

René Voss – Attorney at Law

15 Alderney Road
San Anselmo, CA 94960
Tel: 415-446-9027
renepvoss@gmail.com

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Restoration CE Comments
P.O. Box 4208
Logan, UT 84323

Subject: Categorical Exclusions (CEs): Sequoia ForestKeeper Comments re: Soil & Water Restoration CEs; Support for and Opposition to Certain Aspects of proposed CEs

To Whom It May Concern:

Thank you for the opportunity to provide comments. Sequoia ForestKeeper (SFK) conditionally supports some and opposes other aspects of the newly-proposed Soil & Water Restoration CEs.

Summary of Comments

More specifically, we believe the intent of all three restoration CEs hit a high mark. *See* proposed 36 C.F.R. § 220.6(e)(18) – (20). But the CEs need further numerical limitations, and one specific example is inconsistent with the ultimate goal of these CEs to restore ecological functions, as expressed in the rule’s preamble:

The Forest Service’s proposed categorically excluded actions promote hydrologic, aquatic, and landscape restoration activities. All three categorical exclusions involve activities that are intended to maintain or restore ecological functions and better align the Agency’s regulations, specifically its categorical exclusions, with the Agency’s current activities and experiences related to restoration.

77 Fed. Reg. 35323, 35324 (June 13, 2012).

To achieve this purpose, it appears that CEs 18 & 20 are largely consistent with the rule’s preamble, although both CEs need to specify limitations in project size and potential effects on water bodies to meet the intent of excluding the analysis from NEPA. CE 19, however, includes an example of an activity that is both (1) internally inconsistent and inconsistent with the preamble and (2) is subject to abuse, based on past practices of the U.S. Forest Service:

(iii) Removal of downed or damaged trees that limit or reduce public access, result in potential risks to public safety, or where removal is needed to restore wildlife, or protect infrastructure; ...

77 Fed. Reg. at 35326.

First, the example is inconsistent with the rule’s purposes because “protect[ing] infrastructure” is not an “activit[y] intended to maintain or restore ecological functions” and it is internally

inconsistent because these activities do not promote restoration of “uplands, wetlands, or riparian systems to pre-disturbance conditions, to the extent practicable, such that site conditions will not impede or negatively alter natural processes.” *See* CE 19. Moreover, the removal of damaged or downed trees is not “needed to restore wildlife.” Second, the example given is subject to abuse because past practices in many national forests have allowed the Forest Service to remove large numbers of downed or damaged trees when their removal is not needed to restore wildlife habitat (and may actually harm wildlife) or their removal is not needed to avert risks to public safety. Most of the examples where the Forest Service has abused the public’s trust are roadside or recreation site hazard tree cutting and removal projects. In our comments below, we provide several examples of this abuse. Therefore, we urge that all “removal” of downed or damaged trees be eliminated as an example in proposed CE 19.

All non-emergency tree removal projects should be fully analyzed under NEPA with either an Environmental Assessment (EA) or Environmental Impact Statement (EIS) with a full range of alternatives.

Detailed Comments

I. Conditional Support for Proposed Categorical Exclusions in § 220.6(e)(18) & (20)

In general, the use of CEs for restoring water bodies and removing roads and trails are good ideas, so long as the allowed activities are limited in scope and size and are, in fact, completely beneficial without any adverse direct, indirect, or cumulative environmental impacts. Therefore, SFK urges the Forest Service to place numerical limits on the size of the project, based on several factors.

A. CE 18: Restoring wetlands, streams, and riparian areas ...

The examples provided are likely to have a long-term beneficial impact to assist with the restoration of wetlands, streams, and riparian area, but if the amount of fill or soil disturbance from implementation of the action would exceed a threshold amount that could adversely affect the watershed or a stream it could result in direct or indirect short-term adverse effects (based either on a sensitive resource or the total amount of the discharge or fill) by itself or in combination with other watershed or stream effects. So, when the proposed activity exceeds a certain size, the Forest Service should not allow the use of this CE. The CE should provide a specific quantifiable limitation on the amount of soil movement (in cubic yards or meters) above which the restoration project should be analyzed fully under NEPA. To derive this figure, it would be necessary to go back to the projects that were reviewed to create this CE and determine at which point the soil movement or size of the project would potentially cause an effect that would necessarily require analysis in an EA or EIS. This method was use in the past by the Forest Service to derive limitations on project size appropriate for using CEs for small timber sales, as an example. *See* 68 Fed. Reg. 44598 (July 29, 2003).

