" from the existing phrase

"minor special uses" and also eliminates the contiguous limitation. The proposal quadruples the cap on the number of acres impacted by the special use authorization, from five to twenty, thereby allowing the CE to be used for activities that impact a much larger area. Finally, the proposed rule expands several of the listed examples of activities that can be undertaken under the umbrella of the CE—namely:

- It allows for the use of the CE for 40-foot utility corridors crossing four miles of Forest Service land – representing an increase from one mile.

- It allows for the use of the CE for new telecommunications facilities, improvements, or uses at a site that is currently being used for those purposes.

- It allows for the use of the CE to expand an existing gravel pit, while simultaneously increasing the potential acreage to twenty acres – representing a four-fold increase in the size of the gravel pit without any environmental review.

In the supporting statement provided with the proposed rule, the agency states that it:

> [R]eviewed the NEPA documentation for 62 recent projects that relate to actions associated with this proposed CE . . . . The average size of these projects was 40 acres, with a range from under five acres to over 300 acres. . . . The USFS reached a finding of no significant impact on each of the environmental assessments associated with these projects.

Supporting Statement at 16. The supporting statement goes on to say that the agency "obtained information related to implementation and monitoring of 9 of these projects," *id.* – a notably small sample. The statement reports that "the effects were not more intense or substantial than predicted in the EA, DN, and FONSI," and that "[n]one of the environmental analyses for the projects reviewed for this proposed special uses CE predicted significant effects on the human environment." *Id.* Based on this, the agency concludes that the proposed actions covered by the CE would not individually or cumulatively have significant effects on the human environment. That conclusion is not supported by the record.

The proposed rule deletes the word "minor" from the existing phrase "minor special uses," reasoning that "[t]he presence of 'minor' has caused confusion among Agency personnel because it is not a term of art in this context."[218] The proposed rule also eliminates the contiguous limitation without explanation. The agency offers no other explanation for these significant changes.

Deletion of the word "minor" will have substantive real world consequences. Special use authorizations will no longer have to be minor to qualify for use of the CE. As a result, any special use authorization of any kind that disturbs 20 acres of land or less will be exempt from environmental review. It may be that the term "minor" could use further definition. However, the solution for that problem is to define it rather than eliminate it. At any rate, the distinction between "major and minor" CEs is not one that has proven impossible in the past. *See Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1005 (E.D. Cal. 2005) (aff'd in relevant part by *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), rev'd on other grounds by *Summers v. Earth Island Inst.*, 555 U.S. 488, (2009)) (holding that, under the

[218] 84 Fed. Reg. at 27548.

Appeals Reform Act, the Forest Service was "required to delineate between major and minor [CE] projects").

Deletion of the word "contiguous" is even more far-reaching. This deletion would allow the agency to approve special uses that could stretch across an entire forest so long as the total amount of surface disturbance is limited to 20 acres. Forty drilling well pads of half an acre each spread across a large area could be approved without environmental review, despite the fact that approval of such a project would adversely impact far more than the 20 acres directly disturbed.

How surface disturbance is permitted to occur can have vastly different environmental impacts. As the Tenth Circuit recognized, having a simple limitation on the amount of surface disturbance but no direction on how the disturbance will occur can result in a significant variation in the effects of that disturbance on plants and wildlife. In *New Mexico ex rel. Richardson v. BLM*, the BLM changed from an alternative that limited surface disturbance associated with oil and gas development to a specific location (along existing roads) to a cap of one percent of lease acreage. The Court found that this required a supplemental NEPA analysis "[b]ecause location, not merely total surface disturbance, affects habitat fragmentation." 565 F.3d 683, 707 (10th Cir. 2009). As the Court elaborated:

> the location of development greatly influences the likelihood and extent of habitat preservation. Disturbances on the same total surface acreage may produce wildly different impacts on plants and wildlife depending on the amount of contiguous habitat between them.

Id. at 706. These effects were significant in the fragile Chihuahuan desert grasslands at issue in *Richardson*, and, depending on the nature and location of the proposed special use authorization at issue, are likely to be significant in the context of implementing proposed CE(e)(3) as well.

In short, the agency is asserting that every special use authorization, of any kind, that disturbs 20 non-contiguous acres of land or less does not result individually or cumulatively in significant effects on the human environment. Combined with the four-fold increase from 5 to 20 acres of land that could be disturbed, proposed CE(e)(3) is likely to encompass numerous projects with individually and cumulatively significant impacts.

For example, Stilo, a foreign-owned company, is seeking to construct a massive resort development on a private inholding less than a mile from the southern boundary of Grand Canyon National Park. Current access to the parcels that Stilo grand hopes to develop is by dirt road. In 2014, the Town of Tusayan, on Stilo's behalf, submitted a permit to pave and widen the routes to the parcels and to obtain rights-of-way for water, sewer, electricity, gas, etc. Because the total area to be disturbed totaled over 5 acres, the Forest Service could not have categorically excluded the proposal.

However, under the proposed rule, the applicant could seek access across a single route to the western most (Kotzin Ranch) parcel, either the north (14.8 acres of disturbance) or the south (8.9 acres) access routes, via a CE.[219] The applicant could attempt to submit separate,

[219] *See* Town of Tusayan, Application For Transportation And Utility Systems And Facilities On Federal Lands, (submitted June 5, 2014) at page 2, available at

sequential applications for each of the Kotzin access routes as well, and each application would meet the new categorical exclusion definition. On Kotzin Ranch, Stilo proposes to construct a wide range of visitor services that will include lodging, a pedestrian-orientated retail village, an educational campus, a Native American Cultural Center, a conference hotel, other services and hundreds of residential units - development that cannot take place but for the improvements Stilo seeks across Forest Service land via the special use permit. As a result, a significant portion of one of the most contentious and potentially damaging proposals involving Forest Service lands near Grand Canyon National Park could be approved via a CE (or two) without public involvement or environmental review, ignoring the larger connected action (development of the private parcels) the rights-of-way seek to promote.

By allowing non-minor special uses impacting up to "20 acres *of NFS lands*," 36 C.F.R. 220.5(e)(3) (proposed, emphasis added), the proposal ignores the full impacts of some Forest Service decisions, because some inarguably significant projects may occur only partly on national forest system lands. For example, an intrastate natural gas pipeline that crosses a national forest will not require FERC approval, and may need no other federal approvals. In that case, Forest Service authorization is a necessary condition for construction of the pipeline, with all its direct, indirect, and cumulative impacts. But no federal agency will have reviewed those impacts through the lens of NEPA. State and local road projects, too, may cause significant environmental impacts that evade NEPA review even though they are not possible without Forest Service approval.

The failure to assess a project's impacts on non-NFS lands along with its effects to NFS lands is unlawful when the Forest Service has regulatory authority over the project. *See, e.g.*, *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 26 1039, 1042 (4th Cir. 1986) (*quoting Biderman v. Morton*, 497 F.2d 1141, 1147 (2d Cir. 1974)); *Sugarloaf Citizens Ass'n v. Fed. Energy Regulatory Comm'n*, 959 F.2d 508, 512 (4th Cir. 1992). Furthermore, even if another federal agency is involved in some fashion, it is likely that the Forest Service would ordinarily be the lead agency for some of these projects. If the Forest Service relies on a CE, then those other agencies will have to complete the needed analysis. It is not efficient for the agency with the most expertise and stake in the permitting process to shift its NEPA responsibilities to another agency without the expertise necessary to effectively analyze effects.

More generally, the supporting statement for the proposed CE points to the agency's review of a limited sample of special use authorizations completed with an EA, lists the range of acreage, and then concludes that a 20-acre CE is appropriate because each of the reviewed EAs resulted in a FONSI. There is a fundamental flaw in this logic. Most EAs include mitigation requirements to minimize the environmental impacts of the proposed action. Some projects are also modified after scoping to achieve the same goal. These modifications and mitigation requirements form an essential component of the finding that the project will have no significant impacts. The conclusion that these EAs and their FONSIs justify a blanket CE for projects of 20 non-contiguous acres completely ignores these mitigation and modification requirements. Thus, the agency's justification does not satisfy its burden of proof for promulgating a categorical exclusion under applicable case law. *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007).

---

https://www.fs.usda.gov/nfs/11558/www/nepa/101448_FSPLT3_2461075.pdf (last viewed Aug. 3, 2019).

Several examples from the projects on which the agency relies to justify the proposed CE illustrate its failure to assess critical mitigation measures and modifications that resulted from the NEPA process. For instance:

- *L.E.D.E. Reservoir Enlargement Project*: In 2013, the White River National Forest approved a proposal to expand a dam and reservoir in order to provide the town of Gypsum, Colorado with water for projected municipal growth. The preferred alternative expanded the area of the reservoir from 24.8 surface acres to 32.2 surface acres, a change of 7.4 acres. This would fall under the proposed categorical exclusion at 220.5(e)(3) because it impacts an area of less than 20 acres, but would not be eligible for the existing CE because it impacts an area of more than 5 acres. As a result of the EA that was required at the time, the Forest Service was able to identify and implement several mitigation measures to reduce the impact of the project. These included a bypass flow around the dam during spring runoff to protect stream habitat, and offsite mitigation to replace 1.91 acres of wetlands that would be destroyed by the project.[220]

- *Laurel Creek Property Owners Association Access Across National Forest System Lands*: Owners of a small inholding within an undeveloped, otherwise-wilderness-eligible area in North Carolina sought permission to use and extend road access to the property to facilitate development. For much of its length, the road was located within 10 feet of a state Outstanding Resource Water, and new ground disturbance would have crossed steep slopes and potentially exposed acid-producing rock. The Forest Service authorized the use in 2013, but the FONSI was reversed on appeal due to a failure to consider alternatives. On a second go around, the project incorporated mitigation requirements requested by the public and the state Wildlife Resources Commission. After considering the difficulties of mitigating harm to water quality, the property owners sold the property to a land trust, and it will soon be transferred to the Forest Service.

- *Minnesota Department of Transportation (MnDOT) Allied Radio Matrix for Emergency Response*: Similarly, the agency relies on the Superior National Forest's 2013 approval of a project to build two new and two replacement communications towers in close proximity to the Boundary Waters Canoe Area Wilderness. The proximity of the towers meant they would have visual impacts to the Wilderness Area after construction. Additionally, one of the radio tower sites was in close proximity to a possible heritage site. During the scoping process, numerous mitigation measures were attached to the project and included in the preferred alternative. These included moving the site of one of the towers to avoid harm to the historic site, removal of guy-wires from the towers to minimize wildlife impacts, and design modifications such as natural finishes and reduced lighting to minimize visual impact to the surrounding area.[221]

---

[220] *See Decision Notice and Finding of No Significant Impact, L.E.D.E. Reservoir Enlargement Project* (April 24, 2013), available at https://www.fs.fed.us/emc/nepa/-revisions/includes/docs/specialuses/proposedces/ledereservoir-dnfonsi.pdf.

[221] *See Decision Notice and Finding of No Significant Impact, Minnesota Department of Transportation (MnDOT) Allied Radio Matrix for Emergency Response (ARMER)* (February

- *Floyd Hill Distribution Tie-In Project*: Under the examples cited in the proposed rule, the proposed CE would also cover up to 4 miles of utility corridors. In at least one of the supposedly comparable projects the agency relies on, extensive mitigation measures were imposed as a result of the NEPA process. In 2013, the Arapaho National Forest analyzed the 3-mile long Intermountain Rural Electric (I-REA) Distribution Line as part of the Floyd Hill Distribution Line Tie-in Project. In approving the project, the agency required extensive mitigation measures, including the retention of woody debris and topsoil, slope stabilization and revegetation, and installation of drainage features. It also imposed a long list of mitigation measures during the construction process.[222]

- *Ameren Powerline Reconstruction Project*: This utility ROW permit is illustrative too. The project was modified to add mitigation for state-listed species and sensitive wildlife and plants. Despite those efforts, the corridor is overgrown with non-native and invasive species, and its access roads are visibly compacted.

- *Red Butte Cinder Pit Expansion Project*: The proposed rule also lists gravel pit expansions of 20 acres or less as an example of special uses subject to the expanded CE. Here too, at least one of the projects the agency relies on benefited significantly from the NEPA process. In February 2015, the agency approved a 16-acre expansion of the Red Butte Cinder Pit. However, in doing so, it required substantial mitigation, including restrictions on disturbances within ¼ mile of bird nests and equipment and soil screening for invasive species - all site-specific mitigation measures necessary to support a FONSI.[223]

In short, the agency has not demonstrated that the proposed expansion of CE(e)(3) would not result in individually or cumulatively significant impacts, nor has the agency attempted to ensure that needed mitigation measures from past similar projects are incorporated as limits on the category. The proposed expansion of the CE should be abandoned.

3. Proposed CE (e)(23), (e)(24), and (e)(25) (36 C.F.R. §§ 220.5(e)(23), (e)(24)) - Road Construction, Reconstruction, and Conversion of Unauthorized Routes to System Roads or Trails.

The proposed rule offers an unprecedented set of new CEs that would allow thoughtless expansion of the Forest Service's already bloated transportation system. Proposed CEs (e)(23), (e)(24), and (e)(25) would permit construction of up to 5 miles of new Forest Service System roads, reconstruction of up to 10 miles of system roads, and unqualified conversion of unauthorized, user-created routes to system roads and trails – all with no environmental analysis, consideration of alternatives, or public input.

2013), -https://www.fs.fed.us/emc/nepa/revisions/includes/docs/specialuses/proposedces/-mndot-dnfonsi.pdf.

[222] *See Environmental Assessment; Floyd Hill Distribution Tie-In Project* (July 2013), available at https://www.fs.fed.us/emc/nepa/revisions/includes/docs/specialuses/-proposedces/intermountain-ea.pdf.

[223] *See Decision Notice, Red Butte Cinder Pit Expansion Project* (April 2015), available at https://www.fs.fed.us/emc/nepa/revisions/includes/docs/specialuses/proposedces/redbutte-dnfonsi.pdf.

These proposals are contrary to decades of Forest Service travel and transportation management policy requiring the agency to right-size its outsized system to one that is ecologically and fiscally sustainable and to ensure that all public motorized vehicle use occurs in accordance with various designation criteria that necessitate a public process and environmental review. In short, Forest Service policy dictates that the agency is no longer in the business of raising the high-water mark of its over-extensive road system. Instead, science and policy dictate that the agency should focus its limited resources on *eliminating* unneeded roads and trails and reducing the deferred maintenance backlog for needed roads and trails, thereby enhancing the quality of recreation opportunities and access. Given the well-documented significant impacts associated with road building and motorized use on national forests and grasslands, the Forest Service has not made, and cannot make, the requisite showing that these proposed CEs will not have individually or cumulatively significant effects on the human environment. The proposed CEs should be abandoned.

The National Forest System has about 370,750 miles of system roads and at least another 60,000 miles of non-system routes, including temporary roads and unauthorized roads and trails. System roads alone are nearly eight times the length of the entire U.S. Interstate Highway System, enough to circle the earth at the equator fifteen times, and enough to get to the moon and most of the way back. About 18% of the system roads are passable by a car, while 55% are high clearance, and 27% are closed to public motorized travel.[224] Much of the system suffers from inadequate maintenance, as recent appropriations have paid for one-fifth to one-half of the annual required maintenance cost. As of 2018, the national forest road system had a more than $3.1 billion maintenance backlog.[225] These roads – both system and non-system – are contributing sediment pollution to forest streams and water bodies, resulting in impacts to fish and other aquatic and riparian systems. In some forests, stream segments are listed under the Clean Water Act as impaired because of road-derived sediment pollution. These roads also fragment wildlife habitat, reduce wildlife connectivity, facilitate the spread of non-native, invasive species, increase the risk of fire ignitions, and increase opportunities for poaching and looting of archaeological sites.

The scientific literature, including numerous Forest Service reports and studies, document the many environmental problems attendant to the agency's large and under-maintained road system. A 2001 Forest Service technical report by Gucinski *et al.* entitled "Forest Roads: A Synthesis of Scientific Information," still provides an accurate summary and description of the science regarding the myriad damaging impacts of roads on the landscape.[226] The Gucinski report followed on the heels of the Forest Service's final EIS on the Roadless Area Conservation Rule, which found significant ecological and other benefits to prohibiting the construction of new roads within roadless forest. In a 2010 technical report, the Forest Service summarized some of the problems associated with the road system:

> Expansive road networks, however, can impair water quality, aquatic habitats, and aquatic species in a number of ways, *often to a greater degree than any other activities conducted in forested environments* . . . . Roads intercept surface and subsurface flows, adding to the magnitude and flashiness of flood

[224] National Forest System Statistics FY 2018 (attached).
[225] *Id.*
[226] Gucinski, Hermann *et al.* 2001, Gen. Tech. Rep. PNW-GTR-509, *Forest Roads: A Synthesis of Scientific Information*, *available at* http://www.fs.fed.us/pnw/pubs/gtr509.pdf.

> peaks and accelerating recession of flows . . . . Road networks can also lead to greater channel incision, increased sedimentation, reduced water quality, and increased stream habitat fragmentation. Modern road location, design, construction, maintenance, and decommissioning practices can substantially mitigate these impacts, but most forest roads were built using older methods and are not adequately maintained owing to a lack of resources. In addition, many critical drainage components like culverts, are nearing or have exceeded their life expectancy.
>
> These deteriorating road conditions threaten our ability to manage forests and pose significant risks to watersheds. Climate change elevates these risks by increasing the frequency and magnitude of large storm events and flooding.[227]

An extensive investigation of the Nantahala and Pisgah National Forests' road system commissioned by Southern Environmental Law Center and The Wilderness Society in 2015[228] revealed that unmaintained roads continue to cause significant resource damage. Specifically, we found that maintenance funds were being depleted before they could be used to maintain low-use roads, particularly those in lightly developed areas. We found numerous instances of acute and chronic sedimentation and barriers to aquatic organism passage in violation of state and federal water quality laws and NFMA. We confirmed that the Forest Service was vastly overestimating its best management practice (BMP) implementation rates because it lacked the capacity to survey and catalog these widespread BMP failures. Our findings included the following:

- We surveyed 438 stream crossings and 67 other BMP sites on 45 roads, 322 of which were crossings of perennial or intermittent streams (which are subject to North Carolina's Forest Practice Guidelines ("FPGs")). Fully 40% (127) of these 322 crossings were in violation of the FPGs because of accelerated erosion in the crossing or visible sediment delivery into the stream. An additional 7 sites (not at stream crossings) were found to have failed BMPs that were contributing visible sediment to perennial or intermittent streams. In almost all cases, accelerated erosion and visible sediment violations were caused by inadequate BMP installation or maintenance—for example, water eroding the road surface due to a blocked or buried culvert intake or inside ditch. The severity of these FPG violations varied dramatically, from relatively minor erosion at a culvert outfall to large slope failures and deep erosion gullies.

- 314 sites (60% of the 505 total) had other BMP failures that were not currently causing violations of the FPGs but, if left unmaintained, are likely to do so in the future. Many of these BMP failures were causing erosion of the road surface, but it was not yet evident that visible sediment is impacting perennial or intermittent streams. These included inside ditch and road culvert blockages, failures of erosion control features like dips, and BMP installation or location problems.

---

[227] USDA Forest Service, General Technical Report PNW-GTR-812, *Water, Climate Change, and Forests: Watershed Stewardship for a Changing Climate*, p. 72 (2010) (emphasis added), *available at* https://www.fs.fed.us/pnw/pubs/pnw_gtr812.pdf.
[228] See Grosse et al., *Analysis of Forest Road Conditions and the Impact on Water Quality and Aquatic Organisms in the Pisgah-Nantahala National Forests* (2015) (attached).

- In addition to sediment impacts, we also determined that aquatic organism passage was very poor on these low-standard forest roads. Larger perennial streams provided the best aquatic organism passage, because many were spanned by bridges. Crossings of smaller streams with pipe culverts, however, were nearly all impassable for small fish and/or salamanders. Specifically, of the 22 stream crossings we surveyed with a summer flow depth of 4 inches or greater, none were passable for small fish. The passage rate for salamanders was slightly better—14%. Connectivity for trout in trout waters was slightly better (at 35%), but still unacceptably low.

The BMP failures we observed were directly contributing to aquatic resource degradation. In general, state monitoring data show that improperly implemented BMPs cause risk to waters 70% of the time in the mountain region where the Nantahala and Pisgah are located (NC Forestry BMP Implementation Survey Results, 2006-2008). Our investigation similarly showed that BMP failures and FPG violations have had observable adverse impacts on aquatic ecosystem health. Waters downstream of failed BMPs often snowed significant sediment accumulation compared to waters immediately upstream, with noticeable effect on the number and diversity of benthic macroinvertebrates. In fact, we failed to find any aquatic organisms whatsoever at 55 of 194 culverted, flowing stream crossings—a failure rate of 28%. These were generally streams with considerable sediment accumulation and embeddedness. Like sediment pollution, connectivity barriers have a negative impact on aquatic ecosystem integrity. Impassable stream crossings cause genetic isolation and decrease the availability of food sources for downstream species. Furthermore, some connectivity barriers (such as improperly sized, installed, or maintained culverts) can also increase the risk of sediment pollution by making stream crossings more prone to washouts or surface erosion. Clearly, backlogged road maintenance is a problem that the Forest Service has yet to address.

The Forest Service also summarized these effects in the final rule for existing CE(e)(20), which covers reclamation and physical decommissioning of unauthorized roads and trails, and provided a list of select research papers and supporting documents for the establishment of that CE in 2012.[229] The agency's supporting statement for the proposed expansion of CE(e)(20) references and incorporates that record, concluding that "road and trail restoration treatments are effective in significantly reducing sediment yields from roads and trails."[230]

Exhibit 5 to our ANPR comments surveys the extensive and best-available scientific literature on a wide range of road-related impacts to ecosystem processes and integrity on National Forest lands. These adverse impacts are long-term, occur at multiple scales, and often extend far beyond the actual "footprint" of the road. For example, erosion, compaction, and other alterations in forest geomorphology and hydrology associated with roads seriously impair water quality and aquatic species viability.[231] Roads disturb and fragment wildlife habitat, altering species distribution, interfering with critical life functions such as feeding, breeding, and nesting, and resulting in loss of biodiversity.[232] Roads also facilitate increased

[229] 78 Fed. Reg. at 56157, Appendix I, *available at:* https://www.fs.fed.us/emc/nepa/-restorationCE/includes/USFS_CE_Supporting_Statement_Appendix%20I.pdf.
[230] Supporting Statement for Proposed Infrastructure CEs, p. 41 & Appx. F.
[231] ANPR Comments, Exhibit 5 at 2-4, 6-8.
[232] *Id.* at 4-8.

human intrusion into sensitive areas, resulting in poaching of rare plants and animals, human-ignited wildfires, introduction of exotic species, and damage to archaeological resources.[233]

Climate change intensifies the adverse impacts associated with roads. For example, as the warming climate alters species distribution and forces wildlife migration, landscape connectivity becomes even more crucial to species survival and ecosystem resilience.[234] Climate change is also expected to lead to more extreme weather events, resulting in increased flood severity, more frequent landslides, altered hydrographs, and changes in erosion and sedimentation rates and delivery processes.[235] Many National Forest roads, however, were not designed to any engineering standard, making them particularly vulnerable to these climate alterations. Unauthorized non-system routes created by haphazard use were decidedly not designed to any engineering standard. And even those roads and trails designed for storms and water flows typical of past decades may fail under future weather scenarios, further exacerbating adverse ecological impacts, public safety concerns, and maintenance needs.[236]

Motorized vehicle use on Forest Service roads and trails is also associated with a host of resource impacts. While dirt bikes, all-terrain vehicles, side-by-sides, and other off-road motorized vehicles (ORVs) can provide important access and recreational enjoyment, over four decades of research has documented significant adverse environmental and social impacts associated with their use on public lands. Impacts can include physical resource damage such as soil compaction, erosion, crushing of vegetation, spread of invasive species, stream sedimentation, and air pollution. ORV use can also degrade and fragment wildlife habitat, diminishing resilience to climate change, while ORV noise, dust, emissions, and the presence of humans can disrupt wildlife processes such as breeding, feeding, migration, and nesting. Damage to cultural and archaeological resources, including unintentional crushing of artifacts and increased vandalism and looting, is also associated with ORV use. Finally, ORV use poses public safety and user conflict concerns. In particular, the noise, dust, fumes, and physical resource damage associated with ORV use can seriously impair the experience of the majority of public lands visitors engaging in non-motorized forms of recreation.[237]

As a result of these impacts from an unsustainable and bloated system, Forest Service policy has, for almost two decades, required the agency to "maintain an appropriately sized and environmentally sustainable road system that is responsive to ecological, economic, and social concerns."[238] In doing so, forests must use a science-based

---

[233] *Id.* at 9.
[234] *Id.* at 9-11; *see also* USDA Forest Service, *National Roadmap for Responding to Climate Change* (2011), *available at* https://www.fs.fed.us/climatechange/pdf/Roadmapfinal.pdf (recognizing the importance of reducing fragmentation and increasing connectivity to facilitate climate change adaptation).
[235] ANPR Comments, Exhibit 5 at 9.
[236] USDA Forest Service 2010.
[237] *See generally* T. Adam Switalski & Allison Jones, "Off-road Vehicle Best Management Practices for Forestlands: A Review of Scientific Literature and Guidance for Managers," *Journal of Conservation Planning* 8:12-24 (2012) (attached).
[238] Memorandum from Joel Holtrop to Regional Foresters *et al.* re Travel Management, Implementation of 36 C.F.R., Part 212, Subpart A (Nov. 10, 2010); Memorandum from Leslie Weldon to Regional Foresters *et al.* re Travel Management, Implementation of 36 C.F.R., Part 212, Subpart A (Mar. 29, 2012); Memorandum from Leslie Weldon to Regional

analysis to "identify the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands," with the minimum road system defined as:

> the road system determined to be needed [1] to meet resource and other management objectives adopted in the relevant land and resource management plan . . . , [2] to meet applicable statutory and regulatory requirements, [3] to reflect long-term funding expectations, [and 4] to ensure that the identified system minimizes adverse environmental impacts associated with road construction, reconstruction, decommissioning, and maintenance.

36 C.F.R. §212.5(b)(1).

Forests must also "identify the roads . . . that are no longer needed to meet forest resource management objectives and that, therefore, should be decommissioned or considered for other uses, such as for trails." *Id.* § 212.5(b)(2). Forest officials should give priority to decommissioning those unneeded roads that pose the greatest risk to public safety or to environmental degradation. *Id.*

Most forests have completed the required science-based analysis and produced a "travel analysis report" (TAR) that recommends unneeded roads for decommissioning and provides the foundation for identifying and implementing a sustainable minimum road system. While these TARs are often lacking in their fiscal analysis and other respects, overall they put the agency on a trajectory towards achieving modest but meaningful reductions in the road system – *if* those recommendations are implemented. Based on completed TARs we have reviewed, the agency has recommended nearly 24,000 miles of system roads as likely unneeded in Regions 1, 2, 4, 5, 6, and 8 – or about 9% of system road miles across those forests.[239]

With the Forest Service able to maintain only about 41% of its current system on those forests with its current budget, the recommended reductions in the system would allow the agency to maintain closer to 52% of the needed system with its current budget. In some regions, TARs recommended more significant reductions, with Region 8, for example, recommending 14% of its current road system as likely unneeded, which would allow it to maintain 72% of the needed system with its current budget. Despite its clear policies to achieve an ecologically and fiscally sustainable minimum road system, the Forest Service has lagged in implementing TAR recommendations and generally in making sufficient progress towards achieving those policy objectives.[240]

Foresters *et al.* re Travel Management Implementation (Dec. 17, 2013) (Exhibit 4 to our ANPR comments).

[239] *See* attached summary of available TAR data as of September 2017, compiled by The Wilderness Society. The summary does not include Region 3, which generally prepared its TARs prior to travel management planning.

[240] *See generally* Jacob Smith, *Mile by Mile: Ten Years of Legacy Roads and Trails Success* (2018), attached and *available at* https://static1.squarespace.com/static/5a32b3819f07f53cfb2008cf/t/5a935bad419202959376a456/1519606722720/Mile+By+Mile+-+Ten+Years+of+Legacy+Roads+%26+Trails.pdf (describing urgent need to retire unneeded roads and concentrate resources on reducing deferred maintenance and storm-proofing remaining needed roads, with benefits to local

In addition to the requirement to achieve a minimum road system encompassed in subpart A of the Travel Management Rule (TMR), subpart B of the TMR sets important direction for managing public motorized uses on national forests. This direction was in response to decades of unregulated ORV use on public lands and the corresponding and well-documented environmental damage, social conflicts, and public safety concerns. To address those concerns, Presidents Nixon and Carter issued Executive Orders 11644 and 11989 in 1972 and 1977, respectively, requiring federal land management agencies to plan for ORV use based on protecting resources and other recreational uses and to promulgate regulations to that end.[241]

The resulting Forest Service regulations, codified at subpart B of the TMR, restrict motor vehicle use to a designated system of roads, trails, and limited open play areas and articulate specific criteria that the agency must apply in designating roads, trails, or areas for such use. 36 C.F.R. Part 212, subpart B. These criteria include:

- Public involvement. 36 C.F.R. § 212.52(a).

- Consideration of impacts to natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among users, and maintenance and administration needs and resources. *Id.* § 212.55(a).

- Designation of trails and areas with the objective of minimizing: (1) damage to soil, watershed, vegetation, and other forest resources; (2) harassment of wildlife and significant disruption of wildlife habitats; (3) conflicts between motor vehicle use and existing or proposed recreational uses; (4) conflicts among different classes of motor vehicle uses; and (5) compatibility of motor vehicle use with existing conditions in populated areas, including noise, emissions, and other factors. *Id.* § 212.55(b).

- Consideration of speed, volume, composition, and distribution of traffic, and compatibility of vehicle class with road geometry and surfacing when designating roads. 36 C.F.R. § 212.55(c).

These criteria originate from the 1972 executive order and are commonly referred to as the "minimization criteria."[242] A robust body of caselaw interpreting the criteria requires the Forest Service to provide a "granular analysis" that demonstrates how it meaningfully applied and implemented the minimization criteria when designating each trail or area for motorized use. *E.g.*, *WildEarth Guardians v. U.S. Forest Serv.*, 790 F.3d 920, 929-32 (9th Cir. 2015).

The Forest Service must identify designated roads, trails, and areas on a "motor vehicle use map" made available to the public. 36 C.F.R. § 212.56. It also must periodically monitor the effects of motor vehicle use on the designated system and revise designation decisions as

---

communities, ecosystem health, drinking water, species, and the $9.5 billion outdoor recreation economy).

[241] *See generally* The Wilderness Society, *Achieving Compliance with the Executive Order "Minimization Criteria" for Off-Road Vehicle Use on Federal Public Lands: Background, Case Studies, and Recommendations* (May 2016) (attached).

[242] Exec. Order No. 11644, § 3 (Feb. 8, 1972), *as amended by* Exec. Order No. 11989 (May 24, 1977).

needed to meet changing conditions. *Id.* §§ 212.54 & 212.57. Compliance with the mandates of subpart B of the TMR is generally accomplished and documented in concert with the NEPA process for the relevant travel management designation decisions. *See, e.g.*, *WildEarth Guardians*, 790 F.3d at 930-31 & n.11 (considering the Forest Service's NEPA analysis for purposes of determining whether the agency complied with the minimization criteria but clarifying that "[a]lthough related, NEPA and TMR set forth separate requirements" and so compliance with NEPA does not necessarily mean compliance with the TMR).[243]

Indeed, federal courts have recognized the importance of robust NEPA analysis in addressing resource impacts associated with ORV use:

> It goes without saying that reducing ORV use is beneficial to resources. That conclusion, however, has already been reached by the laws and regulations requiring [travel management planning]. What is required of the agency is an analysis comprised of something more than restating that conclusion.

The Wilderness Soc'y v. U.S. Forest Serv., 850 F. Supp. 2d 1144, 1168 (D. Idaho 2012).

Most forests completed travel management planning by 2012 and prepared EISs for those planning processes, which generally garnered significant public involvement and controversy. The proposed rule would adopt three sweeping and unprecedented CEs that would facilitate significant additions to the Forest Service transportation system by permitting conversion of unlimited miles of unauthorized routes to system roads or trails, construction or realignment of up to 5 miles of system roads, and reconstruction of up to 10 miles of system roads.[244]

The proposed rule provides no limitations on or estimates of the number of times these proposed CEs could be used, with their use potentially encompassing hundreds or even thousands of miles of additions to the system each year. Indeed, the lack of a "cap" on this proposed CE provides some insight into why it is inappropriate in the first place. It would be impossible to create a CE that ensures the road system doesn't continue to swell while still allowing for new roads when needed. Road decisions require analysis and public input at multiple scales, from the risks and needs for particular roads to the sustainability of the road system as a whole. Such analyses do not fit into CEs. The Forest Service has provided no rational justification for the need for these proposed CEs, and its conclusions that the proposed categories will not have individually or cumulatively significant impacts is arbitrary, capricious, and contrary to the record.

a) The proposed CEs are unneeded and contrary to law and Forest Service policy.

The agency asserts that the proposed CEs "were developed with a focus on increasing efficiency and management of National Forest System roads," including to address concerns

---

[243] *See also*, 70 Fed. Reg. 68263, 68279 (Nov. 9, 2005) (Notice of Final Travel Management Rule noting that "public involvement associated with the NEPA process will often fulfill the requirements of [the TMR]").

[244] 84 Fed. Reg. at 27548 (proposed sections 220.5(e)(23), (e)(24), & (e)(25)). Proposed CE(e)(24) would also permit reconstruction of parking areas, opening or closing a system road, and culvert or bridge rehabilitation or replacement along system roads.

related to "environmental and safety concerns" associated with "[d]eterioration of roads over time," and "would help the Forest Service more efficiently address recreation management needs."[245] As described above, long-standing agency policy and science make clear that accomplishing those objectives requires *decreasing* system roads and trails. By facilitating potentially significant *additions* to the system, the proposed CEs would have the opposite effect – increasing deferred maintenance and ecological damage associated with an unsustainable system, while reducing reliable access and high-quality recreational opportunities for local communities and the public. History shows that ad hoc decisionmaking for the road system invariably results in *increases* to the road system. Every road has a reason, and a constituency, and making decisions on a road-by-road basis without broader-scale context will result in more roads added and fewer removed.

We agree that the agency's "ability to maintain, rehabilitate, and enhance [its] infrastructure is vital to continuing to provide [] goods and services to the public and to ensure public health and safety" and that recreation on national forests is a major economic generator.[246] But again, the oversized transportation system is a key cause of the agency's current *inability* to maintain its infrastructure and ensure it is providing optimal access and opportunities for recreation. We also agree that "[h]ealthy, resilient landscapes will have greater capacity to recover from disturbances and large-scale threats to sustainability, especially under changing and uncertain environmental conditions, such as those driven by climate change and increasing human use," and that the watershed condition policy and its focus on improving watershed condition is an important foundation for ecosystem health.[247] Again, these objectives are best accomplished by implementing long-standing Forest Service policy to right-size the oversized transportation system to achieve a fiscally and ecologically sustainable minimum road system, as required by law. The proposed CEs would do the opposite. The agency has provided no rational or supported justification for the need for these proposed CEs.

