

USDA Forest Service  
Washington DC

Via electronic web submission at:

<https://cara.ecosystem-management.org/Public/CommentInput?project=ORMS-2688>

November 16, 2020

Dear Forest Service,

The following are comments from the undersigned on the Forest Products Modernization Batch 1 #ORMS-2688, i. e., proposed timber directives in the 2400 series Forest Service Manual and Handbooks. All of the endorsers follow issues related to timber cutting on national forest lands, and will frequently write comments on individual projects and plans involving timber cutting, as well as on related directives.

We refer to Forest Service Manual (FSM) and Handbooks (FSH) by number as described in the proposed directives.

## **INTRODUCTION**

It would have helped public review of the proposed directives if the Forest Service had clearly marked what was proposed to be changed. This was done for the proposed guidance on e-bikes, for which there was a recent comment period. For the timber directives, a summary of changes was provided, but that was too cumbersome to use over 200 pages of Manual and Handbook language, and it was also imprecise because the exact changes in language were not provided.

Thus we do not know from the directives put out for comment exactly what is in the existing FSM and FSH, and what is proposed to be added, deleted, or modified. Therefore, we refer to “proposed” changes for all the sections we comment on below, while realizing that some of the language we address may be in the existing directives. In any case, we hope the agency will make the requested changes.

Also, there was no hard mail address given, to which interested parties could have mailed comments and/or provided referenced material. There was also no contact person listed for questions or from who to seek further information. This violates agency regulations, which require that notices for commenting on directives must

Provide a physical mailing address and an internet address or similar online resource for submitting comments.

36 CFR 216.3(b)(2)<sup>1</sup>.

We request that the agency correct these flaws in all future proposed changes to the Manual and Handbooks.

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<sup>1</sup> See 83 Fed Reg 13649, March 30, 2018.

## **FOREST SERVICE EMPLOYEES MUST MARK OR DESIGNATE TREES FOR SALE OR DISPOSAL**

Proposed FSM section 2441.03 7a tries to justify the use of designation by prescription:

Designating timber authorized to be cut through a prescription prepared by the Forest Service (DxP) meets the statutory requirements for designation.

However, the law, as amended by the 2014 Farm Bill, requires “designation including marking when necessary” to “be conducted by persons employed by the Secretary of Agriculture” who “shall have no personal interest in the purchase or harvest of the products; and... shall not be directly or indirectly in the employment of the purchaser of the products”. 2014 Farm Bill, section 8303, slightly amending National Forest Management Act, section 14(g).

The proposed Manual provision appears to be designed to allow a contractor to do any marking, as is stated at 2441.11a. (But see below.) That would violate the law as amended, as the contractor would obviously not be a DOA employee and would clearly be employed by the purchaser, and thus have a personal (financial) interest in the harvest of the products. Having the prescription prepared by the agency is not, by itself, sufficient for legal compliance.

Proposed Manual section 2441.11a says that leave tree marking does not require approval of the Forest Service. However, proposed section 2441.12 states “[t]imber marking must be inspected by designated employees of the Forest Service to ensure quality of paint marks and compliance with written marking guides”. This apparent contradiction must be resolved.

The proposed Manual section further states:

Designation by Description (DxD) and Designation by Prescription (DxP) shall not be used in situations where marking cut or leave trees in advance of harvesting is necessary to verify compliance with the description or prescription.

Proposed Manual section 2441.03 6. Why would marking cut or leave trees ever not be necessary to verify compliance with the aims of the sale? To prevent possible timber theft, the Forest Service should always verify that timber cut and removed by the purchaser is only that which s/he is allowed to take.

This section of the Manual must be amended to emphasize that to comply with the law, only DOA employees can designate or mark timber for sale or disposal.

## **THE PROPOSED MINIMUM RATE IS MUCH TOO LOW**

Under proposed Manual section 2431.31 1, the minimum rate would be \$0.25 per hundred cubic feet (CCF). This is likely lower than it has been in the past and is so low that it is close to a free

giveaway. The Forest Service must not give away the timber on lands under its jurisdiction except as allowed under 36 CFR 223.5 through .11. A rate this low undercuts private woodlot and forest owners who wish to sell timber from their lands. The (often) large corporations that purchase national forest timber must be required to pay their fair share.

Indeed, another provision seems designed to discriminate against small operators:

15. Set the minimum charge for small sales at a higher rate than the minimum charge established in FSM 2431.34, if needed, to offset the administrative costs of small sales.

Proposed FSM 2404.15a.

The agency should not discriminate against small operators, as they will often cut trees and manufacture products designed to meet local community needs much better than a large company would do. Smaller companies will do less damage to forest resources, or at least it would occur over a smaller area and be easier to repair. They can more easily be made to comply with law, regulations, and contract terms, as opposed to large companies, which can employ an army of lawyers and lobbyists to fight, or at least delay, required compliance.