Moreover, when the proposed activity would require placing fill or cause a discharge into a water of the United States, the Forest Service should exclude the activity from this CE. If the dredging, excavation, or placement of fill results in discharges into waters of the United States, the Forest

Service must first apply for and receive a Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) permit or CWA Section 401 permit, usually from the applicable State. *See Sequoia ForestKeeper v. U.S. Forest Service*, No. 1:09-cv-00392, Slip. Op. at 7-8 (E.D. Cal. Mar. 15, 2011) (requiring USFS to consider a CWA Section 401 permit for diversion, dam, and discharge into U.S. waters). This should preclude the project from using this CE, because CWA permits should always be accompanied with an EA or full EIS.

B. CE 20: Removing or restoring roads and trails

Again, the examples provided will likely have a long-term beneficial impact to assist with the restoration of watersheds, streams, and water quality. But again, the CE must include limitations on the locations of the restoration activities and should include numerical limits on the size of the activity above which it could potentially have adverse effects due to potential soil movement into nearby streams.

Further, the CE should be very overly cautious and should exclude proposed activities in floodplanes, riparian areas, and areas near streams so that road or trail removal activities in these areas are considered either in an EA or in a full EIS. Outside floodplanes, riparian areas, and areas near streams, the CE should also place a limit on the size based on a numeric standard, such as the total amount of soil to be moved, the amount of soil that could potentially move into a waterway from the restoration activity, or the number of miles of road or trail proposed for rehabilitation, restoration, or re-contouring. As stated above, to derive this figure, it would be necessary to go back to the projects that were reviewed to come up with this CE and determine at which point the soil movement or size of the project caused an effect that would necessarily require analysis in an EA or EIS.

Again, when the proposed activity would require placing fill or cause a discharge into a water of the United States, the Forest Service should exclude the activity from this CE. If the dredging, excavation, or placement of fill results in discharges into waters of the United States, the Forest Service must first apply for and receive a Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) permit or CWA Section 401 permit, usually from the applicable State. This should preclude the project from using this CE, because CWA permits should always be accompanied with an EA or full EIS.

II. Opposition to Tree Removal as an Example in Proposed § 220.6(e)(19)

SFK opposes the example provided with CE 19, which would allow the

- (iii) [r]emoval of downed or damaged trees that limit or reduce public access, result in potential risks to public safety, or where removal is needed to restore wildlife, or protect infrastructure

77 Fed. Reg. at 35326.

A. Tree Removal is Not a Legitimate Restoration Activity

This example is not a legitimate restoration activity and should be eliminated from the CE as an example. First, the Forest Service can provide public access without “removing” a downed or damage tree by simply moving it out of the way. Second, a potential risk to public safety can also be averted by moving the tree out of the roadway or trail or by felling a damaged tree without removing it. Third, tree removal is rarely, if ever, needed to “restore wildlife [sic]” or even wildlife habitat. Instead, standing dead trees (snags) and downed logs are essential ecological components of a healthy forest ecosystem, which many of the most imperiled species in our national forests need for their survival or recovery. Finally, the protection of infrastructure is not a proper “restoration” activity, and this example does not belong in a CE whose purpose is ecosystem restoration. Further, the removal of trees necessarily requires the use of heavy equipment that disturbs soils and also implicates safety issues. For example, logging trucks are generally incapable of staying in their own lane on narrow forest roads and are a public safety risk.¹ Moreover, logging activity is risky and can cause fires and logging trucks cause air pollution from burning and using petroleum products in trucks, which also implicates issues with green house gas emissions and climate change.

Finally, the example is fundamentally inconsistent with the CE’s purpose “to restore uplands, wetlands, or riparian systems to pre-disturbance conditions, to the extent practicable, such that site conditions will not impede or negatively alter natural processes.” *See* 77 Fed. Reg. at 35326.