Nor has the Forest Service articulated why or how existing CEs are inadequate to address infrastructure management needs. As we pointed out in our comments on the ANPR, existing CEs cover a wide range of infrastructure and facilitates management activities, including repair and maintenance of roads and trails ((d)(4)), repair and maintenance of recreation sites and facilities ((d)(5)), construction and reconstruction of trails ((e)(1)), and rehabilitating and decommissioning unauthorized roads and trails ((e)(20)). As with many elements of the proposed rule, the lack of an accurate and data-driven articulation of the problems the agency is trying to fix has led to overly broad and unsupported proposals.

Other statements or assumptions offered by the agency in support of the proposed CEs are unsupported, contrary to the record, or simply false. For instance, the statement that the agency's 370,000 miles of system roads "are typically necessary over time"[248] is belied by the agency's own TAR data recommending tens of thousands of miles of roads as likely unneeded and appropriate for decommissioning.[249] If the agency intends to reverse its policies and undo its efforts to identify and disinvest in unneeded roads, it will need more than a handful of FONSIs to rely on.

---

[245] *Id.* at 27548-49.
[246] Supporting Statement for Proposed Infrastructure CEs, p. 6.
[247] *Id.*
[248] *Id.* p. 34.
[249] *See* TAR summary, *supra*.

By lumping proposed CE(e)(23) in with proposed CE(e)(22) regarding construction, reconstruction, decommissioning, or disposal of buildings, infrastructure, or improvements at an existing recreation site, the agency suggests that unauthorized routes created by illegal travel are somehow comparable to existing recreation sites and infrastructure. This is deeply misleading, as the former have never been planned for, analyzed, assessed in relation to alternatives, subject to public input, or approved. Indeed, a federal court invalidated a Forest Service EA that failed to analyze the site-specific impacts associated with converting "routes created over the years by use outside the designated system whose impact on the environment has never been analyzed," reasoning that "[t]he Forest Service's position that these are not 'new' roads does not absolve it of the need to take a 'hard look' at the impact of the roads before making them a part of the designated route system." *Wilderness Soc'y*, 850 F. Supp. 2d at 1157-58.

The related assumption that such unauthorized routes should be sanctioned through conversion to official system routes to "address recreation management needs in order to reduce environmental and public safety concerns" has no basis in the record. It also sends a perverse incentive to the minority of national forest users who would create or use illegal, unauthorized routes that, by creating such routes and advocating for their conversion, they can expand the route network without environmental review, public input, limitations on mileage, or other sideboards. And it threatens the hard work that the Forest Service has undertaken – in close collaboration with the public – over the past 14 years to develop and implement travel management plans that address the damaging legacy of decades of unmanaged and unplanned motorized recreation and cross-country travel by designating a system of roads, trails, and limited play areas for motorized uses pursuant to the criteria in the TMR.

The Forest Service does not even attempt to explain how it will comply with the requirements of the TMR when utilizing the proposed CEs to convert or construct system roads or trails available for public motorized use. While proposed CE(e)(23) mentions consistency with applicable travel management decisions,[250] it is not clear how this would provide any sort of meaningful limitation on use of the CE or ensure compliance with the TMR. To the extent that existing travel management decisions address previously unauthorized routes, they would already have determined whether to add such routes to the system and conducted an EA or EIS on that decision.

Any decision to convert additional unauthorized routes to system routes open to motorized use could not occur absent compliance with the relevant TMR designation criteria – including the minimization criteria for trails. With NEPA the typical vehicle for conducting the required public process and documenting compliance with the TMR, it is unclear if or how the Forest Service would meet its TMR obligations for decisions subject to the proposed CEs. In short, the CEs to convert unauthorized routes to system roads or trails open to public motorized use will not work in practice because either: (1) an existing travel management decision – generally accompanied by an EA or EIS – already addressed the relevant route(s), in which case the CE is unnecessary, or (2) a new travel management decision – generally accompanied by relevant NEPA analysis – will be required.

[250] 84 Fed. Reg. at 27557 (proposed section 220.5(e)(23)).

Any newly constructed or reconstructed system roads or unauthorized routes converted to system roads that are open to public motorized use would be subject to TMR requirements. Yet proposed CEs (e)(24) and (e)(25) make no mention of compliance with the TMR. The preamble mentions consideration of outcomes related to travel analysis, travel management decisions, and overall goals and objectives of the transportation plan when determining whether to convert an unauthorized road to a system road under proposed CE(e)(25).[251] But this language is not repeated in the proposed regulation. In any event, existing travel management decisions will not address unauthorized, non-system roads. Nor will travel analyses, which looked only at system roads.

b) The proposed CEs are unsupported and likely to result in individually and cumulatively significant impacts.

Similar to other proposed CEs, the Forest Service's conclusion that proposed categories (e)(23), (e)(24), and (e)(25) would not have individually or cumulatively significant impacts is unsupported. In fact, the record demonstrates a high likelihood of individually and cumulatively significant impacts associated with the proposed CEs.

As an initial matter, the Forest Service relies on a small sample of cherry-picked projects. With respect to CEs (e)(24) and (e)(25), the supporting statement references 311 out of 784 "road management" projects between 2012 and 2016 that were completed using an EA, DN, and FONSI.[252] Of those 311 projects, "the interdisciplinary team [IDT] reviewed a representative sample of 62 projects," 55 of which are included in Appendix D to the supporting statement and presumably would be covered by the proposed CEs.[253] We analyzed those 55 projects in detail and provided the results of our analysis below and in Appendix 2. Curiously, a significant proportion (18%) of those 55 projects do not appear to be relevant to the proposed CEs because they did not include activities that would be authorized under them.[254] The agency then solicited feedback from field staff on a further subset of 30 of the 55 projects, and actually received feedback on 22 of the 30, only 20 of which had been implemented.[255] Of those 20, the Forest Service reports that 3 (15%) had more intense effects than were anticipated.[256] This fact alone is fatal to the proposed CEs. If Forest Service FONSIs are unreliable for road decisions 15% of the time, then the use of this authority over time cannot be assured to avoid significant impacts.

---

[251] 84 Fed. Reg. at 27548.
[252] Supporting Statement for Proposed Infrastructure CEs, p. 31.
[253] *Id.* pp. 31-32.
[254] *See* Appendix 2, "Re-Analysis of Infrastructure CE Projects." For instance, the West Glacier Spur Road Area Enhancement project on the Tongass National Forest involved improving trails, signage, parking areas, and toilets and included no work on system roads, while the Chipmunk Recovery and Restoration project on the Plumas National Forest involved roadside hazard tree treatments, salvage timber harvest treatments, temporary road construction, and reforestation, and the West Tensleep Corridor Master Recreation project on the Medicine Bow-Routt National Forest involved modification to developed and dispersed camping.
[255] Supporting Statement for Proposed Infrastructure CEs, p. 32.
[256] *Id.* The agency discounts the unanticipated and more intense effects of those three projects by providing conclusory statements that were "not directly tied to the road management components and were not significant" or were addressed through implementation of mitigation measures.

In other words, the agency is relying on a sample (20 of the 22 projects for which the IDT team received survey responses) of a sample (30 projects on which the IDT solicited feedback from the field) of a sample (55 projects included in Appendix D) of a sample (62 projects reviewed by IDT) of a sample (311 projects authorized via EA/DN/FONSI) of a sample (784 road management projects) of projects completed between 2012 and 2016. There is no explanation of how, why, or pursuant to what criteria these projects where whittled down and what similar projects with individually or cumulatively significant impacts were never reviewed by the IDT or eliminated from consideration. Moreover, decades of Forest Service EAs and EISs for road and travel management decisions document a host of significant impacts associated with the road-building and unauthorized route conversion activities that would be covered by the proposed CEs. A quick search of the Federal Register archives shows numerous projects authorizing similar activities that were completed via an EIS. We catalogued just 18 of those EISs in Appendix 8.[257] In short, the Forest Service has not addressed the substantial body of agency data relevant to the proposed CEs and the activities that they would authorize.

Indeed, just one poorly placed road can yield significant impacts to water quality, species, and other resources. For instance, a 1.4-mile forest system road located on an unstable slope above crucial refugia for at-risk fish species in the Olympic National Forest resulted in repeated landslides (including the 2016 one pictured below) and sedimentation of the Dungeness River and its anadromous fish habitat. Due to the large deep-seated landslide, high cost to reconstruct and maintain the road, moderate safety risk to users from unstable slopes, and high risk for aquatic resources, the Forest Service recently decided to decommission the road.[258]

/// //// ///
/// /// ///
/// /// ///

[257] Appendix 8, "FS Road EIS Projects."
[258] *See* Dungeness Watershed Roads Management Project project page, *available at* https://www.fs.usda.gov/project/?project=49643.

Examples like these are ubiquitous throughout the National Forest System. Even if some road conversion or construction projects can be implemented without individually significant effects (and many cannot), there is no question that unlimited use of the proposed CEs for construction of up to 5 miles of roads, reconstruction of up to 10 miles of roads, and conversion of unlimited mileage of unauthorized routes will have cumulatively significant impacts on a variety of resources, such as the at-risk native salmon, steelhead, and char species impacted by the Gold Creek/Dungeness River road. Even the extremely limited sample of the 55 projects the Forest Service relies on to justify the proposed CEs suggests that such cumulatively significant impacts are highly likely. For instance, our analysis of the projects reveals that the Forest Service predicted adverse effects to Regional Forester identified sensitive species for 60% (33) of the projects, as well as adverse effects to 25 different threatened, endangered, or proposed species for 20% (11) of the projects.[259]

Our analysis of the 55 projects further demonstrates that the Forest Service's conclusion that its proposed CEs would not have individually or cumulatively significant impacts is not supported by the record. First, a significant majority of the projects relied upon do not justify the scope of proposed CEs (e)(24) and (e)(25). For instance, proposed CE(e)(24) would authorize road construction up to 5 miles and reconstruction up to 10 miles. But with only 10 of the 55 projects covering road building activities, the mean among the 55 projects is only 0.3 miles of newly constructed road and the median is 0 miles, as depicted in the following table. The story is similar with respect to proposed CE(e)(25), which would permit unlimited mileage of unauthorized roads to be converted to system roads. Yet with only 10 of the 55 projects addressing that activity, the mean mileage of converted routes is 1.2 miles and again the median is 0 miles.

[259] *See* Appendix 2, "Re-Analysis of Infrastructure CE Projects."

Activity Authorized by Proposed CEs	Number/Percent of Projects with Activity	Mean	Median	Range
Road construction up to 5 miles	10/18%	0.3	0.0	0 to 9
Road reconstruction up to 10 miles	22/40%	2.8	0.0	0 to 27.6
Changes in motorized access	18/33%	-3.3	0.0	0 to 33.8
Culverts replaced	8/15%	0.3	0.0	0 to 5
Bridges replaced, removed, constructed	8/15%	0.4	0.0	0 to 8
Adoption of unauthorized routes into the official road system	10/18%	1.2	0.0	0 to 53

Even considering the subset of the 55 projects that did authorize the relevant activity, the mean and median mileage is still significantly lower than the proposed CEs. For instance:

- For the 10 projects that included road construction, the average mileage was 1.7 and the median mileage was 0.6, with 9 (90%) of the projects falling below the proposed 5-mile threshold for new road construction.

- For the 22 projects that included road reconstruction, the average mileage was 7.1 and the median mileage was 3.6, with 16 (73%) of the projects falling below the proposed 10-mile threshold for road reconstruction.

- For the 10 projects that added unauthorized roads to the system, the average added mileage was 6.6 and the median added mileage was 1.2. Removing one outlier, the average added road mileage was only 1.5 miles.

On this record, it is arbitrary to suggest that these projects support the proposed CEs for up to 5 miles of road construction, up to 10 miles of road reconstruction, and the addition of unlimited mileage of unauthorized roads to the system. Furthermore, many projects that authorize extensive road reconstruction do not actually reconstruct nearly as many miles as

the decision would indicate. Instead, most of the mileage is mere maintenance, with some spot reconstruction. Greater mileage of reconstruction is included to give more flexibility about where that reconstruction may occur. Without knowing how much reconstruction actually occurs on the ground, the Forest Service cannot rely on this record to justify the CE.

Second, the record shows that many of the 55 projects benefited from and changed as a result of environmental analysis and public input, including through public scoping, public comment on the EA, alternatives analysis, and/or objection/appeal:

- 21 (36%) of the projects changed between scoping and the publication of the EA.
- 13 (22%) of the projects changed between the publication of the EA and the final decision.
- 17 (31%) projects had more than two alternatives analyzed in detail.
- 6 (11%) of the projects were appealed/objected to.

Isolating the subset of projects that authorized the specific activities covered by the proposed CEs, the proportions of projects that changed as a result of the NEPA process becomes even more significant:

- For the 10 projects that included road construction, 4 (40%) had more than two alternatives analyzed in detail in the EA; 4 (40%) changed between scoping and the EA; and 2 (20%) changed between the EA and the final decision.
- For the 22 projects that included road reconstruction, 11 (50%) had more than two alternatives analyzed in detail in the EA; 8 (36%) changed between scoping and the EA; and 5 (22%) changed between the EA and the final decision.
- For the 10 projects that added unauthorized roads to the system, 6 (60%) had more than two alternatives analyzed in detail in the EA; 5 (50%) changed between scoping and the EA; and 4 (40%) changed between the EA and the final decision.

This data highlights the critical importance of site-specific analysis of and public input on the types of road-building and route-conversion activities contemplated by the proposed CEs. As described above, one-size decidedly does not fit all when it comes to the significant variability and potential impacts associated with adding to the Forest Service's already oversized and decaying transportation system.

Third, the Forest Service has not accounted for the fact that virtually all of the 55 projects have design features (sometimes called resource protection measures) to reduce impacts. While some are restatements of relevant land management plan standards or best management practices (BMPs), many others are developed specifically for the project, including as a result of public engagement and alternatives analysis. The agency makes no attempt to identify or assess those important project-specific mitigation measures that permitted a FONSI and whether they should be enshrined as regulatory limitations on any proposed CE. Nor does the Forest Service attempt to assess if or how general BMPs or applicable land management plan standards are typically sufficient to mitigate impacts below

the significance threshold.[260] And many land management plans include little-to-no meaningful direction on road and travel management decisions. Recent land management plan revisions tend to weaken what minimal standards were in place.[261]

As just one of many examples of these deficiencies, the agency relies on the 2015 Lava Restoration project on the Mt. Hood National Forest to support proposed CEs (e)(24) and (e)(25). In response to over 600 public comments and environmental analysis, the agency dropped one 58-acre unit from the proposal and included 13 pages of mitigation measures in the Decision Notice.[262] A letter by the district ranger clearly references the great importance of public participation in developing the project.[263] Moreover, more than four years after its approval, the road decommissioning components of the project are still not complete, and so the agency cannot assess whether the impacts are as predicted.

The Mount Hood Lava Restoration project is also illustrative of the overbreadth of the proposed road building and unauthorized route conversion CEs and the Forest Service's failure to articulate with any specificity the types of projects and uses that could be authorized under them. While the Lava Restoration project is used to support proposed CEs (e)(24) and (e)(25), the project was primarily a vegetation management project, with certain road and access elements.[264] The language of the proposed rule suggests that the proposed CEs are intended largely to address road and recreation management, with the non-exclusive list of examples for CEs (e)(23), (e)(24), and (e)(25) focused on enhanced access and recreation opportunities. While use of the proposed CEs for the types of projects listed in the examples (e.g., conversion of a non-system road crossing land acquired by the Forest Service or constructing a road to improve access to a trailhead or parking area) may be less likely to have individually or cumulatively significant effects, the proposal includes no restrictions on other more intensive uses of the proposed CEs. For instance, given the extreme breadth of proposed CE(e)(26) and the proposal to allow stacking of multiple CEs to cover different elements of a single project, there is a strong likelihood that the CEs may be used to authorize road-building associated with large-scale vegetation management projects that include commercial timber harvest – activities which cumulatively have a host of potentially significant impacts.

The Forest Service's "benchmarking" of other agencies' experiences is also arbitrary. The experiences of four of the six agencies discussed in the supporting statement are largely

---

[260] The supporting statement, pp. 33-34, simply lists the National Road BMPs "that would likely be considered" when implementing projects under the proposed CEs, but provides no assessment of their implementation in the projects the agency relies on or assurance that they would be implemented in projects authorized under the proposed CEs.
[261] *See, e.g.*, 2018 Flathead National Forest Revised Land Management Plan, which eliminated forest-wide standards for motorized route density and road decommissioning established to protecting grizzly bear and bull trout habitat from road-related impacts including habitat fragmentation and sedimentation.
[262] *See* Lava Restoration, Final Decision Notice & Finding of No Significant Impact, Appendix 2.
[263] *See* Nov. 15, 2014 letter from Hood River District Ranger (attached).
[264] Of the 55 projects the Forest Service relies on for the road-related CEs, 23 (42%) were vegetation management projects, 24 (44%) were watershed improvement or road system projects, and 8 (15%) were recreation improvement projects. *See* Appendix 2, "Re-Analysis of Infrastructure CE Projects."

irrelevant. Agencies like the USDA Farm Service Agency, the Bureau of Indian Affairs, the Federal Transit Administration, the Federal Highway Administration, and the Department of Energy have vastly different missions and governing laws and policies with respect to transportation and infrastructure management than public land management agencies like the Forest Service, which must balance road and trail management with a host of legal and resource stewardship obligations.

With respect to the Bureau of Land Management's (BLM) CE for incorporation of eligible roads and trails in any transportation plan, the limitation on no new construction or upgrading is crucial in avoiding individually or cumulatively significant impacts. Moreover, unlike the Forest Service, which has completed travel management planning for nearly all units that generally addresses and defines the status of unauthorized routes, the BLM has still not completed initial travel management plans for many areas. The National Park Service CE for various road repair activities on existing Park Service roads is comparable to the Forest Service's existing CE for road maintenance. The Park Service CE in no way supports the proposed CEs for construction of new roads or conversion of unauthorized routes to system roads or trails.

And finally, the Forest Service does not address the significant fiscal impacts associated with expansion of the road system under the proposed CEs. For instance, annual maintenance costs in the Pacific Northwest Region are approximately $227/mile for maintenance level (ML) 1 roads, $431/mile for ML 2 roads, and between $8,126 and $15,562/mile for ML 3-5 roads.[265] Other Regions, especially Alaska, also have high road maintenance costs. The proposed CEs for up to 5 miles of road construction and conversion of unlimited miles of unauthorized roads to system roads is highly likely to have significant cumulative budgetary impacts that are particularly troubling in the context of the agency's obligation under subpart A of the TMR to identify a fiscally sustainable minimum road system. The agency does not address these impacts.

In short, the Forest Service's conclusion that proposed CEs (e)(23), (e)(24), and (e)(25) will not have individually or cumulatively significant impacts is arbitrary, capricious, and contrary to the record. The proposed CEs must be abandoned.

4. Proposed CE (e)(20) (36 C.F.R. § 220.5(e)(20))– Restoration and Decommissioning of System Roads and Trails.

We support the proposed expansion of CE(e)(20) to include restoration and decommissioning of system roads and trails. We agree with the Forest Service that the actions and environmental impacts are generally the same for restoration of lands occupied by a system road or trail versus an unauthorized road or trail. As articulated in our ANPR comments, the expansion will advance the pace of restoration, help address the Forest Service's exorbitant and ever-growing road maintenance backlog, and steer the agency toward compliance with long-standing policies that require it to decommission unneeded roads and achieve an ecologically and fiscally sustainable transportation system. Restoring lands and waters disturbed by unneeded roads that have been closed to public motorized use is one of the most significant and enduring restoration actions the agency can take – particularly in the face of climate change.

[265] *Mile by Mile*, Appx. C, *supra*.

Unlike the proposed CEs that would expand the transportation system, the proposed expansion of CE(e)(20) is supported by robust agency data showing the overwhelmingly beneficial and non-significant impacts of road decommissioning. Indeed, that same record shows why contrary actions to build new roads and expand the system are likely to have individually and cumulatively significant impacts and are therefore inappropriate for a CE.

5. Proposed CE (e)(21), (e)(22) (36 C.F.R. §§ 220.5(e)(21), (e)(22))– Infrastructure at Existing Sites.

Proposed CEs (e)(21) and (e)(22) would cover construction, reconstruction, decommissioning, relocation, or disposal of buildings, infrastructure, or improvements at existing administrative or recreation sites. Similar to our concerns with the proposed special use permitting CEs and their breadth and lack of side-boards, we have significant questions about the scope of these proposed CEs, including but not limited to how the agency is defining existing administrative or recreation sites and what parameters would apply to construction, reconstruction, decommissioning, relocation, or disposal activities. For instance, could a picnic table at the end of a rarely used ML 2 road be converted and expanded to a developed campground or trailhead, with corresponding road upgrades? The potential impacts associated with that type of project are much more likely to be significant than, say, reconstructing a sign or replacing a maintenance shed. The agency should clarify and significantly narrow the scope of these proposed CEs and address the deficiencies identified throughout these comments in its approach to supporting these and other proposed CEs. As written, this CE cannot be finalized because it would allow potentially significant changes to existing sites. *See, e.g.., RESTORE: The N. Woods v. Dep't of Agriculture*, 968 F. Supp. 168 (D. Vt. 1997) (use of CE invalid where developing an existing site from a tennis court to a hotel and parking lot).

We also note that, like other proposed CEs, the Forest Service's sampled projects fail to account for the projects that may have been abandoned, instead cherry picking from decisions that were completed. The Southern Appalachian Farmstead project on the Sumter National Forest[266] is just one example of a project that would have fit into this category, but was abandoned because of public input.

6. Proposed CE 26 (36 C.F.R. § 220.5(e)(26))– Ecosystem "Restoration" Projects.

While many of our organizations actively support forest, range, and grassland restoration, we are united in our very strong opposition to the proposed CE at 36 C.F.R. § 220.5(e)(26), which would allow "restoration" projects of up to 7,300 acres, up to 4,200 acres of which could include unqualified commercial timber harvest, so long as there is at least one "add on" restoration activity, which could be as minimal as replacing a single culvert. The category reads, in full:

> (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

[266] https://www.fs.usda.gov/project/?project=29475

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 or 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.

36 C.F.R. § 220.5(e)(26) (typographical errors in original).

The implications of this authority are far reaching. First, the authority is large enough to devour the probable sale quantity of many forests, especially the relatively small and ecologically complex forests in the East. Second, the authority is extraordinarily broad in substance: it would cover “restoration” treatments, as the Forest Service notes, but it would also allow timber harvest for other purposes, including timber production and salvage, which are much more controversial, both socially and scientifically. Third, the authority could be used to cover the vast majority of Forest Service decisions. In combination with the related weakening of extraordinary circumstances, the loss of scoping, the provision allowing segmentation of complex actions into multiple CEs, and line officers’ discretion to tailor the size of their analysis areas to match the upper bounds of the CE authority, this new CE will consume the timber programs for many forests.

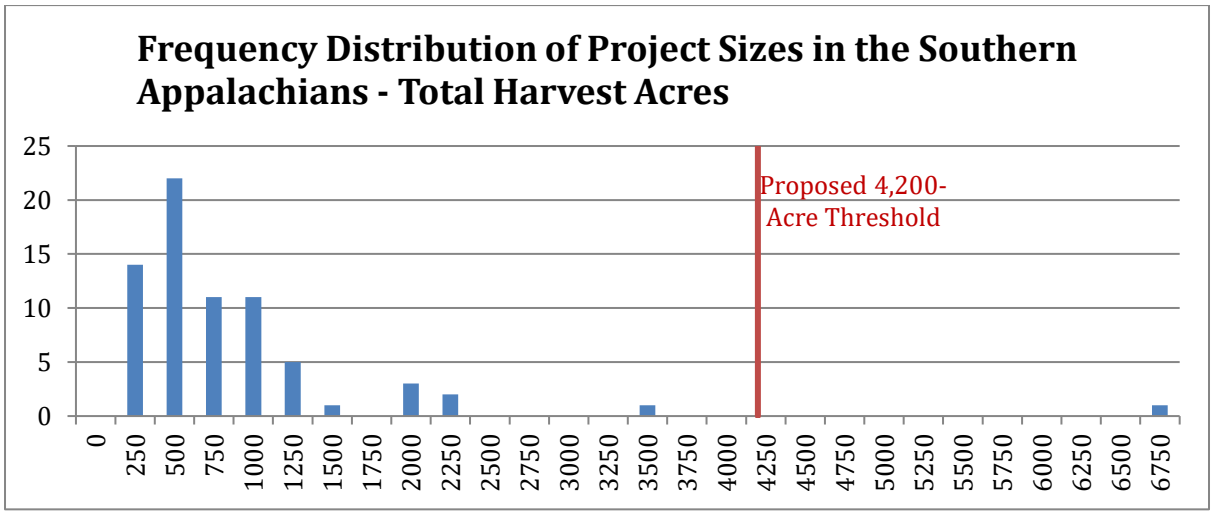
For example, we reviewed all of the vegetation management projects completed using an EA between 2009 and 2019 for the George Washington and Jefferson National Forests, Nantahala and Pisgah National Forests, Cherokee National Forest, and Chattahoochee National Forests. Together, these Forests encompass 4.3 million acres—the vast majority of federal landholdings in the Southern Appalachian mountains. Of all 71 projects completed

during that time period in the Southern Appalachians, only one would have exceeded the 4,200-acre threshold (1.4%).[267]

Table: Total Harvest of Projects in the Southern Appalachians, 2009-2019

Forest	# Projects 2009-2019	# Acres Min.	# Acres Max	#Acres Average	#Acres Median
GW/Jeff	28	75	3422	565	412
NPNF	23	173	1666	561	326
Chattahoochee	8	394	6663	1975	1464
Cherokee	12	212	2214	870	796.5
All	71	75	6663	772	535

Chart: Frequency Distribution of Project Acreage in Southern Appalachians, 2009-2019



Based on historical data, fully 98.6% of projects in the Southern Appalachians would fall under the proposed 4,200-acre threshold. Centered around CE 26, it is hard to see this rulemaking as anything but an attempt, to the greatest degree possible, to minimize public involvement in the Forest Service's exercise of discretion over one of the most controversial aspects of forest management. But even if the Forest Service intends to use its discretion to beneficial ends, that discretion clearly includes the potential for significant negative impacts. The entire timber program for an ecoregion as complex as the Southern Appalachians simply cannot be considered to have non-significant impacts. As a result, this CE cannot be adopted consistent with NEPA. The Forest Service's rationale for the authority is superficial and deeply flawed, rendering the proposal arbitrary and capricious.

a) CE 26 is not limited to restorative actions.

A CE is a "category of actions which do not individually or cumulatively have a significant effect …." 40 C.F.R. § 1508.4. The CE itself "must clearly define the eligible category of

[267] See Appendix 3, "Analysis of Southern Appalachian Projects."

actions, as well as any physical, temporal, or environmental factors that would constrain its use."[268] CE 26 does not contain limitations to ensure that its effects would not be significant.

Restoration is inherently site specific and requires site-specific analysis, because the relevant measures of ecological integrity function at multiple scales. See FSH 1909.12 sec. 12.13. Defining restoration, even broadly at the forest plan level, is notoriously difficult. The same treatment at a different location can be alternatively restorative or degrading, so a rational national-level CE that covers purported "restoration" work without sweeping in potentially damaging work would be nigh impossible. Restoration also requires constant learning, monitoring, and adapting, with feedback from previous projects into successive ones. It's hard work, requires monitoring and adaptive management, and it is improved by public participation. Our organizations often work closely with the agency to refine restoration prescriptions. In the EA process, we have worked with the Forest Service to drop stands, add stands, and change prescriptions to lighter or heavier treatments. Even where timber harvest is truly intended for ecological restoration, it often carries negative consequences to soil, water, recreation, wildlife, scenery, and other natural resources. Balancing the pros and cons of ecological restoration is ill-suited for a CE.

The Forest Service asserts that CE 26 is based on "decades" of experience "implement[ing] forest and watershed restoration projects," and that the CE is intended "to achieve restoration activities that improve forest health and resiliency to disturbances, and/or improve terrestrial and aquatic habitat and other watershed conditions."[269] The content of the category is not connected to this purpose, and the proposal is therefore arbitrary and capricious.

Despite the Forest Service's attempt to frame CE 26 as limited to beneficial activities, the category is extraordinarily broad in its scope. It is ostensibly limited to "restoration and/or resilience" activities, but it defines those activities to include "commercial harvest" and "non/pre-commercial thinning" without qualification. In other words, while the CE would allow harvest for purpose of restoration, it would also allow harvest for other reasons, such as timber production and salvage, which can be much more controversial scientifically and socially. The CE itself implicitly acknowledges this fact, requiring that timber harvests be accompanied by at least one of the other activities, which fall more neatly under the rubric of ecological restoration, in order to qualify.

More action does not mean less impact. Adding a restoration-focused activity to unqualified timber harvest does not ensure that the entire project will have only beneficial impacts, especially when the "add on" could be relatively minor, such as the replacement of a single culvert on a road being used to access the commercial harvest of, say, old growth forests. For that reason, the category is suspect from the outset. As CEQ regulations explain, "actions which may have both beneficial and detrimental effects" may be "even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8. Yet even if we were to accept the hocus pocus of this proposal—that adding restoration actions can somehow negate the harmful impact of activities like timber production—the balance of the category tips sharply toward potentially harmful actions and does not show a real commitment to restoration. In the sample of 68 projects relied on to create this authority, projects had an average of 2.8 restoration add-ons. In other words, without any requirement to do so,

[268] CEQ CE Memorandum.
[269] CE 26 Supporting Statement, 3.

vegetation management projects are routinely including almost 3 times as many restoration add-ons as required by this so-called "restoration" CE.[270]

In its rationale, the Forest Service emphasizes the need for, and its institutional commitment to, ecological restoration. First, the agency asserts that 80 million of the 190 million acres in the national forest system are in need of restoration.[271] The agency does not explain how it derived this figure but, more importantly, the CE is not limited to those acres, nor is it limited to the supposed restoration needs that were tallied to find it. The Forest Service also states that it "uses ecological restoration to manage NFS lands in a sustainable manner."[272] But as FSM 2020 clearly notes, "Not all natural resource management activities are required to include restoration, and not all National Forest System lands require restoration."

Nor does the requirement of consistency with the forest plan preclude the use of this authority for non-restoration activities. The Forest Service cites the 2012 planning rule, which requires that management plans "must provide for social, economic, and ecological sustainability," where ecological sustainability is defined as "the capability of ecosystems to maintain ecological integrity."[273] However, the Forest Service has never before taken the position that *every* activity implementing a forest plan must be intended for restoration purposes, but has always explained that this requirement applies at the landscape level, and individual projects can proceed for other economic and social purposes, so long as they do not prevent the achievement of other desired conditions and objectives. *See, e.g.*, 36 C.F.R. § 219.11. If the Forest Service is revising that position—if, instead, plans must henceforth prohibit all activities, including timber production and salvage harvest, that are not intended for ecological restoration—then it should clearly say so. At any rate, most existing plans were developed under the 1982 planning rule, which emphasized economic efficiency, and did not limit timber harvest to ecologically beneficial projects. 36 C.F.R. § 219.1(b)(13) (1982).

b) Forest plans don't prevent significant impacts.

Until this rulemaking, it has never been suggested that forest plans somehow prohibit projects that may have individually or cumulatively significant impacts. Instead, as the Forest Service has explained in the past, the development of 1982-rule plans required the preparation of an EIS *because* they were conceived of as a "collection" of all the hypothetical projects that would occur under the plan.[274] In other words, the sum of the work done under a plan is, by definition, significant. That is still the case: the Forest Service here is proposing to add "development of a new land management plan" to the list of actions normally requiring EISs. 36 C.F.R. § 220.7(a)(2) (proposed). It is internally inconsistent and arbitrary and capricious for the Forest Service to assert that forest plans are inherently significant but that the work underneath them—*all* of the work underneath them in some regions—must be insignificant. If that were the case, then an EA at most would be needed to document the development of forest plans.

---

[270] Appendix 1, "Re-Analysis of Restoration CE Projects," at Table 2.
[271] 84 Fed. Reg. at 27,544.
[272] CE 26 Supporting Statement, 4-5 (citing FSM 2020).
[273] 84 Fed. Reg. at 27,547 (citing 36 C.F.R. §§ 219.9; 219.19).
[274] "The Evolution of National Forest System Land Management Planning and Results of the Review of Revised Land and Resource Management Plan Environmental Impact Statements" (May 2006) at 6.

Even if there were a hypothetical forest plan that prohibited implementing actions with individually or cumulatively significant impacts, application of a plan's many goals, objectives, and standards and guidelines to a particular project is not a mechanical process; it requires the exercise of discretion in consideration of site-specific factors, with public involvement to ensure consistency. Accordingly, it cannot be mapped into a flowchart and included in the text of the CE, as it would have to be in order to ensure that the CE itself "clearly define[s] the eligible category of actions, as well as any physical, temporal, or environmental factors that would constrain its use."[275]

c) Site-specific factors matter.

One fundamental flaw of proposed CE 26 is that it does not admit of differences between the almost infinite number of contexts in which covered activities may occur. Different areas of the national forests are different, and the same actions in different areas will have different benefits and harms. 16 U.S.C. § 529; *New Mexico v. BLM*, 565 F.3d 683, 706 (10th Cir. 2009). Examples of site-specific factors affecting the potential significance of a project's impacts include, in addition to the "resource conditions" in proposed 36 C.F.R. § 220.5(b) (proposed):

- **Type/intensity of harvest** (*Curry v. Forest Service*, 988 F. Supp. 541 (W.D. Pa. 1997); *House v. Forest Service*, 974 F. Supp. 1022 (E.D. Ky. 1997));

- **Economic cost of harvest** (*Kettle Range Cons. Group v. Forest Service*, 148 F. Supp. 2d 1107 (E.D. Wash. 2001));

- **Old-growth characteristics** (*Curry v. Forest Service*, 988 F. Supp. 541 (W.D. Pa. 1997); *Lands Council v. Cottrell*, 731 F. Supp. 2d 1028 (D. Idaho) (R&R adopted 731 F. Supp. 2d 1074); *Neighbors of Cuddy Mountain v. Forest Service*, 137 F.3d 1372 (9th Cir. 1998); *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562 (9th Cir. 2000) (overruled on other grounds); *Wildwest Inst. v. Austin*, 2006 WL 8435846, at *1 (D. Mont. 2006));

- **Presence within an area potentially suitable for future protection as wilderness** (*Lands Council v. Martin*, 529 F.3d 1219 (9th Cir. 2008); *Mountaineers v. Forest Service*, 445 F. Supp. 2d 1235 (W.D. Wash. 2006));

- **Proximity to a unique area such as designated wilderness** (*Sierra Club v. Bosworth*, 352 F. Supp. 2d 909 (D. Minn. 2005));

- **Risk factors for soil impacts and erosion** (*Cowpasture River Pres. Ass'n*, 911 F.3d 150, 177 (4th Cir. 2018); *Sierra Club v. Forest Service*, 843 F.2d 1190 (9th Cir. 1988); *Kettle Range Cons. Group v. Forest Service*, 148 F. Supp. 2d 1107 (E.D. Wash. 2001); *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998); *Wildwest Inst. v. Austin*, 2006 WL 8435846, at *1 (D. Mont. 2006));

- **Sensitivity of receiving waters and fisheries** (*Sierra Club v. Forest Service*, 843 F.2d 1190 (9th Cir. 1988); *League of Wilderness Defenders v. Forest Service*, 2005

[275] CEQ CE Memorandum, supra.

