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Submitted via public participation portal to: <https://cara.ecosystem-management.org/Public-CommentInput?project=ORMS-1797>

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

Dear Chief Tooke:

February 1, 2018

On behalf of the 83 undersigned organizations and individuals, we are pleased to provide the U.S. Forest Service with the attached comments on the agency's advanced notice of proposed rulemaking (ANPR) regarding National Environmental Policy Act (NEPA) compliance, 83 Fed. Reg. 302 (Jan. 3, 2018). 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. We have extensive expertise regarding the Council on Environmental Quality (CEQ) NEPA regulations, the Forest Service's NEPA regulations and procedures, and the federal body of 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.

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 impact.

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 use of tiering, mitigated findings of no significant impact, appropriate application of existing categorical exclusions, and other tools. Within the scope of this existing authority, we have seen agencies conduct highly efficient yet robust NEPA analysis, and have provided examples in our comments. 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, we believe the primary problems with – and solutions to – the Forest Service's NEPA process lie not with the agency's regulations and procedures but with operational and organizational culture issues that can be addressed within the scope of the agency's existing authority.

We have carefully tracked and engaged in past and ongoing legislative and administrative efforts to modify and weaken NEPA. Based on misperceptions that the law prescribes overly burdensome process, analysis, and public engagement requirements, these efforts generally fail to identify root causes and hence implement meaningful changes to improve federal decision-making. We have learned over the years that attempts to undercut NEPA's democratic principles of government accountability and public engagement often result in more controversy and less trust, collaboration, and efficiency in the long run. To avoid a similar outcome, and in a collaborative spirit of improving the quality of the human environment, as NEPA commands, our comments offer the following recommendations:

- **The Forest Service should conduct an adequate and complete problem analysis, including examining operational hurdles, prior to initiating the rulemaking. The agency should craft a strategy, including an action plan, to address operational and organizational culture issues related to environmental analysis and decision-making.** Accurately defining the problems is a necessary prerequisite to finding effective solutions. The agency's data shows that delays in project implementation are most often the result of operational and organizational culture issues such as staffing, funding, and training.

- **The Forest Service should better utilize programmatic, landscape-scale analysis and decision-making, with tiered project-level analysis and appropriate use of categorical exclusions.** Done correctly, the two-tiered approach facilitates more integrated and collaborative restoration actions that incorporate high-quality ecosystem science and stakeholder input. However, effective use of this two-tiered approach *requires* 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.
- **The Forest Service should continue to invest in more up-front public process, including collaboration, to help improve and expedite project planning and implementation.** The agency should encourage early public outreach and engagement, a proven strategy to reduce controversy and back-end delays, and invest in relevant training. The agency should not consider any changes to its NEPA regulations that would reduce or eliminate public engagement opportunities, even when collaboration has taken place.
- **Prior to creating new authorities, the Forest Service should analyze its current use of existing authorities designed to make environmental analysis and decision-making more efficient, articulate if and how those authorities are being utilized ineffectively, and provide direction to field officers on improved utilization.** The Forest Service enjoys a broad range of existing tools and authorities – including over three dozen categorical exclusions – that allow it to expeditiously implement restoration and other forest management projects. These tools are often under- or ineffectively-utilized. In addition, some authorities (e.g., Farm Bill categorical exclusions, good neighbor authority) are relatively new, and the agency may simply need more time and resources to incorporate them into widespread practice.
- **Regarding categorical exclusions:**
 - **New or expanded categorical exclusions must be predicated on a publicly-available analysis that demonstrates they are needed and appropriate.** The Forest Service cannot presume that a category of action typically documented with an environmental assessment is appropriate for a categorical exclusion, and it must support any new or expanded categorical exclusion categories with meaningful analysis documenting that the category does not have significant individual or cumulative effects. The analysis must be shared with the public for comment.
 - **The Forest Service should explore expanding existing categorical exclusions related to restoration of lands and waters disturbed by unneeded closed roads** to address the agency’s significant backlog of road maintenance needs. Such categorical exclusions would facilitate restoration of aquatic and terrestrial systems.

- **Additional categorical exclusions related to outfitter and guide special use authorizations, if contemplated, must have sufficient sideboards to ensure that the actions are below the significance threshold, and should result in more equitable access and opportunities on our national forests.** Guided access to national forests is an important way to connect people, especially traditionally underserved populations and youth, to our national forests.
- **The Forest Service should not consider expanding the breadth of existing categorical exclusions to enable larger-scale salvage logging.** The science is clear that post-fire salvage logging does not advance ecosystem integrity or restoration, which is a stated purpose of this rulemaking, and instead is a “tax” on the environment. Thus, expanding the acreage for salvage logging projects that can be categorically excluded from NEPA analysis would be completely inappropriate.
- **The Forest Service should not consider further relaxing its definition of extraordinary circumstances.** The extraordinary circumstances direction is integral to appropriate application of existing categorical exclusions. The public needs the assurance that the filter is sufficiently rigorous.
- **The Forest Service should use this rulemaking to clean up remnant inconsistencies with other regulations and federal court decisions.**
- **The Forest Service should retain important and necessary procedural safeguards for roadless and wilderness-eligible lands.** The agency should, however, make targeted changes to the relevant regulatory language to reflect updated terminology, but it should not otherwise alter or weaken that language.

As outlined above, our organizations have extensive experience and expertise with NEPA analysis, implementation, and case law, and would welcome the opportunity to work with the Forest Service to incorporate our best practices into the proposed rulemaking and the broader Environmental Analysis and Decision Making initiative. In the meantime, thank you for considering these comments.

With regards,

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I. Introduction.

Thank you for the opportunity to comment on the U.S. Forest Service's advanced notice of proposed rulemaking (ANPR) regarding National Environmental Policy Act (NEPA) compliance, 83 Fed. Reg. 302 (Jan. 3, 2018). 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. We have extensive expertise regarding the Council on Environmental Quality (CEQ) NEPA regulations, the Forest Service's NEPA regulations and procedures, and the federal body of 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.

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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 use of tiering, mitigated findings of no significant impact, appropriate application of existing categorical exclusions, and other tools. Within the scope of this existing authority, we have seen agencies conduct highly efficient yet robust NEPA analysis and have catalogued examples in Appendix I, primarily at sections 2.a and 2.b. 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 described in detail below, we feel the primary problems with – and solutions to – the Forest Service's NEPA process lie not with the agency's regulations and procedures but with 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, the 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. To avoid a similar outcome, and in a collaborative spirit of improving the quality of the human environment, as NEPA commands, we offer the following comments in response to the ANPR.

II. Accurate and Complete Problem Identification is Required Prior to Initiating Rulemaking.

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. We do not agree, however, that the proposed rulemaking to amend the agency's NEPA procedures is the correct "solution" to the problem. While the Forest Service's approach to NEPA compliance leaves room for improvement, we disagree that the "fault" lies with the agency's NEPA regulations. This rationale has been deployed for decades, yet we are unaware of any data to support it.¹

Instead – and as the agency itself recognizes² – 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. The ANPR notes that "an increasing percentage 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," and that "there has also been a corresponding shift in staff, with a 39 percent reduction in all non-fire personnel since 1995." 83 Fed. Reg. at 302. We agree: the Forest Service has fewer employees generally, and the majority of the agency's already-reduced budget now goes to pay for fire suppression. Both factors necessarily reduce the agency's ability to focus on and complete mission-critical work. Additionally, 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.³ 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 the capacity challenges cited above.