¹ Off-tracking long Vehicles Increase Public Safety Danger:

According to the December 1989 California Department of Transportation (CALTRANS) Report to The Legislature, as required by Chapter 1378, Statute of 1986 (SB 2232 - McCorquodale), about 19 percent of the California State highway system, mostly mountain roads (not counting Forest Service roads or county roads) are inadequate, at any truck speed, to handle tractor-semitrailers of 30 feet truck kingpin to rear axle length (KP-RA). According to the sworn testimony of CALTRANS Attorney, William R. Morrisroe, Esq., CALTRANS engineers found that tractor-semitrailers more than 30 feet king pin to rear axle length (KP-RA), would have to be “off-tracking” (leave their lane of traffic and illegally cross over the centerline of the road and or use the shoulder of the road), possibly causing accidents with on coming traffic, due to the extremely dangerous conditions of the tight radius of curves and narrow roadway that currently exist on these narrow roads. CALTRANS posted warning signs on these State Highways alerting drivers to the inadequacies of the State Highway system roads to handle tractor-semitrailers over 30 feet KP-RA, without “off-tracking”. According to the testimony of Officer Martin, California Highway Patrol, Commercial Section, most logging trucks are 33 feet 6 inches KP-RA plus any overhang of logs. So the average logging truck is 3 feet and 6 inches longer than the maximum length truck that can safely be geometrically handled by these narrow roads in the State Highways System.

The Forest Service is responsible for public safety which is directly threatened by this and other Forest Service actions. The Forest Service must assume the responsibility for public safety threatened by the future logging that could be specified as a result of implementing this project. The Forest Service must consider, study, and analyze the public safety impacts caused by this project, in addition to the other cumulative impacts on the environment.

The probability of an accident occurring with one of these future logging trucks, which will most likely be off-tracking on narrow, curving mountain roads is significant. The Forest Service cannot ignore the public safety concerns of off-tracking trucks, which have actually caused injury and death. If litigation results from an accident, ignoring the issue of future off-tracking logging trucks, which may cause accidents and deaths, could implicate the Forest Service with contributory negligence.

B. Examples of Abuses of Tree Removal

SFK and other groups have opposed and challenged a number of projects on the Sequoia and Los Padres National Forest, including in Federal Court, in which the Forest Service has proposed to cut and remove trees in popular recreation sites or along roads without adequate public oversight and without the necessary NEPA analysis. These projects can be described more accurately as timber sales, disguised as threats to public safety. Again, as stated above, the risk to public safety can be averted by simply felling or moving a tree from a roadway or trail.

1. Tree Removal from the Trail of 100 Giants – Sequoia National Forest

On April 15, 2000, President Clinton signed the Presidential Proclamation creating the Giant Sequoia National Monument (“GSNM”) out of the Sequoia National Forest. The signing ceremony was held in this easily-accessible and frequently-visited area within the GSNM, the Trail of 100 Giants, which is within a giant sequoia grove. The Proclamation stated that the purpose of the newly designated monument is to protect the Sequoia forests and end logging for timber. *See* Declaration of Ara Marderosian, ¶9 (attached as Exhibit A).

In April of 2004, the Forest Service stated their intention to fell “hazard” trees along the Trail of 100 Giants using a CE and SFK was told there would be no Environmental Assessment. SFK was told, verbally, that the project would fell all of the designated “hazard” trees, predominantly dead trees (88 were designated and 11 were previously cut to open the southern end of the trail). Hand crews were to limb and buck up the large pieces and chip and scatter the chips around the base of the large sequoias. Some of the larger trees were to be transported by helicopter out of the grove to a landing to be distributed elsewhere in the GSNM, but they were not to be sold in a timber sale. *See id.* ¶10.

There was nothing distributed to the public in writing regarding this hazard tree project: no formal written public notice; no written announcement; and no invitation to submit written comments. Also, there was no Environmental Assessment or Environmental Impact Statement, no decision memo, and no administrative appeal period. SFK did not know that the trees were being cut until he visited the Trail of 100 Giants in 2005 and saw the trees on the ground. *See id.* ¶11.

After the trees were felled in the Trail of 100 Giants, SFK discovered that the Forest Service had removed 67 live, green trees that they declared to be hazards, and piled the live and dead trees in a log deck at a landing area. This felling also occurred within an occupied California spotted owl nest site, and included removal of many large live trees and snags, which are important habitat components for the owl. *See id.* ¶12.

After the project was completed SFK requested and received a document titled “Project File for Monument Proclamation Hazard Tree Felling,” stating that “hazard” trees would be felled on the Trail of 100 Giants, and that it would be categorically excluded from environmental analysis and documentation under the rubric of routine road/trail maintenance. *See id.* ¶13.

