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**PROTECTING
NATURAL
RESOURCES**

February 1, 2018

cc: Ara Marderosian

Mr. Tony Tooke, Chief
United States Forest Service
Department of Agriculture
1400 Independence Ave SW
Washington, DC. 20250

Via: nepa-procedures-revision@fs.fed.us, and
<https://cara.ecosystem-management.org/Public/CommentInput?project=ORMS-1797>

Subject: Advanced Notice of Proposed Rulemaking, Request for Comment, National Environmental Policy Act Compliance (83 Fed. Reg. 302 (January 3, 2018))

Chief Tooke,

Sequoia ForestKeeper thanks you for the opportunity to provide the U.S. Forest Service with the following comments regarding the agency's advanced notice of proposed rulemaking (ANPR) regarding National Environmental Policy Act (NEPA) compliance, as generally outlined in 83 Fed. Reg. 302 (January 3, 2018).

We offer the following observations and comments.

The Purposes of NEPA and the Need for Thorough Environmental Analyses

In its passage of NEPA into law, Congress stated that “The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” 42 U.S.C. § 4321.

In enacting NEPA, Congress sought to ensure:

- transparency and accountability,
- meaningful public participation,
- improving the quality of the human environment,
- reducing and mitigating harmful environmental impact, and
- reliance on sound science and an interdisciplinary approach to environmental analyses.

See generally, 42 U.S.C. § 4332. NEPA also created the Council on Environmental Quality (CEQ), which is responsible for designing and implementing NEPA regulations “to tell federal agencies what they must do to comply with the procedures and achieve the goal of [NEPA]. These rules are “ ‘action forcing’ provisions to make sure that federal agencies act according to the letter and spirit of the Act.” 40 C.F.R. § 1500.1(a) (citing NEPA Section 102(2)).

“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).

CEQ, however, recognized that “[u]ltimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork even excellent paperwork but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c).

Summary of the ANPR and Agency Premises to Justify Streamlining NEPA Rules

The Forest Service is now proposing to revise its NEPA procedures with the goal of increasing the efficiency of environmental analysis and is seeking comments from the public on ways it can achieve these goals. 83 Fed. Reg. 302.

It tries to justify its need to streamline agency NEPA regulations because

- in 2017 more than 50% of the agency’s resources are spent each year to provide the necessary resources for wildfire suppression, resulting in fewer resources available for other management activities such as restoration;
- along with this shift in resources, there has been a corresponding shift in staff, with a 39 percent reduction in all non-fire personnel since 1995; and
- the agency has a backlog of more than 6,000 special use permits awaiting completion, and over 80 million acres of National Forest System land are in need of restoration to reduce the risk of wildfire, insect epidemics, and forest diseases.

Id. The agency’s goal is to complete project decision making in a timelier manner, to improve or eliminate inefficient processes and steps, and where appropriate increase the scale of analysis and the amount of activities authorized in a single analysis and decision, thereby enabling the agency to ensure lands and watersheds are sustainable, healthy, and productive; mitigate wildfire risk; and contribute to the economic health of rural communities through use and access opportunities. *Id.*

The premise is that the current NEPA regulations, last reviewed in 2008, still reflect in part the policies and practices established by the Agency’s 1992 NEPA Manual and Handbook, inferring that they are outdated and in need of updates and reform.

We are asked to provide comments on the following:

- Processes and analysis requirements that can be modified, reduced, or eliminated in order to reduce time and cost while maintaining science-based, high-quality analysis; public involvement; and honoring agency stewardship responsibilities.
- Approaches to landscape-scale analysis and decision making under NEPA that facilitate restoration of National Forest System lands.
- Classes of actions that are unlikely, either individually or cumulatively, to have significant impacts and therefore should be categorically excluded from NEPA's environmental assessment and environmental impact statement requirements, such as integrated restoration projects; special use authorizations; and activities to maintain and manage Agency sites (including recreation sites), facilities, and associated infrastructure.
- Ways the Agency might expand and enhance coordination of environmental review and authorization decisions with other Federal agencies, as well as State, Tribal, or local environmental reviews.

Comments

1. We urge the Forest Service to not reduce or eliminate processes and analysis requirements just to reduce time and cost. This will also result in reducing or eliminating science-based, high-quality analyses, and public involvement; and it will fail to honor agency stewardship responsibilities.

Instead, the Forest Service should focus on the types of activities the public wants or will tolerate and concentrate and increase public involvement and environmental analysis.

While the goal of increasing efficiency is worthy, we believe that the stated premise, that eliminating, reducing, or modifying processes and analysis requirements will somehow result in an increase in project implementation or a reduction in the backlog of vegetation management, is false and will actually lead to the opposite.