These operational and organizational culture issues – funding, staffing, and training – are wholly unrelated to NEPA. 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

¹ If the agency possesses such data, we request that information be made publicly available prior to the publication of the draft proposed rule.

² USDA Forest Service, *Environmental Analysis and Decision Making: The Current Picture* (Phoenix, AZ, Sept. 2017) (hereinafter Phoenix EADM Presentation).

³ Phoenix EADM Presentation.

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).⁴

Instead, the Forest Service needs to 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. The agency should then craft a strategy, along with an action plan, to address those identified issues, and reflect the strategy in its budget requests and program direction.

Relatedly, litigation is 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. This portrayal is flawed for at least two reasons. First, NEPA is designed to help the agency *avoid* litigation, by conducting transparent, collaborative decision-making processes that result in higher stakeholder satisfaction. While the agency may be tempted to avoid stakeholder complaints by pursuing CEs or limiting projects to an overly narrow scope, that approach often results in poorer quality NEPA analysis that is more vulnerable to litigation. Instead, as described in detail in the following section, the agency should focus its analysis and decision-making on a landscape-scale and over a longer time periods (i.e., programmatic analysis).

Second, the contention 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, and even fewer projects are enjoined by court order such that project implementation does not occur:⁵

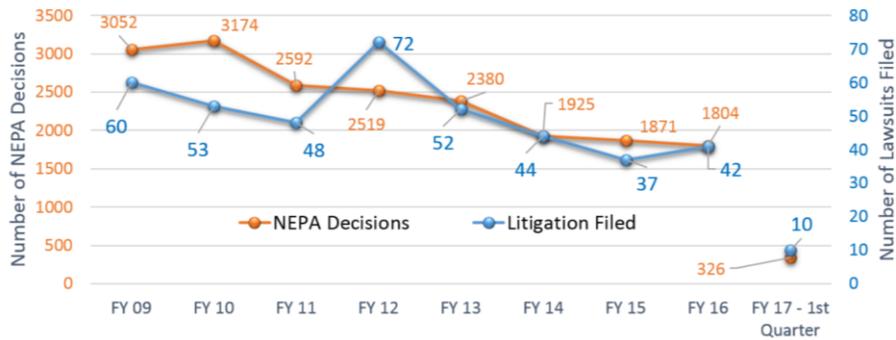
⁴ See also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (decisions that “entirely fail to consider an important aspect of the problem” are arbitrary and capricious); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (record must demonstrate that the agency considered the relevant factors).

⁵ Phoenix EADM Presentation.

**Percentage of NEPA Decisions Challenged by Region
FY 2009 – FY 17, 1st Quarter**

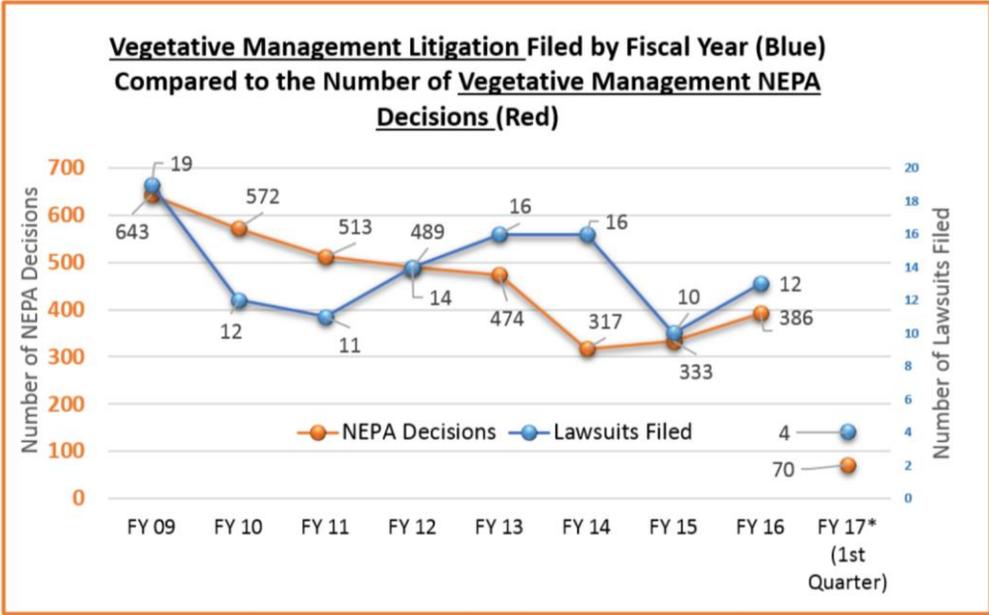
Region	No. Lawsuits	No. NEPA Decisions	% NEPA Challenged
1	91	2112	4%
2	33	2440	1%
3	46	1600	3%
4	51	1784	3%
5	64	2629	2%
6	55	2512	2%
8	26	3091	<1%
9	18	2755	<1%
10	10	730	1%

FS Land Management Litigation Filed by FY vs. # of Agency NEPA Decisions



% 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%



Scholarly and governmental analysis similarly concludes that litigation, while often acutely felt by those involved, has little commensurate effect on project implementation.⁶ Moreover, in our

⁶ See 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*

observation and experience, agency attempts to “bulletproof” 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 address analysis requirements to develop projects that are better for the environment and more effective at achieving project objectives.

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.

For the forgoing reasons, **we urge the Forest Service to conduct an adequate and complete problem analysis prior to commencing the rulemaking process and publishing a draft proposed rule to amend its NEPA procedures. The analysis should clearly articulate operational hurdles to effective environmental analysis and decision-making, and the agency should craft a strategy, including an action plan, for addressing them.**

III. Existing Authorities Allow for Efficient Environmental Analysis and Decision-Making and May Be Under-Utilized.

The stated goal of the proposed rule-making is to increase the efficiency of environmental analysis in order “to complete more projects needed to increase the health and productivity of our national forests and grasslands.” 83 Fed. Reg. at 302. The ANPR fails to address, however, the significant number of existing authorities that allow the Forest Service to expeditiously implement projects, often with expedited or reduced NEPA analysis. For instance, the following, non-exhaustive chart catalogues the existing streamlining authorities that we are aware of that apply to various restoration activities.

Major Forest Service Authorities to Expedite, Facilitate, and Streamline Project Planning and Associated Environmental Analysis Related to Vegetation Management, Restoration, and Fuels Reduction (not exhaustive)

Authority	Description	Purpose
Administrative Categorical	At least seven CEs apply to activities related to vegetation management, wildlife management, and specific restoration activities that have	Eliminate the requirement to prepare an EA or EIS for project categories that the agency has

(2010); Jacqueline Vaughn & Hanna J. Cortner, *George W. Bush’s Healthy Forests: Reframing the Environmental Debate* (2005). Articles attached as Exhibit 1.