WL 3307087, at *1 (D. Or. 2005));

- **Impacts to wetlands** (*Helena Hunters & Anglers v. Tidwell*, 841 F. Supp. 2d 1129 (D. Mont. 2009));

- **Efficacy of site-specific BMPs** (*Colorado Envt'l Coalition v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999); *Ohio Valley Envtl. Coalition v. Hurst*, 604 F. Supp. 2d 860, 889 (S.D.W.Va. 2009); *Hells Canyon Pres. Council v. Connaughton*, 2012 WL 13047991 (D. Or. 2012) (R&R adopted 2013 WL 665134 (2013)));

- **Recreational values and uses** (*Sierra Club v. Forest Service*, 843 F.2d 1190 (9th Cir. 1988); *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909 (D. Minn. 2005));

- **Scenic and esthetic qualities of the site** (*Sierra Club v. Forest Service*, 843 F.2d 1190 (9th Cir. 1988); *Curry v. Forest Service*, 988 F. Supp. 541 (W.D. Pa. 1997));

- **Geology of the particular area** (*House v. Forest Service*, 974 F. Supp. 1022 (E.D. Ky. 1997));

- **The presence of rare species** (e.g., sensitive, forest concern, regional forest concern, species of conservation concern)(*Lands Council v. Cottrell*, 731 F. Supp. 2d 1028 (D. Idaho) (R&R adopted 731 F. Supp. 2d 1074) (species viability));

- **Impacts to quality of wildlife habitat** (*Found. for N. Am. Wild Sheep v. Dep't of Ag.*, 681 F.2d 1172 (9th Cir. 1982));

- **Impacts to connectivity of wildlife habitat** (*Helena Hunters & Anglers v. Tidwell*, 841 F. Supp. 2d 1129 (D. Mont. 2009));

- **Condition and location of access roads** (*Or. Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1189 (9th Cir. 2019); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989 (9th Cir. 2004));

- **The likelihood that the action will cause an increase of use on a particular road associated with the project** *(Found. for N. Am. Wild Sheep v. Dep't of Ag*., 681 F.2d 1172 (9th Cir. 1982));

- **The history of similar activities at the particular site** (*Sierra Club v. Forest Service*, 843 F.2d 1190 (9th Cir. 1988); *Curry v. Forest Service*, 988 F. Supp. 541 (W.D. Pa. 1997); *Conservation Congress v. Forest Service*, 2013 WL 4829320, at *1 (E.D. Cal. 2013));

- **Foreseeable future activities at the particular site** (*Sierra Club v. Forest Service*, 843 F.2d 1190 (9th Cir. 1988));

- **The degree of scientific certainty that activities or mitigation measures will have the predicted effect given a site's unique characteristics** (*Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998); *Cascadia*

Wildlands v. Forest Service, 937 F. Supp. 2d 1271 (D. Or. 2013));

- **Absence of data about the ecological importance of the site** (*Helena Hunters & Anglers v. Tidwell*, 841 F. Supp. 2d 1129 (D. Mont. 2009)); and

- **Recency of data that are subject to change over time** (e.g., wildlife population data) (*Klamath-Siskiyou Wildlands Ctr. v. Forest Service*, 373 F. Supp. 2d 1069 (E.D. Cal. 2004)).

The Forest Service cannot lawfully use CEs for projects that could, depending on the agency's exercise of discretion with respect to harvest location, have different impacts on these site-specific factors. Where alternative locations or methods for harvest would have different environmental impacts, NEPA requires the agency to weigh those alternatives, even if the environmental differences would not be "significant" enough to require an EIS. *See EPIC v. Forest Service*, 234 F. App'x 440 (9th Cir. 2007).

Proposed CE 26 includes a wide variety of treatments that could be applied in an equally wide variety of contexts. Generally, the Forest Service works hard (with public input) to put the right treatments in the right places. But nothing about proposed CE 26 prevents responsible officials from choosing the wrong treatments or the wrong places. Indeed, without public input it is likely they will do so, at least occasionally. As a matter of law, an agency simply cannot rely on unguided discretion or good intentions in order to ensure that actions under a proposed CE will not have significant impacts.

d) The new CEs would undermine Congressionally imposed limits.

The Forest Service relies on the existence of two Congressionally created CEs to justify its "benchmarking" of CE 26.[276] These categories, as a matter of law, are irrelevant to the administrative determination of whether categories of action will have significant impacts. Indeed, Congress enacted these authorities to incentivize the agency to have a significant, albeit very specific, kind of impact on the landscape, and Congress declared as a matter of law (not fact) that the categories could be "considered" excluded from NEPA analysis and documentation.

Furthermore, by proposing CEs broader than the legislated CEs, the Forest Service is proposing to violate Congressionally imposed limits. In granting the Forest Service the authority to conduct hazardous fuels and forest health treatments at scale, Congress included a number of sideboards it believed were necessary to ensure that the projects would be in the public interest, including:

- Limits on project purposes (namely, to address risks caused by insect and disease and wildfire), which help to ensure that the authorities are not used for inherently controversial projects;

- A size limit of 3,000 acres, which ensures that the projects' sizes don't outstrip the agency's capacity to implement them fully and safely;

[276] CE 26 Supporting Statement, 19.

- Transparent and inclusive collaborative project development, which helps to ensure that the projects are focused on the highest-priority work;

- Limits on the locations of treatments (namely, in areas designated at risk for pests and pathogens, the wildland-urban interface, or areas at elevated risk for wildfire), which, like other requirements, helps to focus treatments on the highest priorities;

- Procedural safeguards of public notice and scoping, which ensure that members of the public are aware of the project and can provide input through the collaborative process;

- The requirement that the treatments maintain or restore ecological integrity in light of the best available scientific information, which helps to prevent the use of the authorities for uncertain or unproven treatments that may not address the categories' purposes;

- A requirement to maximize retention of old-growth and large trees, which helps to protect rare ecological values;

- Prohibition of activities in wilderness and roadless areas or where there are extraordinary circumstances, which helps to avoid unintended harmful impacts;

- A prohibition of the construction of permanent roads, which can quickly lead to cumulative significant impacts;

- A requirement that temporary roads be decommissioned within 3 years, to ensure that those temporary roads are not eventually added to the road system through accretion;

- Forest plan consistency, to ensure that use of the authority does not undermine progress toward unit-level desired conditions; and

- Reporting requirements to Congress on the use of the authority, to provide an extra measure of accountability.

16 U.S.C. §§ 6591b; 6591d. It is important to note again that the actions authorized under these authorities, even with all their sideboards, will not necessarily prevent significant impacts as a matter of *fact*, but they are instead "considered" categorically excluded from further analysis and documentation as a matter of *law*. Indeed, Congress gave the Forest Service these authorities to make a significant change on the landscape. The sideboards are in place to balance Congress's national priorities against the reality that aggressive management can have locally unacceptable impacts.

In the same vein (that is, irrelevant comparison to legislated authorities), the Forest Service also reasons that CE 26 is similar to the activities that can be implemented using stewardship contracting.[277] This is comparing apples and oranges: stewardship contracting is an implementation tool, not a decisionmaking or project design tool. That some restoration activities are undertaken through the stewardship contracting mechanism does not mean that these projects have insignificant effects; indeed, often the contrary is true.

[277] CE 26 Supporting Statement, 10.

e) The justification for the CE is arbitrary and capricious.

The Forest Service's justification for CE 26 is arbitrary and capricious because it ignores important aspects of the problem. In the Supporting Statement, the agency explains its superficial process:

> The Forest Service … randomly select[ed] a sample of 68 projects from over 718 projects completed under an EA from fiscal years 2012 to 2016. The associated [DN] and FONSI were reviewed to look at the types of project activities occurring on the ground related to restoration actions…. The average of commercial and non-commercial harvest … was 4,237 acres, and the average of total project activities was 7,369 acres.
>
> [T]hese restoration activities, whether implemented singularly or bundled, were not determined to result in potentially significant effects, as was documented in the associated FONSI for each project reviewed.
>
> To obtain information related to information and monitoring of these projects, USFS personnel … who were familiar with the projects[] responded to a questionnaire …. For the 16 projects … that received survey responses, respondents indicated that the effects were not more intense or substantial than predicted in the EA, DN, and FONSI.
>
> There are no foreseeable events that indicate that the activities proposed under this CE would substantially differ in the future.[278]

This rationale is fraught with problems, rendering the proposed CE arbitrary and capricious. The discussion below re-analyzes data from the Forest Service's 68-project sample and summarizes a comprehensive analysis of projects from several Southern Appalachian National Forests. The data for these analyses are provided in Appendices 1 and 3.[279]

To begin with, there are a number of problems with the project sample. Although the rationale fails to explain exactly how the 718-project dataset was identified, it is clear that the agency did not cast as broad a net as it should have. The dataset's limitations result in subtle cherry-picking for the 68 projects ultimately sampled and analyzed further.

First, the 718-project dataset, according to the agency, was limited to projects the agency considered "related to restoration actions." As explained above, however, the category itself is not limited to restoration activities. The category's limits cannot be broader than the data on which it is based. For example, because the CE does not prohibit timber production or salvage, the database queries that generated the list of 718 projects should not have excluded projects for those purposes.

---

[278] CE 26 Supporting Statement, 10-12.

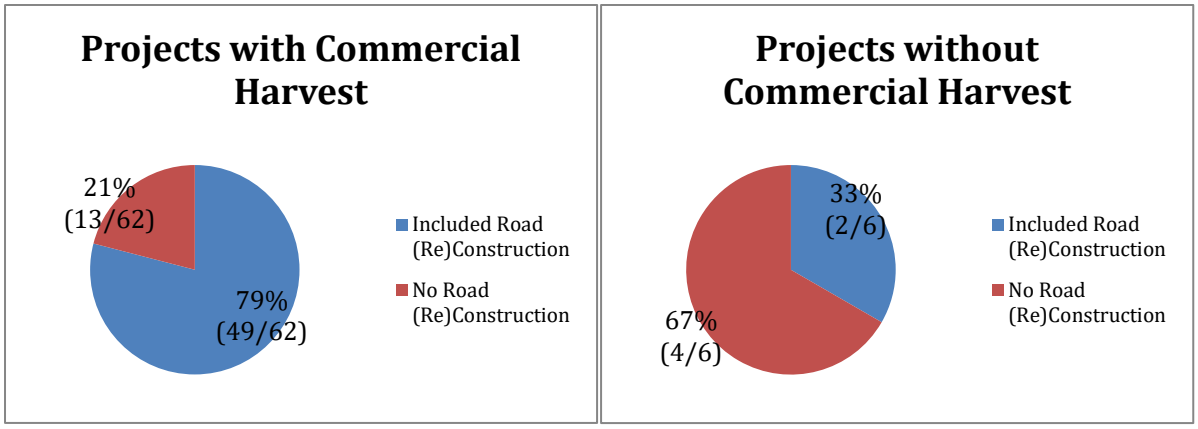
[279] Appendix 1, "Re-Analysis of Restoration CE Projects," and Appendix 3, "Analysis of Southern Appalachian Projects."

Second, the dataset includes only projects that were "completed" during the date range and excludes projects that were abandoned because of public feedback. The worst Forest Service proposals are often dropped when the public raises concerns that cannot be easily mitigated. As just one example, the Beaverdam project on the Cherokee National Forest was dropped in or around 2010 after the public identified significant issues that the agency had missed—namely, impacts to uninventoried roadless areas and impacts to rare species. Without the influence of public involvement, such projects might well have been approved. The Forest Service's dataset must therefore include projects that were proposed but dropped or shelved due to public input, and it must show that those projects would not have had significant impacts, individually or cumulatively. Needless to say, we do not think the Forest Service can make that showing.

Third, the dataset fails to include projects that *did* need an EIS. Without considering projects with potentially significant impacts alongside projects without such impacts, the Forest Service cannot reliably identify what makes them different. The line is not as black and white as an acreage cap. Instead, some projects without significant impacts are greater than 4,200 acres, while some projects with significant impacts are less than 4,200 acres in size. *E.g.*, *Conservation Congress v. Forest Service*, 2013 WL 4829320, at *1 (E.D. Cal. 2013) (492 acres); *House v. Forest Service*, 974 F. Supp. 1022 (E.D. Ky. 1997) (EIS necessary for proposal to log 199 acres); *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909 (D. Minn. 2005) (EIS necessary for proposal to log 1,689 acres); *Klamath-Siskiyou Wildlands Ctr. v. Forest Service*, 373 F. Supp. 2d 1069 (E.D. Cal. 2004) (EIS necessary for proposal to log 1,354 acres). By omitting projects that required an EIS for harvest of fewer than 4,200 acres, the agency ignores the most important factor it should have been considering in this effort: what factors explain the difference between projects with and without significant impacts. Each of those relevant differences must be reflected in the language of the CE or in the list of extraordinary circumstances.

For the 68 projects sampled for further analysis, the Forest Service has made some basic logical errors. A CE, as quoted many times in these comments, is "*a* category," 40 C.F.R. § 1508.4. This CE instead includes many categories of action lumped together, and the rationale does not differentiate between them. One example of the problem is the lumping of commercial and noncommercial harvest, limiting the category by total "harvested acres." Commercial and non-commercial harvests, however, can have very different impacts—for example, soil and water impacts caused by the ground disturbance associated with commercial harvest, recreational impacts, and impacts to scenery—that are not addressed by the list of exceptional circumstances proposed at 36 C.F.R. 220.5(b)(1). For example, commercial logging often requires much heavier equipment to fell and remove timber, which in turn necessitates construction of haul roads, skid trails, and log landings, By contrast, noncommercial harvest often involves hand work that simply drops trees to the ground and leaves them in place, and generally does not require much if any associated road construction. The projects on which the Forest Service is relying bear out this difference: 79% of projects that included commercial timber harvest (49 of 62) also included road construction or reconstruction, but only 33% of projects that did not include commercial timber harvest (2 of 6) included road construction or reconstruction.

Charts: Percentage of Projects with and without Commercial Harvest that also Included Road Construction / Reconstruction



The Forest Service's sample set therefore illustrates what is a fundamental conceptual flaw with CE 26 and the rationale on which it rests. The authority would allow up to 4,200 acres of total harvest, but every single one of those acres could be a heavy form of regeneration harvest, such as clearcutting, with associated cumulative impacts from roads, log landings, follow up treatments such as herbicides, etc. If the Forest Service had differentiated between the actions lumped together in this category, it would not have found support for an average project size of 4,200 acres of clearcutting. The only way the rationale reaches such high numbers is by using less harmful activities to support an authority to conduct more harmful activities.

To drive the point home, we analyzed the projects in Appendix A to determine how much commercial harvest was ordinarily included, as opposed to commercial and noncommercial harvest lumped together. Six of the 68 projects in Appendix A did not include commercial timber harvest at all. The average amount of commercial timber harvest of the remaining 62 projects is 3,154 acres, more than 1,000 acres less than the Forest Service's 4,200-acre proposal. However, the estimate of average commercial timber harvest is inflated by several large projects. (Removing the 16 projects with the largest acreage of commercial timber harvest,[280] the remaining 46 projects averaged just 1,433 acres.) In order to correct for the bias caused by outliers, we calculated the median commercial timber harvest size. Unlike averages, medians are not affected by outliers. Median commercial timber harvest for the 62 relevant projects in Appendix A was only 1,891 acres, far below the 4,200 acres authorized by proposed CE 26.

Additionally, even within the categories of commercial and noncommercial harvest, different harvest prescriptions will have different purposes, different benefits, and different impacts, especially when used in different biophysical (and even socioeconomic) contexts. For example, the Deer Pen Restoration Project, one of the projects included in Appendix A, included three forms of noncommercial harvest on 190 acres: 1) 125 acres of "[midstory treatments] in commercially thinned … areas, with herbicide and/or cut and leave, and/or mechanical mulching to establish open park-like conditions"; 2) 62 acres of "[s]ite preparation by mechanical mulching prior to hand planting longleaf [pine] seedlings"; and 3)

[280] In other words, the largest 25% of the 62 projects with commercial harvest.

About 3 acres of "annual mowing and planting of wildlife food crops" in order to "[m]aintain permanent early seral stage habitat on existing linear strips."

Based on these descriptions, it is clear that the Forest Service selected three different harvest prescriptions in order to accomplish three different objectives, and the activities have demonstrably different impacts. Mowing to maintain existing early seral habitat is much different than harvesting trees, commercially or noncommercially, or using herbicides to implement a midstory treatment. The proposed CE, however, would lump these activities into 190 "harvested acres." By lumping very different harvest prescriptions into an undifferentiated bucket of "harvested acres," the Forest Service is using apples to justify oranges, and vice versa.

A similar "lumping" error undermines the agency's rationale with respect to total project size. The different non-harvest treatments included in proposed CE 26 could have very different levels of impact, especially in different contexts. Control of non-native invasive plants, for example, may involve the widespread use of herbicides. "Wildlife habitat creation" inherently involves the destruction or modification of one kind of habitat in order to create a different kind of habitat, with potentially significant impacts for the disfavored habitat type. Both would tend to carry more harm or risk than the use of prescribed fire in a fire-adapted ecosystem. Yet the Forest Service uses large projects with relatively innocuous treatments to support the authority to conduct more harmful actions at equally large scales.

In addition to logical errors, the Forest Service makes inexcusable counting errors. The data used by the Forest Service do not support a maximum total project size of 7,300 acres for the treatment area, because: (1) the Forest Service's arithmetic is wrong; (2) the average total size of projects in Appendix A is biased by several large projects; and (3) the agency double counted acres where multiple activities occurred on the same footprint.

As an initial matter, we were unable to validate the Forest Service's statement that the "average of total project activities was 7,369 acres."[281] Neither Appendix A nor the Supporting Statement include an explanation of how the Forest Service obtained its average total project size. We calculated average total project size for the projects listed in Appendix A by summing acreages for activities included in each project and then averaging those values. Average total harvest of the 68 projects included in Appendix A is 7,253 acres, 116 acres less than the figure used by the Forest Service.

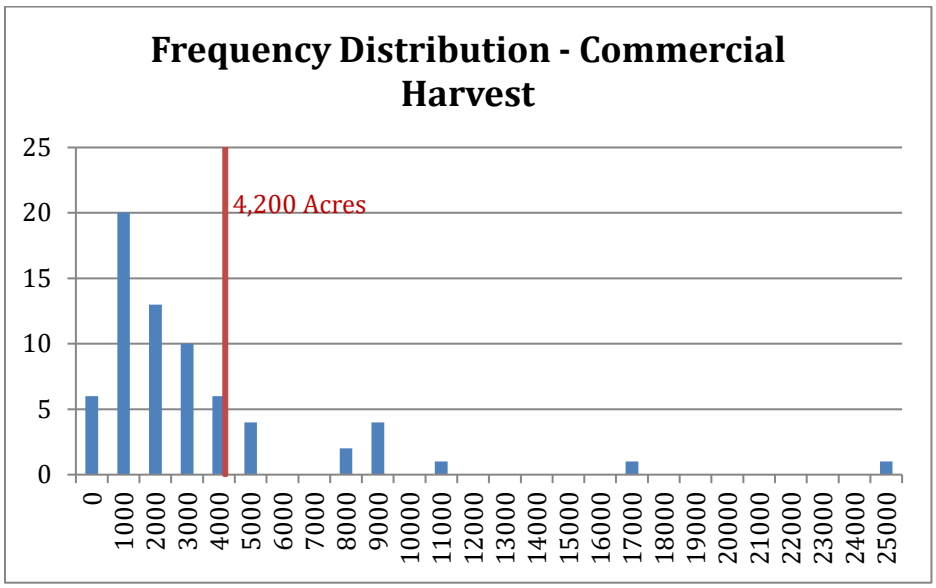
In addition, projects included in Appendix A do not support a total project size of 7,300 acres because several large projects inflate the average total project size for the sample. The largest 25 percent of projects in Appendix A (n=17) have an average project size of 20,459 acres. However, the average project size of the remaining 75 percent (n=51) is approximately 2,852 acres, nearly 4,500 acres less than the Forest Service's 7,300-acre proposal. In other words, just a few large projects, such as large prescribed burns, are inflating the average total project size and obscuring the average size of projects with other kinds of activities. To understand the extent of this bias, consider that *all* of the 51 projects below the 75th percentile are smaller than the average of all projects (ranging from 11 to 6,995 acres), and the 12 smallest projects, when added all together, cover a footprint of only 6,427 acres.

[281] *See* 84 Fed Reg. at 27,549.

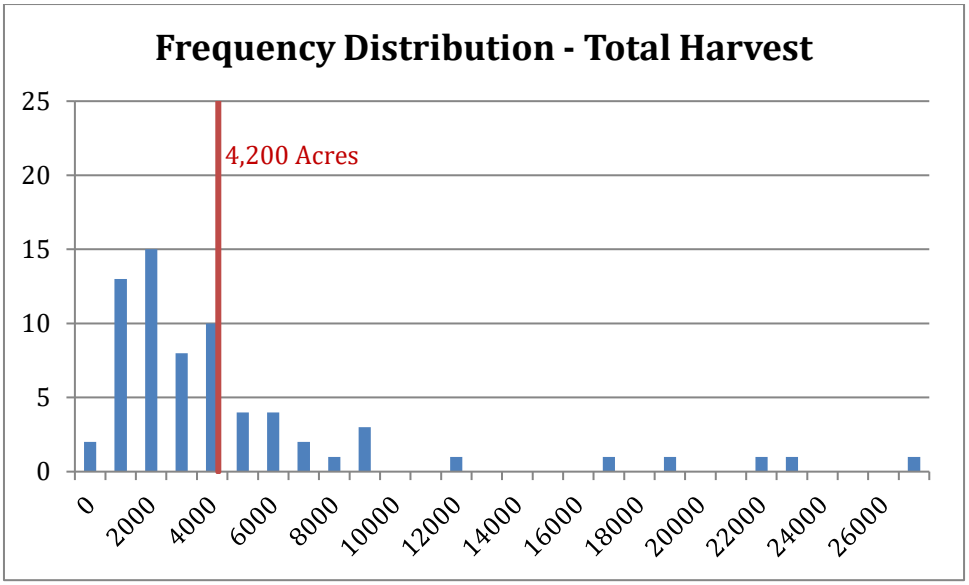
Epitomizing this error, the large size of a single project inflated the Forest Service's estimate of total project size by nearly 1,000 acres. The Davy Crockett Red-cockaded Woodpecker Prescribed Burn project proposed a single activity—a 69,000 acre prescribed burn—with no timber harvest, commercial or otherwise. The Davy Crockett project is 36,256 acres larger than the next largest project in Appendix A, which inflated the Forest Service's estimate of total project size. Average total project size excluding the Davy Crockett project is 6,332 acres, 968 acres smaller than the Forest Service's 7,300-acre proposal.

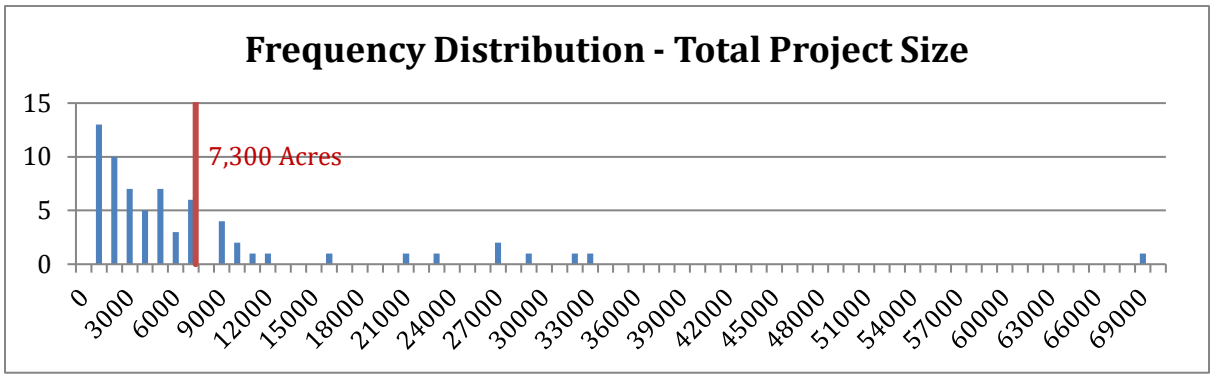
The same error also affected the calculation of the 4,200-acre harvest limitation. Two of the projects in Appendix A included no harvest at all. Of the remaining 66 projects, the harvest acreage ranged from 23[282] to 26,396 acres, a range of more than 3 orders of magnitude. Six projects included more than 10,000 total harvest acres and these large projects inflated the estimate of average total harvest. In fact, 48 projects in Appendix A included less than 4,200 acres of total harvest. Fifteen projects included 1,000 acres or less of total harvest. In order to remove bias resulting from the inclusion of several large projects we calculated the median total harvest for the projects in Appendix A. Median total harvest for the projects in Appendix A was 2,663.5 acres. The Forest Service's reliance on average total harvest obscures the typical project size.

These errors can easily be seen in the frequency distributions for project size of the 68 projects in Appendix A. The vast majority of the projects included in the sample are much smaller than the proposed harvest and project-size thresholds.



[282] The Black Locust project. Appendix A includes 46 acres for this project, but that is incorrect because total harvest was overestimated by 100% due to double counting, as explained below.





Furthermore, the Forest Service's data do not support the authority to treat up to 7,300 acres because double counting inflated the average project size of the 68 projects upon which the Forest Service relied. In order to identify double counting, we compared project activity acres in Appendix A to project activity acres included in the EAs and DNs for these projects. (See Table below). We found that *more than half* of the projects (38 of 68) double counted, with the magnitude of the error ranging from 44 to 14,972 acres. When double counted acres were removed from the accounting of total project size, the average total project size decreased to 5,901 acres, 1,399 acres smaller than the Forest Service's 7,300-acre proposal.

Table: Projects with Double-Counted Acres

Project	Appendix A Acres	Acres Double Counted	Notes
Arrowhawk	6,514	118	Proposed action includes 2,500 acres of non-commercial brush treatments and 118 acres of non-commercial aspen treatments. Appendix A includes 2618 acres of non-commercial harvest and 118 acres of watershed improvement.
Bald Fire	26,146	11,783	All but 417 acres of 12,200 acres of proposed reforestation would occur

Project	Appendix A Acres	Acres Double Counted	Notes
			within areas proposed for salvage and fuels treatments (see EA p. 14).
Barnyard South	2,450	860	Proposed reforestation would occur within areas proposed for commercial harvest (see DN p. 2).
Bigelow-Newaygo	4,762	2,400	EA, p. 1-1, states "approximately 2,767 acres would be treated in the Proposed Action." Alternative summaries (see EA p. 2-2 to 2-4) reveal the selected action included 429 fewer acres than the proposed action. Selected action was modified in the DN, adding 24 acres of savanna restoration. Based on this, a corrected total project of 2767 - 429 +24 = 2362 acres. 4,762-2,362 = 2,400.
Biggie	2,791	171	Total project footprint is 2620 acres (see EA p. 13).
Black Locust	92	69	Agency proposed four treatments in same 23 acre treatment area (See DN p. 2 Table 1).
Bucks Lake	2,056	543	Proposed action (Alternative A) intended to create 1,511 acres of DFPZs. Cross-referencing Alt. A description (EA p. 10-11) and Table 1 (EA p. 17) shows 543 acres of noncommercial harvest located within commercial harvest acres.
Charlie Preston	1,448	82	Proposed reforestation would occur within 82-acre “Off-Site Ponderosa Pine Treatment” (see DN p. 5).
Cherokee Park	5,128	211	211 acres of non-commercial harvest located within commercial harvest area (see EA p. 8).
French Fire	6,640	675	Total project area: 5,695 acres within the 13,832 acre analysis area (see DN p. 5).
Gooseberry	4,643	1,783	Maximum project size: 2,860 (see EA p. 8-9 Tables 1-2).
Grass Flat	1,535	83	83 acres of reforestation located inside other treatments.
Grizzly Fire	4,862	1,700	Most of the 1,837 acres proposed for reforestation are located within areas proposed for harvest. The DN states that most reforestation would occur within 1,700 acres of salvage and danger tree removal (see DN p. 5).
Interior	20,885	4,141	Total project area approximately 16,744 acres (see DN p. 3).

Project	Appendix A Acres	Acres Double Counted	Notes
Iron Springs	5,044	769	EA Table 9 includes a footnote that states the total number of treated acres is less than 5,044. SL p. 4 states that aspen cleaning and pre-commercial thinning occur within the commercial conifer thinning acres.
Julius Park	764	65	65 acres of non-commercial located within commercial areas (see DN p. 2).
Junction	26,982	14,972	Alternative 3 proposed no/limited treatment in 7,692 acres (see EA p. 27). Approximately 2,416 of 7,692 acres could receive some noncommercial treatment (EA p. 27). Total project footprint of selected action: 17,556 - 7,962 + 2,416 = 12,010 acres..
Keola	922	398	Total project area: 550 acres (see DN p. 1).
Kidaw	1,925	1,105	Total project area: 820 acres (see EA p. 1-2).
Larson	31,302	1,261	Total project area: 30,041 acres (see EA p. 8).
Lower Skokomish	4,484	247	Project area included 247 acres of “skips” where no treatment would occur (see DN p. 2).
Martin Creek	2,041	500	DN authorizes up to 500 acres of shrub planting for wildlife (Table 1). These 500 acres are located within timber harvest areas (see DN p. 10).
Middle Bugs	1,461	756	Total project area 705 acres (see EA p. 3). Post-harvest burning located inside timber harvest units (see DN p. 3).
Millsteck	6,848	3,494	Total project area: 3,354 acres. All vegetation management activities included within those 3,354 acres (see EA p. 5-6).
Pine Ridge	32,744	10,378	Total project area: 23,366 acres (see DN p. 2).
Pipeline	3,357	461	Project includes 461 acres of reforestation, which would occur subsequent to 461 acres of commercial harvest in same area (see EA p. 43, DN p. 2).
Roy Creek	9,197	2,577	Total activity acres 6,620 (see SL p. 1).
Sagehen	4,977	2,350	Total project area: 2,621 acres (see DN p. 2).
Salmon West	5,220	2,673	Total project area: 2,547 acres (see EA p. 5).

Project	Appendix A Acres	Acres Double Counted	Notes
Sandbox	11,747	1,583	2,097 acres of noncommercial is located within commercial harvest areas and is therefore double counted (see DN Table 3). 2,087 acres of precommercial thinning is located within harvested areas and is identifed as a post-treatment activity. 10 acres of precommercial thinning is located in RHCAs. RHCA acres are located within 2,120 acres of commercial harvest. Not apparent 2,097 acres includes 559 of noncommercial harvest included in DN Table 3. Double-counted non-commercial acres are 2,097-559=1,538. 45 acres of commercial harvest is double counted (see DN Table 3). DN proposed 2,120 acres of commercial harvest. Additional 45 acres is the sum of 5 acres commercial in DN Table 1 and 40 acres within RHCAs. RHCA treatments are within 2,180 total harvest acres. Total double counting is 1,538+45=1,583 acres.
Smith Mountain	15,355	5,349	Comparing project maps reveals 23 stands in 8 compartments include some form of timber or wildlife treatment without prescribed burning. These 23 stands total 1,036 acres. This is an overestimate of the total acres not intended for prescribed burning because in some cases only part of a stand is outside the prescribed burn boundary. For example, approximately 7/8s of Compartment 63 Stand 2 is within the prescribed burning boundary. Stand 63/2 is 75 acres. All 75 acres were included in the 1,036 acres described previously. Based on this, only 1036 acres of 5,813 total harvest are not doubled counted with prescribed burning. Additionally, 572 reforestation acres are included in precommercial harvest acres (see DN p. 14). Therefore, total project area is 8970+1,036=10,006. Total double counted acres are 5,813-1036=4,777.
Soldier Bay	3,739	1,409	EA Table 1 shows total treated acres are 2,330. 3,739 – 2,330 = 1,409.

Project	Appendix A Acres	Acres Double Counted	Notes
South Summit II	9,950	170	Dropped 170 acres of harvest treatments in DN (see DN p. 3).
Southern Creek	8,358	2,898	Total project area on NFS land: 5,460 acres (see EA p. 1).
Telogia	1,708	147	Total project area 1580.4 - 20 = 1560.4 (see EA Table 1). 1,708 – 147 = 1,561.
Toll Joe	1,083	44	44/139 non-commercial is included in commercial units (see DN. P. 4).
Upper Lake Winona	28,576	13,019	Total project area on NFS land: 15,557 acres (see EA p. 6 Table 1.2).
West Slope	4,546	710	Total treatment acres in DN 3,836. USFS estimated 3,836 treatment acres within 4,546 acres of treatment units (see EA p. 12; DN p. 2). 4,546 – 3,836 = 710.

Together, the bias introduced by the inclusion of the Davy Crockett project and the double-counting error drastically inflated total project size. When double counting and the Davy Crockett project are removed from the calculation of average total project size, average total project size is 4,959 acres, over 2,300 acres less than the Forest Service's 7,300-acre proposal.

In addition to the sampling bias and these logical and counting errors, another fundamental error in the supporting rationale for CE 26 is the Forest Service's failure to look beyond the FONSI to understand how the sampled projects changed between the project proposal and the final decision. The administrative record must support a rational conclusion that the category of actions described in CE 26 would not and did not have significant impacts. When basing that conclusion on previously implemented actions, the agency must demonstrate that the safeguards responsible for the absence of significant impacts for the prior actions are included as "required design element[s]" of the new category.

Here, the relevant safeguards are the procedural requirements of the EA process itself—scoping comments, EA comments, and objections. In order to illustrate the importance of those safeguards, we reviewed the scoping, analysis, and decision documents for all 68 of the projects included in Appendix A to the Supporting Statement. First, we quantified the magnitude of the changes to each project, by activity, between proposal and decision. In addition, we tabulated the number of projects that were modified between the release of a scoping letter and the release of the subsequent EA. We classified the reason(s) projects were modified at this stage of the NEPA process. We repeated the analysis by reviewing decision notices in order to identify projects that were modified after the release of an EA and the reasons for modifications. For both stages, we classified the reason(s) projects were modified as: 1) substantive changes due to public comment; 2) substantive changes due to internal review or undisclosed reasons; and 3) analytical or informational changes that were non-substantive. We defined substantive changes as those resulting in differences to the proposed actions in terms of type, size, or location, or mitigation added. Analytical or informational changes, in contrast, include those in which the Forest Service added an alternative based on

public input but did not select it, or provided information about actions or effects that would not have been provided otherwise.

The Forest Service's sample of projects in Appendix A shows that the NEPA process is responsible for substantial changes to project proposals. From proposal to decision, these 68 projects decreased in total size by an astonishing 127,699.5 acres (21%). They decreased in harvest acreage by 60,986 acres (17%). Note that these are *net* changes to these projects, and therefore likely undercount the total improvements to projects (such as adding or relocating harvest acres or other activities). Still, even with this conservative accounting, the Forest Service decided to drop at least 1 out of every 5 acres it proposed for treatment during the EA process.