It is our experience on the Sequoia National Forest that the agency has already attempted this streamlining process by increasing its reliance on categorical exclusions (CEs), which reduce public involvement opportunities, eliminates crucial environmental analyses, and the consideration of any alternatives. Instead of increasing efficiencies, it has led to more litigation and, ironically, a significant delay in the implementation of many or most actions, which would otherwise have moved through the process quicker with the greater public involvement and accountability through an EA or EIS process. The increased use of CEs in place of a thorough environmental analysis erodes ours and the public's trust in the agency because CEs reduce transparency and accountability, meaningful public participation, and do not achieve NEPA's goal of reducing and mitigating harmful environmental impacts.

Since early-2015, the use of thorough environmental analyses has almost come to a complete halt. We recall only one project on the Sequoia National Forest and Giant Sequoia National Monument that was analyzed and approved using a full Environmental Assessment and Decision

Notice, rather than by CE or Decision Memorandum. That project, titled the **Mill Flat Creek Road Management Project (Hume Lake District, Sequoia NF)**, appears to be one of the few successful projects in the Forest, in which the NEPA process, using an EA and alternatives, sought to decommission or close unneeded roads in the at-risk Mill Flat Creek watershed. In response to public comments during the NEPA process, the Forest Service revised its goals and greatly increased its proposal to decommission 21 miles out of the 86 miles in the project area.

All other projects since that time, including virtually all vegetation management and/or timber sale projects, have been approved using CEs or Supplemental Information Reports (SIRs). Many of those decisions have resulted in NEPA litigation because the Forest's managers attempted to do what the ANPR proposes; that is, they streamlined the processes by reducing public involvement and environmental analysis during the NEPA process, and eliminated the administrative oversight that a more thorough analysis, alternatives, and the objection process could yield. Instead, our only resort for our NEPA and other grievances was litigation, which has resulted in significantly reduced efficiencies for the agency due to the need to respond to legitimate legal concerns raised in federal courts from the truncated NEPA process and elimination of thorough analyses.

We believe the goals espoused by the ANPR will likely backfire and result in reduced efficiencies. Instead, the Forest Service should find ways to build trust and increase environmental analysis by relying less on CEs and more on EAs and EIS,' which require increased public input, the study of alternatives that could result in better decisions, and provide an administrative back-stops through the objection process rather than an immediate need for aggrieved parties to resort to the only other course of action: litigation.

2. Special Concerns Regarding Collaboration

The Forest Service has been organizing and emphasizing local collaboration in its attempts to gather consensus for proposals that we consider highly controversial. This is a poor use of collaboration, and collaboration is not a substitute and must not short-change public involvement through the NEPA Process.

We agree with the sentiments in the following report from the Bolle Center, in which the researchers interviewed participants about collaboration and the NEPA process:

B. Undermining NEPA

A dominant issue identified in the interviews is the impact collaboration has on the NEPA process. A significant amount of respect was given to NEPA and how it can work in federal lands management. NEPA, it was said repeatedly, provides a fair playing field and allows for broad public participation. It is also a process in which scientific analysis—rather than politics—has a better chance of shaping final decisions and outcomes.

Several people made the case that collaboration is “undermining,” “subverting,” and “disempowering” the more democratic NEPA process. A clear contrast was often made

between an exclusive and self-selected set of paid interest groups participating in a collaborative versus a more broad-based and inclusive public participation process governed by NEPA. Several people were particularly concerned about collaborative groups having a disproportionate amount of influence with the Forest Service and that they have unfairly determined the trajectory of forest plans (under revision) and other projects before NEPA begins in earnest.

Consider the following critique:

Indeed, the recent models and experiments in collaboration dealing with public land issues shows it to be undemocratic, controlled by local special interests, and in violation of NEPA. In essence, elite groups of local (or regional) people come together to make decisions, couched as recommendations with the support of Forest Service staff and resources unavailable to ‘ordinary citizens.’ Since these recommendations precede NEPA analysis—and there is an implicit understanding the collaborative group’s recommendation will be implemented—the NEPA process is rendered a pro forma exercise, contrary to the law.

What some of these collaborative groups are purportedly doing, in other words, is undercutting and devaluing NEPA’s traditional scoping process. Similar concerns were also shared about the revision of the Nez Perce-Clearwater Forest Plan in Idaho, which is also being revised pursuant to the 2012 NFMA regulations. These regulations have added a new twist to forest planning by opening up the planning process to public participation before NEPA’s scoping process begins. Some people are concerned that collaborative groups focused on these forest plans will have undue influence over the planning process and give it an “internal momentum” that will be difficult to correct once the wider public becomes involved during NEPA scoping.

The Contested Use Of Collaboration & Litigation In National Forest Management, A Bolle Center Perspective Paper – Martin Nie & Peter Metcalf (October 2015), pp. 19-20 (footnotes omitted) (Attachment A, hereto).