Exclusions, 36 C.F.R. § 220.6(d) and (e)	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.	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 scales.
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.	Expedite decision-making and subsequent implementation of certain hazardous fuel reduction projects.
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.	Eliminate need for environmental analysis for specific types of insect & disease remediation projects. Expedites project development and implementation.
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	Enhance the efficiency and effectiveness of the consultation

	requirements for activities conducted in support of the National Fire Plan.	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 restoration footprint and otherwise increase the pace of project implementation. The Forest Service has, in some cases, made innovative and effective use of existing authorities. For

example, the Crawley Branch project on the Grandfather District of the Pisgah National Forest was a pilot project for the 2014 Farm Bill insect and disease treatment authority, and it enjoys strong support from the Grandfather CFLR. *See* App’x 1 at § 3.a. for additional detail. However, it generally seems as if 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. *See* App’x 1 at § 3.c. In addition, some authorities (e.g., Farm Bill CEs and good neighbor authority) are relatively new, and the Forest Service may simply need more time and resources, including training, to incorporate them into widespread practice.⁷

Prior to creating new authorities, the Forest Service should analyze its current use of these and any other authorities that are designed to make environmental analysis and decision-making more efficient. The analysis should document the frequency with which each tool is used, identify trends around the use of each tool (e.g., used more or less frequently for certain types of projects or in certain geographies) and cite the rationale for using or not using the tool. It should identify where and how current tools can be better utilized, and where certain tools may be being used inappropriately. It should also identify gaps, if any, where the existing authorities do not permit efficient environmental analysis and decision-making, and it should clearly articulate a rationale for any proposed alterations or additions to existing authorities. Finally, where the Forest Service finds that existing CEs are under-utilized or inappropriately utilized, the agency should provide direction to field officers to address the identified issues.

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

The ANPR specifically seeks comment on approaches to landscape-scale analysis to increase the pace and scale of restoration on the national forests and grasslands. While the objective of enhanced restoration is not appropriate for every type of ecosystem across the National Forest System,⁸ we generally agree that the Forest Service can better employ programmatic, landscape-scale analysis both to attain restoration objectives where ecosystems are degraded and to streamline other project-level decision-making. In general, we believe that programmatic, landscape-scale analysis with tiered project-level analyses of site-specific impacts – or, in appropriate circumstances, use of categorical exclusions – 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. Projects can then be implemented with

⁷ 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) (Exhibit 2).

⁸ For example, not all ecosystems are outside of their natural ecological condition, and do not require upscaled management intervention. *See also* Forest Service Manual 2020 (“not all National Forest System lands require restoration”).

an environmental assessment, or in certain circumstances, a categorical exclusion (categorical exclusions are discussed in more detail in the following section). This front-loaded approach in the long run will result in smarter management strategies, more public buy-in, and better consideration of cumulative impacts. Other large landscape-level analysis, such as that required by the Collaborative Forest Landscape Restoration Program, can also be used to more efficiently analyze the potential impacts of restoration projects.

Beyond the obvious benefits of strategizing restoration at multiple scales and better aligning analysis to scale, the two-tiered 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. For example, the Cherokee National Forest is currently working on an innovative programmatic project as a bridge from the plan's broad restoration goals to concrete site-specific action. The project will identify common departed conditions in need of vegetation management as "covered activities," avoiding duplicative analysis in future projects. *See App'x 1 at § 2.a.* for additional detail.

We are concerned, however, that the agency's current use of landscape-scale analysis and tiering is under-utilized and often ineffective at achieving the benefits described above. The approach is not encouraged or emphasized in the Forest Service's current policies. In fact, the term "tiering" does not even appear in the current regulations. Moreover, in our experience the agency is often highly reticent to include meaningful and enforceable restrictions and set affirmative priorities in programmatic analysis and decisions that will guide project-level decision-making. This reticence leads to projects that create a risk of surprise, controversy, and delay from litigation. *See App'x 1 at § 2.c.* Including enforceable side-boards 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.

Perhaps no opportunity for providing meaningful programmatic direction and associated environmental analysis is more significant than land management planning. And, 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.

The May 2016 draft plan for the Sierra National Forest provides an example of this problem.⁹ There the Regional Forester identified sixty-four species of conservation concern (SCC)¹⁰ – many of which are negatively impacted by vegetation management and other restoration-focused activities. The draft plan included species-specific plan components for only six of those SCC. For the remaining fifty-eight, the Forest Service deferred development of conservation measures to project-level planning. The draft plan provided only high-level plan components,¹¹ and no additional direction to guide the development of conservation measures at the project development stage. This approach ensures that, prior to authorizing restoration or other forest management activities, more robust project-level environmental analysis will be necessary to comply with NEPA and relevant species protection laws. In contrast, the George Washington National Forest, under the 1982 planning rule, used an efficient combination of strategies, including management area allocations and coarse- and fine-filter protections, to ensure that very few projects will require considerable additional analysis.

Another important aspect of programmatic NEPA analysis that can help streamline project implementation is meaningful consideration of climate impacts. While the majority of Departments in the Trump Administration continue to systematically dismantle important policies aimed at mitigating climate impacts and enhancing climate adaptation and resilience, 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

⁹ The Sierra National Forest is currently preparing a revised draft plan and draft EIS.

¹⁰ SCC list available at

http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/3403_FSPLT3_3096353.pdf.

¹¹ For instance, the draft plan included a standard requiring “consideration” of special habitats during project design (p. 32) and guidelines that projects should protect at-risk species and their habitat by “considering” them early in environmental planning processes and incorporating “design features, mitigation, and project timing considerations” (pp. 97-98).

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. Programmatic analysis of climate impacts and contributions also provides an important opportunity to develop appropriate climate adaptation and mitigation measures that will help confine project-level impacts and analysis. For instance, programmatic analysis of climate adaptation needs could help set priorities and identify best management practices for aquatic restoration, including removal of under-sized culverts and other mechanisms to stormproof aging infrastructure.

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.

V. Existing Categorical Exclusions Provide Significant Authority to Conduct Streamlined NEPA Analysis.

A. Governing Law & Policy.

The CEQ NEPA regulations permit agencies to identify categories of actions “which do not individually or cumulatively have a significant effect on the human environment” and therefore may be “categorically excluded” from the requirement to prepare an environmental assessment or environmental impact statement under NEPA. 40 C.F.R. § 1508.4. These categorical exclusions (CEs) do not apply, however, where there are “extraordinary circumstances in which a normally excluded action *may have* a significant environmental effect.” *Id.* (emphasis added). Agency procedures must identify such extraordinary circumstances. *Id.* Where an action is categorically excluded, agencies are free to prepare an EA even though they are not required to do so. *Id.* §§ 1508.4, 1508.9.

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. § 1.13, 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 actions, including numerous restoration activities and special use permitting.

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 1027-1028.¹² The determination of significance must be made in light of the same context and intensity factors that are implicated in evaluating individual actions. *See id.* at 1030-1031. The agency cannot evade such analysis by asserting that the analysis of cumulative impacts is impractical or infeasible, because 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 1030.¹³ 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. *See id.* 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.”).