Table: Changes to Appendix A Projects from Scoping to Decision

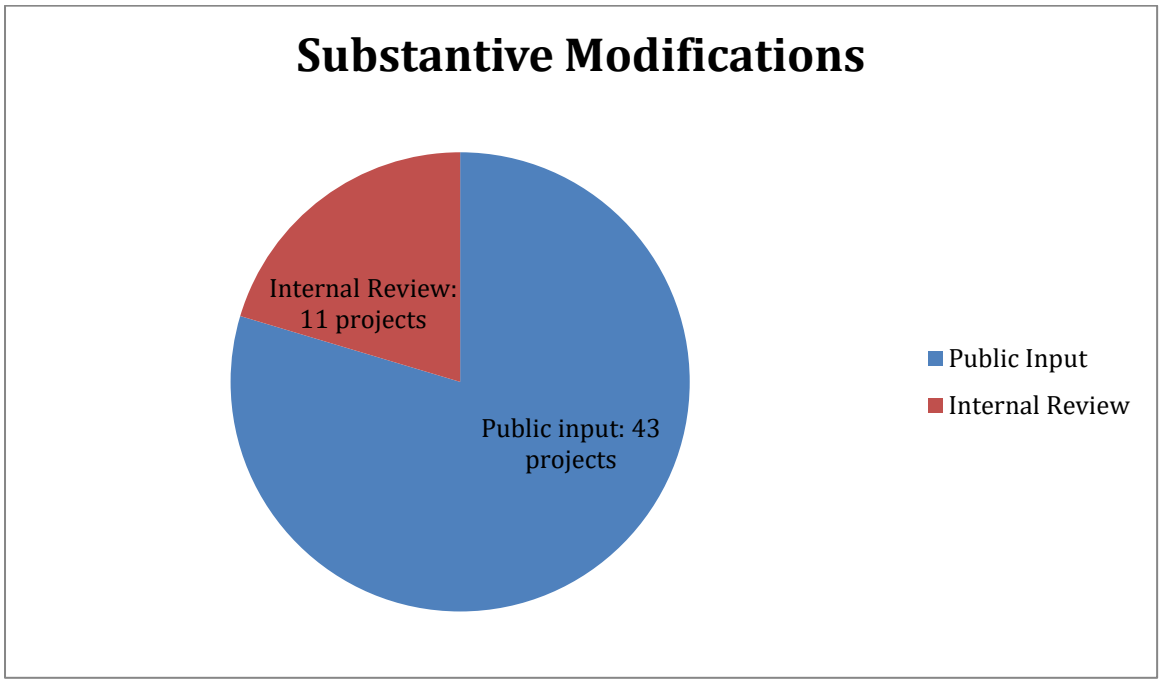
	Change in Total harvest	Change in total harvest as % of proposed harvest	Change in Total project size	Change in total project size as % of Proposed total project size
Total	-60,986	**-17%**	-127,699.5	**-21%**
Average	-896.9		-1,877.9	

Furthermore, the large majority of the changes to projects were the direct result of public input, and a smaller number were the result of internal analysis. Sixty projects were modified in some fashion during the NEPA process. Thirty-seven projects were substantively modified between scoping and EA, with 29 being modified due at least in part to public comment. Thirty-three projects were substantively modified after the release of an EA, with 26 being modified due at least in part to public comment. We found only 8 of the 68 projects did not appear to change at all throughout the NEPA process (See Table below).

All told, we found that concerns expressed by the public resulted in 70 substantive modifications to 43 projects. Public input on 6 additional projects caused the Forest Service to conduct additional analysis but did not result in substantive changes. The agency made just 15 modifications to 11 projects based on its own internal review process. These data show that the Forest Service was roughly 4 times more likely to modify a project based on concerns expressed by the public than due to internal review, which has important and substantive implications for the agency's proposal to eliminate public scoping for CEs because it is plain that public comment can and does alter projects to better protect natural resources.[283]

[283] The substantive positive effect on natural resource protection and utilization is another reason why the Forest Service should have conducted a NEPA analysis and initiated formal consultation under the ESA for its proposed rule. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961 (9th Cir. 2003) (requiring NEPA and ESA compliance for forest planning rule); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (same); *California ex rel. Lockyer v. United States Dep't of Agric.*, 2009 U.S. App. LEXIS 19219 (9th Cir. Aug. 25, 2009) (removal of protections for roadless areas requires NEPA and ESA compliance); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956 (9th Cir. 2015) (same).

Chart: Substantive Project Modifications



For the projects that did change, the improvements were varied. Many involved reducing the number of acres, reducing mileage or changing locations of permanent or temporary roads, changing harvest types, or changing harvest locations. The degree of changes varied too, from small adjustments to large swings in the thousands of acres. While most changes resulted in activities being dropped, they were sometimes just relocated, and activities were occasionally added in response to public comment too. Many of the changes involved the addition of mitigation measures, which were also quite varied, including, for example, retention of old trees, avoidance of temporary roads in unroaded areas, restrictions on herbicide, and project-specific measures to protect rare species.

Table: Changes to the 68 Projects in Appendix A

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
Bald Fire	X			Adjusted treatment acres from SL to EA after fieldwork (see EA p.12). Added Alternative 3 to address public concern regarding commercial timber harvest (see EA p. 16).
Barnyard South	X			Reduced miles of road construction/reconstruction from SL to EA. Added alternatives in response to public concerns about road construction (Alt. 3), openings in forest canopy caused

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				by logging (Alt. 4), and the need for "real restoration" (Alt. 5) (see EA p. 9-10). Analyzed Alts. 3, 4 in detail. Selected Alt. 2. Added documentation to project record in response to an objection (see DN p. 1).
Bigelow-Newaygo	X			Added Alternative 3 to address public concerns. Alternative 3 included the following: 1) Reduced acres of red pine stands proposed for conversion to prairie by changing treatment to thinning. 2) Dropped stands proposed for savanna restoration. 3) Dropped new road construction from southern part of project area; retained roads proposed for closure based solely on the fact the roads were duplicative (see EA p. 1-9 - 1-10). Selected Alt. 3 with some modifications (see DN p. 2). Modifications included adding 24 acres of savanna restoration (see DN p. 8-9).
Biggie	X			Changed 2 treatment areas from commercial to noncommercial treatment; changed follow-up fuels treatments of two treatment areas; dropped 772 acres of roadside hazard tree treatment (see EA p. 7). Updated timber volume and economic analysis as a result of internal review (see EA p. 7). From EA to DN, dropped hazard tree treatments, which reduced noncommercial harvest from 1,718 to 1,008 acres.
Black Locust		X		Reduced treatment area from original SL to EA (see EA p. 1-2).
Bucks Lake	X			Added Alternative D in response to scoping (EA p. 8). From EA to DN agency dropped 15.2 acres of mechanical thinning (590-574.8), dropped 5.4 acres of radial thinning (155.8-150.4), and added

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				22.2 acres of group selection treatments. USFS received two objections on the project (DN p. 12). Changed commercial harvest treatments in order to resolve objections.
Charlie Preston	X			From SL to EA: added public firewood gathering, provided more dispersed camping, reduced timber harvest along private property boundary, and provided more explanation. Added Alternative C to address public concerns about amount and types of timber harvest and amount of road construction (see EA p. 11). From EA to DN: selected Alternative C
Cherokee Park	X			Agency performed revised travel analysis in response to scoping. Agency added design criteria to address concerns about timber harvest impact on viewshed (see DN p. 3).
Davy Crockett		X		Dropped RX fire in all areas in which the management emphasis was not for red cockaded woodpecker, from 105,941 acres to 69,000 acres (see EA p. 1).
Deep Creek	X			Agency added project-specific design measures for monarch butterfly, sage grouse, and water quality (see DN p. 6).
Deer Pen	X			Removed used of herbicide, glyphosphate, in response to scoping comments. Resulted in 63-acre decrease in project size (see EA p. 32).
Dry Restoration			X	Added more information to descriptions of proposed activities in response to scoping.
East Wedge	X			From SL to EA: reduced commercial treatments and increased Rx fire. Agency added Alternative C, which reduced

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				amount of treated acres in response to public comment. Selected Alternative C and modified it by changing treatments and removing treatment acres from selected action (see DN p. 2-4). Removed Canada lynx habitat from areas proposed for commercial harvest. Agency removed all new road construction from proposed action. Removed areas along US-Canada border from areas proposed for commercial harvest. Removed re-designating a forest road from proposed action.
Elkhorn	X			Changed types of vegetation treatments applied to some areas. Modified travel management activities associated with project.
Escalante	X			Reanalyzed proposed timber management in unroaded and lightly roaded areas and excluded areas from consideration if accessing the areas would require "extensive temporary road construction."
French Fire	X			Developed Alternative 4 in response to public comments re. California Spotted Owl. Developed Alternative 5 in response to public comments. Developed Alternative 3 in response to public comments regarding hazards posed by herbicides. After EA released, removed herbicide treatment from one area in response to scoping comments provided by USFWS. USFWS comments pertained to California red-legged frog (see DN p. 5).
Gooseberry		X		Dropped construction of new temporary road in order to avoid a stream crossing (see DN p. 2).

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
Grass Flat	X			Agency's preferred alternative in EA was "Modified Alternative B," which was developed in response to public comment (EA Ch. 2.5, p. 10). EA Table 2.8 depicts difference in commercial harvest between original proposed action and modified Alternative B. Agency reduced total treatment acres from 1,808 to 1,602 (compare EA Table 2.2 to EA Table 2.5). Agency changed treatments in many areas, emphasizing more basal area retention for spotted owl. From EA to DN agency shifted 29 acres of mastication to hand-cut pile and burn treatment.
Grizzly Fire			X	Agency developed Alternative 3 in response to public comments on scoping notice (EA p. 12). Agency selected Alternative 2.
Hams Fork	X			Agency developed proposal that was presented in scoping letter with a collaborative working group (see DN p. 5-6). Original proposal was to treat 10,414 acres (see EA p 19), including 12 miles of roads (8 miles in Invent. Roadless Area). Collaborative group (w/ USFS) reduced size of proposed action to 8,622 acres in order to avoid constructing 8 miles of roads in an Invent. Roadless Area (see EA p. 19; DN p. 6). Received 4 objections to proposal (DN p. 4). Objection Reviewing Officer tasked District with explaining how the project complied with the 2001 Roadless Rule and with various exemptions from restrictions on timber harvest (DN p. 7). District's response at DN p. 7-10.
Interior	X			Released first scoping letter 12/20/2012. Released second

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				scoping letter 07/25/2013. From first to second SL, prescribed fire reduced by 398 acres, timber harvest reduced by 326 acres, road construction increased by 5 miles, wildlife resource improvements reduced by 180 acres. From SL2 to EA, hazardous fuels treatments increased by 108 acres, timber harvest reduced by 141 acres. From EA to DN hazardous fuels treatments decreased by 16 acres.
Iron Springs	X			Changed proposed action treatment acres from SL to EA (compare SL p. 4 to EA Table 9). Created Alternative A in response to public comment on scoping letter (EA p. 7).
Junction	X			From SL to EA: maintained the same total acres treated: 16,034 (see SL Table 1; EA Table 2). Developed Alternative 3 in response to public comments on scoping notice (see EA, p. 12). Alternative 3 intended to favor habitat for three woodpecker species (see EA, p. 12). Selected Alternative 3 Modified (see DN, p. 1: "Overstory, understory, and fuels treatments may occur on the same acres."). Modification to reduce commercial harvest from 9,864 (see EA p. 29) to 8,964 (see DN p. 2)
Kidhaw		X		Midstory control by mulching decreased from 600 acres in SL and EA to 545 acres in DN.
Larson	X			From SL to EA: added 2 miles of temporary road construction. Added Alternative 3 in response to public input on draft EA (see EA p. 12). Modified Alternative 3 in final EA to address public concern about mistletoe infected trees (see EA, p. 26). Selected

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				Alternative 2, with modifications. Modified Alternative 2 by removing all temporary road construction from the proposal (see DN p. 4).
Lemon Butte	X			Prior to release of EA, reduced commercial harvest from 1650 acres to 603 acres. USFS dropped 6058 acre prescribed burn from SL to EA. Dropping prescribed burn was internal decision (see EA p. 21). Reduced commercial harvest from 1,650 acres to 603 acres in response to public input and internal review (see EA p. 17).
Lower Skokomish	X			Multiple modifications to treatment acres and treatment types from SL to EA. Original proposal had a 13,500 acre footprint. SL reduced that to 4,900. Proposed action in EA included 4,237 acres. SL included 5 miles road construction. EA included 15.6 miles construction and 3.1 reconstruction.
Macedonia			X	Developed a no herbicide alternative in response to public concern (see EA p. 10).
Marshall Woods	X			Developed Alternative N in response to public comment but did not analyze it in detail (see EA p. 27). Developed Alternatives C and D in response to public comment (see EA p. 26). Agency implemented a hybrid of Alternatives C and D (see DN p. 1).
Martin Creek	X			Developed Alternative C in response to public comment (see EA p. 2-1). Modified selected alternative in response to internal and public comment (see DN p. 8). Reduced total timber harvest acres, reduced precommercial

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				thinning acres, reduced acres of tree planting (see DN Table 1).
Middle Bugs	X			SL proposed 712 acres commercial harvest. DN contained 705/114 commercial/noncommercial harvest. Within the commercial harvest acres, the DN included 642 acres of Rx burn. Developed Alternatives C-E in response to public comment (see EA p. 6-7). Implemented Alternative C (see DN p. 1).
Millsteck	X			SL included 2036 acres of even-age commercial harvest. EA reduced even-age commercial harvest to 2,033 acres. From SL to EA, prescribed fire changed from 1,727 to 1,795 acres. Reforestation changed from 3,114 to 3,090 acres from SL to EA.
Mitchell Spring	X			Removed pinyon-juniper treatment in response to public comment and agency fieldwork, resulting in a modified proposed action (see EA, p. 16). Developed Alternative 3 in response to public comment (see EA p. 27). Selected the modified proposed action for this project (see DN p. 1).
Morrison Run	X			From SL to EA to DN, commercial harvest changed from 1325 acres, to 1,399 acres, to 1,401 acres. RX Burn acres went from 429 to 370 to 370 acres. Developed Alternative 3 in response to public comment and IDT concerns regarding amount of timber harvest and associated road building (see EA p. 18).
Mower Tract	X			Scoped non-commercial treatments over 12,597 acres. Agency included 12.597 acres in the EA. Following EA release, agency engaged in ESA Sect. 7

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				consultation. As a result of consultation, the agency removed 6,239 acres from the project in order to avoid Cheat Mtn. Salamander habitat (see DN p. 11).
North Heber			X	Added alternative in response to public comments (see EA p. 13).
North Shore	X			From EA to DN: reduced size of prescribed burning by 40 acres.
Pine Ridge	X			From SL to EA: removed ponderosa pine planting from proposed action and refined design features for proposed activities (see EA p. 4). Modified selected action (see DN p. 2).
Pipeline		X		Modified acres proposed for 4 types of treatment between Sl and EA. Comm Trt 1: 451 to 461 acres; Comm Trt 2: 1209 to 1142 acres; Comm Trt 3: 336 to 341 acres; Non-comm Trt 1: 1203 to 952 acres. Modifications from SL to EA.
Red Hill			X	Developed alternative in response to scoping (see EA p. 1-17).
Reedy		X		Scoped 1,350 acres and proposed 1,275 in EA. Added drum chopping in all treatment areas to be completed after commercial harvest and before herbicide treatments.
Renshaw	X			Added 13 acres of commercial harvest from SL to EA. Added 3 miles of road construction and 33 miles of road reconstruction from SL to EA.
Sagehen	X			Dropped one unit from project because of public comment regarding the effect of underburning on goshawk habitat (see EA p. 27).
Salmon West		X		Agency removed a 19-acre stand from selected action (see DN p. 2).

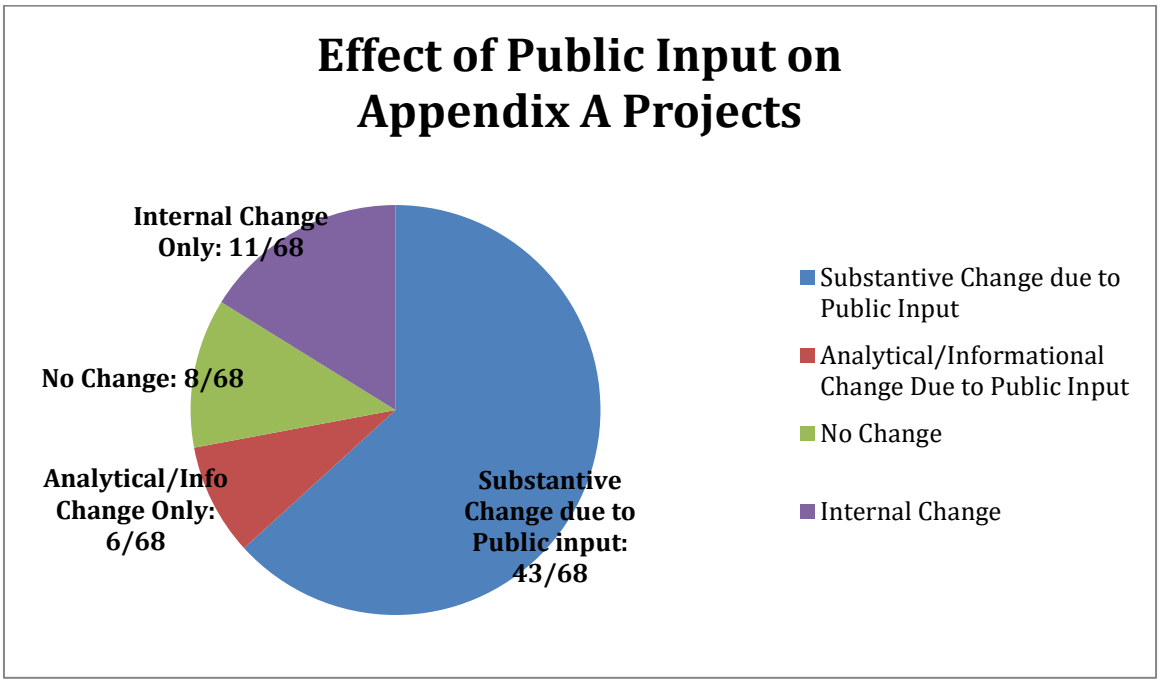
Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
Sandbox	X			Developed Alt. 3 in response to scoping (comparison of SL to EA). Agency incorporated two elements from Alt. 3 into the selected action (Alt. 2) (see DN p. 1).
Shores		X		Dropped 48 acres of timber harvest and 0.4 miles of temp road construction between SL and EA (see EA p. 5, Sect. 1.4.1).
Smith Mountain			X	Developed no-herbicide alternative in response to scoping (see EA p. 21).
Soldier Bay	X			Dropped 500 acres - in 15 stands - of commercial harvest from EA to DN. Dropped all treatment from 8/15 stands (see DN Table 1). Decreased intensity of thinning from 40 BA to 50 BA for all commercial harvest. Dropped acres due to objection to EA (see DN p. 8). USFS received one objection to the EA/DN (DN p. 8). Changes described in DN Table 1 were made to resolve disagreement between agency and objector. Changes removed thinning treatment from 500 acres (234 acres treated with herbicide only; 266 acres removed from all treatment). Thinned density for all treated areas increased from 40 BA to 50 BA (DN p. 1 Table 1).
South Bridger	X			Added mitigation in response to objection (see DN p. 5).
South Summit II	X			Acres reduced from 2,350 proposed to 2,180 in DN (see DN p. 3).
Southern Creek Ouachita River		X		Added 18 acres commercial harvest and 60 acres RX fire.
Spring Gulch	X			USFS received 1 appeal on original EA (see DN p. 2-3). USFS withdrew DN in order to

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				gather more information (see DN p. 3). Agency revised EA and released revised EA. From EA to DN: reduced noncommercial timber harvest and added prescribed burn.
Sulphur Forest	X			Modified proposed action due to internal scoping (EA p. 15). Modified selected action (DN p. 1). Total project area reduced from 1,700 to 1,677 acres.
Telogia	X			Modified treatments from EA to DN based on public input and two objections. Changed from clearcut to firewood harvest and herbicides on 46 acres; dropped 20 acres from the project; changed 98 acres from clearcut to clearcut with reserves; and changed 79 acres from 'third-row harvest' to 'thin from below to 50 BA (see DN Table 1).
Toll Joe	X			Dropped 163 acres of commercial and 45 acres of noncommercial harvest. Reduced road construction from 1.5 to 1.3 but added 5.5 miles of reconstruction.
Upper Lake Winona		X		Reduced miles of fire line maintenance from 30 to 28.
Upper South Fork Skokomish	X			Reduced commercial harvest from 1,050 acres to 880 acres.
West Slope	X			Added two alternatives in response to scoping (see SL p. 2). The proposed action (Alt. 2) included 2,350 acres of mastication. Alternative 3, which the agency identified as its preferred alternative (see EA p. 12), included 4,546 acres of mastication because Alternative 3 dropped the use of herbicides in

Project	Explicitly due to Public Comment	Due solely to Internal review or Unexplained	Non-substantive (Analysis or Informational)	Notes
				response to public comment (see SL p. 2; DN p. 4).
Westside	X			Commercial harvest in SL was 607/698/44 acres (see SL Table 1). In EA, agency adjusted commercial treatments to 506/799/44 acres (see EA p. 2-1). This change was described as Modified Alternative 2 in EA. From EA to DN the agency retained 0.68 miles of roads intended for decommissioning. Roads were retained due to public comment and subsequent agency fieldwork (see EA p. 1-15).
Windy	X			From EA to DN, commercial harvest was 3,958 to 2,699. Noncommercial treatment acres were 334 to 549. Burn acres were 390 to 186. Road construction went from 7.8 to 9 miles. Modified the selected Alternative (Alt. 3) by dropping 110 acres from the project and adding 112 of treatments to the project. Added reforestation to the selected action.
Total	**43**	**11**	**6**	

In summary, public input was important in 49 of the 68 projects in Appendix A (72%). 43 of the 68 projects (63.2%) were substantively modified based on public input. Public concerns were serious enough that the Forest Service performed or gathered additional information, performed additional analysis, or developed alternative(s) for comparison in an additional 6 projects (8.8%). **As a result, the Forest Service cannot rely on the absence of significant impacts from projects that were improved, and whose impacts were reduced, because of the very process it seeks to eliminate.** *See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, No. 18-1129, slip op. at 25 (D.C. Cir. Aug. 9, 2019).

Chart: Relative Effect of Public Input on Appendix A Projects (n=68)



As explained above, the Forest Service cannot eliminate input and analysis based on the absence of significant effects from projects that avoided such effects only because of input and analysis. Consequently, the only projects that the Forest Service can possibly rely on to support the establishment of the CE are the projects that did not change between scoping and decision. The Forest Service has adduced only 8 such projects. Notably, the 8 projects that did not change between scoping and decision were much smaller on average than the full sample of 68 projects, as shown in the Table below. For these projects, the average total harvest was 2,605 acres, and the median total harvest was 1,827 acres (43.5% of the proposed 4,200-acre threshold). The average total project size was 3,736 acres, and the median total project size was only 1,875 acres (25.7% of the proposed 7,300-acre threshold).

Table: Projects that Did Not Change During EA Process

Project	Commercial Harvest	Non-Commercial Harvest	Total Harvest	Total Project Size
Arrowrock	878	2,618	3,496	6,514
Gordon Hill	1,466	1,188	2,654	2,749
Hopkins Prairie	1,000	-	1,000	1,000
Julius Park	675	89	764	764
Keola	371	401	772	922
Ocala	-	352	352	352
Roy Creek	2,550	865	3,415	9,197
Watson Hill	8,384	-	8,384	8,384
Average	**2,190**	**919**	**2,605**	**3,736**
Median	**1,000**	**633**	**1,827**	**1,875**

Note that we do not endorse the use of this tiny sample for establishing a CE. The sample is much too small. In fact, it's only about 1% of the Forest Service's cherry-picked 718-project dataset, and a much smaller fraction of all the vegetation management projects the agency has implemented over the years. The sample also suffers from all the other errors described in this section. For example, we strongly doubt the Forest Service has *any* physical monitoring data for these projects to establish their actual effects: NEPA is a forecasting law, and requires monitoring to validate predicted environmental effects. Further, it is as likely as not that these projects did have potentially significant impacts but that local conservation stakeholders lacked the capacity to review and comment on the projects. Without monitoring data, the Forest Service has no way of knowing whether such impacts did in fact occur on the ground, and cannot justify its conclusions. Still, taking the numbers at face value, these projects simply do not support the establishment of the proposed CEs. They also reflect the common-sense reality that larger and more complex projects are more likely to require changes in response to public input in order to avoid significant impacts.

The 68-project sample is also flawed because it is geographically skewed. For example, none of the projects were located in Region 10. And although the projects appear roughly balanced between the eastern and western continental states, with 44 western projects and 24 from Regions 8 and 9, some ecoregions are underrepresented or missing altogether. Only a single project, for example, was located in the Appalachian Mountains, and it did not contain any commercial timber harvest.[284] As a result, it is impossible to conclude from these data that 4,200-acre timber sales would not have significant impacts in any region, such as the ecologically and socially complex Appalachians.

Even more important is the *reason* that some regions and forests are underrepresented. Some units of the National Forest System have always been "timber baskets," turning out larger and more frequent timber sales relative to forests with greater ecological complexity and recreational use. With the sampling methods used in this analysis, it was inevitable that the Forest Service's data would be skewed toward the "timber baskets," because there are simply more projects in the database. As a result, the timber baskets are inflating the average. This error is compounded by the more sensitive and difficult contexts that line officers face when designing projects in underrepresented areas like the Appalachians.

Furthermore, as explained generally above, the proposed CE is unsupported by monitoring data or other ground-truthing. "A lack of data is not an indication that there will be no impacts." *Helena Hunters & Anglers v. Tidwell*, 841 F. Supp. 2d 1129, 1138 (D. Mont. 2009). The Forest Service's approach to ground-truthing its projects is utterly inadequate. The agency started with a cherry-picked dataset of 718 projects, then took a sample of that sample to identify 68 projects for further analysis, then took yet another sample of the sample of the sample to identify 20 projects for ground-truthing. Only a sample of that sample of the sample of the sample returned answers to the questionnaire. Sixteen projects, from an agency that, by our best estimate, completed around 1,450 unique EAs related to forest products, vegetation management, and fuels, in the five-year period from FY 2012 to FY 2016: this is 1.1% of relevant projects for which the Forest Service received a completed questionnaire.

Although that questionnaire has not been provided to the public, the Forest Service's description indicates that respondents were asked, in their subjective opinions, whether

[284] The Mower Tract project on the Monongahela National Forest included 6,358 acres of noncommercial harvest.

impacts were "more substantial than predicted." *Id.* Although respondents were also asked to describe "how effects were observed or documented," the Supporting Statement curiously omits to provide the responses to the public. *Id.* Because only a fraction of project activities on any given project receive any on-the-ground monitoring, it is likely that only a subset of those 16 projects—and perhaps none or a very small subset—have any *actual data* to back up a conclusion that would turn loose the skidders across the entire national forest system.

A sample of a sample of a sample of a sample of a sample. To state the obvious, this data is simply not sturdy enough to bear the weight of the conclusion. Even one case of significant impacts from an otherwise qualifying project would be enough to cast the enterprise into doubt. What impacts have been missed because the Forest Service failed to look for them? Here are two from the relevant time period:

- Courthouse Creek (Pisgah District, Pisgah NF). In this project, stakeholders submitted comments and an administrative appeal highlighting extraordinary risk to soil resources. Although the District reduced the size of the project (from 461 to 368 acres) and eliminated some of the stands where logging presented the greatest risk to soils, it declined to consider an alternative that fully grappled with the significant risk of erosion. During the first phase of project implementation, the precise scenario feared by stakeholders (heavy rains on disturbed steep and fragile soils) led to unacceptable erosion, sedimentation of a trout stream, a notice of violation from the State of North Carolina, and expensive remediation work. As a result, about 2/3 of the remaining acres included in the DN/FONSI have been dropped during implementation. This project is a vivid reminder that project level analysis, alternatives, and mitigation cannot be skipped over merely because projects of a similar size routinely proceed without significant impacts.

- Hogback (Ocoee District, Cherokee NF): The Island Creek and Hopper Branch Timber Sales, both authorized by the Hogback Project, each caused significant damage to soil resources. Between the two timber sales, at least four separate harvest units caused soil impacts above the 15% threshold considered to violate NFMA.

For these projects, the impacts are well documented in the agency's own records, including Monitoring and Evaluation Reports, so there is no excuse for the agency's failure to disclose that effects from some of its projects do, in fact, exceed predicted levels and result in significant impacts and violations of law. But because the Forest Service actually completes so little monitoring, there may be many more such examples that were not observed and documented. That is especially true for the rare species whose occurrences were not found in surveys before harvest. The fact is, the agency simply doesn't have the record to show that its timber program—a large portion of which it hopes to shoehorn into CE 26 in this rulemaking—does not have significant impacts.

In addition, the Forest Service fails to consider that risky activities from some projects may have been dropped during implementation, even though they were included in a controversial DN/FONSI. For example, the Middle Citico project on the Cherokee National Forest (discussed supra and infra) included risky management in an area draining to critical habitat for aquatic species. In order to manage that risk, the Forest agreed to robust monitoring, and as a result conservation stakeholders agreed not to challenge the DN/FONSI. After the decision, however, the Forest decided to drop the controversial stands. This is not an isolated example; many stands are dropped during implementation, either before or after serious

problems begin to occur. As a result, the mere fact that the agency issued a DN/FONSI cannot support the conclusion that the activities *included in the decision* were nonsignificant, even if the project-as-implemented did not have significant impacts.

Without robust monitoring, the Forest Service can't make reliable predictions. This is as true at the project level as it is at the policy-making level. But here the consequences are much higher, and so is the legal standard the agency must satisfy. Creation of CEs is not a place where the agency can gloss over risk and uncertainty.

The Forest Service's stakeholders have for a long time been asking the agency to follow through with its obligations to monitor impacts. We've argued that short-term thinking—shortchanging monitoring to devote resources to the other end of the timber sale pipeline—was keeping the forests and districts from being able to scale up. Uncertainty is responsible for much of the conflict over project-level decisions. When there is uncertainty about how risky an action is, some people (the ones whose main priority is the resource at risk) will oppose it, while others (the ones whose main priority is the benefit of action) will support it. To get past conflict, you first have to get past uncertainty.

There are two ways to get past uncertainty: you can go after the "low-hanging fruit," or you can tackle harder problems with monitoring and research. This rulemaking, and CE 26 in particular, facilitates neither. It does not set limits to confine the agency to the low-hanging fruit, challenging as that might be to describe in a CE, and it ignores the lack of data needed to tackle the harder questions. To understand how this proposal would instead exacerbate uncertainty and risk at the project level, look no further than the range of comments submitted in connection with the rulemaking: Some commenters no doubt will support CE 26 for the potential good work it *could* include; most commenters will oppose it for the potential harms it *could* cause. The truth, of course, is that the CE is broad enough to allow both beneficial and harmful actions, but the Forest Service doesn't have the monitoring data to differentiate between them, which would be necessary to include appropriate limits on the CE. Regardless of the intentions of agency leadership, decentralized Districts and Forests would be given sweeping and unaccountable discretion for good or for ill. That is not what CEs are for, and it is not what Congress, in enacting NEPA, intended.

The Forest Service apparently fails to apprehend the limits of its data, and this blind spot reveals just how unprepared the Forest Service is to understand its impacts or to fulfill its mission in an era of changing climate, new and expanding pests and pathogens, and changing social and economic equilibria. We hope that the Forest Service will abandon this proposal and instead commit itself to the reforms it truly needs to make, including a meaningful commitment to monitoring. For now, however, CE 26 cannot be approved; there simply is no actual data about biophysical effects to support it.

Perhaps realizing that the proposed category is much too broad, and the supporting information much too weak, to survive review, the Forest Service leans heavily on supposed limitations that are external to the category or the list of extraordinary circumstances. Specifically, the agency relies on the existence of forest plans and national BMPs that projects must comply with. See Supporting Statement at 12-14. The reliance on forest plans is unavailing, as explained above in detail. And the Forest Service's reliance on the national BMPs provides no additional support for its proposal. The BMPs cited by the agency are vague to the point of uselessness at the project level. Again, the BMPs relevant to CE 26 include:

- Fire-2: “Avoid, minimize, or mitigate adverse effects of prescribed fire and associated activities on soil, water quality, and riparian resources that may result from excessive soil disturbance as well as inputs of ash, sediment, nutrients, and debris.”

- Veg-1: “Use the applicable vegetation management planning processes to develop measures to avoid, minimize, or mitigate adverse effects to soil, water quality, and riparian resources during mechanical treatment activities.”

- Road-7: “Locate and design roads to avoid, minimize, or mitigate adverse effects to soil, water quality, and riparian resources.”

How these BMPs should be applied at the site-specific level can be a controversial issue. How much uncertainty is there about the risk to be mitigated? How effective are the particular measures chosen? And if impacts are merely “minimized,” what guarantee is there that the impacts fall below the threshold of significance? As described above, many impacts from road construction - damage to wilderness character, hydrology, habitat fragmentation, spread of exotic invasive species, increased fire ignitions, poaching, cultural artifact looting - are likely to be significant and difficult if not impossible to eliminate. Project modifications made in response to public comment often relate to these questions. To rely on these general BMPs to avoid that process is circular reasoning.

Yet another problem with the rationale for CE 26 is an unsupported reliance on past projects as predictors of future effects. The Forest Service asserts that there are no “foreseeable events” that cast prior project outcomes into doubt. However, even if the Forest Service had good monitoring data to show that past projects did not have significant effects, it would be difficult to make the case that there will be no significant effects from similar projects in the future. First, the transparency of the current process helps to ensure that line officers generally avoid risky projects. Without transparency, projects of the same size may nonetheless carry greater risks.

Second, risks are increasing regardless of line officer behavior. For example, the Forest Service’s rationale ignores the reality of climate change, which is already changing conversations about forest management. Because of climate change, invasive species’ ranges are changing, and management practices we’ve long gotten away with may now be much riskier. Native species such as pinyon pine are experiencing declines due to drought, which is exacerbating the steep decline of pinyon jay. (As an example of the importance of examining current trends with public input, the BLM recently dropped pinyon pine removal from a pinyon-juniper hazardous fuels EA in southeastern Utah following scoping comments, a field tour requested by the public, and submission of scientific evidence.) Another area of importance is the resilience of forest infrastructure. More frequent and intense flooding is causing forest-road related landslides, and best management practices relating to culvert sizing are quickly becoming outdated. Good decisionmaking in the face of these changes requires an openness to new information and ideas, not churning out “routine” projects, which may only appear routine because the agency is unwilling to look below the surface.