Collaboration, if done at all, can only succeed if it is a part of and not a substitute for NEPA:

Our view on this matter is that collaboration can be legitimately done within the NEPA framework. If done with care, collaboration can help achieve two of NEPA’s core goals: to promote meaningful public participation and to better inform government decisions. A particular benefit of a broad-based collaborative group is the ability to find the so-called “common zone of agreement,” as doing so can help the Forest Service better understand how it can avoid proposals that are likely to trigger controversy and dissent. FN93.

FN93. When it comes to the subject of public participation and NEPA in the academic literature, a long-time criticism has been that agencies have not used public participation at earlier and more formative stages of agency decision making and that the public is often forced to react to agency “purpose and need” statements that do not have widespread public support. See e.g., Ann Steinemann,

“Improving Alternatives for Environmental Impact Assessment,” Environmental Impact Assessment Review 21 (2001), pp. 3-21.

All the better if a collaborative group can shape a proposal so that negative environmental effects are avoided in the first place. As we see it, NEPA is not undermined if collaboration can make a proposal more acceptable to a broad range of interests. That, to us, is the best way to facilitate implementation of NEPA. FN94.

FN94. According to one survey of experts focused on NEPA and infrastructure development, many delays in the NEPA process “can be attributed to a lack of communication and consensus in the pre-NEPA planning stage, administrative process bottlenecks, project management failings, or a lack of capacity among the agencies involved in the process.” Also relevant to national forest management is the experts’ position on the “misdirected response to the threat of litigation” by agencies. The experts consulted for the study observed “that excess documentation of every possible environmental impact, however remote, is not an effective strategy for discouraging or fighting lawsuits. Motivated opponents will sue, no matter the length and exhaustiveness of the environmental documentation [i.e., bullet-proofing]. A more effective strategy would be to compile a thorough administrative record, which documents key decisions in the EIS process and why the decisions were made.” Regional Plan Association, *Getting Infrastructure Going: Expediting the Environmental Review Process* (2012), available at <http://www.rpa.org/library/pdf/RPA-Getting-Infrastructure-Going.pdf>.

That said, the use of collaboration, by itself, in no way justifies a more limited NEPA analysis or the law’s exemption altogether. While we believe collaboration has an important role to play in national forest management, it should not be used to justify the narrowing of other important forms of public participation. NEPA’s scoping process, NFMA’s objection process, and the use of litigation are all important forms of public participation in public lands management.

Bolle Center Report, pp. 27-28 (some footnotes omitted) (Attachment A, hereto).

Our view is that the core environmental laws governing the national forests are more necessary and important today than ever before. And collaboration is no substitute for accountability. In many situations, collaboration can help steer restoration to appropriate places and contexts. But collaboration is not enough. Also necessary is the scrutiny, scientific analysis, and the wider opportunities for public participation afforded by NEPA.

Id., pp. 29-30.

3. Approaches to landscape-scale analysis and decision making under NEPA that facilitate restoration of National Forest System lands.

We believe that the best approach to increasing and facilitating more restoration of National Forest System lands begins with the recognition that there are perverse incentives for logging built into the system, which make restoration projects that include logging, highly controversial and subject to inherent resistance from the public and conservation groups.

To increase real ecological restoration, the focus must be on alternatives to achieving the restoration objectives, which do not involve logging (especially larger trees—over 12 inches dbh) or the give-away or sale of public resources to special interest. The logging and sale of larger trees, which are often greatly discounted to ensure industry interests, does nothing to restore the public's lands or their trust. And with the sale of timber, the Forest Service gets to keep a part of the timber receipts as a perverse incentive for their own budgets, which always makes the sale of timber suspect.

The extreme example is salvage logging, especially after fires, which achieves no restoration purpose, but instead degrades those public lands, which the Forest Service is entrusted to protect. The salvage sale fund pumps most of the timber receipts from logging back into the Forest Service's budgets for more salvage logging, in an antiquated financial system that rewards bad behavior and does little to achieve the goals of NEPA or restoration. Salvage logging, especially after fires, fails to recognize the ecological importance of rare habitat types created after a fire, on which many species depend. This intact and unlogged complex, early-seral habitat is one of the rarest habitat types in most forests because agency managers generally allow salvage logging of this habitat after a fire.

The solution offered after fires by the Forest Service is to increase logging to reduce the fire threat, yet our preliminary research on data from 2000 to 2016 shows very little correlation between logging and reduced fire severity. Data show the role of different management strategies on forest fires. Our preliminary analysis of Cal Fire Inciweb, and real-time local fire data discovered the paradigm that forests burn unless they are logged is false.