B. New or Expanded CEs for Vegetative Restoration are Generally Unnecessary.

We are aware that the Forest Service is keenly interested in identifying new or expanded CEs to encompass vegetation management and other restoration-focused activities that are typically evaluated using an environmental assessment (EA). While we generally support the use of appropriately-tailored CEs, we believe that new or expanded CEs for vegetation management are generally unnecessary and urge the Forest Service to tread very cautiously for the following reasons.¹⁴

¹² *See also id.* at 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”).

¹³ *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.’”).

¹⁴ We also refer you to the comments in the beginning of this letter about operational barriers to efficiency, and the need to accurately define those barriers before contemplating changes to the regulatory framework.

First, we are concerned that the Forest Service rationale that a CE may be appropriate for the significant portion of its vegetation management projects that are analyzed using EAs fails to appreciate the difference between an EA and a CE. 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 proceed 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. Because mitigation measures are used to reduce a project’s impacts below the significance threshold, there is little factual basis to conclude that the scope of work proposed in a mitigated EA is appropriate for a CE. CEs are intended to be “a category of actions which do not individually or cumulatively have a significant effect on the human environment.” 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. This is particularly so where mitigation measures are often developed through engagement with the public during preparation of the EA – a process which would not occur with use of a CE.

Significant issues addressed through project refinement, alternatives analysis, 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. *See* App’x 1 at § 1.a. for examples. 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. *See generally* App’x 1 at § 4. The haphazard approach to road-building in previous eras is the 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).

Moreover, in our experience, 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 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 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. *See* App’x 1 at § 1.b. for examples. 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.

Second, 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 vegetation management projects of significant size or scope would have no significant individual or cumulative effects. Indeed, CEs for larger-scale restoration projects could very well overwhelm smaller national forests, particularly those in the east. The examples provided in Appendix 1 illustrate, among other things, the different scales at which projects begin to cause significant impacts in different ecoregions. Moreover, given the vast dearth of monitoring that occurs post-project, we would be surprised to learn that the agency has carefully analyzed this issue. To justify a determination that a scope of 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, and urge that one be completed before proposing any new vegetation management CEs.

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.

Third, it appears that the Forest Service may be employing circular logic to justify increasing the pace and scale of forest management (or restoration) by using CEs. 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” projects, 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 above.

Fourth, the Forest Service's existing CEs already encompass many restoration activities. Some are oriented at vegetation management (*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); HFRA § 404 (CE for silvicultural assessments and treatments)), while others address 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)). As with programmatic analysis and tiering, the Forest Service should ensure it is effectively utilizing these existing authorities before contemplating new CEs.

Finally, we strongly caution the Forest Service against expanding the breadth of existing CEs to enable larger-scale salvage logging. The science is clear that post-fire salvage logging does not advance ecosystem integrity or restoration.¹⁵ Given that a stated purpose of this rulemaking is to advance restoration, it would be inappropriate to expand the acreage for salvage logging projects that can be completed using a CE. Moreover, there is no evidence to suggest that salvage logging at larger scales will not individually or cumulatively have significant impacts on the human environment.

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. The Forest Service already has ample authority – via programmatic analysis and tiering, existing CEs, and other streamlining authorities – to conduct efficient environmental analysis for vegetation management and other restoration activities. 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. The Forest Service should not consider expanding the breadth of existing CEs to enable larger scale salvage logging.

¹⁵ See, *e.g.*, David L. Peterson, James K. Agee, Gregory H. Aplet, Dennis P. Dykstra, Russell T. Graham, John F. Lehmkuhl, David S. Pilliod, Donald F. Potts, Robert F. Powers, and John D. Stuart, 2009. *Effects of Timber Harvest Following Wildfire in Western North America*. General Technical Report PNW-GTR-776. March 2009; Jonathan R. Thompson, Thomas A. Spies, and Lisa M. Ganio, 2007. *Reburn severity in managed and unmanaged vegetation in a large wildfire*. Proceedings of the National Academy of Sciences. Published online June 11, 2007; D. C. Donato, J. B. Fontaine, J. L. Cambell, W. D. Robinson, J. B. Kauffman, 3 B. E. Law, 2006. *Post-Wildfire Logging Hinders Regeneration and Increases Fire Risk*. In *Science*. Vol 359, Issue 6374. January 2006. Available at: <http://science.sciencemag.org/content/suppl/2006/01/10/1122855.DC1>. Articles attached as Exhibit 3.

VI. CEs Related to Permitting for Outfitters and Guides and Recreational Infrastructure.

The ANPR asks for feedback specifically on:

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 . . . special use authorizations; and activities to maintain and manage Agency sites (including recreation sites), facilities, and associated infrastructure.

83 Fed. Reg. at 302. In this section, we provide feedback to this query for CEs specific to outfitter and guide permitting and recreation infrastructure and facilities.

If the agency is contemplating a new CE related to recreation infrastructure maintenance and management or special use authorizations, the agency must carefully identify the ways in which the existing CEs are deficient. If the language of the CEs is adequate but the application of the CEs has been deficient, then the agency should address the application problem. If the agency determines that the existing CEs are deficient, we urge it to consider amending them before creating entirely new CEs. A few surgical amendments to the existing language might address these deficiencies with minimal disruption and less risk of unanticipated consequences. The agency should only explore creating an entirely new CE if the existing CEs cannot be modified to address agency needs, or if the subject matter of the desired CE is entirely new. In short, the key threshold step is to carefully identify the problem the agency is trying to solve, and then provide as narrow a fix as possible. As discussed above, the agency must undertake the requisite analysis to support the creation of appropriate new CEs, consistent with the requirements articulated by the Ninth Circuit in *Sierra Club v. Bosworth*, 510 F.3d 1016.

A. Outfitter and guide permitting.

Outfitting and guiding is an important service that helps visitors get out into nature, learn outdoor skills, and connect with forest resources. People who are cautious about getting outdoors in our national forests, especially for longer trips or those requiring specialized outdoor skills, look to professional outfitters and guides to assist them. In addition, organizations classified as outfitters and guides that serve youth and traditionally underserved populations by taking them into (and teaching them about) National Forest System lands are crucial to ensuring that forests are, and will continue to be, enjoyed and cherished by future generations. Guided visitation can often be less damaging than dispersed visitation (for the same amount of people doing the same activity) because the outfitter is bound by permit conditions that may not apply to the general public.

Outfitters and guides operate under outfitter-guide recreational special use authorizations. These authorizations fall into two categories: priority use and temporary use. Priority use permits are generally for ten years. Temporary use permits are issued on an annual basis and authorize the short-term use (180 days) of National Forest System lands for up to 200 service days. Temporary permits are currently most useful to outfitters and guides proposing one-time uses of Forest Service lands and also to smaller or start-up outfitters and guides seeking to break into the

system and obtain service days. They may also be useful to priority use permitted outfitters and guides that would like to add service days to their operation (for instance, in response to changes in weather, or other factors that affect demand).