Finally, the Forest Service’s “benchmarking” against other agencies’ CEs does not provide support for CE 26. Compared to CE 26, the relevant CEs included in the Supporting Statement are either much smaller in size, much more limited in scope, or both:

- BLM allows “sale and removal of individual trees or small groups of trees which are dead, diseased, injured, or which constitute a safety hazard, and where access for removal requires no more than maintenance of existing roads.” This authority would not permit timber harvest at the scale, or for the breadth of purpose, as the Forest Service’s proposal.

- BLM also allows “precommercial thinning and brush control using small mechanical devices.” This authority is similar to the Forest Service’s existing CE 6, except limited further than the Forest Service’s authority by the restriction to “small mechanical devices.”

- BIA allows “approval of forest stand improvement projects of less than 2000 acres.” This authority is similar to the Forest Service’s existing CE 6, which provides the same authority with no acreage limitation.

These authorities are nowhere near as sweeping as the Forest Service’s proposal. The benchmarking analysis suggests strongly that the Forest Service is well outside the bounds of actions that other agencies believe can be implemented without significant impacts. Even if they were similar in scale, the Forest Service would not be able to rely on them because these other agencies’ authorities are meaningfully limited by extraordinary circumstances, which cannot be circumvented (as the Forest Service here proposes) by an uninformed determination that any effects will not be “substantially adverse.”

The Forest Service’s errors in this proposed rulemaking will cause concrete harms. Accordingly, we zoom in to a single ecoregion—the Southern Appalachians—to illustrate both the radical scope of this proposed CE and the importance of the process that the Forest Service seeks to discard.

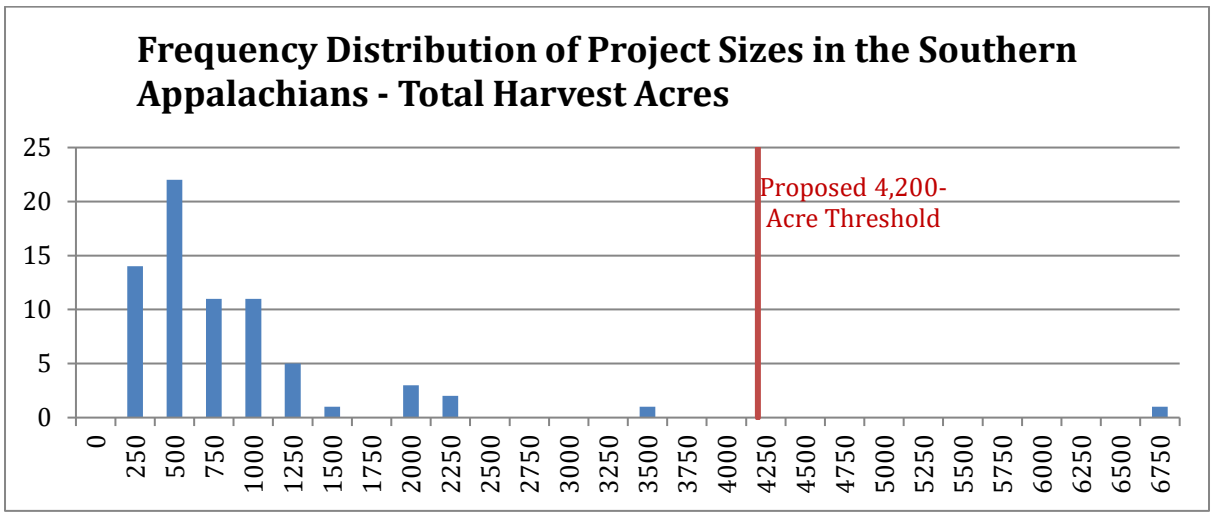
The national forests within the Southern Appalachians are ecologically, socially, and economically complex. Because of their unique history, topography, and climate, these Forests boast incredible biological diversity, especially for salamanders, mussels, fish, and crayfish. These Forests are also among the most visited in the National Forest System because of their proximity to population centers and because they provide recreational and scenic contexts not otherwise available in the East. As a result, this region is a useful example of why public participation is so important to refine projects and minimize harms.

We reviewed vegetation management projects in several Southern Appalachian Forests completed with DN/FONSIs between 2009 and 2019. As noted above, essentially every project in this region would fall under the proposed size thresholds for CE 26. From 2009 to 2019, 98.6% of projects in the Southern Appalachians (70 out of 71) included less than 4,200 acres of harvest, and most had far less. The average project size was a mere 772 acres; projects ranged from 75 acres to 6,663 acres of total harvest. Median project size ranged from 326 acres on the Nantahala and Pisgah National Forests to 1,464 acres on the Chattahoochee National Forest, and the median across all forests analyzed was 535 acres. As a result, the proposal would eliminate public input requirements for practically every project in this region. A project nearly 8 times as large as the historical median project size for the Southern Appalachians could fit into the new loophole that would be created by CE 26.

Table: Southern Appalachian Project Sizes – Total Acres of Harvest

Forest	# Projects Completed 2009-2019	# Acres Min.	# Acres Max	#Acres Average	#Acres Median
GW/Jeff	28	75	3,422	565	412
NPNF	23	173	1,666	560	326
Chattahoochee	8	394	6,663	1,975	1,523
Cherokee	12	212	2,214	870	796.5
All	71	75	6,663	772	535

Chart: Frequency Distribution of Project Acreage in Southern Appalachians, 2009-2019



The loss of the public process and analysis associated with EAs for the timber sale program in the Southern Appalachians would cause significant impacts on the ground. Public input makes a big difference on projects in these forests, individually and in the aggregate. We took a closer look at the net changes made to these 71 projects because of the public input and analysis required for EAs. During the NEPA process, 4,915.5 net acres of commercial harvest (11.62% of the total proposed) were dropped, and 7,131.4 net acres of total harvest (11.51% of the total proposed) were dropped. In addition, 4.7 miles of permanent roads and 4.25 miles of temporary roads were dropped (11.03% and 3.71% of the totals proposed, respectively).

Table: Net Changes to Project Activities During EA Process

Forest	Δ Commercial Harvest (acres)		Δ Total Harvest (acres)		Δ Permanent Roads (miles)		Δ Temporary Roads (miles)	
GJ/Jeff	-1,531	-12.45%	-2,053	-11.49%	0.45	2.70%	-3.48	-8.20%
NPNF	-1,854.5	-20.06%	-2,746	-17.57%	-6.35	-74.1%	-1.97	-9.30%
Chattahoochee	-1,312	-8.44%	-1,985	-11.23%	0	0.00%	1.7	5.33%
Cherokee	-218	-4.19%	-347.4	-3.22%	1.2	22.86%	-0.5	-4.14%
Total	-4,915.5	-11.62%	-7,131.4	-11.51%	-4.7	11.03%	-4.25	-3.71%

During our analysis, we observed that the "net" changes undercount the actual impact of public input. Public input can also be responsible for adding acres or road mileage, often to reduce negative impacts or improve the ecological impact of the project. For example, during development of the Paint Creek project on the Cherokee National Forest, collaborative input (submitted formally as comments during the NEPA process) resulted in the addition of 94 acres of commercial harvest (17.77% of the project total).[285] Accordingly, we separately tallied projects that showed an increase in total harvest or commercial harvest.

Although referred to hereafter as "gross" changes to distinguish them from the overall net change, please note that our process did not fully account for gross project changes due to public input. Our methodology did not account for harvest increases within a single project that may have been offset by other harvest decreases. In other words, we did not attempt to catalog changes within a single project where stands were replaced or relocated. Rather, we kept track of harvest increases only where an individual project showed a *net* increase of commercial or total harvest.

Using this conservative accounting, public input resulted in the addition of at least 993 acres of commercial harvest and 1,271 total acres of harvest. The results by Forest are shown in the tables and chart below.

Table: Net and Gross Changes to Total Timber Harvest by Forest

Forest	Combined Increases in Total Harvest	Combined Decreases in Total Harvest	Net Change Total Harvest	Gross Change Total Harvest	% Gross Change Total Harvest
Chattahoochee	241	-2108	-1985	2467	14.0%
Cherokee	890	-1237.4	-347.4	2127.4	19.7%

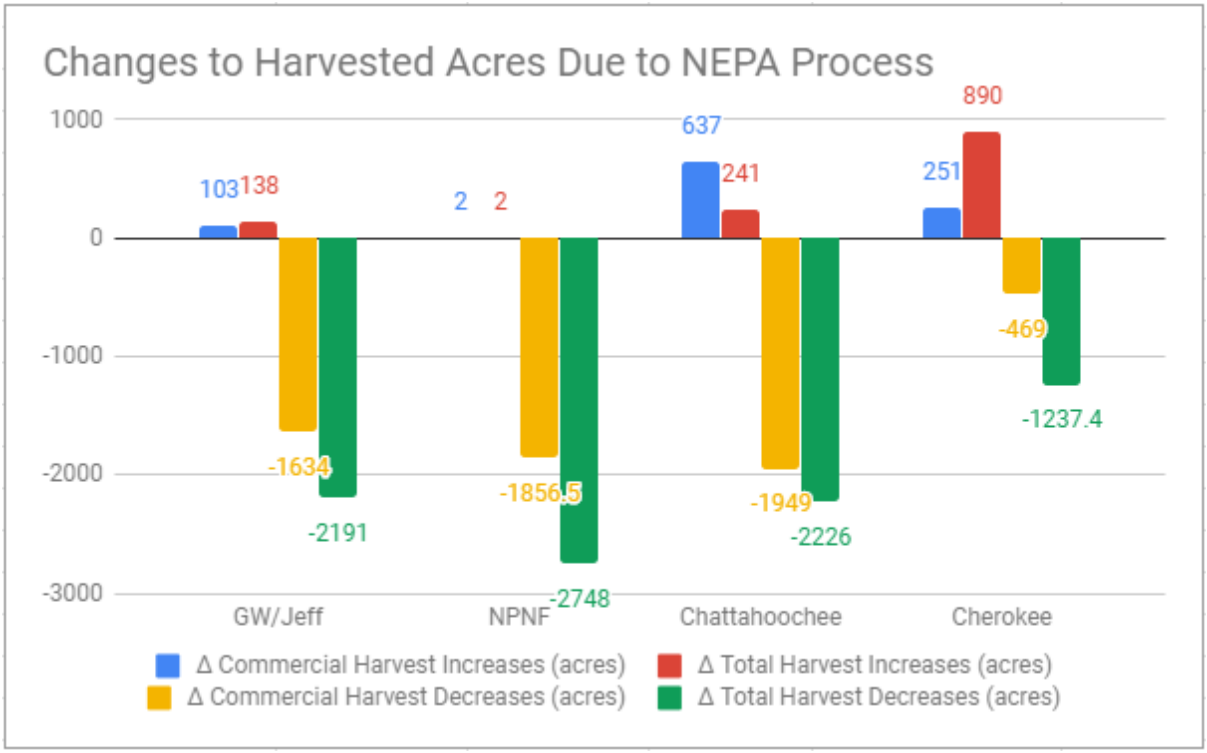
[285] https://www.fs.usda.gov/project/?project=41477

NPNF	2	-2595	-2746	2750	17.6%
GWJ	138	-2191	-2053	2329	13.0%
Total	**1271**	**-8402.4**	**-7131.4**	**9673.4**	**15.6%**

Table: Net and Gross Changes to Commercial Timber Harvest by Forest

Forest	Combined Increases in Commercial Harvest	Combined Decreases in Commercial Harvest	Net Change Commercial Harvest	Gross Change Commercial Harvest	% Gross Change Comm. Harvest
Chattahoochee	637	-1949	-1312	2586	14.2%
Cherokee	251	-469	-218	720	13.9%
NPNF	2	-1856.5	-1854.5	1858.5	20.7%
GWJ	103	-1634	-1531	1737	14.1%
Total	**993**	**-5908.5**	**-4915.5**	**6901.5**	**16.3%**

Chart: Changes to Harvested Acres Due to NEPA Process, Adjusted for Projects that Gained in Commercial or Total Harvest



These numbers are revealing. They show that public input is important in each of the Southern Appalachian forests, and they show that public input is used differently in different forests. Some forests, like the Cherokee National Forest, are more flexible than others in using public input to refine projects and add actions, such as restoration or wildlife habitat improvements, when requested by the public. Others only drop actions based on concerns or mistakes identified by the public. As noted elsewhere in these comments, this variation shows that the NEPA regulations themselves are less important than the agency's internal training and cultural issues, which vary significantly across forests.

In summary, the NEPA process was responsible for large aggregate changes to project activities. Nearly 10,000 acres were either removed from or added to projects because of the NEPA process—*i.e.*, 15.6% of the total harvest acres proposed by the Forest Service in the Southern Appalachians from 2009 to 2019. Nearly 7,000 acres of commercial harvest were added or removed from projects—16.3% of all commercial harvest proposed during that same period.

In addition to these changes to proposed actions themselves, the data further show that analysis and public participation was responsible for improving a number of projects through the addition of site-specific mitigation that would not otherwise have been provided. We determined that a potentially significant issue was "present" in a project only if it was objectively clear from the project documents (for example, where timber harvest was located in a wilderness-eligible area) or, for issues requiring subjective judgment, only if the Forest Service affirmatively agreed that the issue was present (for example, where the Forest Service agreed that a particular stand proposed for harvest qualified as old growth). Issues were identified as "mitigated" where the Forest Service made any substantial change to the project's activities or design in order to address the potentially significant issue.

In the 71 projects we reviewed, we identified 146 potentially significant issues—on average, a little more than 2 potentially significant impacts per project. Public comment was responsible for avoiding or mitigating 108 of those potential impacts (74%) in these Forests during the analysis period.

Table: Mitigation Added During EA Process (Number of Projects)

Forest	**Ch. 70**		**Old growth**		**PETS**		**State nat. area**		**Water quality**		**Soil/Slope**	
	Present	Mitigated	Present	Mitigated	Present	Mitigated	Present	Mitigated	Present	Mitigated	Present	Mitigated
GW/Jeff	4	2	6	6	5	4	1	1	9	9	9	9
NPNF	10	2	9	4	16	10	10	3	5	1	3	1
Chatt.	1	1	2	2	6	6	6	6	8	8	8	8
Cherokee	3	0	1	1	3	3	1	1	9	9	11	11
Total	18	5	18	18	30	23	18	11	31	27	31	29

Summary of Potentially Significant Issues Present & Mitigated

Total Number of Potentially Significant Issues Present	146
Total Number of Potentially Significant Issues Mitigated	108
Percent of Potentially Significant Issues Mitigated	74%

These numbers stand for places that matter to the members of the public who visit these forests and who commented on the projects. Some examples from the projects reviewed include:

- ***Stoney Creek (Watauga District, Cherokee NF)***: The Stoney Creek project, on the flanks of Holston Mountain, was proposed with a small acreage but a large potential impact. Of the 383 acres proposed for timber harvest, 119 acres were old growth, which was not recognized by District staff during stand examinations. In the NEPA process, stakeholders identified the existing old growth and visited the stands with Forest Service staff. The old growth stands were dropped and, with stakeholders' help, replaced with other stands where harvest was needed for ecological restoration. In addition, the project proposed to authorize a legacy road as a system road within the Big Laurel Branch Extension IRA. After public comment, the Forest Service decided instead to authorize another legacy road outside the IRA, which stakeholders supported. Either impact--the new road in a roadless area or the harvest of extremely rare and ecologically important old growth--would have been significant, but both impacts were avoided by modifying the project based on public participation in the NEPA process.

- ***Clarke Mountain (Watauga District, Cherokee NF)***: This project proposed to harvest 55 acres of old growth within a larger patch. Initially, the District resisted acknowledging that the area was old growth, but after citizen scientists submitted supporting data during the NEPA process (including a number of tree cores), the District designated the patch as existing old growth and modified the project to drop those stands.

- ***Mossy Oak (Nantahala District, Nantahala NF)***: This modestly sized, 235-acre project included two highly controversial stands: one with 13 acres of old growth forest, and the other overlapping a North Carolina natural heritage area with an exemplary oak-hickory forest and seep wetland. After several comment letters throughout the NEPA process, a field visit, and an objection, the District agreed that the old growth forest should be managed to enhance its existing ecological values rather than regenerated, and that activities overlapping the natural heritage area should be limited to avoid impacting wetland hydrology. Without the modifications achieved through the NEPA process, this project would have been headed for an impasse over the significance of the impacts to old growth and the state-designated area.

- ***Rocky Spur (North River District, George Washington NF)***: This project was proposed with logging and road building within a potential wilderness area (PWA), but those activities were dropped during the NEPA process. The project went forward with a DN/FONSI, and conservation stakeholders did not oppose it.

- ***Upper Warwoman (Chattooga River District, Chattahoochee NF)***: Based on public participation in the NEPA process, the District modified the proposed project to restore and protect old growth, including some that had initially been proposed for regeneration, and avoid road reconstruction and harvest in an undeveloped area (not an IRA, but eligible for inventory under FSH 1909.12, Chapter 70). Avoiding these impacts allowed the project to proceed with a DN/FONSI. In addition, the District also modified the project to avoid the need to obtain an individual permit under Section 404 of the Clean Water Act, which would have added considerable time and effort to the project's development.

- ***Citico Creek (Tellico District, Cherokee NF)***: This project, involving a combination of timber harvest, road construction, a parking lot, and excavation for an equestrian trail system, would have created an extraordinary risk for federally endangered smoky madtom and the threatened Citico darter. Based on input from stakeholders and experts on those species received during the NEPA process, the District convened a collaborative group to offer recommendations for redesigning the project, ultimately issuing a DN/FONSI that included robust monitoring and provided greater assurance that downstream species would be protected.

In summary, both the Forest Service's own sampling of projects from across the national forest system and the comprehensive look at projects from selected forests in the Southern Appalachians show the importance of public input through the EA process. To recap:

- In the aggregate, the EA process was responsible for a net decrease of about 61,000 acres (17%) of the acres proposed for harvest in the 68 projects included in Appendix A. Total project size decreased by about 127,700 acres (21%) from what was originally proposed.

- 43 of the 68 projects included in Appendix A were substantively changed explicitly because of public comment. The public's concerns in 6 more Appendix A projects were serious enough that the Forest Service provided additional analysis, information, or alternatives comparison to address them. In other words, 49 of the 68 projects relied on by the Forest Service to support the CE (72%) would have been inappropriate for the use of that CE.

- Only 8 of the projects included in Appendix A did not change between scoping and decision, and they were much smaller on average than the full 68-project sample.

- Nearly 10,000 acres in the Southern Appalachians were either dropped from treatments or treated when they otherwise would not have been because of the current NEPA process for EAs between 2009 and 2019. That's 15.6% of the Forest Service's total management footprint in the Southern Appalachians.

- Vegetation management projects in the Southern Appalachians implicated an average of 2 potentially significant impacts per project. 74% of those potential impacts were avoided or mitigated because of public input.

Public input both shapes the agency's analysis and results in substantive improvements to project activities—dropping harmful actions, relocating activities, changing prescriptions,

and adding site-specific mitigation measures. The places and resources protected by public input are significant, both ecologically and socially. Unless the Forest Service can show that these same improvements can be guaranteed by limitations on the newly proposed CEs, then it cannot rely on this administrative record to promulgate those new CEs.

7. Proposed CE 27 (36 C.F.R. § 220.5(e)(27)) – Other Agencies' CEs.

The proposed rule includes a new categorical exclusion to permit the Forest Service to use another agency's CE, where the proposed action is a Forest Service action but will be implemented jointly with another agency. *See*, 36 C.F.R. § 220.5(e)(27) (proposed). The only proposed limitation is that the action must quality for the CE of the other agency and the Forest Service responsible official "must obtain written concurrence from the other Federal agency that the categorical exclusion applies to the proposed action." *Id*. This is not a sufficient approach to address the application of CEs that were not crafted in the context of the specific statutory mission and regulatory framework of the Forest Service.

This proposed CE would improperly exclude numerous activities from review. The Council on Environmental Quality's (CEQ) guidance on "Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act"[286] specifically prohibits simply relying on another agency's categorical exclusion, stating: "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."[287] Instead, CEQ provides that an agency can "substantiate a categorical exclusion of its own based on another agency's experience with a comparable categorical exclusion and the administrative record developed when the other agency's exclusion was established."[288] But the Forest Service has not provided that supporting administrative record or other evidence or analysis with this rulemaking.

Further, CEQ makes it clear that relying on another agency's experience is not a minor undertaking, providing that, in order to determine that another agency's experience with regard to the actions in question are comparable, an agency should look to:

> (1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions (4) applicable standing operating procedures or implementing guidance (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place.[289]

The Forest Service has not even attempted to justify why its use of the myriad CEs developed by other land management agencies would not lead to significant impacts on national forestlands. Looking just at CEs potentially available from other agencies in the Department of the Interior, there are at least 180 additional exclusions that could the Forest Service potentially seek to apply with no more than a letter from the agency in question.[290] A

---

[286] Available online at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf
[287] CEQ guidance, November 23, 2010, p. 9.
[288] *Id.*
[289] *Id.*
[290] An overview of the existing CEs of the Forest Service, Bureau of Land Management (BLM), Fish and Wildlife Service and National Park Service is attached to our ANPR comments.

comparison of the other agencies' CEs with those of the Forest Service shows that they address wider ranges of activities than those that the Forest Service currently uses.

Further, because these agencies have different organic acts and statutory frameworks, they were developed to address the needs of these agencies, which would require a thorough evaluation of how their characteristics, implementation, frequency, extraordinary circumstances, and environmental settings might differ from those in which they would be used in a Forest Service action. For instance, the BLM has a much broader set of CEs both by number and types of activities such as transportation and energy development. While the BLM is also a multiple use agency, the definitions of multiple use and sustained yield in the Federal Land Policy and Management Act and the National Forest Management Act are different, FLPMA specifically discusses minerals and energy development (as do the BLM's regulations), and the environmental settings in which the agencies operate are very different. Moreover, the BLM is currently operating under guidance that directs it to maximize use of CEs for approving permits to drill and infrastructure proposals for oil and gas development.[291] Thus, asking the BLM to confirm the application of a CE developed for its statutory mandate and under its current guidance is not only improper executive delegation, but also not a substitute for developing a categorical exclusion with sufficient support for Forest Service actions, as is clear from the standards set out by the CEQ above.

Finally, the Forest Service's proposed CE 27 would allow it to take advantage of other agencies' CEs that have not even been created yet. New CEs being developed by BLM, for example, are rumored to be even more sweeping in scope than the Forest Service's proposal here. It is legally impossible for the Forest Service to defend in this rulemaking the absence of significant impacts from activities that have not even been described yet. The proposed CE set out in 36 C.F.R. § 220.5(e)(27) for relying on other agencies' CEs cannot be supported and must not be adopted.

X. The Proposed Extraordinary Circumstances Regulatory Language is Arbitrary and Capricious.

A. The Forest Service cannot further weaken the threshold for finding extraordinary circumstances.

Currently, the agency must consider seven different types of resource conditions "in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS." 36 C.F.R. § 220.6(b)(1). The regulation explains:

> The mere presence of one or more of these resource conditions does not preclude use of a [CE]. 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.

36 C.F.R. § 220.6(b)(2). The current direction is a relaxation of prior direction, which precluded the use of a CE if any "resource condition" was present at all in the action area.

[291] *See*, Information Bulletin 2018-061 "NEPA Efficiencies for Oil and Gas Development." Available online at https://www.blm.gov/policy/ib-2018-061.

The proposed rule seeks to further weaken this already anemic language. It states:

> …The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion. 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 likelihood of substantial adverse effects. The responsible official may consider whether long-term beneficial effects outweigh short-term adverse effects in making this determination.

84 Fed. Reg. 27,554 (proposed 36 C.F.R. § 220.5(b)(2)). There are a number of problems with this proposed language that would render its adoption unlawful.

First, the proposed language does not appear to have any evidentiary support. Neither the preamble nor the proposed rule include information about the current use of CEs or extraordinary circumstances, or the need to alter this language. Rulemaking must be based on factual, legal, or other evidence; but this proposed language has no justification. This is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

Second, the regulation vests in the responsible official an extremely broad level of discretion to make the determination of whether or not a CE is appropriate. Prior iterations of this regulation provided for interdisciplinary team input into the determination of the existence and "cause and effect relationship" between a proposed project and the effects of the action on resource conditions. The proposed rule rests solely on the responsible official's discretion in his/her determination of environmental effect. This violates NFMA, which requires an interdisciplinary team approach to planning at all levels. 16 U.S.C. § 1604(g)(3)(F)(ii).

Third, the proposed regulation is impermissibly vague. There is no metric against which to evaluate "a likelihood" of "substantial adverse effects." Is "likelihood" a 50.1% chance? A 51% chance? Some other relative probability of occurrence? Without a definition, metric, or sideboards, there will be no limit to the responsible official's discretion, allowing the accumulation of negative impacts, although individually determined to be insubstantial, that are cumulatively significant. This is arbitrary and capricious.

Similarly, what are "substantial" adverse effects? If there are two or three adverse effects, is this "substantial"? NEPA requires the preparation of an EIS if a project "may" have "significant environmental impacts." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); 42 U.S.C. § 4332(2)(C). The proposed language overrides statutory direction by replacing "significant" with "substantial adverse effects," and places projects with effects that heretofore would have been evaluated with an EIS into a category of actions that may be assessed instead with a cursory CE. The agency provides no evidence supporting this shift in level of impact necessary to justify a CE.

Fourth, the CEQ NEPA regulations currently require an EIS if there are significant environmental effects, *whether positive or negative*. 40 C.F.R. § 1508.27(b)(1). The proposed rule disregards this conflicting regulatory requirement with its proposed language "likelihood of substantial *adverse* effects."[292] This proposed language should be stricken in its entirety.

[292] 84 Fed. Reg. 27,554 (proposed 36 C.F.R. § 220.5(b)(2))(emphasis added).

Fifth, the proposed language states that "The responsible official may consider whether long-term beneficial effects outweigh short-term adverse effects in making this determination."[293] This is patently inconsistent with CEQ's regulations, which provide that "[e]ffects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8. Further, this "trade-offs" analysis is an important part of the purpose of NEPA, which is to transparently evaluate the environmental consequences of federal agency actions. *See, e.g.*, *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (Forest Service violated NEPA where the agency failed to address the "trade-off" between wilderness protection and development in alternatives analysis). Rather than conducting this analysis in full view and with public participation, the proposed rule shifts this analysis to the responsible official. NEPA does not permit the agency to conduct environmental analysis behind closed doors. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency ... 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 [public] audience").

Sixth, under the existing rule, the agency must only evaluate the degree of potential effect of its proposed actions on the enumerated resource conditions, which allows for those actions to move forward, provided there are no direct, indirect, or cumulative effects that warrant the preparation of an EA or EIS. The existing extraordinary circumstances direction helps to ensure that these resources will be protected during land management activities, and we do not support a regulatory change that would make it easier to disregard the diverse and often fragile nature of our national forests and grasslands. The agency failed to provide a rationale for why the existing regulation is problematic.

An extraordinary circumstances analysis is further complicated by the fact that the Forest Service already has an extensive list of CE authorities and is seeking to add to it with this proposed rule, such that nearly every single management action it could conceivably take on the national forests is covered by a CE. As a result, it would be an extremely rare project that did not either fit within an existing or proposed CE, or did not encounter an enumerated resource condition, and indeed, this appears to be the agency's intent with shift 93% of its decisionmaking to CEs.[294] As a result, the exceptions to detailed environmental analysis have swallowed the rule, making the "exceptions" analysis inherently problematic.

---

[293] *Id.*

[294] This may in fact be the agency's intention with the proposed rule: to remove the vast majority of decisions and activities affecting national forests from public oversight and science-based decisionmaking. If so, a refresher of some of Gifford Pinchot's maxims is warranted and appropriate:

- A public official is there to serve the public and not run them.
- Public support of acts affecting public rights is absolutely required.
- It is more trouble to consult the public than to ignore them, but that is what you are hired for.
- Find out in advance what the public will stand for. If it is right and they won't stand for it, postpone action and educate them.
- Get rid of an attitude of personal arrogance or pride of attainment or superior knowledge.
- Don't try any sly, or foxy politics. A forester is not a politician.

We recommend that the Forest Service abandon its proposed expansions of CEs, and then focus on situations where monitoring has revealed that truly routine actions have resulted in possible or demonstrated direct, indirect, and cumulative effects. These projects obviously should not have been analyzed with a CE in the first instance, but more importantly, it is these exceptional situations that reveal the situations under which a CE is not appropriate, even though the agency originally believed that a CE was the appropriate analysis tool.[295] Analyzing these exception situations should reveal under what conditions a CE – initially thought to be appropriate – is, in fact, not appropriate; and these situations would then form the basis of an appropriate (and administratively supported) list of extraordinary circumstances.

In the absence of any sort of rational fact- and science-based approach to developing extraordinary circumstances, the proposed rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

B. Removal of Sensitive Species from the list of resource conditions is arbitrary and capricious.

The proposed rule also would change the list of resource conditions relevant to the extraordinary circumstances analysis. However, the Forest Service failed to provide any rationale for the changes, including but not limited to eliminating sensitive species as a resource condition. In particular, sensitive species are still identified and managed under most existing forest plans, which were developed under the 1982 planning rule; and until all forest plans are revised under the 2012 planning rule, sensitive species remain an important wildlife resource. We remind the Forest Service of its legal obligation imposed by NFMA to manage for viable populations of these species. See 40 C.F.R. 1508.27 (impacts require NEPA analysis where they threaten a violation of law).

If the Forest Service were to update the list of resource conditions, the law and the administrative record would compel a significant expansion of additional resource conditions, not just the addition of Wild and Scenic Rivers (which, to be clear, is appropriate but inadequate by itself). In this proposal, the Forest Service is significantly expanding its CE authorities to include most of its decisions. With such an expansion, the potential complexity of project proposals, the number of different contexts that they will affect, and the types of harms they could inflict will also proliferate. The Forest Service's extraordinary circumstances requirements must be adequate to account for those many complexities, contexts, and impacts. The list in the proposal, emphatically, is not.

According to CEQ,

> When proposing new or revised [CEs], Federal agencies should consider the extraordinary circumstances described in their NEPA procedures to ensure that they adequately account for those situations and settings in which a proposed categorical

---

Grey Towers Historical Society, *Gifford Pinchot's 11 Maxims*, available at https://www.greytowers.org/11-maxims/ (visited July 3, 2019).

[295] We suspect that CEs with large acreages and multiple activities are likely to be the types of projects that result in significant environmental consequences.

> exclusion should not be applied…. If an agency's existing extraordinary circumstances do not provide sufficient parameters to limit a proposed new or revised [CE] to actions that do not have the potential for significant environmental effects, the agency should identify and propose additional extraordinary circumstances….[296]

Again, as explained above, site-specific issues that may lead to "significant" impacts include old growth, eligibility for inventory under Chapter 70, proximity to designated or other sensitive areas, risk factors for soil erosion, sensitivity of receiving waters, wetlands, recreational uses, scenic values, presence of rare species, importance of habitat for connectivity, risks caused by geological peculiarities, impacts to access, or indirect impacts leading to increased motorized use, among many others. Indeed, the sheer number of different kinds of significant impacts that could occur (and therefore must be listed as resource conditions) should remind the Forest Service of CEQ's warning: "If extensive extraordinary circumstances are needed to limit a proposed [CE], the agency should also consider whether the proposed [CE] itself is appropriate."[297]

In summary, the Forest Service cannot simultaneously expand the contexts in which CEs may be used and weaken the extraordinary circumstances backstop that would prevent them from having Accordingly, in order to account for those complexities and different contexts, the Forest Service cannot simu and need to identify .

XI. The Application of Multiple CEs is Arbitrary and Capricious.

Proposed 36 C.F.R. § 220.5(a) would add language essentially permitting the stacking of numerous CEs to cobble together a justification to exclude a larger, multi-faceted single proposed action from NEPA review. As the Forest Service explains: "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."[298] The proposed additional language in the rule is: "Multiple categories may be relied upon for a single proposed action when a single category does not cover all aspects of the proposed action."

This approach would improperly exclude activities from review. The Council on Environmental Quality's (CEQ) guidance on "Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act" provides 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. [299]

---

[296] CEQ, 2010 CE Memorandum at 5-6.
[297] Id.
[298] 84 Fed.Reg. 27,546.
[299] CEQ Guidance, November 23, 2010, p. 5 (emphasis added). Available online at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov-232010.pdf.

This approach echoes the case law forbidding segmenting of environmental review of a proposed action to avoid preparation of an environmental impact statement, which for decades has similarly prohibited applying NEPA review only to segments of larger projects and requiring that each action must have "independent utility." *See, e.g., Daly v. Volpe*, 514 F.2d 1106, 1109-11 (9th Cir. 1975); *Indian Lookout Alliance v. Vole*, 484 F.2d 11, 18-19 (8th Cir. 1973); *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014).

Further, agencies must take into account connected actions, so that an agency cannot divide a project into smaller actions "each of that might have an insignificant environmental impact when considered in isolation, but that taken as a whole have a substantial impact." *Northwest Resource Info. Ctr. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995); *see also* 40 C.F.R. § 1508.25. Finally, applying multiple CEs to different parts of a project is likely to lead to inadequate analysis of cumulative impacts, which "can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7; *see also Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1078 (9th Cir. 2002). As the Supreme Court has stated, "[o]nly through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

Based on the existing legal framework regarding segmentation and cumulative effects, the proposed rule that would allow for the implementation of multiple CEs is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

XII. Expanding Existing CEs by Removing Implicit Limitations is Arbitrary and Capricious.

In addition to creating new CEs, the proposal expands the scope of existing CEs by removing implicit limitations. According to the proposal, "[a]ll categories are independently established and do not constrain or limit the operation of each other." 36 C.F.R. § 220.5(a)(2) (proposed). Regardless of whether this assertion is accurate with respect to newly proposed CEs, the Forest Service does not have the administrative record to show that CEs created in the past can be applied without the context of related CEs.

Of particular importance in this regard is CE 6, currently codified at 36 C.F.R. § 220.6(e)(6), and proposed to be retained with the same verbiage at 36 C.F.R. § 220.5(e)(6). The history of CE 6 and CE 12 shows that the purposes of each of the Forest Service's vegetation management CEs must be understood to clarify the boundaries of the others. Far from being created in a vacuum as standalone CEs, these CEs evolved out of CEs created in 1981, and their proper scope and intent can only be understood when considering this regulatory history, as well as associated litigation.

CE 6, which was promulgated in 1992, applies to activities to improve wildlife habitat and/or timber stands ("Improvement CE").[300] Example improvement activities include:

- girdling trees to create snags;
- thinning or brush control to improve growth or reduce fire hazard including the opening of an existing road to a dense timber stand;

[300] 57 Fed. Reg. 43180, 43209 (Sept. 18, 1992).