Later, SFK also received a letter, dated November 8, 2004, signed by Acting District Ranger Nancy C. Ruthenbeck, which was titled “100 Giants Hazard Tree Falling Project – Log Deck Treatment.” The letter stated: “The file stated that the felled trees which were removed from the trail area by helicopter would be taken to a landing and piled. The resulting log deck constitutes an attractive nuisance, thereby creating a safety hazard for the public. The log deck needs to be removed. The treatments in the project area are consistent with the Giant Sequoia National Monument management plan.” No memo in the Forest Service file indicated that the cut trees were to be sold as a “means of removal.” Yet, on November 17, 2004, the log deck was offered as a commercial timber sale. On July 26, 2005, these trees were sold to the timber industry: Jess Witten and Sierra Forest Products. *See id.* ¶14.

This incident not only created a safety hazard for the public but it caused a major breach in the public’s trust of the Forest Service to protect valuable resources, and the agency should not let this occur again, especially under the guise of “restoration” or to avert risk from standing dead trees in a recreation site. SFK urges the Forest Service to drop the example provided in proposed CE 19 for this reason alone.

2. *Tree Removal Along Roads – Federal Court Litigation in the Los Padres, Sequoia, Malheur, and Plumas National Forests*

In response to a tree felling and removal project along a road in an area of the Los Padres National Forest after the Day Fire, plaintiff Los Padres Forestwatch filed suit, seeking to overturn the Forest Service’s decision allowing the roadside hazard project using CEs for road, trail, and recreation site maintenance. The court held that the project violated NEPA because it should have prepared at least an EA, since it exceeded the 250 acre limitations of another CE for salvaging dead or dying trees. *See Los Padres Forestwatch v. U.S. Forest Service*, No. 2:08-cv-00845, Slip. Op. at 18 (C.D. Cal. July 3, 2003) (attached as Exhibit B).

In another example, plaintiff League of Wilderness Defenders challenged the Forest Service’s decision to remove 15,000 roadside hazard trees after the Flagtail Fire on the Malheur National Forest using a CE for road maintenance. The court permanently enjoined the project, holding that additional NEPA analysis was required. *See League of Wilderness Defenders-Blue Mtns. Biodiversity Project v. U.S. Forest Service*, No. 3:03-cv-00171, Slip. Op. at 5 (D.Or. Feb. 17, 2005) (attached as Exhibit C).

In a final example, plaintiff Earth Island Institute challenged the Forest Service’s decision to proceed with a roadside hazard project after the Moonlight Fire on the Plumas National Forest, again using the road maintenance CE. During the case, the Forest Service withdrew its decision and the Forest Service agreed in a stipulated order that it would not proceed with the project using a CE and would prepare a full NEPA analysis. *See Earth Island Institute v. Carlton*, No. 2:08-cv-01957, Stipulated Order at 2 (E.D. Cal. Oct. 31, 2008).

On the Sequoia National Forest, plaintiff Sequoia ForestKeeper challenged the Forest Service’s decision to proceed with a roadside hazard tree removal project, which also included a claim that the Forest Service exceeded the acreage limitation of the salvage CE. *See Sequoia ForestKeeper v. Exline*, No. 1:09-cv-01519 (E.D. Cal. 2009).

These legal examples show an overriding failure of trust of the Forest Service in its use of CEs for roadside hazard tree removal and an abuse of discretion with regard to the need to prepare adequate NEPA analysis for projects that should never be excluded from environmental analysis.

SFK believes that if the new CE 19 for restoration allowed tree removal as proposed for wildlife purpose, public safety or to protect infrastructure (which are not appropriate in a restoration CE), the ambiguity of the tree removal example would prompt further distrust and litigation.

Therefore, the tree removal example should be removed from the final version of the CE.

As a final note, we suggest that the Forest Service consider adding a statement suggesting that ecological restoration necessarily requires a prohibition on any further grazing, logging, fire suppression, road construction or any other activities that caused the stream or watershed problem to begin with, and that these activities will continue to cause the adverse post-disturbance condition if they are not discontinued.

For Sequoia ForestKeeper,

A handwritten signature in black ink, appearing to read 'René Voss', with a stylized flourish at the end.

René Voss – Attorney at Law

Ara Marderosian
Sequoia ForestKeeper
P.O. Box 2134
Kernville, CA 93238-2134
ara@sequoiaforestkeeper.org

cc: Peter Gaulke, U.S. Forest Service: pgaulke@fs.fed.us