Research has established that logging affects the ecosystem by compacting soil, drying forest litter, causing extremely flammable annual grass growth, and changing the seral succession of the forest. Climate change and air pollution are taxing the forests, which are our defense against floods. Standing dead trees allow for some shade to help seedlings survive increased temperatures. The current tree die-off is too new to utilize previous fire data and make assumptions based on anything but anecdotal field observations, but needs to be discussed because the Forest Service is using the tree die-off to accelerate logging.

State and federal forest management agencies claim that logging must increase to reduce the fire danger. Erosion in salvage-logged, fire scarred landscapes causes sedimentation in streams, affecting domestic and agricultural water supplies. Preliminary research using agency data from 2000 to 2016 on acres burned indicated that more acres of forests were burned by wildfires in logged areas than in un-logged forests, so this data must be considered by forest managers to

prevent actions that would harm the forests that provide drinking water to down-stream communities.

We believe that the best approach to increasing and facilitating more restoration of National Forest System lands begins with the recognition that logging increases the fire danger and creates the need for more restoration, more fire suppression funding, more fire-suppression personnel, and fire-suppression activities and causes resource damage through the sale of public resource trees to special interests, reduces public safety, increases forest temperature, reduces water storage capacity in the forest, increases fragmentation, soil erosion, and sedimentation into streams, increases sediment flows into reservoirs that reduce water storage capacity of reservoirs, does nothing to restore the public's lands or trust, and requires treasury funding to defend court challenges by citizens to these ill-advised and unscientific actions and processes by federal forest managers.

With regard to landscape-level analysis of true restoration project, we could support the use of programmatic Environmental Impact Statements to which individual projects are tiered; however, the environmental analyses must be sufficiently rigorous and detailed enough to ensure that individually-tiered projects do not stray from the goals and environmental effects of the landscape-level design. At the larger scale, these types of analyses are performed in Forest Plan revisions, but could also be done at a larger watershed scale to provide more detail and specific outcomes that Forest Plans do not provide. Stakeholders should be identified early for ideas regarding restoration needs and input to ensure restoration goals are clear, and projects that move forward under a landscape-level programmatic analysis should not rely on timber receipts or even logging outfits for implementation.

To effectively plan and implement a landscape-level approach to restoration, we suggest that the Forest Service add requirements or incentives for agency staff to offer additional public participation checkpoints before and after scoping comments are received. Such checkpoints could take the form of meetings or sharing written materials, such as preliminary EAs or other preliminary decision documents (for CEs), for which formal comments are accepted. The goal would be for agency staff to actually consider and incorporate stakeholder input, and then to get feedback to ensure stakeholders have been understood. The goal would be to avoid surprises after experienced stakeholders have reviewed agency NEPA documents in response to their comments, but do not feel their input was considered or fairly characterized.

4. Classes of actions that are unlikely, either individually or cumulatively, to have significant impacts and therefore should be categorically excluded from NEPA's environmental assessment and environmental impact statement requirements, such as integrated restoration projects; special use authorizations; and activities to maintain and manage Agency sites (including recreation sites), facilities, and associated infrastructure.

First, we have great concerns regarding the overuse of Categorical Exclusions or other truncated NEPA reviews of management proposal in the Sequoia National Forest and Giant Sequoia National Monument. We currently have three lawsuits, in which we believe the Forest has

abused its discretion to use CEs or SIRs, and are likely to file a forth case shortly.¹ CEs and SIRs are inappropriate for large timber sale projects (over 250 acres), which require at least an EA, or sometimes an EIS, to adequately analyze environmental effects and study viable alternatives, if used as tools for restoration or other vegetation management actions.

There is, however, a restoration CE that we could support, which stems from one that the agency previously considered, but did not enact:

- **Decommissioning roads**, already identified as no longer needed for access or resource management – decommissioning and restoring roads always results in known cost and environmental benefits by reducing fragmentation, soil erosion, and sedimentation; and because these identified roads are generally already closed to the public, there is little controversy, and a CE would be appropriate.

For Sequoia ForestKeeper,

Sincerely,

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

René Voss – Attorney at Law

¹ See *Sequoia ForestKeeper v. LaPrice*, No. 1:16-cv-00759 (E.D. Cal.), currently under appeal, No. 17-17011 (9th Cir.) (“Frog Project SIR”); *Sequoia ForestKeeper v. Watson*, No. 1:16-cv-01865 (E.D. Cal.) (“Summit CE, Bald Mtn. & Joey SIRs”); *Earth Island Institute and Sequoia ForestKeeper v. Elliott*, No. 1:17-cv-01320 (E.D. Cal.) (“Bull Run CE of 3,500 acre Salvage Sale”); and TBD (“Spear Creek CE of 1,250 acre Salvage Sale”).