Applying and receiving a priority use permit requires a detailed application and usually an environmental assessment. This makes sense given the potential effect on the human environment, length of permit, and scope of operation. However, the Forest Service recognized that the issuance of temporary permits, or the renewal or replacement of existing priority use authorizations, under certain conditions could appropriately be done under CEs, hence expediting permitting and increasing guided access opportunities to national forests and associated benefits. These existing CEs are:

- Section 220.6(d)(8) covers “[a]pproval, modification, or continuation of minor, short-term (1 year or less) special uses of NFS lands. Examples include, but are not limited to . . . (i) Approving, on an annual basis, the intermittent use and occupancy by a State-licensed outfitter or guide.”
- Section 220.6(d)(10) covers “[a]mendment to or replacement of an existing special use authorization that involves only administrative changes and does not involve changes in the authorized facilities or increase in the scope or intensity of authorized activities, or extensions to the term of authorization, when the applicant or holder is in full compliance with the terms and conditions of the special use authorization.”
- Section 220.6(e)(15) covers “[i]ssuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are not changes to the authorized facilities or increases in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization.”

Taken together, these CEs cover short-term permits for minor intermittent uses, permit replacement without modification, and permit renewal without modification. They do not cover issuance of new permits that are for more than one year.

Regarding the second and third CEs, we suspect that in practice the Forest Service’s interpretation of what constitutes an “administrative change” may be inconsistent. For instance, we know of one instance in which an outfitter wanted to shift kayak service days to paddleboard service days but was told he could not do so. **We therefore recommend that the Forest Service explore whether a clarification about what constitutes an administrative change in the context of the second and third CEs is necessary, and provide that clarification if it is.**

If the agency contemplates a new or expanded CE related to outfitter and guide permitting, the Forest Service must, of course, satisfy the requirements for new and expanded CEs described earlier in this letter. Further, any exploration of a new or expanded CE should start with an evaluation of problems related to permit backlogs, and whether operational issues rather than the absence of a CE are primarily to blame. While we recognize that providing guided services to the public, especially traditionally underserved populations and youth, is important, we also are cognizant that shifts in how specific trails and areas are used can at times be controversial and

deserve a public conversation before long-term outfitting is permitted. That said, we offer two major ideas for your consideration.

First, we believe programmatic NEPA and tiering are underutilized in this context of special use administration. We believe **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.**¹⁶ These reviews could be used to establish overall activity and service day limitations for a forest, district, or zone, which in turn would put the forest in a better position when special permit applications are submitted. When an application is submitted, the forest would be able to tier – or potentially categorically exclude – its environmental review of the specific proposal to its programmatic analysis. This would simplify the review process for specific proposals, increasing efficiency and lowering the costs of processing special use applications. It would also produce better, more consistent environmental reviews and public engagement.

Second, **if the agency feels that there is a compelling need for a new or expanded CE related to issuing outfitting and guide permits, it must include the following sideboards necessary to ensure that excluded actions individually and cumulatively will not have significant impacts:**

1. A CE should only apply to permit applications for 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;
2. A CE should only apply to uses that are the same or substantially similar to an existing permissible use of the covered area;
3. A proposed use must be consistent with applicable plans (e.g., land management plan, programmatic recreation plan, or wilderness management plan);
4. A CE should only be used for proposed uses 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
5. A CE should only be used to issue permits of limited duration.

In furtherance of marrying these two preceding recommendations, the agency should seriously consider crafting any contemplated CE so that it could only be invoked under the umbrella of a programmatic analysis for special use authorizations. This would have the effect of encouraging programmatic recreation planning, a sorely lacking function currently within the agency.¹⁷

¹⁶ For high recreation forests, these reviews could be integrated into the land management plan.

¹⁷ For example, a CE could be made available for certain classes of activity that have been determined in planning or a programmatic analysis to not have impacts greater than ordinary use for a discrete area within the plan or analysis area.

B. Recreational infrastructure and facilities.

With respect to recreation infrastructure and facilities, the agency currently has CEs that appear to be broad enough to cover a wide range of activities. These include:

- Repair and maintenance of roads and trails (36 C.F.R. § 220.6(d)(4)).
- Repair and maintenance of recreation sites and facilities (36 C.F.R. § 220.6(d)(5)).
- Construction and reconstruction of trails (36 C.F.R. § 220.6(e)(1)).

We do not see a need for broader CEs related to maintenance and repair (although note that we do see a need for expedited decommissioning of unneeded roads and trails, as discussed in the next section, which would have the practical effect of freeing up more funds for maintenance and repair of needed infrastructure).

VII. The Forest Service Should Consider an Expansion to CE#20 to Facilitate the Restoration of Lands and Waters Disturbed by Unneeded Closed Roads.

The ANPR asks for feedback specifically on:

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; . . . and activities to maintain and manage Agency sites (including recreation sites), facilities, and associated infrastructure.

83 Fed. Reg. at 302. While our organizations are skeptical that new or expanded CEs for vegetation management activities are appropriate given the array of current authorities, including CEs, designed to expedite NEPA processes for those projects, we are interested in seeing the agency explore expanding the scope of the CE at 36 C.F.R. § 220.6(e)(20) to include the restoration of lands occupied by system roads that have been closed to public motorized use. This expansion would advance the pace of restoration and address the Forest Service's exorbitant and ever-growing road maintenance backlog. Restoring the lands and waters disturbed by these roads is one of the most significant and enduring restoration actions the agency can take.

A. Background.

1. Roads in the National Forest System.

The National Forest System has about 370,700 miles of system roads and at least another 60,000 miles of non-system routes. That is nearly eight times the length of the entire U.S. Interstate Highway System and enough to circle the earth at the equator fifteen times. About 18% of the system roads are passable by a car, while 55% are high clearance, and 27% or closed to motorized travel. USDA Forest Service 2016. 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 2016, the national forest road system had a 3.2-billion-dollar

maintenance backlog. *Id.* 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 actually listed under the Clean Water Act as impaired because of road-derived sediment pollution. These roads also fragment wildlife habitat, reduce wildlife connectivity, and facilitate the spread of non-native, invasive species.

2. Road Policy Framework.

Current Forest Service direction for the management of the road system is to “maintain an appropriately sized and environmentally sustainable road system that is responsive to ecological, economic, and social concerns.”¹⁸ In doing so, forests must use a science-based analysis to “identify the minimum road system [MRS] needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands,” with the MRS 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.* The aforementioned analysis is referred to as a travel analysis and the resulting report, which has now been completed by a majority of forests, is referred to as a travel analysis report (TAR).

3. Adverse environmental effects associated with the Forest Service road system.

The scientific literature, including numerous Forest Service reports and studies, document the many environmental problems attendant to the Forest Service’s large and under-maintained road system. For a general summary, we recommend that you consult the Forest Service Technical Report by Gucinski *et al.* entitled “Forest Roads: A Synthesis of Scientific Information,” which summarizes and describes the science as of 2001 regarding the effects of roads on the landscape. In a 2010 technical report, the Forest Service summarized some of the problems associated with the road system;

¹⁸ 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 Foresters *et al.* re Travel Management Implementation (Dec. 17, 2013) (Exhibit 4).