- prescribed burning to control understory hardwoods in stands of southern pine;

- prescribed burning to reduce natural fuel build-up and improve plant vigor.[301]

CE 12, promulgated in 2003, applies to harvest of up to 70 acres of live trees ("Timber Harvest CE"). Examples of activities include:

- Removal of individual trees for sawlogs, specialty products, or fuelwood;

- commercial thinning of overstocked stands to achieve the desired stocking level to increase health and vigor.[302]

Prior to 1981, Forest Service CEs largely were limited to non-forest management activities, such personnel actions, funding or scheduling of projects, emergency situations, routine operation and maintenance related to transportation, and studies or research activities[303]
In 1981, however, the Forest Service established several new management CEs that, based on previous experience, had "limited context and intensity."[304] These included a CE for:

- "actions of limited size or magnitude." Examples included "*some*" timber sales, thinning and pruning projects, seeding and planting projects, and range and wildlife and improvement projects.[305]

In 1985, the Forest Service clarified these activities by reorganizing them into new CEs, including:

- CE for "[l]ow-impact silvicultural activities that are limited in size and duration and that primarily use existing roads and facilities[.]"[306] Examples included firewood sales; salvage, thinning, and small harvest cuts; site preparation; and planting and seeding.[307]

- CE for "[f]ish and wildlife habitat management activities. Examples included improving habitat, installing fish ladders, and stocking native or established species."[308]

In 1992, the Forest Service again sought to clarify CEs by expanding and re-organizing them.[309] The newly separate CEs included:

---

[301] 57 Fed. Reg. 43180, 43209 (Sept. 18, 1992).
[302] 68 Fed. Reg. 44598, 44607 (July 29, 2003).
[303] 44 Fed. Reg. 44718, 44731 (July 30, 1979).
[304] 46 Fed. Reg. 56998-01, 57000 (Nov. 19, 1981).
[305] *Id.* (emphasis in original).
[306] *Id.* at 26081.
[307] *Id.* At the same time, the Forest Service also crafted a separate CE for "[f]ish and wildlife management activities, such as improving habitat, installing fish ladders, and stocking native or established species." Id. at 26082.
[308] 50 Fed. Reg. 26078, 26082 (June 24, 1985).
[309] 58 Fed. Reg. at 19721 (Apr. 29, 1991).

- CE 6 for Improvement of Timber Stand and/or Wildlife Habitat Activities. The 1992 Improvement CE combined the 1985 CE for "low-impact," "limited size and duration" timber stand improvement activities CE and 1985 fish and wildlife habitat management activities. When developing the CE, the Forest Service described these activities as having "*little potential for displacement of exposed soil, changes in vegetation species composition, or new sources of water pollution.*"[310] In responding to comments on the draft CEs, the Forest Service made clear that evaluating potential damage to soil, air, water, or sensitive resources was not tantamount to analysis in an EA or EIS and that "[a]n appropriate evaluation of the potential effects of a proposed action can and should be made by the Responsible Official prior to the placement of the proposed action in a category exclusion."[311]

- CE for timber harvest and salvage harvest. The 1992 Timber Harvest CE allowed 250,000 board feet of timber harvest and 1,000,000 board feet of salvage harvest. Examples included harvesting, salvaging, and thinning.[312]

In 1999, a federal court invalidated the 1992 Timber Harvest CE and prohibited its use throughout the nation. *Heartwood*, 73 F.Supp.2d 962 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947 (7th Cir. 2000). The court did so because it found the drastic increases in allowable timber harvest were "a classic example of an arbitrary decision." *Id.* at 975. The Court also found that the Forest Service failed to show that timber harvests of this magnitude would not have cumulative effects on the environment. *Id* at 976. Consequently, the Court held the Forest Service's decision to advance the CE was arbitrary and capricious, declared the CE null and void, and enjoined the use of the 1992 Timber Harvest CE nationwide. *Id* at 980.[313] The Forest Service did not appeal the ruling.

Instead, in 2003, the Forest Service tried to craft a new timber harvest CE. In light of the court ruling in the *Heartwood* case, the agency proposed a CE "much more limited in scope" than the invalidated 1992 Timber Harvest CE.[314] The new timber harvest CE provided:

- CE12 for Harvest of live trees not to exceed 70 acres. The 2003 Timber Harvest CE allowed timber harvest of 70 acres with no more than .5-mile temporary road construction and prohibited even-aged regeneration harvest or vegetation type conversion. Examples of activities included: Removal of individual trees for sawlogs, specialty products, or fuelwood; and commercial thinning of overstocked stands to achieve the desired stocking level to increase health and vigor.[315]

---

[310] 56 Fed. Reg. 19718, 19745 (Apr. 29, 1991). Example activities included: girdling trees to create snags; thinning or brush control to improve growth or reduce fire hazard including the opening of an existing road to a dense timber stand; prescribed burning to control understory hardwoods in stands of southern pine; prescribed burning to reduce natural fuel build-up and improve plant vigor. 57 Fed. Reg. 43180, 43209 (Sept. 18, 1992).
[311] 57 Fed. Reg. at 43184.
[312] 57 Fed. Reg. 43180, 43209 (Sept. 18, 1992).
[313] CE-12: *Harvest of live trees not to exceed 70 acres*. The 2003 Timber Harvest CE allowed timber harvest of 70 acres with no more than .5-mile temporary road construction and prohibited even-aged regeneration harvest or vegetation type conversion.
[314] 68 Fed. Reg. 1026-02, 1027 (Jan. 8, 2003).
[315] 68 Fed. Reg. 44598, 44607 (July 29, 2003).

The parallel development of these CEs shows that they cannot be read independently of one another. The CE for harvesting live trees, with accompanying ground disturbance, would not have been needed if those kinds of activities were permissible at even greater scales under the harvest for timber stand and wildlife habitat improvement. Accordingly, the scope of CE 12 is highly relevant to the interpretation of CE 6, showing that CE 6 still is limited to activities with little potential for ground disturbance, species composition changes, or sedimentation. Indeed, without the implicit limitation, CE 6 could be read to allow an unlimited acreage of ground-based logging—a reading that would certainly encompass significant impacts. The Forest Service simply does not have the administrative record to show that expanding historically limited CEs will not have significant impacts.

To the contrary, this re-interpretation of existing CEs is already having significant impacts. As noted above, the George Washington and Jefferson National Forests in Virginia have already begun using CE 6 to authorize commercial timber harvests at a much greater scale than in the past, with approximately 1,000 acres of commercial harvest currently proposed under CE 6, with likely, or at the very least uncertain, direct and cumulative effects on listed and other rare species.[316] If this same interpretation becomes de rigueur across the national forest system, then those significant impacts would proliferate.

XIII. Scoping.

Ironically, in the Supporting Statements for the new CEs, the Forest Service argues that "[t]he responsible official relies on many sources of information in making a determination concerning extraordinary circumstances [i.e., eligibility of an action for coverage under a CE], including input from the public …." The proposed rule would eliminate scoping requirements (and therefore all requirements for advance notice and comment) for CEs.

As explained by the Government Accountability Office, "most studies and reports agree that for both federal and nonfederal stakeholders, the benefits of working together cooperatively to resolve differences often outweigh the costs of early and continuous public involvement."[317] For that reason, agencies should involve the public in the decisionmaking process as early as possible. For Forest Service decisions, which involve repeated decisions on a beloved and contested landscape, with the same stakeholders at the table each time, this means *ongoing* participation at every relevant scale of decisionmaking.

For that reason, the proposed rule's changes to scoping requirements are particularly unwise, not to mention unlawful. Under the proposal, the Forest Service would eliminate scoping for both CEs and EAs. *See* 36 C.F.R. § 220.4(d) (proposed). As a result, scoping would be eliminated on as much as 98% of all decisions, and, assuming that 3/4 of EA-level decisions are authorized using CEs in the future, *all* public comment would be eliminated on over 93% of Forest Service decisions.[318]

---

[316] Examples include the following projects: Duncan Knob project; Pkin Vegetation Improvement project; Molly's Hill Thinning project; and North Zone Fire Wood Sales and Road Day-lighting project.
[317] GAO, Forest Service Decision-Making (1997) at 47.
[318] Based on data provided under the Freedom of Information Act, of the roughly 30,000 decisions made by the agency between 2006 and 2016, the vast majority (80.1%) were approved using CEs; 17.6% were approved using EAs; and the remaining 2.3% of decisions

The Forest Service does not have the discretion to eliminate scoping for some of its CEs because Congress required scoping for these categories when it created them. Per 16 U.S.C. §§ 6591b and 6591d, the Secretary is obligated to "conduct public notice and scoping for any project or action" proposed under those sections. By eliminating scoping across the board, the agency fails to recognize the important distinction between - and importance of both - means of public engagement.

CEQ requires individual agencies to develop supplemental NEPA regulations, but their discretion to do so is not unbounded. 40 C.F.R. § 1505.1. CEQ's regulations require that agencies' procedures be geared "to make the NEPA *more* useful to decisionmakers and the public" and to "[e]ncourage and facilitate public involvement in decisions. 40 C.F.R. § 1500.2(b). Agencies are further required to use scoping to identify controversies early in the process and thereby avoid delay. 40 C.F.R. §§ 1500.5(d); 1501.2.

The importance of scoping is not merely theoretical: it is also a matter of good NEPA practice to advise the public of the environmental consequences of actions its government undertakes. For CEs, the loss of scoping would mean the loss of the public's only chance to raise potential inconsistencies with the forest plan or alert the agency to the existence of extraordinary circumstances or cumulative impacts. Mistakes happen, and they happen more often when the public is not involved. A recent example from the Nantahala National Forest: the Camp Branch Salvage CE (2017) was proposed to recoup economic value from timber that had been damaged by the previous fall's wildfires. During scoping, members of the public realized that the project would have included the harvest of live trees within a designated future old growth patch (inconsistent with the forest plan) and existing old growth that was not protected within the patch. Because of those scoping comments, the Forest moved some of the harvest activities and revised the designated patch boundary to include the existing old growth—an outcome that was consistent with the forest plan, better for ecological protection, and still able to meet the project's goals; and it satisfied the public's interests.

In our review of the 68 projects included in Appendix A to the Supporting Statement for CE 26,[319] we found that public comment is by far the most common reason that a project is modified and that more changes happen in response to public comment at scoping than any other time. Sixty projects were modified in some fashion during the NEPA process. Thirty-seven projects were substantively modified between scoping and EA, with 29 being modified due at least in part to public comment. Thirty-three projects were substantively modified after the release of an EA, with 26 being modified due at least in part to public comment. We found only 8 of the 68 projects did not appear to change at all throughout the NEPA process.

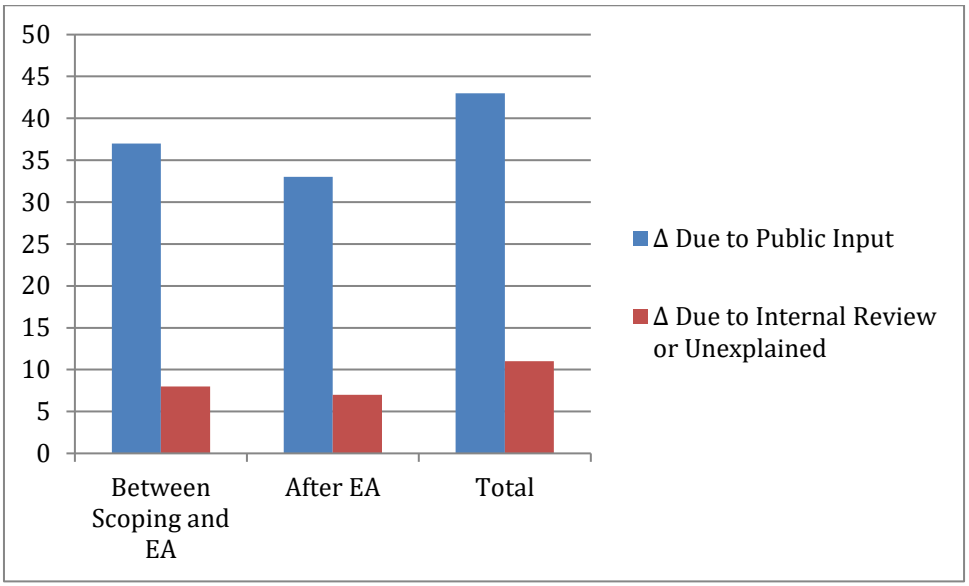
As described in a preceding section, we found that concerns expressed by the public resulted in 70 substantive modifications to 43 projects. Public input on 6 additional projects caused the Forest Service to conduct additional analysis but did not result in substantive changes. The agency made just 15 modifications to 11 projects based on its own internal review process. These data show that the Forest Service was 4 times more likely to modify a project based on concerns expressed by the public than due to internal review.

---

were made with EISs. If 3/4 of the EAs were shifted to CEs, 93.3% of all decisions would be authorized using CEs.

[319] Appendix 1, "Re-Analysis of Restoration CE Projects."

Chart: Number of Projects from Appendix A Modified in Response to Public Comment and due to Internal Review at Different Stages of Project Development (n=68)



Unless the Forest Service first analyzes its prior decision processes to understand how, and how often, projects change in response to scoping comments, a decision to eliminate scoping would be arbitrary and capricious, because it would fail to consider an important factor (i.e., the cost to good decision making). Our analysis shows that the cost would be high.

Even if the Forest Service had the discretion and the record to support elimination of scoping, it would be an unwise revision to its NEPA procedures and bad NEPA practice. The loss of scoping for EAs would be inefficient and harmful to the public's ability to participate effectively. Scoping is an important opportunity to raise concerns early, before sunk costs in a project make changes difficult.

Despite the agency's claims otherwise,[320] the SOPA is not a good substitute for scoping. Scoping is designed to actively reach members of the public whose interest may be connected to a specific place that may be affected by agency action. The SOPA, by contrast, is designed to passively provide minimal information to a broad audience that may or may not be interested in land management projects. Many individuals whose interests may be affected by a particular project would not be on the list to receive the SOPA.

Furthermore, the SOPA does not require advance notice of an action, but rather allows updates to be made *after* a decision has been made. 36 C.F.R. § 220.3 (existing and proposed) (defining SOPA as "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.) (emphasis added). While scoping notices are published with the express purpose of soliciting comments, SOPAs are not, as they are simply published at the beginning of each quarter. A project for which the agency identifies a need on the second day of the quarter, and for which public involvement might be useful shortly thereafter, might not be published in the SOPA until after a decision is made, or after

[320] *E.g.*, 84 Fed. Reg. at 27,551.

public comment is useful. And, of course, the SOPA (unlike scoping) does not provide an opportunity for comment, nor does it provide a deadline for when comments would be most useful.

Most importantly, using the SOPA would not facilitate useful input. Unlike scoping, which gives the public a concrete idea of the direction that a project is headed, the SOPA describes a project in only the most general way, without maps, prescriptions, or ideas for priorities that could achieve ecological goals. Location is often provided only by township, range, and section, which may be a familiar concept to Forest Service staff, but is likely not to the general public. If a member of the public wanted to engage based on the SOPA's paltry information, that person would have to provide a laundry list of every possible idea or concern in the analysis area. This would not promote the iterative and ongoing relationship between the public and the agency that helps to focus and improve project development. In sum, the SOPA is not a substitute for scoping.

Put simply, eliminating scoping is inconsistent with NEPA. NEPA notes "…each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331. To that end, the CEQ NEPA regulations, which this proposed rule purports to implement, further explain that "accurate scientific analysis, expert agency comments, *and public scrutiny* are essential to implementing NEPA. 40 CFR §1500.1(b) (emphasis added). To protect the public's role, the CEQ regulations require that agencies' implementing procedures "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 CFR §1500.1(b). Specifically, agency procedures must, "to the fullest extent possible":

- "Implement procedures to make the NEPA process more useful to decisionmakers and the public;" 40 CFR §1500.2(b)

- "Encourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 CFR §1500.2(d)

The proposed regulations, which eliminate requirements to involve tribes, federal, state, and local government bodies and the public in the early development of nearly 93% of all Forest Service proposals, arbitrarily and capriciously contravene NEPA and the CEQ regulations. The current procedures are certainly "possible," and they have proven themselves practicable. Indeed, the Forest Service's current procedures have averted countless environmental harms. The agency simply has no basis for discarding them so cavalierly.

XIV. Determinations of NEPA Adequacy are Arbitrary and Capricious.

The Forest Service should not adopt determinations of NEPA adequacy (DNAs) as a tool. Neither NEPA nor the CEQ regulations contemplate such a tool, and there is no lawful purpose for DNAs that is not already addressed by other tools already in the Forest Service's toolbox. The proposal introduces DNAs as follows:

> (1) NEPA analysis performed for a previous proposed action can suffice for a new proposed action. A Determination of NEPA Adequacy (DNA) is a tool to determine whether a previously completed NEPA analysis can satisfy NEPA's requirements for a subsequent proposed action. In making this determination, the responsible official 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 [sic] 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.

36 C.F.R. § 220.4(i) (proposed). The stated purpose of the addition is "to be more efficient by reducing redundant analyses of substantially similar proposed actions with substantially similar impacts."[321] The Forest Service explains that this section was "modelled after" a similar concept in the Bureau of Land Management's (BLM's) procedures.[322]

BLM's use of DNAs began as a "best practice" as early as 1999 for the incorporation of previous "existing environmental analyses" by reference into a new decision document. *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1152 (10th Cir. 2004).[323] If it had been confined to that context, we would likely not be discussing it here. Its use quickly spread, however, to other types of decisions, because prior environmental analyses can be relevant to current decisionmaking in several distinct ways.

Using examples, BLM's NEPA Handbook (H-1790-1 at Ch. 5) describes three potential uses for a DNA, and identifies when public participation is required in preparing the DNA itself (as distinct from public participation required for a separate NEPA process):

- First, a DNA can be used to determine whether a prior decision can be used in support of a later, similar project. The example given is a permit for a second OHV race on the same route as a previously analyzed race. In these circumstances, the prior analysis can be incorporated by reference into a new decision. If there are differences between the projects—for example, if the type of vehicle was different in the second race—then BLM seeks public input on its use of the DNA to determine whether those differences are relevant to the type or degree of environmental impacts.

---

[321] 84 Fed. Reg. at 27,546.
[322] *Id.*
[323] 68 Fed. Reg. 52,595, 52,599 (2003); 72 Fed. Reg. 45,504, 45,538 (2007); 73 Fed. Reg. 126 (2008).

- Second, BLM allows the use of DNAs to determine whether a proposal is part of a broader ongoing action that was previously analyzed. As an example, BLM describes a particular timber sale that may have been previously analyzed in a landscape-level timber harvest project. The relevant question is whether a broader NEPA document has already identified and analyzed the impacts of the instant portion of the ongoing action—or, to paraphrase, did the previous decision "get all the way to the ground"? If the prior analysis did not address the specific locations for the timber sale, then BLM would seek public input on the use of the DNA to determine whether the newly identified location has unique or different considerations from what was disclosed more generally in the prior analysis.

- Third, BLM allows use of DNAs to determine whether there is new information requiring supplementation for an ongoing action. As an example, BLM offers a proposed road that has been analyzed in an older NEPA document, but for which a decision was delayed by "several years." The DNA would be used to determine whether new information or circumstances are relevant to the decision's potential impacts. BLM has broad discretion to seek public input in the use of the DNA if it believes the public may have relevant contributions with respect to new information or circumstances.

Of these uses for a DNA, the first relates to a *new* decision that relies on the analysis from a *separate* decision: the decisionmaker determines that the previous analysis is adequate to *support the subsequent decision*. In the second scenario, the decisionmaker evaluates whether the previous analysis is adequate *standing alone* because the later action was included (and adequately analyzed) in the prior decision. In the third scenario, the decisionmaker determines whether the previous analysis is adequate, again standing alone, because it is being used to support the *same decision* it was associated with in the first place.

These important differences have caused BLM to misuse DNAs and left it subject to litigation. Decisionmakers occasionally have the misperception that a finding that the previous analysis is *adequate* means that no additional NEPA process is required. That is true only with respect to the second and third scenarios. Specifically, in the second scenario, if the prior analysis *did* get all the way to the ground, then no additional NEPA documentation would be required. But if the prior analysis *did not* get all the way to the ground, then a subsequent "tiered" decision would be needed to address the previously unanalyzed facts or issues. Similarly, in the third scenario, if there was no new information, then the decision could be made on the basis of the previous but unconsummated analysis. If, on the other hand, there *is* new information, then the decision would require new analysis with a fresh NEPA process to seek public input on the new or supplemental analysis.

For the first scenario, however, additional NEPA documentation is required regardless of the outcome of the DNA process because there is a *new and distinct decision*. If the prior analysis is adequate to support the new decision in part or in full, then it can be incorporated by reference into the new decision. If the prior analysis is not fully adequate, then new analysis - potentially tiering to or supplementing the earlier analysis - is required to support the new decision. Either way, however, the new NEPA decision must be subject to applicable public notice and comment requirements.

BLM gets into trouble when it attempts to use a DNA to substitute for a new NEPA decision—i.e., when it finds that a previous analysis related to a previous decision is "adequate" and then fails to go through the NEPA process for a temporally or spatially distinct decision. *E.g.*, *Triumvirate LLC v. Bernhardt*, 367 F. Supp. 3d 1011 (D. Alaska 2019) (in forgoing an EA, BLM improperly relied on DNA to issue another outfitter's permit even though the permits would have had similar effects); *compare Friends of Animals v. BLM*, 232 F. Supp. 3d 53 (D.D.C. 2017) (approving use of DNA where the new gather was part of an ongoing action in the same herd management area), *with Friends of Animals v. BLM*, 2015 WL 555980 (D. Nev. 2015) (reliance on DNA violated NEPA where the new gather was an action of different scope and intensity); *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1212 (D. Idaho 2018) (enjoining oil and gas leasing in sage grouse habitat via DNAs without additional public notice and comment).

The Forest Service's proposed section on DNAs uses the same kitchen-sink approach as BLM, and it consequently suffers from the same lack of clarity. By including factors such as "significant new information," the Forest Service mixes these conceptually distinct types of decision. Worse, the Forest Service proposal emphasizes the use of DNAs in the scenario where it is most plainly unlawful: "A [DNA] is a tool to determine whether a previously completed NEPA analysis can satisfy NEPA's requirements for a subsequent proposed action." 36 C.F.R. § 220.4(i) (proposed). Although the proposal suggests that a "new proposed action" relying on a DNA will be "subject to all applicable notice, comment, and administrative review processes," the proposal does not clarify the circumstances in which this provision would apply, nor explain what additional process is "applicable" to those circumstances. As a result, the proposal is so vague and ambiguous that the public cannot fairly be expected to respond in comments. If the Forest Service intends to move forward with a DNA procedure, it must clarify its intent and re-notice the section for additional comment.

The DNA proposal, to the extent it can be considered lawful, is redundant with procedures that the Forest Service already has in its toolbox. Where DNAs could be used to determine whether there is new information or changed circumstances, the Forest Service already has the tool of Supplemental Information Reports. *See* FSH 1909.15 Sec. 18.1 (2012); 36 C.F.R. § 220.4(l) (proposed). Similarly, where the Forest Service might use a DNA to decide whether an action is part of a previously analyzed decision, it already has several useful tools. *See* FSH 1909.15 Sec. 11.23, 11.4, and 11.41 (2012) (outlining authorities). Finally, where the Forest Service might use a DNA to decide whether previous analysis can be incorporated by reference into a new analysis or decision, it can already do that too. *See* FSH 1909.15 Sec. 11.43 (2012).

Given its redundancy with these lawful authorities, there is no work left for DNAs to do in the Forest Service's procedures. The only possible effect of adding DNAs would be to confuse line officers, who may make the same mistakes as BLM officials who have seen DNAs as a convenient substitute for NEPA requirements. Indeed, this potential for confusion is precisely why CEQ instructs that individual agencies' "procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures." 40 C.F.R. § 1507.3.

Finally, the proposed adoption of DNAs is simply bad policy and NEPA practice. Like other elements of the proposed rule addressed throughout these comments, adoption of DNAs as a misguided invitation to line officers to avoid the NEPA process for new proposed actions

would damage public trust and increase the agency's litigation exposure. The agency should abandon the proposal to adopt DNAs.

XV. Condition-Based Decisionmaking is Arbitrary and Capricious.

The proposed rule would endorse what the agency calls "condition-based management" by adding new language to two provisions. 36 C.F.R. § 220.3 would be amended to add the following definition:

> *Condition-based management*. 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 stems from the recognition that the environment is dynamic, changing as ecosystems respond to changing natural and human-caused events.

The Forest Service also proposes to add a provision permitting the agency to consider condition-based management alternatives in NEPA documents.

> *Condition-based management.* 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.

36 C.F.R. § 220.4(k) (proposed).

As a feature of programmatic analysis, the concept of condition-based decisionmaking would offer considerable efficiencies and could be implemented without shortchanging public participation. However, in practice, condition-based approaches are being used in *contrast* to programmatic analysis, as a once-and-for-all decision that skips over the need for subsequent, site-specific analysis, public involvement, and decision. These proposals would therefore endorse and codify a controversial approach that, as already applied by the Forest Service, violates NEPA for failing to take the required hard look at site specific impacts, threatens violations of other laws, and has led to significant controversy, objections, and litigation. We urge the Forest Service to remove any provision regarding condition-based management from the proposal. If the Forest Service wishes to develop this concept further, it must be under the rubric of programmatic analysis, not as a stand-alone concept that is subject to misuse.

A. NEPA Requires Disclosure of Site-Specific Information.

Project implementation requires a site-specific decision. Site-specific decisions require site-specific analysis. *See, e.g., 'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095-97 (9th Cir. 2006).

NEPA has two fundamental goals: "(1) to ensure that the agency will have *detailed information* on significant environmental impacts when it makes decisions; and (2) to

guarantee that this information will be available to a larger audience." *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1184 (N.D. Cal. 2004) (emphasis added) (*quoting Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002)); *see also Earth Island v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003) ("NEPA requires that a federal agency 'consider every significant aspect of the environmental impact of a proposed action ... [and] inform the public that it has indeed considered environmental concerns in its decision-making process.'") *quoting Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002); *Stein v. Barton*, 740 F. Supp. 743, 749 (D. Ak. 1990) (NEPA requires site-specificity to ensure that agencies are making informed decisions prior to acting and that the public is given a meaningful opportunity to participate in those decision-making processes); *City of Tenakee Springs v. Block*, 778 F.2d at 1407 (reasoning that an EIS must give decisionmakers sufficient data).

NEPA's review obligations are more stringent and detailed at the project level, or "implementation stage," given the nature of "individual site specific projects." *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 923 n.2 (9th Cir. 1999); *see also Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800-01 (9th Cir. 2003); *New Mexico ex rel Richardson v. Bureau of Land Management*, 565 F.3d 683, 718-19 (10th Cir. 2009) (requiring site-specific NEPA analysis when agency did not propose to undertake a future NEPA process). Courts hold that agencies must take a hard look at site-specific impacts in EAs as well as EISs. *Colo. Envtl. Coal. v. Ofc. of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1209-12 (D. Colo. 2011) (requiring site-specific NEPA analysis in an environmental assessment even when future NEPA would occur because "environmental impacts were reasonably foreseeable"); *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1953-54 (9th Cir. 2013) (concluding agency failure to address site-specific alternative in an environmental assessment violated NEPA); *Fund For Animals v. Mainella*, 283 F. Supp. 2d 418, 433-34 (D. Mass. 2003) (ordering agency to prepare an environmental assessment to evaluate site-specific impacts where programmatic EIS failed to address those impacts and deferred such analysis to a later review). "[G]eneral statements about possible effects and some risk do not constitute a hard look, absent a justification regarding why more definitive information could not be provided." *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (citation omitted); *see also Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (holding the Forest Service's failure to discuss the importance of maintaining a biological corridor violated NEPA, explaining that "[m]erely disclosing the existence of a biological corridor is inadequate" and that the agency must "meaningfully substantiate [its] finding").

Analyzing and disclosing site-specific impacts is critical because where (and when and how) activities occur on a landscape strongly determines the nature of the impact. As the Tenth Circuit Court of Appeals has explained, the actual "location of development greatly influences the likelihood and extent of habitat preservation. Disturbances on the same total surface area may produce wildly different impacts on plants and wildlife depending on the amount of contiguous habitat between them." *New Mexico ex rel Richardson*, 565 F.3d at 706. The Court used the example of "building a dirt road along the edge of an ecosystem" and "building a four-lane highway straight down the middle" to explain how those activities may have similar types of impacts, but the extent of those impacts – in particular on habitat disturbance – is different. *Id*. at 707. Indeed, "location, not merely total surface disturbance, affects habitat fragmentation," and therefore location data is critical to the site-specific analysis NEPA requires. *Id*.

These are the same touchstone criteria the Ninth Circuit applies in evaluating whether an EIS is adequately site-specific. *See WildEarth Guardians*, 790 F.3d at 921-25 (holding EIS inadequate for failure to disclose location of moose range); *see also Or. Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1189, 1190-91 (9th Cir. 2019) (holding environmental analysis violated NEPA by failing to establish "the physical condition" of roads and trails and authorizing activity without assessing the actual baseline conditions). Merely disclosing the existence of particular geographic or biological features is inadequate—agencies must discuss their importance and substantiate their findings as to the impacts. *Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (holding EIS inadequate for failure to evaluate in detail impacts of ski area expansion to acknowledged biological corridor); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 995 (9th Cir. 2004) (holding numeration of logging acres and road miles insufficient to describe actual environmental effects).

B. Condition-Based Management Without Subsequent Site-Specific Analyses and Decisions Violates NEPA.

Because site-specific information in an EIS is essential for a meaningful analysis of impacts and alternatives, the Forest Service's condition-based management approach, as proposed in these regulations and as currently applied by the agency, violates NEPA.[324]

The proposed rule states that "[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." 36 C.F.R. § 220.4(k)(proposed). This is an impossible task because the complex ecosystems that comprise forests cannot be boiled down to a "certain set or range of conditions." All forest stands are not created equal. They vary by too many factors to capture with a few "design elements" the different habitat values, different spatial relationships to other habitats, different proximity to communities, different elevations, different slopes and aspects, different hydrology, different soil types, different past management and different use by people, among many other variations. In short, each patch of forest is unique. *Hoffman on behalf of NLRB v. Cement Masons Union Local 337*, 468 F.2d 1187, 1192 (9th Cir. 1972) (holding that "each parcel of real property is unique," and that each parcel "serves a unique public interest because of its location and other intangible factors"). Any attempt to identify a number of design elements and then to attempt to disclose impacts without understanding the forest at issue acre by acre and as a whole will fail to take the hard look at impacts required by the law.

At least one EIS that purports to rely on condition-based management admits the limitation of the approach. The Prince of Wales Landscape Level Analysis Final EIS, analyzing the largest proposed timber sale in the U.S. over the last three decades, admits: "Measures of habitat area may be insufficient to predict the effects of habitat loss, because habitat loss has different effects on populations, depending on where the habitat loss occurs. Species interactions also influence responses to habitat loss."[325]

---

[324] Site-specific information is also critical for an environmental assessment (EA), where the agency must ensure that site-specific impacts do not have the potential to be deemed significant.

[325] U.S. Forest Service, Prince of Wales Landscape Level Analysis Final EIS (Oct. 2018) at 173, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd601039.pdf (last viewed Aug. 24, 2019).

The varying attributes influencing the value of a particular forest stand for habitat and other resources—and the divergent impacts of logging (or otherwise treating) those stands or building roads to them and through them—are too numerous to catalog fully, but a few examples suffice to prove this point. For example, few attributes are more important than forest structure. As the Forest Service has recognized, "[f]orest structure is important because it reflects the complex spatial and temporal interactions between plant growth (e.g., dispersal and competition), environmental gradients (*e.g.*, geology, soils, slope, aspect, elevation, and climate), and disturbance (e.g., wind and logging)."[326] Elevation is also key. At higher elevations, average temperatures may decrease, soil moisture may increase, and snowpack may linger longer, all of which will impact the nature and productivity of the stand.

Connectivity and fragmentation of forest stands can have a major impact on wildlife. Populations can become isolated, and therefore at greater risk of local extirpation, if fragmentation hinders movement of individuals between subpopulations. The degree to which this occurs depends on species-specific dispersal capabilities, the distance between habitat patches, and conditions within the matrix between habitat patches.[327] Mere discussions of road density cannot capture the potential for fragmentation.

Different sites within or among forest stands may have different productivity based on soil type. For example, Karst soils in southeast Alaska's Tongass National Forest are uniquely productive for forest growth, have high values for wildlife and the region's unique cave systems, are unevenly distributed, and are especially vulnerable to logging.[328] The Tongass Forest Plan thus requires highly site-specific analysis in timber sale project planning.[329]

Logging or other forest treatments can have a significant impact on stream runoff with much local variation. Factors influencing runoff include hillslope gradient, topography, soil type, rainfall, and the proportion of the watershed previously logged. Two resources that are particularly location-specific, vulnerable to logging, and unknown before surveying include rare plants and cultural resources.

---

[326] U.S. Forest Service, Tongass National Forest Land and Resource Management Plan Amendment Final EIS (2016) at 3-189, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd507736.pdf (last viewed Aug. 24, 2019).

[327] *See, e.g.*, Tongass National Forest Plan Amendment Final EIS (2016) at 3-189; U.S. Forest Service, Roadless Area Conservation Final EIS, Landscape Analysis and Biodiversity Specialist Report (Nov. 2000) at 34 (describing causes and impacts of fragmentation), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_035781.pdf (last viewed Aug. 24, 2019). *See also* S. Trombulak & C. Frissell, Review of Ecological Effects of Roads on Terrestrial and Aquatic Communities, Conservation Biology, Vol. 14, No. 1 (Feb. 2000) (discussing fragmentation impacts), available at https://onlinelibrary.wiley.com/-doi/epdf/10.1046/j.1523-1739.2000.99084.x (last viewed Aug. 24, 2019); U.S. Forest Service, Forest Roads: A Synthesis of Scientific Information (May 2001) ("Fragmented populations can produce increased demographic fluctuation, inbreeding, loss of genetic variability, and local extinctions."), available at https://www.fs.fed.us/pnw/pubs/gtr509.pdf (last viewed Aug 24, 2019).

[328] Tongass National Forest Plan Amendment Final EIS (2016) at 3-28 to 3-36.

[329] *Id.* at 3-34.

Each wildlife species has its own unique habitat needs. Different species will have different needs respecting forest structure, elevation, proximity to surface water, proximity to roads, prey availability, and habitat fragmentation. For these reasons, the specific locations proposed for new logging (or other forest treatment) and road construction matter a great deal for wildlife, for hunters, and for other people who use and enjoy the forest.

Because impacts cannot be adequately described except at the site-specific level, the practices codified by the provisions for "condition-based management" are arbitrary and capricious. Those practices have generally involved describing a set of actions that can be used (different types of logging and burning) and design elements that will be applied in certain circumstances over a broad area (sometimes hundreds of thousands of acres), with no description or prediction for the location of those treatments or accompanying road construction. Without information about the location of proposed logging and roads within a project area, however, a NEPA document will never be able to provide the detailed, site-specific assessment of impacts, nor allow for public input at a meaningful time, as NEPA requires.

C. Post-NEPA Analysis and Input Cannot Substitute for NEPA.

Environmental analyses for current Forest Service condition-based management proposals often assert that specific treatment applications to specific areas will be defined only after the NEPA process is complete and the agency's decision has been made. The Forest Service promises a post-hoc public involvement opportunity for the public to advise the agency on the site-specific appropriateness or location of the treatment.