## **CEASE ALL OPERATIONS WHEN A SALE IS IN LITIGATION**

Proposed FSM 2432.31a would allow timber sale preparation to continue after litigation is filed, based on six considerations. All of them are subjective, such as

Strength of the project's NEPA analysis and compliance with other applicable laws, regulations and policies, including compliance with Forest land and resource management plans;

Likelihood that a temporary restraining order or a preliminary injunction will be granted.

The Forest Service will of course think that it has produced a good NEPA document in nearly every case and that the project complies with the Forest Plan, but in many cases this is at least arguably not true.<sup>2</sup> In any case, agency personnel are not objective, unbiased judges or a project's NEPA quality. The agency is also not in a good position to judge whether a restraining order or injunction will be issued by the court.

Once litigation is filed on a project, all work to advance that project should cease pending resolution of the litigation. The one exception might be actions necessary to minimize damage from activity that has already occurred, e. g., reducing erosion from a partially constructed road.

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<sup>2</sup> One need only look at the success of litigation over the last 20 years or so on these issues, particularly in Region 1, to see that this is true.

## **DO NOT ALLOW CONTRACTORS OR PURCHASERS TO FORCE CONTRACT CHANGES**

The contracting officer (CO) on his/her own, could overrule the sale administration team:

the Contracting Officer may, as appropriate, change a decision of a contract administration team member upon the request of the Purchaser or upon a determination that the original decision would cause significant environmental impacts. For example, a temporary road is approved in a location precluded from disturbance in the National Environmental Policy Act (NEPA) decision.

Proposed FSM 2450.3 3.

The CO should never change decisions based solely on a request from a purchaser. Negotiations with the purchaser are the responsibility of the sale administration team. See FSH 2409.15 13.21 3. While the CO should consider any input from contractors, any change should be made only after full vetting with the contract administration team. If this language is retained, the agency must, at a bare minimum, state under what circumstance such CO override might be appropriate.

## **SUSPEND OR DEBAR CONTRACTORS AND PURCHASERS WHO PERSISTENTLY OR FLAGRANTLY VIOLATE THE LAW, REGULATIONS, OR CONTRACT PROVISIONS**

Proposed language makes one wonder how any company could be suspended or debarred:

Debarment and suspension actions are not used to punish persons lacking business integrity or honesty or as a means of penalizing a person for illegal activity or for failure to comply with contract terms.

FSH 2409.18a zero code at section 02. A similar statement occurs at proposed FSM section 2433, replacing the last clause above with “means of penalty for prosecution of an illegal activity”.

If these are not grounds for suspension or debarment, then what are? We are not suggesting that contractors be suspended or debarred for minor violation of the law, regulation, or contract terms. However, repeated violations, even if minor, should be grounds for possible debarment or suspension, provided that the Forest Service has warned the offender and s/he has not made any serious attempts to correct the deficiencies.

Under 36 CFR 223.132(a),

The Forest Service shall solicit and consider timber sale bids from and award contracts only to responsible business concerns and individuals. Debarment and suspension by the Forest Service are discretionary actions that, taken in accordance with these regulations, are appropriate means to effectuate this policy.

Thus businesses that have repeatedly shown a lack of integrity in dealings with the federal government should be considered for suspension or debarment.

## **INCLUDE DISCLAIMERS IN TIMBER SALE SCHEDULES**

Under proposed Manual section 2404.16a, Forest Supervisors shall:

3. Establish, maintain, and update the Forest's timber sale implementation schedule including listing proposed sales scheduled in each year for a period of at least five years.

And proposed Manual section 2431.21 has the following requirements for Regional timber sale schedules<sup>3</sup>:

Include in the list detailed information for all sales where site-specific analysis, in accordance with procedures under the National Environmental Policy Act, has been completed (sales scheduled for three years in the future, but at least one year in the future) and more general information for the sales proposed in the final two years of the 5-fiscal-year period.

Timber schedule needs to be published with a disclaimer to avoid potentially misleading the public and prospective purchasers. Since some of the proposed sales on the schedule will not have been through NEPA, the schedule needs to note that the proposals could be altered or even not offered at all pending public input, completion of NEPA, and the subsequent line officer's decision on the project or sale. The schedule should also note that the budget to prepare and offer any project is not assured. And finally, the schedule needs to state that any proposed sales could be altered or dropped based on discovery of threatened, endangered, candidate, sensitive, conservation concern species of their habitat, slippery soils, and/or other factors not foreseeable at the time the schedule is composed.

Language should be added to this Manual section requiring the disclaimers.

## **MISCELLANEOUS**

Proposed FSM sections 2432.4 and 2432.5 refer to a section, 2432.31b, that does not exist., or at least is not in the text circulated for public comment.

## **CONCLUSION**

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<sup>3</sup> Presumably this would be assembled by collating the sale implementation schedules from each unit within the respective region, but this should be made clear.

The proposed directives need modification. The agency should modify the directives as described above and issue a new draft version for public comment. Any such issuance must comply with 36 CFR 216.

Please be sure we are timely informed about any further proceedings on the proposed directives.

Sincerely,

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