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 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.

Gucinski *et al.* 2010 (emphasis added). The Forest Service also summarizes these effects in the final rule for CE#20, and provides a list of select research papers and supporting documents for the establishment of CE#20. 78 Fed. Reg. at 56157, Appendix I.¹⁹

Exhibit 5 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. Exhibit 5 at 2-4, 6-8. 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. *Id.* at 4-8. Roads also facilitate increased 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. *Id.* at 9.

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. *Id.* at 9-11; *see also* USDA Forest Service 2011 (National Roadmap for Responding to Climate Change recognizes importance of reducing fragmentation and increasing connectivity to facilitate climate change adaptation). 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. *Id.* Many National Forest roads, however, were not designed to any engineering standard, making them particularly vulnerable to these climate alterations. And even those 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. USDA Forest Service 2010.

¹⁹ Available at:

https://www.fs.fed.us/emc/nepa/restorationCE/includes/USFS_CE_Supporting_Statement_Appendix%20I.pdf.

B. Actions required to restore lands and waters impacted by unauthorized and closed system roads are similar, and do not shift access.

Most scientific research and agency publications do not distinguish between the impacts of non-system routes and system routes. This is because the character of, the impacts from, and the restoration strategies applied to unauthorized and authorized roads are substantially similar. See Exhibit 5 for a summary of these impacts.²⁰ For example, National Forest System roads 219 A and 905 as shown in Figure 1 are system roads closed to public motorized use in the Cibola National Forest. It is indistinguishable in character from the non-system road shown in Figure 2 also located in the Cibola National Forest. In both cases, decommissioning will include activities such as ripping the compacted surface, placing brush across the entrance, and re-establishing natural contour and stable drainage patterns.

In addition, in the case of both unauthorized and closed system roads, motorized access is prohibited, and the act of restoring the lands and waters disturbed by the roads does not alter access. 36 C.F.R. §§ 212.50(a) & 261.13. As the Forest Service rightly noted, “the majority of issues associated with road and trail restoration activities are related to access and travel management policies, rather than from implementing restoration projects.” 78 Fed. Reg. at 56160.

C. Expanding the scope of CE#20 would increase the pace and scale of restoration on national forests and create efficiencies in environmental analysis.

The National Forest System contains thousands of miles of system roads that are closed to public motorized use, no longer needed, and should be fully decommissioned to reduce impacts.²¹ In recent years, the Forest Service commendably has launched several initiatives designed to “right-size” the road system. These initiatives involve a combination of identifying unneeded and environmentally problematic roads for decommissioning, closing unneeded routes to public motorized use, and identifying roads for decommissioning in project-level decisions. Examples of these initiatives with road decommissioning elements are provided in Exhibit 6.²² In some

²⁰ In fact, during the rulemaking process for CE#20, respondents asked that the Forest Service expand the proposed CE to include closed system roads; in response, the Forest Service notably did not argue that the impacts of unauthorized and system roads fall into different categories and instead simply stated that the agency felt that the requested expansion was “at this time [] unnecessary and would divert public and agency focus from the Agency’s continued implementation of the 2005 Travel Management Rule.” 78 Fed. Reg. at 56159.

²¹ In 2017, The Wilderness Society aggregated data offered in forest-level TARs in 68 of the 86 forests in Forest Service Regions 1, 2, 4, 5, 6, and 8 (these were the TARs available online in these regions as of August 2017) and found that the Forest Service across these regions identified about 10% (about 37,000 miles) of its system roads as likely unneeded for future use.

²² The Forest Service utilizes an array of strategy documents and project level plans to document and design needed projects for restoring lands and waters occupied by closed roads that are unneeded and/or environmentally problematic. These include: Travel Management Plans in which forests establish designated systems for motorized vehicle use; TARs in which forests identify unneeded roads for decommissioning or conversion to trails; Watershed Restoration

forests, there are hundreds of miles of roads waiting for decommissioning or some type of restoration work to prevent further environmental degradation, prevent illegal use, and reduce the financial burden of the current road system. Enabling this work to be done through a CE would speed up the pace of restoration and enable the Forest Service to address the impacts to aquatic and other resources that these roads continue to cause.

In the final rule that established CE#20, the Forest Service stated that “[t]he primary economic effects of the CEs for soil and water restoration activities are changes in costs of conducting environmental analysis and documentation.” 78 Fed. Reg. at 56161. By expanding CE#20 to include closed system roads, the Forest Service would reduce its costs significantly for this work and could direct saved funds to additional on-the-ground restoration projects.

D. Recommended language for a modified CE#20.

We recommend the following modifications to CE#20 (additions in bold, italics; deletions in strike-through text):

(20) Activities that restore, rehabilitate, or stabilize lands occupied **by system roads and trails that are closed to public motorized use or by unauthorized** roads and trails, ~~excluding National Forest System Roads and National Forest System Trails,~~ to a more natural condition that may include removing, replacing, or modifying drainage structures and ditches, reestablishing vegetation, reshaping natural contours and slopes, reestablishing drainage-ways, or other activities that would restore site productivity and reduce environmental impacts.

Additionally, we recommend the Forest Service modify example (i) as follows:

Decommissioning a road ~~that is no longer a National Forest System Road~~ to a more natural state by restoring natural contours and removing construction fills, loosening compacted soils, revegetating the roadbed and removing ditches and culverts to reestablish natural drainage patterns;

VIII. The Forest Service Should Eliminate Categorical Exclusions that the Courts Have Invalidated or Called into Question.

The Forest Service should use the proposed rulemaking to address inconsistencies between its existing CEs and federal court decisions. First, the Forest Service Handbook properly strikes the hazardous fuels reduction activities CE, 36 C.F.R. § 220.6(e)(10), the use of which has been enjoined by a federal court pending compliance with Ninth Circuit direction in *Sierra Club v. Bosworth*, 510 F.3d 1016. *Sierra Club v. Bosworth*, No. 04-2114 (E.D. Cal. Nov. 25, 2008). **The**

Action Plans, in which forests identify necessary projects for the restoration of a priority watershed including road decommissioning; Access and travel management plans, in which forests identify roadwork projects, including decommissioning, necessary to move towards an appropriately sized transportation system; and integrated restoration plans, in which forests identify integrated restoration projects necessary for the integrated restoration of an identified planning area.

hazardous fuels reduction activities CE still appears in the Forest Service regulations at 36 C.F.R. § 220.6(e)(10) and should be removed.