NEPA, however, does not permit the agency to delay gathering data about site-specific impacts until after the environmental review is complete. The Ninth Circuit has held that ascertaining baseline information during implementation is inconsistent with NEPA's purposes because "an agency cannot carefully consider information about significant environmental impacts" and "the public is deprived of their opportunity to play a role in the decision-making process." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011). Indeed, proposing "to increase the risk of harm to the environment and then perform [] studies … has the process exactly backwards." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). *See also Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1953-54 (9th Cir. 2013) (where agency failed to disclose site-specific impacts and alternatives in a programmatic EIS, it must do so in a site-specific EA).

Such a subsequent non-NEPA process for implementation cannot make up for the lack of an adequate EIS or EA. To ensure its purposes of informed decisions and meaningful public participation are met, NEPA contains myriad requirements that will not apply to a post-hoc, and ad-hoc, implementation plan. NEPA requires a detailed, site-specific analysis of the direct, indirect, and cumulative impacts of the proposed action and—importantly—of alternatives to it, including the alternative of no action. 40 C.F.R. §§ 1502.14, 1502.16, 1508.8, 1508.9 (requiring EAs to evaluate alternatives). It requires a draft EIS that discloses "all major points of view" on these impacts. *Id.* § 1502.9(a). It requires a minimum of 45 days for members of the public, other agencies, tribes, and state and local agencies to submit comments on the draft. *Id.* § 1506.10(c). It requires the Forest Service to respond to comments in a final EIS that discusses "any responsible opposing view." *Id.* §§ 1502.9(b),

1503.4. It requires the agency to explain the reasons for its final choice in a ROD. *Id.* § 1505.2. For an EA, CEQ regulations require that agencies disclose environmental impacts, provide evidence and analysis sufficient to determine whether the action may have significant impacts, discuss and analyze alternatives. 40 C.F.R. § 1508.9.

In our experience with condition-based projects, implementation plans for Forest Service projects virtually never meet all (or indeed, any) of these mandates. They could, but only if the condition-based decision were only the first, broad-scale step in a programmatic project decision, leaving the site-specific work to a future tiered decision. We are aware of only one such project, on the Cherokee National Forest.[330] Other projects instead promise post-approval processes created outside the NEPA process, despite the fact that the public has no way to hold the Forest Service to its post-NEPA commitments. This erodes the public's trust in the process, because the process appears to be little more than window dressing regarding a decision that has already been made. The Forest Service cannot rely on these post-implementation measures to comply with NEPA's mandate that the agency take the hard look at environmental impacts *before* it makes a decision that is likely to impact the environment.

D. Condition-Based Management Has Led to Significant Controversy and Litigation.

Because condition-based management fails to provide the public or the decisionmaker with the necessary site-specific information, and because the Forest Service has attempted to use this approach to expedite consideration of massive, programmatic level decisions, these projects have become highly controversial and drawn objections and legal challenges that are likely to slow down project implementation. Thus, using condition-based management has subverted a key reason the Forest Service proposed this approach.

We include here three examples of how condition-based management has undermined NEPA mandates, generated public controversy, and may slow project implementation. Fact sheets providing analysis of additional Forest projects employing condition-based management are attached.[331]

- *Prince of Wales Logging Project, Tongass National Forest, Alaska*. In October 2018, the Forest Service issued a final EIS and proposed to approve the Prince of Wales Landscape Level Analysis Project in the Tongass National Forest using condition-based analysis. The project is massive; it appears to be the largest timber sale offered by the Forest Service in the United States for three decades. It includes over 160 miles of road building and up to 656 million board feet of logging over 15 years.[332] More than 40,000 acres of old-growth forest – an area of more than 60 square miles, or roughly three times the size of the island of Manhattan – would be logged.

  The environmental and social values at stake are significant. The project area is in temperate old-growth rainforest that is vital habitat for many endemic and/or imperiled species such as Alexander Archipelago wolves, black bears, spruce grouse,

[330] Restoration of Dry Forest Communities on the South Zone of the Cherokee National Forest, https://www.fs.usda.gov/project/?project=55303.
[331] *See* R. Spivak & E. Zukoski, *Leap First, Look Later (If Ever)* (July 2019).
[332] Prince of Wales Final EIS (Oct. 2018) at 23; Prince of Wales Landscape Level Analysis Record of Decision (Mar. 16, 2019) at 1.

Queen Charlotte goshawks, Sitka black-tailed deer, and the Prince of Wales flying squirrel.[333] Communities on the island depend heavily on the island for hunting, fishing, and gathering, including subsistence practices and commercial fishing.[334] The old-growth trees that would be chainsawed store significant amounts of carbon, making them an important carbon sink at a time when U.S. contribution to climate pollution is increasing.

The Final EIS, which uses a condition-based approach, fails to provide any site-specific discussion of impacts or alternatives. Instead, the analysis contains only statements describing the *types* of impacts the agency typically associates with logging and roadbuilding, with no discussion of the fact that the location and nature of chainsawing and bulldozing determine the full scope and intensity of impacts. The Final EIS makes clear, however, that the agency will undertake no further NEPA review.[335]

And despite the fact that the Forest Service committed to inform the public during the implementation phase about where the agency intended to log and build roads, that phase is well under way and the agency has still failed to provide site-specific information about the agency's plans, let alone disclose the impacts. But even if the agency hadn't broken their promise and did inform the public during implementation, the fact remains that such notice is after the decision has already been made. This leaves the public with no real recourse, no way to hold the Forest Service accountable, just rhetoric that the Forest Service is apprising the public. This continued lack of information illustrates the importance of NEPA's pre-decisional requirements, and the hollowness of the agency's promises to meaningfully involve the public post-NEPA.

Unsurprisingly, the controversy engendered by the Forest Service's failure to define the project or its impact by relying on condition-based management has resulted in controversy and litigation. More than a half-dozen conservation groups have challenged the project in court and are seeking a preliminary injunction to halt its implementation. *See, Southeast Alaska Conservation Council v. U.S. Forest Service*, Docket No. 1:19-cv-00006-SLG (D. Alaska 2019).

- *Landscape Vegetation Analysis (LaVA), Medicine Bow National Forest, Wyoming*. In March 2019, the Forest Service issued a final EIS and draft decision proposing to log across 613,107 acres – an area of nearly 1,000 square miles, nearly twice as large as Grand Teton National Park – and to construct up to 600 miles of new temporary road over 15 years within the Medicine Bow National Forest in southern Wyoming. The Forest Service employed a condition-based approach, and in so doing failed to identify the location of any projected road construction, or the specific type of logging treatment that would be employed. Logging could occur across 123,000 acres within 25 individual inventoried roadless areas. The project approves logging, thinning, burning and other "treatments" in 41,516 acres of old-growth stands, although the EIS fails to disclose which "treatments" it would use, making it impossible for the public or the decisionmaker to understand the project's potential impacts. The Forest Service plans to gather site-specific information and provide for informal public involvement

[333] Prince of Wales FEIS at 175.
[334] *Id*. at 4, 292.
[335] *Id*. at Appendix B at B-1.

concerning implementation only *after* it approves the decision and completes the NEPA process.

Conservation groups filed objections to the proposed decision in May 2019, on the grounds, among others, that condition-based management violated NEPA. The Forest Service responded by withdrawing its decision "to clarify the import[ant] role the public will play in developing and implementing the project, refine the Adaptive Implementation and Monitoring Plan throughout the life of the project, and better align resource specialist reports with the final Environmental Impact Statement and draft Record of Decision. A new Draft Decision is expected to be issued later this year and a new project timeline will be established."[336] Thus, the agency's rush to implement the project without disclosing site-specific impacts has already delayed project implementation for months.

- *Lone Pine Vegetation Management Project, San Juan National Forest, Colorado*. In February 2019, the Forest Service issued an EA proposing to log ponderosa pine across more than 60,000 acres – nearly 100 square miles, an area larger than the District of Columbia – and to construct up to 75 miles of new temporary road within the San Juan National Forest in southwest Colorado. The Forest Service used a condition-based approach with design elements, but failed to identify the location of any projected road construction, failing to protect large, old trees, and failing to identify even the specific type of logging treatment that would be employed in individual areas. In response to critical comments, the San Juan NF issued a revised EA in June 2019 that identified 36,000 acres of treatment areas and the type of logging treatments the agency proposed in mapped areas, but still takes a condition-based approach. The Revised EA fails again to disclose the location of temporary road construction (although it now predicts, without explanation, that logging could require up to 100 miles of such roads, a 33% increase), again fails to protect large and old trees, and relies on a new, ill-defined "adaptive management" program that would allow the agency to change the type of logging treatment employed in any area. The agency promises to address proposed changes in logging treatments in a post-NEPA process.[337] Had the agency undertaken a site-specific analysis first, it might have avoided having to spend months preparing a revised EA. Had the agency provided sufficient site-specific analysis in its *revised* EA, it could likely avoid objections and litigation, which may occur unless the agency's analysis improves.

E. Condition-based approaches, as currently practiced, are unlawful, inefficient, or both, and they should be explicitly limited to programmatic analyses that will be followed by tiered, site-specific decisions.

So far, one condition-based project has navigated judicial review. In *WildEarth Guardians v. Conner*, 920 F.3d 1245 (10th Cir. 2019), the plaintiffs brought a narrow challenge to a

[336] Forest Service, Press Release, *Medicine Bow Landscape Vegetation Analysis Project to undergo clarification, new Draft Decision will be issued* (June 21, 2019), available at https://www.fs.usda.gov/detail/mbr/news-events/?cid=FSEPRD639816 (last viewed Aug. 3, 2019).

[337] *See* Forest Service, Lone Pine Vegetation Management Project, Revised Draft Environmental Assessment (June 2019), available at https://www.fs.usda.gov/nfs/11558/-www/nepa/110005_FSPLT3_4656480.pdf (last viewed Aug. 3, 2019).

decision that would have allowed vegetation management in lynx habitat without saying where, precisely, the harvest would occur. The court approved the project on similarly narrow grounds, and only because the Forest Service completed a "worst case" analysis with respect to lynx. In other words, no matter where harvest was ultimately located, the impacts to lynx could not exceed what was disclosed and analyzed in NEPA. Not at issue in the case were the numerous other site-specific conditions that, depending on the location chosen, could have led to very different impacts. Also not at issue in the case (but presumably on the table in the future) is the duty to supplement the analysis to cover impacts and issues that arise at the site-level but were not previously considered, and the corresponding duty to reopen public participation each time.

It would be peculiarly inefficient to attempt a worst-case analysis for all the possible ways that a project could affect locations differently, and/or to supplement your analysis each time a particular site raised a concern you hadn't done that worst-case analysis for. Why analyze worst-case impacts (often requiring an EIS) if you don't intend to cause that impact? On the flip side, if you've already analyzed the worst-case scenario, what incentive do you have to look for less harmful alternatives?

The law provides an exceedingly fine needle for this concept to thread, and existing projects show that the agency would have a very difficult time navigating those requirements. For all these reasons, condition-based approaches, as currently practiced, are unlawful, inefficient, or both. The concept should be abandoned or explicitly limited to programmatic analyses that will be followed by tiered, site-specific decisions.

XVI. The Change to EIS Thresholds for Mining Activities Is Unlawful[338]

As part of its proposal to modify regulations concerning classes of actions that normally require that the agency prepare an EIS, the Forest Service proposed adding the following new category:

> (3) Class 3. Mining operations that involve surface disturbance on greater than 640 acres over the life of the proposed action.

36 C.F.R. § 220.7(a)(3) (proposed).[339] This proposal is similar, but not identical, to that identified in the BLM NEPA Handbook, which states: "The following actions normally require preparation of an EIS: …. (7) Approval of any mining operation where the area to be mined, including any area of disturbance, over the life the mining plan is 640 acres or larger in size."[340]

---

[338] The proposal to remove actions that would substantially alter the undeveloped character of an inventoried roadless area or potential wilderness area is addressed in Section #, above.
[339] This provision appears in part to replace the provision in current regulations that directs the agency to prepare an EIS and Record of Decision when "approving a plan of operations for a mine that would cause considerable surface disturbance in a potential wilderness area." 36 C.F.R. § 220.5(a)(2)(iii).
[340] BLM NEPA Handbook, H-1790-1 (Jan. 2008) at 70, available at https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1790-1.pdf (last visited Aug. 3, 2019).

The proposal would encourage the Forest Service to prepare an environmental assessment, and thus to assume no potential for significant impacts, for actions that would involve the creation of road networks, waste rock dumps, leach piles, and massive pits up to a square mile in size. Mines far smaller in size are likely to degrade – and have significantly degraded – the natural environment. In fact, according to the Associated Press, 40 percent of headwaters of the Western U.S. watersheds have been polluted by mining with hardrock mines producing around 50 million gallons of contaminated waters daily, threatening water supplies of downstream communities.[341]

Further, the proposed provision does not specify that the 640 acres of surface disturbance be contiguous. This means that mining impacts could be spread out over, and damage values on, a much greater area. The proposed provision is also unclear as to whether the 640 acre limit refers to surface disturbance on Forest Service lands. If the mine overlaps significant private or state surface but "only" 500 acres of Forest Service surface, would the provision apply? If so, it would violate NEPA's requirement to consider all of a project's impacts. At a minimum, the Forest Service should clarify whether the 640 acres includes the entirety of the mine's surface disturbance or only the disturbance on Forest Service lands.

Because hard-rock will almost always have the potential for significant environmental damage no matter the size of the mine, we urge the Forest Service to modify the proposal to classify any mining action to be the kind that normally requires the preparation of an EIS.

We note that some of the most contentious mining proposals on Forest Service land – and some with the greatest potential to significantly, and negatively, impact Tribal communities and important natural resources – are proposed or already-approved uranium mines within the Kaibab National Forest that disturb far less than 640 acres. For example, in 1984, the Forest Service properly prepared an EIS for the plan of operations for the Canyon Mine within the Kaibab NF. According to that EIS, the mine would disturb "approximately 17 acres for the mine shaft and surface facilities, plus some new or improved roads within the Forest, depending on which ore transportation route is ultimately selected."[342]

This 17-acre mine thus proposed to disturb less than 3% of the 640-acre area proposed by the Forest Service as the threshold for presumptively preparing an EIS. The legality of the Forest Service's decisions and NEPA analysis concerning this mine has been repeatedly challenged in court; at least one challenge remains pending. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155 (9th Cir. 2018) (remanding to district court the merits of a claim challenging the Forest Service's conclusion that Energy Fuels had "valid existing rights"). The potential environmental damage from the Canyon Mine – to culturally significant landscapes, to groundwater, to communities along the route where uranium ore would be trucked – all required preparation of an EIS. The Canyon Mine's size is not unusual for uranium mines in the area; the Pinenut and Kanab North uranium mines on the North Rim (on BLM land) are both about 20 acres in size. It would take more than 30 of these mines put together under the Forest Service's proposed rule to normally require an EIS, an absurd result.

---

[341] See M. Brown, Associated Press, 50M gallons of polluted water pours daily from US mine sites (Feb. 20, 2019), available at https://bit.ly/2Gp3M1R (last viewed Aug. 3, 2019).
[342] U.S. Forest Service, Final Environmental Impact Statement, Canyon Uranium Mine (Aug. 1986) at page 1.1, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5346657.pdf (last viewed Aug. 3, 2019).

We note that the Forest Service has routinely prepared EISs for mining operations where 640 acres or less are likely to be disturbed, and that even in many of these cases, the preparation of an EIS failed to predict the mines' significant water pollution impacts. For example, the Greens Creek underground mine, owned by Kennecott Minerals Corporation and Hecla, in operation since 1984, removes gold, silver, lead and zinc. It disturbs *170 acres* on Tongass National Forest lands. The Tongass National Forest was the lead agency for all NEPA processes for the Greens Creek Mine, including for the new project to be permitted (1983). The Forest Service prepared subsequent EAs for general operation and waste rock expansion in 1988 and 1992, respectively. In 2003, the Forest Service completed an EIS for the tailings disposal.[343] An analysis concluded that the 1988 EA for expansion failed to predict "the observed acidic, metal-rich seepage from tailings entering smaller streams mentioned in the 2003 EIS." *Id*. at 99.

The Beal Mountain mine was an open pit, heap leach gold and silver mine that disturbed 429 acres on Deerlodge National Forest in Montana. Due to contamination, the site was declared a Forest Service CERCLA site in 2003 and has been the subject of remediation efforts. The Forest Service prepared a 1988 EA on mine permitting, and a 1993 EIS for a mine expansion. *Id*. at 127. An analysis concluded that predictions made in the 1988 EA and the 1993 EIS underestimated the potential for metals leaching and the potential for contamination of groundwater from the leach pad and waste rock, which resulted in the Superfund designation. *Id*. at 130.

The Mineral Hill gold and silver mine operated from 1989 to 1996, and disturbed 106 acres on private and Gallatin National Forest lands in Montana. The Forest Service prepared a 1986 EIS for the new project, and a 2001 EIS on reclamation and closure. *Id*.at 139. The Forest Service-prepared EISs, however, failed to predict the failure of the liner system in the tailings impoundment to prevent the lateral flow of toxic leachate. Post-mitigation predictions were inaccurate because the mitigation measures failed to prevent mineral pollution to groundwater and surface water. *Id*. at 140.

The Grouse Creek mine disturbs 524 acres on private land and Challis National Forest lands in Idaho. The Challis National Forest has been the lead agency for all NEPA actions, including a 1984 EIS for the new project, and a 1992 supplemental EIS for mine expansion. Subsequent testing showed that mitigation systems did not capture all tailings leakage, resulting in contamination of groundwater and surface water with cyanide and other contaminants. The 1992 SEIS failed to predict these impacts, alleging that leakage of contaminated water would be unlikely. *Id*. at 122, 124.

The Forest Service's past history of preparing EISs for mines disturbing far fewer than 640 acres, and even then failing to predict significant water quality degradation caused by the mines, demonstrates that the agency's proposed NEPA regulation is severely flawed. The Forest Service should normally prepare an EIS for *any* hard rock mine likely to involve *any* surface disturbance.

---

[343] Kuipers & Maest, Comparison of Predicted and Actual Water Quality at Hardrock Mines: The reliability of predictions in Environmental Impact Statements, Earthworks (2006) at 97, attached, and available at https://earthworks.org/publications/predicting_water_quality_-at_hardrock_mines/ (last viewed Aug. 3, 2019).

XVII. The Forest Service's Proposal Would Violate Public Participation Requirements Under Section 106 of the National Historic Preservation Act

With this proposal, many more projects that would involve ground disturbing activities, some on a large scale, would affect historic and cultural resources, triggering National Historic Preservation Act (NHPA) requirements. If the Forest Service proceeds with this rulemaking, the agency will no longer be able to use NEPA to comply with NHPA's requirements for public participation. While the agency could theoretically provide opportunities for input outside of the NEPA process, the proposed rule itself does not address this need. As a result, even as a best case scenario, the Forest Service would have two different kinds of project-level processes for its CEs: one, for projects with impacts to historic resources, that involves the public, and another that does not, with no guidance to line officers about the competing approaches and no predictability from the public's perspective. This would not create an efficient decisionmaking process.

Like NEPA, the National Historic Preservation Act ("NHPA") is a "procedural statute requiring government agencies to stop, look, and listen before proceeding." *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 839 (10th Cir. 2019) (citation omitted). Specifically, Section 106 of NHPA requires the Forest Service to consider the effect of its actions on any "historic property" before implementing that action. 54 U.S.C. § 306108. A "historic property" is "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object." *Id.* § 300308. There are four basic steps to complying with this requirement.

- First, the Forest Service must "[d]etermine and document the area of potential effects." 36 C.F.R. § 800.4(a)(1). The "area of potential effects" is "the geographic area or areas within which an [action] may directly or indirectly cause alterations in the character or use of historic properties." *Id.* § 800.16(d).

- Second, the Forest Service must "identify historic properties within the area of potential effects." *Id.* § 800.4(b). This requires a reasonable and good faith effort. *Id.* § 800.4(b)(1).

- Third, if the Forest Service determines that no historic properties are present it must convey that finding to State and Tribal Historic Preservation Offices. *Id.* § 800.4(d). If those Offices do not object to that finding, the Section 106 process is complete. If the Forest Service finds that historic properties are present, it must determine if those properties will be adversely impacted by the project. *Id.* § 800.5. "An adverse effect is found when [an action] may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." *Id.* § 800.5(a)(1). An "adverse effect" "may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." *Id.* It may also include "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." *Id.* § 800.5(a)(2)(v).

- Fourth, if the action will adversely impact a historic property, the Forest Service, in consultation with other parties, must "develop and evaluate alternatives or

> modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." *Id*. § 800.6(a). If consultation is unsuccessful, the Advisory Council on Historic Preservation, in most circumstances, is required to provide official advisory comments to the Forest Service. *See id*. § 800.7.

"The views of the public are essential to informed Federal decisionmaking in the section 106 process." *Id*. § 800.2(d)(1). As a result, to comply with Section 106, the Forest Service must "seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties . . . [and] provide the public with information about an undertaking and its effects on historic properties *and seek public comment and input*." *Id*. § 800.2(d)(1)-(2) (emphasis added). Specific to step four – developing alternatives and modifications to mitigate adverse effects on historic properties – the Forest Service is explicitly instructed to "provide an opportunity for members of the public to express their views on resolving adverse effects of the [action to] . . . ensure that the public's views are considered in the consultation." *Id*. § 800.6(a)(4).

The most straightforward approach to meeting these requirements, and the approach specifically contemplated in the NHPA regulations, is to "coordinate compliance with section 106 . . . with any steps taken to meet the requirements of the National Environmental Policy Act." *Id*. § 800.8(a)(1). But that approach has limitations. First, even if an action has been categorically excluded from NEPA review, the agency must still provide public notice and comment opportunities pursuant to NHPA if the project constitutes "an undertaking." *Id*. § 800.8(c). Because an "undertaking" is any "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency," many Forest Service actions will qualify as undertakings necessitating public participation in Section 106 review. *See* § 800.16(y). Second, for non-CE actions, and CE projects that constitute "undertakings," the Forest Service can rely on its NEPA procedures to fulfill Section 106's requirements but only if, among other things, the Forest Service "[i]dentif[ies] historic properties and assess[es] the effects of the [action] on such properties," "involves the public," and "[d]evelop[s] in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the [project] on historic properties." *Id.* § 800.8(c). If the agency's approach to NEPA does not meet those requirements, they must be provided separately to comply with NHPA.

Several elements of the proposed rulemaking reduce the threshold of public involvement below that required by NHPA, preventing the Forest Service from using its NEPA process to comply with NHPA and requiring the agency to provide public participation opportunities beyond those contemplated in the proposed rule. The most dramatic example is the combined effect of eliminating scoping for projects authorized with categorical exclusions ("CE") and drastically expanding the scope of projects that can be authorized with CEs. Use of the "restoration" CE would allow the Forest Service to implement up to 4,200 acres of commercial logging with no public comment opportunity. Proposed 36 C.F.R. § 220.5(e)(26). Projects of such significant size are almost guaranteed to intersect historic properties in many parts of the country requiring the Forest Service to "seek public comment and input" under NHPA. *Id*. § 800.2(d)((2). Because the agency's NEPA regulations would not provide that opportunity, the agency would have to provide other opportunities for public engagement, diminishing any supposed efficiency gains achieved by excluding the projects from public review under NEPA. Failure to involve the public in those circumstances, as currently contemplated by the "restoration" CE, would violate NHPA.

The Forest Service runs into similar problems in its effort to authorize "condition-based management." Under that approach, rather than identify locations for treatment, and therefore areas where historic properties may be impacted, the Forest Service would identify only "conditions" in its decisions, and it would later implement treatments at the site-specific level without further public involvement or analysis. There are two NHPA problems with this approach. First, NHPA requires the Forest Service to "[d]etermine and document the area of potential effects." *Id*. § 800.4(a)(1). If the Forest Service does not know where its treatments will occur, it cannot determine the area of potential effects. The Forest Service may be able to execute a programmatic agreement, allowing it to evaluate potential impacts to historic properties as it determines where treatments will occur, but that approach seems likely to result in efficiency losses, not gains. Instead of concluding its NEPA and NHPA obligations and then moving forward with project implementation, the Forest Service would have to continually consult with the public, tribes, and State and Tribal Historic Preservation Offices as it attempts to implement its "condition-based" project, modifying its plans along the way. *See id*. § 800.14(b) (describing requirements for programmatic agreements). The Forest Service could potentially avoid this requirement by completing a "worst case scenario" NHPA and NEPA analysis at the beginning but assessing impacts in areas the Forest Service ultimately chooses not to "treat" is similarly likely to result in efficiency losses, not gains. Second, identification of historic properties under this "condition-based" approach would again trigger the requirement to "seek public comment and input" under NHPA. *Id*. § 800.2(d)((2). Condition-based management creates the possibility that the Forest Service will have to virtually continually seek public comment as it identifies new locations for treatments and new historic properties in those locations. That process is out of step with the expected coordination of NEPA and NHPA reviews and is likely to only slow project implementation.

The use of "Determinations of NEPA Adequacy" also creates problems for NHPA compliance. Courts have upheld BLM's use of DNAs for Section 106 purposes but only where the DNA independently fulfilled the agency's NHPA obligations. *See Summit Lake Paiute Tribe of Nevada v. U.S. Bureau of Land Mgmt*., 496 F. App'x 712 (9th Cir. 2012). Use of DNAs does not allow agencies to escape their Section 106 responsibilities.

Finally, NHPA regulations require the Forest Service to consider an action's likely effects on historic properties when determining whether to prepare an environmental impact statement. *See* 36 C.F.R. § 800.8. That is precisely that type of question that is appropriately considered in an EA. Even if the agency chooses not to complete an EA, with the hope that it can utilize a CE, it must consider a project's effects on historic properties *before* making that decision. As a result, the agency must have some idea of the effect of its actions on historic properties before deciding to use a CE. This is not an efficiency gain – the agency will have to consider that same questions either before signaling its intent to use a CE or while preparing an EA. Failure to do so would violate both NEPA and the NHPA.

XVIII. Recommended Changes.

The Forest Service should abandon the proposed rulemaking because the proposed rule is not supported by the administrative record and is arbitrary, capricious, and not in accordance with law. 5 U.S.C. 706(2)(A). Instead, the agency should focus on addressing the demonstrable barriers to effective project planning: the lack of adequate, funding, training, and staffing related to environmental analysis and implementation. These are internal cultural and structural problems unrelated to NEPA.

If the agency persists in a rulemaking, it should develop a new rule that actually helps the Forest Service implement science-based projects without shortcutting its legal obligations or causing unnecessary harm to values that are important to the public. Such a rule should focus on the following themes.

A. The Forest Service Should Better Utilize Programmatic, Landscape-Scale Analysis and Tiering.

A recurring theme of these comments has been the utility of programmatic analysis and tiering (along with other CEQ-approved tools like adoption and incorporation by reference) to gain the efficiencies that are motivating the agency's efforts. This is not a new idea. In 1997, in its review of Forest Service decision making, the Government Accountability Office delved into the same problems that the Forest Service is revisiting now. GAO observed that the Forest Service's process was flawed because of a lack of agency accountability and priority-setting.[344] Changes to the process, according to GAO, would be stymied by "distrust and gridlock" without clear priorities.[345] To address this problem, GAO recommended a single regulatory change—"to *require* rather than merely *allow*, federal agencies to tier plans and projects to broader-scoped policies."[346]

A lack of priority-setting is still the root of the Forest Service's process dilemmas, and programmatic decisionmaking is still the solution. Where the proposed rule would exacerbate the problem by encouraging ad hoc decisions that include less broadly supported work, programmatic approaches would focus the agency and its stakeholders on the areas of greatest need.

Programmatic analysis can increase the efficiency of NEPA and improves outcomes by more effectively aligning impact analysis with scale. This approach requires two levels of decision-making and analysis: the large-scale analysis that appropriately considers the landscape-level impacts and cumulative impacts, and the smaller-scale analysis that appropriately and narrowly looks at site-specific impacts. This front-loaded approach in the long run will result in smarter management strategies, more pubic buy-in, and better consideration of cumulative impacts. The agency already has considerable experience with programmatic analysis: each of its forest plans is a programmatic document. But forest plans do not narrow the decision space for future decisions enough to ease their analysis burdens. A mid-scale programmatic document can fill that gap.

Beyond the obvious benefits of strategizing restoration at multiple scales and better aligning analysis to scale, the programmatic approach to decision-making offers additional benefits. For example, the larger-scale analysis enables the agency to consider the array of ecosystem elements requiring restoration (e.g., aquatic restoration, road restoration) and does not limit projects to vegetation management alone. It also encourages the agency to set implementation priorities instead of relying on haphazard implementation, and facilitates effective engagement by collaborative groups. Ultimately, the two-tiered approach facilitates a more integrated and collaborative restoration approach and results in healthier ecosystem condition and function.

---

[344] GAO, Forest Service Decision-Making, GAO/RCED-97-71 (1997).
[345] Id.
[346] Id. at 82.

Despite its obvious advantages, the Forest Service has been slow to try mid-scale programmatic analysis. That may be changing. The Cherokee National Forest is in the process of finalizing an innovative programmatic project that will act as a bridge from the plan's broad restoration goals to concrete site-specific action.[347] Although the project started slowly with a front-loaded collaborative process, it has moved quickly through NEPA. The scoping notice was published in February 2019, the EA in April 2019, and the draft DN/FONSI in July 2019. We anticipate a final decision only 6 months after scoping. On a 655,000-acre forest, the project identifies up to about 60,000 acres for potential treatment. Rather than reproduce excruciating and lengthy boilerplate, the documents were written from scratch, and they focus on the issues that matter. The programmatic EA heads off the need for duplicative analysis by analyzing the issues likely to be encountered each time at the stand level. Subsequent site-specific EAs will be very short, unless unique issues arise at the site level.

The Cherokee NF accomplished all this without violating NEPA's requirements for public participation. Perhaps the most astonishing fact about this project is what happened immediately before it was initiated. The project began on the heels of a contentious project that had just culminated in a lawsuit. The project-level process and agency leadership were strong enough, however, to turn plaintiffs into collaborative stakeholders. That's something to build on.

The project worked because the Forest Service was willing to set priorities and sideboards at the programmatic scale. District staff spent equal time educating stakeholders about the problems they saw on the landscape and listening to the values expressed by the public. The result is a project that identifies ambitious priorities for ecological restoration, with much of the work providing opportunities for commercial harvest, but setting conservative sideboards to mitigate risk and avoid harming strongly held values.

The Forest Service can get this right, but its policies don't make it easy. Programmatic analysis and tiering are not emphasized in the current regulations. In fact, the term "tiering" does not even appear in the current regulations. Line officers who want to try something new are starting on a blank canvas. For the Cherokee National Forest, that meant relying on and applying CEQ guidance as much as, or more than, its own NEPA Handbook. But not all Districts are as bold and innovative, and, without clear policies in place, similar efforts might not ever get started.

Including enforceable sideboards and affirmative priorities at the programmatic level necessarily narrows the scope and intensity of impacts associated with project implementation, thereby permitting narrower and more streamlined project-level analysis of any remaining site-specific impacts, more effective tiering, and increased use of existing categorical exclusions. This will also help reduce cumulative impacts over time, which in turn lessens the need to analyze complex and cascading cumulative impacts in subsequent project authorizations. In other words, in order to enjoy efficiencies offered by programmatic analysis and subsequent tiering, the programmatic, landscape-scale analysis must constrain the uncertainty and impacts associated with future projects. Yet in our experience, the agency generally shies away from including meaningful and enforceable side-boards or setting affirmative priorities at the programmatic-level. Policy change could set stronger expectations for responsible officials to use these best practices.

[347] https://www.fs.usda.gov/project/?project=55303

Finally, in discussing the advantages of programmatic analysis, we cannot ignore the need for better forest planning, which is responsible for so many of the inefficiencies complained of in this rulemaking. Existing forest plans are responsible for the discretion conundrum—the reality that the agency's analysis at each level of decisionmaking must be commensurate with the decision space it is exercising. Plans that do not set priorities and adopt conservative sideboards are plagued by this. Mid-scale programmatic projects (like the Cherokee National Forest's) can be an excellent patch for the failure of plans to set limits, but plan revision itself should be the long-term solution.

With its substantive requirements to provide for ecological sustainability, the diversity of plant and animal communities, and integrated resource management for multiple uses, 36 C.F.R. §§ 219.8- 219.10, the 2012 Planning Rule provides ample opportunity for developing meaningful programmatic direction for restoration and other projects. Yet we have routinely seen forests engaged in planning under the 2012 Rule be reticent to affirmatively set priorities for restoration and other forest management activities and to develop enforceable standards and guidelines to constrain project-level activities, due to a desire for maximum flexibility and discretion. This results in plans that rely almost exclusively on desired future conditions and unenforceable and optional management approaches and goals. This approach not only raises serious questions about whether and how those forest plans provide for ecological sustainability and species diversity, as required, but also means that future environmental analysis and decision-making at the project level will necessarily need to be more robust – and therefore more resource intensive – in order to comply with NEPA. And with a lack of clear priorities for project-level action, the agency will have expanded decision-space at the project level, with correspondingly diverse potential impacts that will necessarily require sprawling, inefficient analysis. In short, the agency cannot have it both ways: flexibility at the programmatic level and increased pace and scale of project level implementation with streamlined environmental analysis.

Another important aspect of programmatic NEPA analysis that can help streamline project implementation is meaningful consideration of climate impacts. Climate change remains the most significant and fundamental environmental issue of our day and falls squarely within NEPA's focus. Thus, the Forest Service must analyze not only the effects of its proposed actions on climate change (i.e., how will the action contribute to climate change?), but also the implications of climate change on its proposed actions (i.e., how is climate change making affected resources, ecosystems, human communities, or structures more vulnerable to the proposed action's impacts?). In other words, the reality of climate change must be factored into the environmental baseline for NEPA analysis because, "without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA." *Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Given the significant ongoing and reasonably foreseeable landscape-scale impacts of climate change, addressing the already deteriorating, climate-impacted state of resources, ecosystems, human communities, and structures through programmatic analysis will help streamline project-level implementation.

The Forest Service should better utilize programmatic, landscape-scale analysis and decision-making, with tiered project-level analysis, or appropriate use of existing categorical exclusions – tools that are well within the Forest Service's existing authority and do not require significant revision of current regulations and policies. Effective use of this two-tiered

approach will require the development of affirmative priority-setting and meaningful and enforceable restrictions in programmatic analysis and decisions – including in land management plans – to direct and narrow the impacts associated with project implementation. It will also require more meaningful analysis of climate impacts at the programmatic level.

B. The Forest Service should provide better guidance on the use of collaborative project development.

As stated above, public engagement is essential to informed decision-making, and collaboration can be an excellent tool to increase stakeholder understanding and involvement in project development and implementation. Our organizations that participate in collaborative efforts strongly believe that when collaboration is effective, it is effective because our federal partners in the Forest Service involve collaborative groups early in the planning process, well before scoping.[348] Our organizations are willing and able to assist the agency with developing and implementing robust public engagement, and collaboration, processes associated with land management planning and project implementation. Though this will take investments from both us and the agency, we believe the investment will ultimately result in more streamlined and effective environmental analysis, decision-making, project implementation, and adaptive management.