Second, **the two CEs related to land management planning, 36 C.F.R. §§ 220.6(d)(2)(vi) & (e)(16), should be removed.** First, the CE for establishing planning procedures is inconsistent with a federal court decision overturning the use of a categorical exclusion for the Bush Administration’s revision of the Forest Service planning regulations. *See Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp. 2d 1059, 1085-1090 (N.D. Cal. 2007). The Forest Service’s 2012 planning rule was subject to intensive NEPA analysis through an EIS. Given the significant procedural and substantive requirements that the National Forest Management Act requires the planning regulations to address to guide the development, revision, and amendment of land management plans for all national forest system units, any significant amendment or revision to the planning regulations is inappropriate for a CE. Thus, **the CE for establishing procedures for amending or revising forest land and resource management plans, 36 C.F.R. § 220.6(d)(2)(vi), should be repealed.**

The CE for land management plans, plan amendments, and plan revisions, *id.* § 220.6(e)(16), should also be repealed – or, at a minimum, significantly narrowed to encompass only minor amendments – because it is inconsistent with the 2012 planning rule, which requires preparation of an EIS for new plans and plan revisions, *id.* § 219.5(a)(2)(i), and preparation of an EIS, EA, or CE for plan amendments, depending on the scope, scale, and likely effects of the amendment, *id.* § 219.5(a)(2)(ii). More generally, both existing CEs are inconsistent with utilizing programmatic, plan-level analysis to enhance project-level NEPA compliance and efficiency.

IX. The Forest Service Should Not Relax The Extraordinary Circumstances Definition.

While it is not explicitly referenced in the ANPR, we are aware that the Forest Service is interested in revising its extraordinary circumstances guidance as part of this rulemaking effort. 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). This 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.

Currently, 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.

We suspect the current language may present some challenges in employing a CE for a management action, given the myriad of “resource conditions” that are ever-present on national forests and grasslands. Indeed, National Forest System lands are brimming with valuable, important, and sometimes rare resources. 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 Forest Service should not consider any regulatory changes that would further relax the extraordinary circumstances regulation. If the agency does contemplate any changes, it must provide a rationale for why the existing regulation is problematic – and ensure that any proposed changes are adequate to identify when application of a CE may be inappropriate.

Indeed, if the Forest Service intends to propose new or expanded CEs, then it will likely be required to enumerate even more extraordinary circumstances. Each CE contains its own limits on the intensity of the action, but context is limited by the extraordinary circumstances list. The greater the intensity of actions covered by CEs, the more important it will be to differentiate between contexts in which those CEs may have significant impacts. Otherwise, the first CE project proposed in the wrong context will make the entire CE vulnerable to challenge.

We look forward to providing additional comment on this topic, should the Forest Service move forward with amending this aspect of its NEPA regulations.

X. Forest Service NEPA Procedures Must Ensure Proper Consideration of the Character and Future Status of Roadless and Wilderness-Eligible Lands.

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. 36 C.F.R. § 220.6(b)(1)(iv). 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].” *Id.* § 220.5(a)(2).

IRAs are an administrative designation that applies to the roadless lands protected under the Roadless Area Conservation Rule, 36 C.F.R. part 294. Colorado and Idaho have developed their own rules to protect inventoried roadless lands within their states. 77 Fed. Reg. 39576 (July 3, 2012) (Colorado Roadless Rule); 73 Fed. Reg. 61456 (Oct. 16, 2008) (Idaho Roadless Rule). Those designated areas are now properly referred to as Colorado Roadless Areas and Idaho Roadless Areas, respectively. 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, 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.

Roadless Area Conservation Rule, Final Environmental Impact Statement, Summary, p. 17.²³ To properly reflect the current status of administratively designated and protected roadless areas, references to IRAs in the agency's NEPA regulations and procedures should be amended to encompass Colorado Roadless Areas and Idaho Roadless Areas as well.

Potential wilderness area is a term defined in the 2007 version of the Forest Service's land management planning handbook, FSH 1909.12, ch. 70, addressing the wilderness evaluation process. In short, PWAs were the term utilized in the 2007 handbook 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 referred to as “areas that may be suitable for inclusion in the National Wilderness Preservation System.” 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.

Like IRAs, areas identified through the Chapter 70 process provide myriad social and ecological benefits, including habitat for at-risk species, provision of clean air and water, relatively undisturbed and intact ecosystems, climate refugia, and outstanding opportunities for backcountry recreation. However, 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).

We understand that the Forest Service is interested in removing the PWA language from its NEPA regulations. While we support making clarifications to the regulatory language to reflect relevant terminology, it would be inappropriate for the Forest Service to simply remove the procedural protections for PWAs without replacement language to ensure that those and other comparable wilderness-quality lands receive adequate NEPA analysis for proposed management actions that could impact their wilderness characteristics and related social and ecological values. It is not the label, but the areas' (1) generally undeveloped character and (2) eligibility for future designation or other protected status that matters. Simply declaring that development of such areas is no longer significant would be arbitrary, absent a showing that the characteristics that qualified areas for PWA status are somehow no longer worthy of additional consideration – something we do not believe the Forest Service can demonstrate. Indeed, federal courts have

²³ Available at

<http://www.fs.usda.gov/roaddocument/roadless/2001roadlessrule/finalruledocuments>.

repeatedly held that roadless and wilderness-quality lands warrant higher NEPA scrutiny due to their unique attributes. *E.g.*, *Lands Council v. Martin*, 529 F.3d 1219, 1230-1232 (9th Cir. 2008) (citing earlier cases and explaining that roadless area “attributes, such as water resources, soils, wildlife habitat, and recreation opportunities, possess independent environmental significance” and that such areas are also “significant because of their potential for designation as wilderness areas under the Wilderness Act of 1964”). 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, as Congress has explicitly recognized. *E.g.*, Eastern Wilderness Areas Act, Public Law No. 93-622 (1975).

It is important that the Forest Service recognize that “PWA” is not a vestigial term. Numerous forests that conducted planning under the 2007 version of Chapter 70 have PWAs – and will continue to have them until their next plan revision. In fact, as the agency recently recognized in connection with the plan revision for the George Washington & Jefferson National Forests, 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. *See* USDA Forest Service, George Washington & Jefferson National Forests, Resolution of Appeal Agreement (July 22, 2015) (Exhibit 7). 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. 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.

In short, 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. Without that safety valve to account for significant impacts to wilderness-eligible and roadless lands, application of existing CEs or development of new CEs for vegetation management or other activities will be vulnerable to legal challenge. 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.

We anticipate that the Forest Service may take the position that regulatory protections for PWAs or their equivalent can be eliminated because current Forest Service policy is explicit that inclusion in the wilderness inventory and evaluation “is not a designation that conveys or requires a particular kind of management.” FSH 1909.12, ch. 70, § 71. This rationale confuses requirements under the 2012 planning rule (i.e., do wilderness inventory areas require special treatment during planning?) with requirements under NEPA (i.e., what are the agency’s analysis and procedural obligations with respect to proposed projects that may degrade wilderness characteristics?). Sections 220.5(a)(2) and 220.6(b)(1)(iv) are relevant only to the latter; they do not require a particular kind of management for any areas, whether classified as IRAs, PWAs, or a part of any other inventory of wilderness-quality lands. Instead, the current regulations help direct what type of analysis should precede project-level decision-making in those areas, and, as described above, provide necessary safeguards for PWAs. Consistent with the change in Forest Service terminology, those procedural protections should be expanded to encompass all lands that the Forest Service has inventoried and identified as potentially eligible for future inclusion in the National Wilderness Preservation System.

The Forest Service should amend the phrase “inventoried roadless area or potential wilderness area” in sections 220.5(a)(2) and 220.6(b)(1)(iv) as follows: “inventoried roadless areas, Colorado Roadless Areas, Idaho Roadless Areas, or areas that the Forest Service has identified as potentially eligible for future inclusion in the National Wilderness Preservation System.” The agency should otherwise retain those provisions as written to ensure adequate procedural protections of important roadless and wilderness-quality lands.

XI. Consultation and Collaboration.

Consultation with expert federal agencies and stakeholder collaboration are two required elements 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 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. These are not “NEPA problems” and cannot be addressed by changes to the Forest Service’s NEPA regulations.²⁴

The Forest Service increasingly enhances its capacity to implement land management through collaboration with stakeholders. Indeed, the agency’s 2012 planning rule emphasizes the role that collaboration and public engagement play in national forest and grassland management. However, often collaboration – particularly initially – takes substantial investments of time and energy (and sometimes funding) before it can “bear fruit” and result in an increase in the pace,

²⁴ Some of our organizations have worked with the Forest Service and consulting agencies to secure additional funding to support up-front consulting agency participation in the planning process, and remain willing to work with the agencies in the future to meet this need.

scale, and quality of restoration or other management activities. Committing to this initial investment can result in more efficient project planning and implementation. In other words, to improve and expedite project planning and implementation, effective collaboration necessarily requires stakeholders to “go slow to go fast.”

Although many of our organizations participate in collaborative efforts on our national forests and grasslands, we all note that stakeholder collaboration is *never* a substitute for full NEPA compliance. Importantly, not all interested members of the public are able to participate in collaborative efforts, and they are entitled to provide input that is meaningfully considered on those projects. Disclosure and analysis of environmental consequences, consideration of a robust range of alternatives, and public comment on agency actions is essential not only for NEPA compliance, but also for fostering an informed public and open democracy. Collaboration is one way to engage stakeholders in democratic decision-making, but it is by no means the only way.

XII. Public Engagement and Collaboration.

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 the NEPA process commences. *See* App’x 1 at § 2.b. 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.²⁵ 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.

Consequently, we urge the Forest Service to robustly engage the public not only in this rulemaking effort, but also in its land management decision-making processes, especially large-scale endeavors, and implementation actions. This engagement will take time, money,

²⁵ 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.

and effort on the part of the Forest Service, but we believe the investment will ultimately result in more streamlined and effective environmental analysis, decision-making, project implementation, and adaptive management. 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.

Due to the importance of public engagement and transparency, the Forest Service should not consider any changes to its NEPA regulations or procedures that would reduce or eliminate public comment periods. Reducing or eliminating public comment periods would not meaningfully streamline the time for project or permit approvals. Minimal comment periods of at least 90 days for a draft EIS and at least 30 days for other NEPA evaluations constitute only a small portion of the overall time required to reach a Record of Decision (on average 1,373 days in 2016) or Decision Notice (on average 730 days in 2016). In addition, reducing those comment periods would likely slow the NEPA process on the back-end with increased objections, appeals, and legal challenges.

Reducing public comment periods would frustrate the public's ability to fully understand the impacts of a proposal, and impair the ability of the public to provide meaningful comment to agency decision-makers. Members of the public that care about public lands may not realize the full extent of the impacts of a proposal until the agency discloses them in a draft EA or EIS. Moreover, evaluating those impacts once they are disclosed requires a comment period of adequate length to allow the public to understand and respond to the technical analyses set out in the draft document and often highly technical appendices. This often requires obtaining the assistance of experts in diverse and highly technical fields, compiling data and sources cited by the agency, preparing or reviewing GIS information, and coordinating with other interested members of the public, groups, and volunteers. In some cases, it may require obtaining additional documents from the agency through Freedom of Information Act requests.

Thus, any attempt to reduce comment periods would curtail the ability of the public to engage in the activities that are necessary to provide meaningful comments in response to the agency's draft analysis of alternatives and impacts. Further, where lengthy timelines for project approvals are the result of understaffing and underfunding, as the ANPR indicates, reducing public comment periods would clearly be an inappropriate and ineffective route for trimming project timelines.

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 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 we 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.

XIII. Adequate Agency Training.

As discussed above and acknowledged by the Forest Service, agency personnel who deal with NEPA compliance are given inadequate tools for their job: the agency has lacked systematic NEPA training since the 1990s. What training does exist is haphazard at best and inaccurate at worst, as many agency personnel resort to querying colleagues about NEPA compliance and often receive erroneous “advice” as a result. Consequently, it is not surprising that the Forest Service struggles with consistent and accurate application of the law.

Therefore, **we support your decisions to reallocate Washington Office staff to forests to assist with NEPA compliance and to implement rigorous and regular NEPA training for relevant staff.** Many of our organizations employ or retain NEPA practitioners with decades of experience in NEPA compliance, and many are regular NEPA litigants. As a result, we have a unique perspective on how, when, and why the Forest Service goes astray in NEPA compliance, and we would welcome the opportunity for a technical discussion regarding how the agency can do better.

XIV. Conclusion.

Our organizations thank the Forest Service for the opportunity to provide comments on the ANPR. 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 at this time. Instead, we believe that Forest Service resources may be 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.

Attachments

Appendix I: Examples of NEPA Outcomes

- Exhibit 1: 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)
- Exhibit 2: Forest Service Briefing Paper on the Status of Implementing 2014 Farm Bill Insect and Disease NEPA Tools (Mar. 2017)
- Exhibit 3: David L. Peterson, James K. Agee, Gregory H. Aplet, Dennis P. Dykstra, Russell T. Graham, John F. Lehmkuhl, David S. Pilliod, Donald F. Potts, Robert F. Powers, and John D. Stuart, 2009. *Effects of Timber Harvest Following Wildfire in Western North America*. General Technical Report PNW-GTR-776. March 2009; Jonathan R. Thompson, Thomas A. Spies, and Lisa M. Ganio, 2007. *Reburn severity in managed and unmanaged vegetation in a large wildfire*. Proceedings of the National Academy of Sciences. Published online June 11, 2007; D. C. Donato, J. B. Fontaine, 2 J. L. Cambell, W. D. Robinson, J. B. Kauffman, 3 B. E. Law, 2006. *Post-Wildfire Logging Hinders Regeneration and Increases Fire Risk*. In Science. Vol 359, Issue 6374. January 2006. Available at: <http://science.sciencemag.org/content/suppl/2006/01/10/1122855.DC1>.
- Exhibit 4: 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 Foresters *et al.* re Travel Management Implementation (Dec. 17, 2013).
- Exhibit 5: The Wilderness Society. 2014. *Transportation Infrastructure and Access on National Forests and Grasslands: A Literature Review*.
- Exhibit 6: Examples of Forest Service initiatives that identify, recommend or decide road decommissioning.
- Exhibit 7: USDA Forest Service, George Washington & Jefferson National Forests, Resolution of Appeal Agreement (July 22, 2015).
- Figure 1: Photographs showing closed system roads on the Cibola National Forest. Photographs taken 2012.
- Figure 2: Photographs showing unauthorized road on the Cibola National Forest. Photographs taken 2012.

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