Any NEPA rulemaking should provide a useful framework for decisionmakers to better integrate collaboration into the NEPA process. Whether forest plan revision or project planning, relationships among stakeholders – including the Forest Service – must be built, rebuilt, or repaired before the tough work of discussing desired outcomes, management approaches, and the integration of science can begin. When federal and nonfederal partners take the time to understand each other, it is far more likely that they will be able to jointly develop, implement, and monitor on-the-ground projects, which is what stakeholders ultimately want.

Collaboration in the form of stakeholder groups is not the only way to engage the public early on in a decision-making process. Other effective tools include webinars, social media, and monitoring workshops. Outreach to youth and underserved populations is particularly important; as our country's demographics continue to shift, the Forest Service needs to be proactive in engaging the next generation of public lands stewards.[349, 350] Collaboration and meaningful public engagement is useful not only to inform project design, but also to help identify best available scientific information, assess baseline conditions and potential environmental justice impacts of proposed actions, synthesize and incorporate public feedback, and explore potential partnerships to assist with monitoring and other implementation efforts.

Finally, in keeping with the theme that early public and collaborative input and communication is the most important ingredient of efficient decision-making, we suggest that

---

[348] *See infra*, App'x 1 at § 2.b.

[349] The Federal Advisory Committee for implementation of the Forest Service's 2012 planning rule recently issued useful recommendations on public engagement and youth outreach. We encourage the Forest Service to review and incorporate these and other FACA recommendations relevant to environmental analysis and decision-making in the context of this proposed rule- making.

[350] GAO, Forest Service Decision-Making, GAO/RCED-97-71 (1997) at 25.

the Forest Service consider adding a requirement or an incentive for agency staff to offer an additional public participation checkpoint after scoping comments are received and translated into "issues" for analysis. Such a checkpoint could take the form of a meeting or sharing written materials, but either way it would allow agency staff to ask stakeholders, did we understand you? This will help to avoid the surprise often experienced when stakeholders read an EA's or EIS's response to comments and do not feel their input was fairly characterized. Such a check-in has been a hallmark of good collaboration on many projects many of our organizations have participated in. The Cherokee National Forest, for example, has made this a standard part of collaborative project development, and we applaud this extra effort, which is more than worth the time.

XIX. The Proposed Rule is a "Major rule" for Purposes of the Congressional Review Act (CRA).

Although the proposed rule indicates that "Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a 'major rule', as defined by 5 U.S.C. 804(2),"[351] given the environmental and socioeconomic impacts likely caused by this rule, we dispute this determination. Moreover, while OIRA makes the initial determination of whether a rule is major or non-major, the Government Accountability Office generally issues opinions to members of Congress regarding whether a rule is major or non-major.[352] We also remind the Forest Service that the CRA applies to both major and non-major rules.[353]

XX. The Forest Service Should Pause Efforts to Revise the Forest Service Manual and Handbook.

The Notice of Proposed Rulemaking states that the Forest Service "will propose revisions to its directives, Forest Service Handbook (FSH 1909.15) and Manual (FSM 1950), in conjunction with this rulemaking" and will publish a subsequent notice in the Federal Register announcing the availability of the proposed directives and information on how to comment.[354] This suggests the agency may intend to prepare draft revised directives prior to finalizing the proposed rule. Given the wide-ranging and significant deficiencies with the proposed rule identified throughout these comments, the Forest Service should not proceed with revising its directives unless and until the rule is finalized. This is common practice in the agency, with many recent rulemakings of varying scope being completed prior to the agency revising its directives.[355] To proceed with revising the directives prior to finalizing a rule of such magnitude and controversy would constitute a waste of taxpayer resources.

---

[351] 84 Fed. Reg. 27,551.
[352] Congressional Research Service, *The Congressional Review Act: Frequently Asked Questions*, R43992 (April 17, 2015).
[353] *Id.*
[354] 84 Fed. Reg. at 27,550. Any revisions to the current FSH and FSM are subject to mandatory notice and opportunity for public comment. 36 C.F.R. part 216.
[355] *E.g.*, 2012 land management planning rule, 36 C.F.R. part 219 (revised directives finalized in 2015); 2015 over-snow vehicle rule, 36 C.F.R. part 212, subpart C (revised directives finalized in 2016); 2018 public notice and comment for Forest Service directives, 36 C.F.R. part 216 (revised directives not yet released for public review).

XXI. Conclusion.

The Forest Service will not conclude this rulemaking successfully. Rather than throw good money and time after its ill-conceived and unsupported proposals, the agency should abandon this effort. The Forest Service's investigations into its problems have been worthwhile and have provided important insights, but the data simply do not support the proffered solutions. The agency does not have the capacity, social license, or legal authority to reach its "flagship targets" by brute force. Instead, the Forest Service must rely more and more on its stakeholders for information and ideas that can help it to simultaneously improve outputs *and outcomes*.

Tragically, the agency is squandering the steady progress it has been making toward a new paradigm of cooperative management. The Forest Service has for years asked its public to come to the table, and its stakeholders did. They built trust with each other; they engaged with the agency to find productive solutions instead of taking oppositional positions. We have been and remain willing to help the agency buckle down and do more, so long as "more" is respectful of the values we bring to the table—values which, we remind the agency, the statute puts on an even footing with the flagship timber targets.

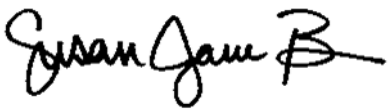
At the most basic level, the Forest Service is attempting to trade away procedural safeguards that have proven effective at protecting national forest resources in exchange for more discretion, more action, and more impact. And more controversy and litigation.

We have explained why this trade is unlawful, but we reiterate here why it is unwise: If the Forest Service can keep its traditionally broad discretion in the implementation of its multiple use mandate, then it will be only because it maintains a strong and inclusive process. The multiple-use mandate, site-specific discretion, and strong public involvement are the three legs of the Forest Service's stool. If the Forest Service is unwilling to meet its procedural obligations, then the public will act to limit its substantive discretion, first through judicial intervention and, eventually, through congressional action. In the meantime, the proliferation of litigation over conflicts that could have been defused in an open and transparent public process will result in haphazard implementation of the agency's goals, fewer outputs, worse outcomes, and evaporating public trust.

While we believe that the agency's environmental analysis and decision-making process could be more efficient, we do not believe that the agency has provided the factual and legal basis for amending its NEPA regulations. Instead, we believe that Forest Service resources are better spent addressing operational issues associated with funding, staffing, training, and budgeting, which are external to the NEPA regulatory framework. We welcome the opportunity to explore these issues further with the Forest Service.

Sincerely,

With regards on behalf of the undersigned organizations and individuals,



Susan Jane M. Brown, Public Lands Director & Staff Attorney
Western Environmental Law Center

4107 NE Couch Street
Portland, OR. 97232
brown@westernlaw.org
503-914-1323

Sam Evans, National Forests and Parks Program Leader
Southern Environmental Law Center
48 Patton Avenue, Suite 304
Asheville, NC 28801
sevans@selcnc.org
828-258-2023

Alison Flint, Director, Litigation & Agency Policy
The Wilderness Society
1660 Wynkoop St., Ste. 850
Denver, CO 80202
alison_flint@tws.org
303-802-1404

Linda Hodges
Aiken Audubon Society
530 Custer Ave
Colorado Springs, CO 80903
hikerhodges@gmail.com
719-425-1903

Leah Donahey
Alaska Wilderness League
122 C Street NW, Ste 240
Washington, DC 20001
leah@alaskawild.org
202-544-5205

Lewis Freeman
Allegheny-Blue Ridge Alliance
P.O. Box 96
Monterey, VA 24465
lewfreeman@gmail.com
540-468-2769

Kate Wofford
Alliance for the Shenandoah Valley
P. O. Box 674
New Market, Virginia 22844
kwofford@shenandoahalliance.org
540-740-4500

Rachel Conn
Amigos Bravos
P.O. Box 238
Taos, NM 87571
rconn@amigosbravos.org
575.758.3874

Peg Rooney
Arkansas Valley Audubon Society
PO Box 522
Pueblo, Colorado 81002
arkvalleyaudubon@gmail.com
719-372-3415

Curtis Smalling
Audubon North Carolina
667 Geore Moretz Lane
Boone, N 28607
csmalling@audubon.org
828-406-1685

Daly Edmunds
Audubon Rockies
116 N. College Avenue, Suite 1
Fort Collins, CO 80525
dedmunds@audubon.org
970-416-6931

Brenna Bell
Bark
P.O. Box 12065
Portland, Oregon 97212
brenna@bark-out.org
503-331-0374

Chris Vondrasek
Biodiversity Northwest
4742 35th Ave S.
Seattle, Washington 98118
chrisv@seaent.com
206-290-1491

Dr. Bruce B. Ackerman, President
Black Canyon Audubon Society
PO Box 387
Delta, CO 81416
BruceAckermanAUD@aol.com
727-858-5857

Sam Merrill, Chair, Conservation Committee
Black Hills Audubon Society
Box 2524
Olympia, WA 98507
SamMerrill3@comcast.net
360-866-8839

Mark Webb
Blue Mountains Forest Partners
22139 Hwy 395
Mt Vernon, Oregon 97865
bmfp06@gmail.com
541-620-2546

Mark Hefflinger
Bold Alliance
PO Box 254
Hastings, Nebraska 68902
mark@boldalliance.org
323-972-5192

Mark Hefflinger
Bold Alliance
PO Box 254
Hastings, Nebraska 68902
mark@boldalliance.org
323-972-5192

Harris Klein
Bosque Chapter Trout Unlimited
712 Charles Pl NW
Los Ranchos, NM 87107
hknm@comcast.net
505-974-0232

Greg Suba
California Native Plant Society
2707 K Street, Suite 1
Sacramento, California 95816
gsuba@cnps.org
916-447-2677

Janet Cobb
California Wildlife Foundation/California Oaks
428 13th Street, Suite 10-A
Oakland, California 94612
jcobb@californiawildlifefoundation.org
510-763-0211

Kimery Wiltshire
Carpe Diem West
PO Box 2008
Sausalito, California 94965
kimery@carpediemwest.org
415-332-2112

Molly Whitney
Cascade Forest Conservancy
4506 SE Belmont St. #230A
Portland, Oregon 97215
molly@cascadeforest.org
503.222.0055

Nick Cady
Cascadia Wildlands
120 Shelton McMurphey Blvd
Eugene, Oregon 97401
nick@cascwild.org
(541) 434-1463

Gabriel Scott
Cascadia Wildlands
POB 10455
Eugene, OR 97440
gscott@cascwild.org
541-434-1463

Josh Laughlin
Cascadia Wildlands
POB 10455
Eugene, Oregon 97440
jlaughlin@cascwild.org
541-434-1463

Edward B. (Ted) Zukoski, Senior Attorney
Center for Biological Diversity
1536 Wynkoop Street, Suite 421
Denver, CO 80202
tzukoski@biologicaldiversity.org
303-641-3149

Karen Schambach
Center for Sierra Nevada Conservation
PO Box 603
Georgetown, CA 95634
Csnckaren@gmail.com
530-305-0503

John Talberth
Center for Sustainable Economy
P.O. Box 393
West Linn, Oregon 97068
jtalberth@sustainable-economy.org
(503) 657-7336

John Stansfield
Central Colorado Wilderness Coalition
PO Box 588
Monument, Colorado 80132
jorcstan@juno.com
303-660-5849

John Buckley
Central Sierra Environmental Resource Center
P.O. Box 396
Twain Harte, CA 95383
johnb@cserc.org
(209) 586-7440

Nicole Hayler
Chattooga Conservancy
9 Sequoia Hills Lane
Clayton, Georgia 30525
info@chattoogariver.org
706-782-6097

Catherine Murray
Cherokee Forest Voices
1101 Antioch Road
Johnson City, TN 37604
mtncat7@earthlink.net
423-341-3805

Allen Johnson
Christians For The Mountains
12664 Frost Rd.
Dunmore, West Virginia 24934
allen@christiansforthemountains.org
304-799-4137

Michael Bochynski
Clean Water Action
1444 I St NW, Suite 400
Washington, DC 20005
mbochynski@cleanwater.org
2.0289504201e+12

Bayard Ewing
Colorado Native Plant Society
PO Box 200
Fort Collins, CO 80522
conpsoffice@aol.com
970-663-4085

Anna Lee Vargas
Conejos Clean Water
304 River Street
Antonito, CO 81141
annalee@cccwater.org
719-580-0740

Luke Schafer
Conservation Colorado
546 Main St. #404
Grand Junction, CO 81501
luke@conservationco.org
970-756-5854

Dave Werntz
Conservation Northwest
1829 10th Avenue West, Suite B
Seattle, Washington 98119
dwerntz@conservationnw.org
360-319-9949

David Jenkins
Conservatives for Responsible Stewardship
P.O. Box 613
Oakton, Virginia 22124
wildalaska@verizon.net
703-785-9570

Susan Crook
Conserve Southwest Utah
321 N Mall Dr Ste B202
St. George, Utah 84790
susan@conserveswu.org
435-773-7920

Ralph Bloemers
Crag Law Center
3141 E Burnside Street
Portland, Oregon 97215
ralph@crag.org
503-525-2727

Mary Camp
Deer Creek Valley Natural Resources Conservation Association
2100 Thompson Creek Road
Selma, Oregon 97538
maryc@rogueriver.net
541-597-4313

Ben Prater
Defenders of Wildlife
1 Rankin Ave.
Asheville, NC 28801
bprater@defenders.org
864-494-4168

Mark Salvo
Defenders of Wildlife
1130 17th Street NW
Washington, DC 20037
msalvo@defenders.org
503-757-4221

Pauline P. Reetz
Denver Auldubon
308 S. Wadsworth Blvd.
Littleton, Colorado 80128
info@denveraudubon.org
303-973-9530

Olivia Glasscock
Earthjustice
325 4th Street
Juneau, Alaska 99801
oglasscock@earthjustice.org
(907) 586-2751

Bruce Gordon
EcoFlight
307 L AABC
Aspen, CO 81611
bruce@ecoflight.org
970-429-1110

Tara Thornton
Endangered Species Coalition
PO Box 65195
Washington, District of Columbia 20035
Tthornton@endangered.org
207-504-2705

Scott Strand
Environmental Law & Policy Center
60 S 6TH ST # 2800
MINNEAPOLIS, Minnesota 55402
sstrand@elpc.org
(612) 386-6409

Thomas Wheeler
Environmental Protection Information Center
145 G. St. Suite A
Arcata, CA 95521
tom@wildcalifornia.org
707-822-7711

JoAnn Hackos
Evergreen Audubon
597 County Road 65
Evergreen, Colorado 80439
Conservation@evergreenaudubon.org
303-670-8517

Katherine Evatt
Foothill Conservancy
35 Court Street #1
Jackson, CA 95642
fhc@foothillconservancy.org
209-223-3508

James Woods
Forest Issues Broup
PO Box 1837
Penn Valley, California 95946
jwoods1945@yahoo.com
530-432-1969

Don and Barbara Rivenes
Forest Issues Group
108 BRIDGER COURT
GRASS VALLEY, CA 959459706
rivenes@sbcglobal.net
brivenes@sbcglobal.net
530-477-7502

Judith Rodd
Friends of Blackwater, Inc.
PO Box 247
Thomas, WV 26292
info@saveblackwater.org
304-345-7663

Grace Gasper
Friends of Coastal South Carolina
PO Box 1131
Mt Pleasant, SC 29465
grace@sccoastalfriends.org
843-697-7535

Frank Gifford
Friends of Highland Scenic Highway
644 Douthards Creek Rd
Marlinton, WV 24954
frankgifford@fohsh.org
304-799-4168

Darrel Jury
Friends of Plumas Wilderness
6681 Bucks Lake Road
Meadow Valley, CA 95956
darrel@plumaswilderness.org
530-616-1461

Nicole Ghio
Friends of the Earth US
2150 Allston Way, Suite 360
Berkeley, CA 94704
nghio@foe.org
510-900-8061

Jora Fogg
Friends of the Inyo
819 N Barlow Ln
Bishop, CA 93514
jora@friendsoftheinyo.org
760-873-6500

Barbara Ullian
Friends of the Kalmiopsis
1134 S.E. Allenwood
Grants Pass, OR 97527
barbara@kalmiopsisrivers.org
541-474-2265

Bryan Hofmann
Friends of the Rappahannock
3219 Fall Hill Avenue
Fredericksburg, Virginia 22401
Bryan.hofmann@riverfriends.org
540-373-3448

Jess Riddle
Georgia ForestWatch
81 Crown Mountain Place, Building C,
Suite 200
Dahlonega, GA 30533
jriddle@gafw.org
706-867-0051

Dr. Dominick A. DellaSala
Geos Institute
84 4th St.
Ashland, OR 97520
dominick@geosinstitute.org
5414824459

Allyson Siwik
Gila Conservation Coalition
305A North Cooper St.
Silver City, NM 88061
allysonsiwik@gmail.com
575-538-8078

Sally Smith
Gila Resources Information Project
305A North Cooper St.
Silver City, NM 88061
grip@gilaresources.info
575-538-8078

Mary O'Brien
Grand Canyon Trust
HC 64 Box 2604
Castle Valley (Moab), UT 84532
mobrien@grandcanyontrust.org
435.259-6205

Nic Korte
Grand Valley Audubon
PO 1211
Grand Junction, Colorado 81502
nkorte1@hotmail.com
970-242-3779

Shelley Silbert
Great Old Broads for Wilderness
PO Box 2924
Durango, OR 81302
shelley@greatoldbroads.org
970-385-9577

Darilyn Parry Brown
Greater Hells Canyon Council
105 Fir Street #327
La Grande, OR 97850
darilyn@hellscanyon.org
541-963-3950

Siva Sundaresan
Greater Yellowstone Coalition
215 S Wallace Ave
Bozeman, MT 59715
ssundaresan@greateryellowstone.org
307 335 5331

Charlie Cray
Greenpeace US
702 H St. NW
Washington, District of Columbia 20001
ccray@greenpeace.org
202-462-1177

Matt Reed
High Country Conservation Advocates
PO Box 1066
Crested Butte, CO 81224
matt@hccacb.org
970-349-7104

Matt Holloway
Holloway Educational Resources
836 10th Street West
Columbia Falls, Montana 59912
matt@hollowayeducation.com
406-270-7429

John Robison
Idaho Conservation League
PO Box 844
Boise, IDAHO 83701
jrobison@idahoconservation.org
208-345-6933

Jennifer Thurston
Information Network for Responsible Mining
P.O. Box 332
Paradox, CO 81429
jennifer@informcolorado.org
970-859-7456

Leah Zamesnik
Jackson Hole Conservation Alliance
685 S Cache St
Jackson, Wyoming 83001
leah@jhalliance.org
307-733-9417

Chad Hanson, Ph.D.
John Muir Project of Earth Island Institute
P.O. Box 897
Big Bear City, CA 92314
cthanson1@gmail.com
530-273-9290

MarieClaire Egbert
John Muir Project of Earth Island Institute
PO Box 897
Big Bear City, CA 92314
marieclaireegbert@johnmuirproject.org
484-554-6566

Ann Vileisis
Kalmiopsis Audubon Society
P.O. Box 1286
Port Orford, OR 97465
annvil@earthlink.net
541-332-0261

Jim Scheff
Kentucky Heartwood
.O. Box 1486
Berea, Kentucky 40403
jim@kyheartwood.org
859-334-0602

Kimberly Baker
Klamath Forest Alliance
PO Box 21
Orleans, CA 95556
klam_watch@yahoo.com
707-834-8826

George Sexton
Klamath Siskiyou Wildlands Center
PO Box 102
Ashland, OR 97520
gs@kswild.org
541-488-5789

Patricia Puterbaugh
Lassen Forest Preservation Group
1540 Vilas Rd.
Cohasset, CA 95973
pmputerbaugh@yahoo.com
530 342 1641

Matthew Davis
League of Conservation Voters
740 15th Street NW, Ste 700
Washington, DC 20005
matthew_davis@lcv.org
202-454-4561

William Lider, PE
Lider Engineering
2526 - 205th Place SW
Lynnwood, WA 98036
Bill@LiderEngineering.com
4257760671

John Weisheit
Living Rivers & Colorado Riverkeeper
PO Box 466
Moab, Utah 84532
john@livingrivers.org
435-260-2590

Dana Carl Ward
Lower Columbia Basin Audubon Society
P.O. Box 1900
Richland, WA 99352
dcarlward@gmail.com
509-545-0627

Kurt R. Schwarz
Maryland Ornithological Society
9045 Dunloggin Ct.
Ellicott City, MD 21042
krschwa1@verizon.net
410-461-1643

Dean Davis
Mid Klamath Watershed Council
PO Box 119
Happy Camp, CA 96039
deandavisart@yahoo.com
530-493-2541

Bartshe Miller
Mono Lake Committee
51365 Highway 395, Box 29
Lee Vining, CA 93541
bartshe@monolake.org
760-647-6595

Amy Robinson
Montana Wilderness Association
565 Spokane Ave
Whitefish, MT 59937
arobinson@wildmontana.org
406-249-4408

Nada Culver
National Audubon Society
1624 Market Street, Suite 202
Denver, Colorado 8020
nada.culver@audubon.org
303-807-6918

Ani Kame'enui
National Parks Conservation Association
777 6th Street NW, Suite 600
Washington, DC 20001
akameenui@npca.org
202-360-6437

Conrad Gowell
Mark Sherwood
Native Fish Society
813 7th Street
Oregon City, OR 97045
conrad@nativefishsociety.org
mark@nativefishsociety.org
503-344-4218

Kabir Green
Natural Resources Defense Council
1152 15th St NW
Washington, District of Columbia 20005
Kgreen@nrdc.org
917-502-2189

Oscar Simpson
New Mexico Horse Council
PO B0X 10206
Albuquerque, NM 87184
oscarsimpson3@yahoo.com
505-917-2134

OSCAR SIMPSON
New Mexico Sportsmen
3320 12TH ST NW
Albuquerque, NM 87107
oscarsimpson3@yahoo.com
505-917-2134

Judy Calman
New Mexico Wilderness Alliance
317 Commercial St. NE #300
Albuquerque, NM 87102
judy@nmwild.org
505-843-8696

Robert Kaye
North Cascades Audubon Society
P O Box 5805
Bellingham, Washington 98227
rkaye@northcascadesaudubon.org
206-849-5410

Arthur Campbell
North Central Washington Audubon Society
PO Box 2934
Wenatchee, Washington 98807
rapakivi@methow.com
509-996-8168

Larry Glass
Northcoast Environmental Center
po 4269
Arcata, CA 95518
larryglassnec@gmail.com
707-822-6918

Teresa Seamster
Northern New Mexico Group, Sierra Club
807 Second Street, Ste. 45
Santa Fe, New Mexico 87505
ctc.seamster@gmail.com
505-983-2703

Nathan Johnson
Ohio Environmental Council
1145 Chesapeake Ave., Suite I
Columbus, Ohio 43212
NJohnson@theOEC.org
614-487-5841

Peter M. Lacy
Oregon Natural Desert Association
50 SW Bond St., Ste 4
Bend, OR 97702
lacy@onda.org
503-525-0193

Doug Heiken
Oregon Wild
PO Box 11648
Eugene, Oregon 97440
dh@oregonwild.org
541-344-0675

Glen H. Spain, NW Regional Director
Pacific Coast Federation of Fiserhmen's Associations (PCFFA)
Intitute for Fisheries Resources (IFR)
P.O. Box 11170
Eugene, OR 97440-3370
Fish1ifr@aol.com
541-689-2000

Greg Haller
Pacific Rivers
10001 SE Water Ave Suite 450
Portland, Oregon 97214
greg@pacificrivers.org
503-228-3555

John W. McCarthy, Acting President
Piedmont Environmental Council
45 Horner Street
Warrenton, VA 20186
jmccarthy@pecva.org
540-347-2334

Cindy Easterson
Pilchuck Audubon Society
1429 Avenue D, PMB 198
Snohomish, WA 98290
ceasterson@gmail.com
425-610-8027

Phillip Musegaas
Potomac Riverkeeper Network
3070 M Street NW
Washington, DC 20007
phillip@prknetwork.org
202-888-4929

Tom Sobal
Quiet Use Coalition
PO Box 1452
Salida, CO 81201
quietuse@gmail.com
719-539-4112

Bob Musil
Rachel Carson Council
8600 Irvington Avenue
Bethesda, MD 20817
bmusil1@yahoo.com
301-493-4571

Kenneth Schroeder
Rainier Audubon
12725 SE 312th ST K305
Auburn, WA 98092
kenschroeder@msn.com
253-939-7470

Susan Ostlie, Co-leader
Rio Grande Valley Broadband of the Great Old Broads fo Wilderness
2401 Madre Dr. NE
Albuquerque, NM 87112
susanostlie@yahoo.com
15052285666

Rosalind McClellan
Rocky Mountain Recreation Initiative
1567 Twin Sister Rd.
Nederland, CO 80466
rozmcclellan@gmail.com
303 447-9409

Tehri Parker
Rocky Mountain Wild
1536 Wynkoop St #900
Denver, Colorado 80202
tehri@rockymountainwild.org
303-546-0214

Vic Thasiah
Runners for Public Lands
1681 San Nicholas St.
Ventura, CA 93001
vic@runnersforpubliclands.org
805-493-3451

Larry Glass
Safe Alternatives for our Forest Environment
P.O. Box 1510
Hayfork, ca 96041
larryglass71@gmail.com
7078457136

Jimbo Buickerood
San Juan Citizens Alliance
1309 East 3rd Avenue #5
Durango, Colorado 81301
jimbo@sanjuancitizens.org
970-259--3583

Christine Canaly
San Luis Valley Ecosystem Council
P.O. Box 223
Alamosa, CO 81101
info@slvec.org
719-589-1518

Sam Hitt
Santa Fe Forest Coalition
P.O. Box 1943
Santa Fe, New Mexico 87508
sam@wildwatershed.org
505-438-1057

Carl Fisher
Save Our Canyons
3690 E Fort Union Blvd., Suite 101
Cottonwood Heights, UT 84121
carl@saveourcanyons.org
801-363-7283

Stephen Feldman
Select One
15702 13th Ave. SW
Burien, Washington 98166
stephanfeldman@gmail.com
206-621-7007

Ara Marderosian
Sequoia ForestKeeper®
P.O. Box 2134
Kernville, CA 93238
ara@sequoiaforestkeeper.org
(760) 376-4434

Steven Frisch
Sierra Business Council
10183 Truckee Airport Road
Truckee, CA 96161
sfrisch@sierrabusiness.org
530-582-4800

Karimah Schoenhut
Sierra Club and its Vermont Chapter
50 F St NW, 8th Floor
Washington, DC 20001
karimah.schoenhut@sierraclub.org
202-548-4584

Chris Wright
Sierra CPR
PO Box 361
Glencoe, California 95232
leapwin@yahoo.com
209-256-6083

Don Rivenes
Sierra Foothills Audubon Society
108 Bridger Court
Grass Valley, CA 959459706
rivenes@sbcglobal.net
530-477-7502

Susan Britting
Sierra Forest Legacy
PO Box 377
Coloma, CA 95613
britting@earthlink.net
530-295-8210

Jenny Hatch
Sierra Nevada Alliance
PO 7989
South Lake Tahoe, CA 96158
jenny@sierranevadaalliance.org
530 542 4546

Andrew Thoms
Sitka Conservation Society
201 lincoln street, rm 4
sitka, Alaska 99835
andrew@sitkawild.org
907-747-7509

Timothy Manns
Skagit Audubon Society
P.O. Box 1101
Mount Vernon, Washington 98274
conservation@skagitaudubon.org
360-333-8985

Louise Misztal
Sky Island Alliance
406 S 4th Ave
Tucson, Arizona 85719
louise@skyislandalliance.org
520-624-7080 ext 19

Dave Willis
Soda Mountain Wilderness Council
P.O. Box 512
Ashland, OR 97520
sodamtn@mind.net
541-482-8660

Malcolm Cameron
Southern Shenandoah Valley Chapter Of PATC
5653 Beards Ford Rd.
Mount Crawford, VA 22841
Malcolmgcameron@gmail.com
154-023-46273

Terry Timme
Southwestern New Mexico Audubon
PO Box 1473
Silver City, NM 88062
swnmaudubon@gmail.com
575-912-1303

Greg Gordon
Spokane Audubon
1217 S. Oak
Spokane, WA 99204
fightingbull63@gmail.com
406-396-4940

Davis Mounger
Tennessee Heartwood and the Tennessee Chapter of the Sierra Club
212 greenleaf street
Chattanooga, Tennessee 37415
wdmounger@yahoo.com
423 877 4616

Steve Brooks
The Clinch Coalition
PO Box 2732
Wise, Va 24293
clinchcoalition@mounet.com
276-479-2176

Craig Thomas
The Fire Restoration Group
P.O. Box 244
Garden Valley, CA 95633
craigthomas068@gmail.com
916-708-9409

Mike Petersen
The Lands Council
25 West Main Ave. Suite 222
Spokane, Washington 99201
mpetersen@landscouncil.org
509-209-2406

Meredith Trainor
Southeast Alaska Conservation Council
2207 Jordan Ave
Juneau, Alaska 99801
meredith@seacc.org
907-586-6942

Pat Churchman
Trinity Presbyterian Earth Care House Church
3619 Mallard Drive
Bridgewater, va 22812
gmapat79@gmail.com
540 828 6073

Art Vollmer
Troiut Unlimited New Mexico Council
P.O. Box 32952
Santa Fe, New Mexico 87505
fish4rgct@gmail.com
505-428-0707

Joan Parker
Tulare County Audubon
P.O. Box 737
Springville, CA 93265
Blueoakpark@gmail.com
559-359-9517

Joseph Patrick Quinn
Umpqua Watersheds, Inc.
251 Wildcat Rd.
Camas Valley, Oregon 97416
jquinn@mydfn.net
541 445 2325

Donna Stevens
Upper Gila Watershed Alliance
PO Box 383
Gila, NM 88038
director@ugwa.org
575-590-5698

Patrick L. Calvert
Virginia Conservation Network
103 East Main St., Ste. 1
Richmond, VA 23219
pat@vcnva.org
434-484-0804

Mark Miller
Virginia Wilderness Committee
P.O. Box 1235
Lexington, Virginia 24450
mmiller24450@gmail.com
540-464-1661

Andrea Imler
Washington Trails Association
705 2nd Ave #300
Seattle, Washington 98104
aimler@wta.org
206-965-8558

Tom Uniack
Washington Wild
305 North 83rd Street
Seattle, WA 98103
tom@wawild.org
206-633-1992

Gloria Griffith
Watauga Watershed Alliance, Chapter of
Blueridge Environmental Defense League
BREDL
900 Mining Town Rd
Mountain City, Tennessee 37683
GLa4797@embarqmail.com
423-727-4797

Dr. John Gardiner
WaterCycle LLC
420 W River St
Cave Junction, Oregon 97523
john.l.gardiner@gmail.com
5414152613

Dr. Christine Perala Gardiner
WaterCycle LLC
420 W River St
Cave Junction, Oregon 97523
john.l.gardiner@gmail.com
541-415-2613

Angie Rosser
West Virginia Rivers Coalition
3501 MacCorkle Ave. SE #129
Charleston, WV 25304
arosser@wvrivers.org
304-637-7201

Karen Yarnell
West Virginia Wilderness Coalition
21 Beverly Circle
Fairmont, WV 26554
karen.yarnell@fairmontstate.edu
304-657-0812

Joro Walker, General Counsel
Western Resource Advocates
307 West 200 South, Ste 2000
Salt Lake City, UT 84101
jwalker@westernresources.org
801-487-9911

Patrick Dooling
Western Slope Conservation Center
204 Poplar Ave
Paonia, Colorado 81428
director@theconservationcenter.org
970-527-5307

Greta Anderson
Western Watersheds Project
738 N. 5th Ave, Suite 200
Tucson, AZ 85705
greta@westernwatersheds.org
520-623-1878

Tom Hollender
White Mountain Conservation League
PO Box 72
Nutrioso, AZ 85932
twhollender@gmail.com
928-245-7787

Tom Hollender
White Mountain Conservation League
PO Box 72
Nutrioso, AZ 85932
twhollender@gmail.com
928-245-7787

Monica Bond
Wild Nature Institute
PO Box 44
Weaverville, North Carolina 28787
monica@wildnatureinstitute.org

Kevin Massey
Wild South
PO Box 1928
Asheville, NC 28802
kevin@wildsouth.org
(828) 258-2667

David Sligh
Wild Virginia
108 5th St SE
Charlottesville, Virginia 22902
david@wildvirginia.org
434-964-7455

Sam Hitt
Wild Watershed
48 Old Galisteo Way
Santa Fe, New Mexico 87508
sam@wildwatershed.org
505-438-1057

Marla Fox
WildEarth Guardians
PO Box 13086
Portland, OR 97213
mfox@wildearthguardians.org
651-434-7737

Peter Hart
Wilderness Workshop
PO Box 1442
Carbondale, CO 81623
peter@wildernessworkshop.org
970-963-3977

Peter Hart
Wilderness Workshop
PO Box 1442
Carbondale, CO 81623
peter@wildernessworkshop.org
970-963-3977

Jessica Schafer
Wildlands Network
1402 3rd Ave Ste 1019
Seattle, WA 98101
jessica@wildlandsnetwork.org
503-467-8007

Matthew Koehler
WildWest Institute
PO Box 7998
Missoula, Montana 59802
koehler@wildrockies.org
406-396-0321

Osprey-Orielle Lake
Women's Earth and Climate Action Network (WECAN)
20 Sunnyside Ave., A-438
Mill Valley, California 94941
osprey@wecaninternational.org
415-722-2104

Rick Bass
Yaak Valley Forest Council
3845 Vinal Lake Rd.
Troy, Montana 59935
Rickbass27@gmail.com
496-291-5338

Dr. Peg Rooney
PO Box 60
Penrose, CO 81240
drpeg@bresnan.net
719-372-3415

George Shook
9665 Takilma Rd
Cave Junction, Oregon 97523
takilmageorge@gmail.com
(541) 592-3083

Steve Bonowski
P.O. Box 280286
Lakewood, CO 80228
climbersteveb@gmail.com
720-459-2841

Bryant Baker
Los Padres ForestWatch
PO Box 831
Santa Barbara, CA 93102
bryant@lpfw.org
805.770.7456

Lura Brookins
P.O. Box 1362
Santa fe, NM 87504
Lurabrookins@gmail.com
505-820-7017

Laraine Ferguson
13 Condesa Rd.
Santa Fe, NM 87508
phebething@yahoo.com
505-466-1733

Michelle Berditschevsky
Mount Shasta Bioregional Ecology Center
P.O. Box 1143
Mount Shasta, CA 96067
shastamedicine@snowcrest.net
530.926.3396

CC:

Edward Boling, Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503
Edward_A_Boling@ceq.eop.gov

Christine Dawe, Director
Ecosystem Management and Coordination
United States Forest Service
cdawe@usda.gov

Brittany Bolen, Associate Administrator for the Office of Policy
U.S. Environmental Protection Agency
William Jefferson Clinton Building, Mail Code: 6101A
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460
Bolen.brittany@Epa.gov

Robert Tomiak, Director
Office of Federal Activities
U.S. Environmental Protection Agency
William Jefferson Clinton Building, Mail Code: 2203A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Tomiak.robert@Epa.gov