

VIA FEDERAL E-RULEMAKING PORTAL

August 1, 2019

NEPA Services Group
Attn: Amy Barker
USDA Forest Service
125 South Street
Suite 1705
Salt Lake City, UT 84138

**RE: Proposed Rule, National Environmental Policy Act (NEPA)
Compliance , 84 Fed. Reg. 27544 (June 13, 2019) 36 CFR 220 RIN 0596-
AD31**

Dear Ms. Barker:

We submit the following comments on the proposed rules captioned above. On behalf of the members and affiliates of the Federal Forest Resource Coalition (FFRC) and the undersigned organizations, we strongly support the proposed rules, and urge the Forest Service to incorporate additional provisions that we believe will significantly strengthen them.

The Federal Forest Resource Coalition (FFRC) is a national, non-profit trade association, representing purchasers of Forest Service and BLM timber from 36 states, collectively representing over 650 companies and over 390,000 employees. Our members purchase, harvest, transport, and process Federal timber resources into products that millions of Americans use every day, including lumber, panels, paper, and biomass energy. We provide jobs in rural communities where the Forest Service is frequently the largest landowner.

As noted in the Background section of the Proposed Rule, the Agency's NEPA handbook was last comprehensively revised in 1992, more than 25 years ago. In the intervening quarter century, a litigation-driven approach to NEPA has led the Forest Service to engage in exhaustive NEPA analysis which has restricted the Agency's ability to eliminate or prevent damage to the environment, which is one of the key purposes of the underlying NEPA statute (Sec. 2, 42 U.S.C. 4321). In the intervening years, timber outputs from the National Forests declined from over 5.7 Billion Board Feet (in 1991) to just

over 1.5 Billion Board Feet in 2002; a dramatic decline of more than 73 percent. Harvest levels have yet to fully recover to the roughly 6.2 Billion Board Feet called for in current National Forest Plans.

As a result of this dramatic decline in harvest activity, the National Forest System has suffered unprecedented declines in forest health resulting from overstocking, stand stagnation, and drought stress. In 1999, the Forest Service said that about 39 million acres of National Forest lands were “at high risk from catastrophic fires.” Today, that total has skyrocketed to over 89 million acres.

During this same period, the Forest Service, under the 1992 Manual and Handbook, became steadily less efficient at moving needed land management projects through the NEPA process. The time required to prepare an environmental impact statement (EIS) has risen from 817 days to over 1,300. The number of days required to complete an environmental assessment (EA) increased from 594 days to 730 days. While the Council on Environmental Quality Guidance says that EIS’s should “normally” be less than 150 pages, and EA’s should generally be between 10 to 15 pagesⁱ, the Forest Service is notorious for producing EIS’s that run several hundred pages, with associated documentation running into the thousands of pages.

According to the Government Accountability Office (GAO), between 2008 and 2012 the Forest Service produced more than twice as many EISs as the Army Corps of Engineers or the Federal Highway Administration, and nearly two and a half times as many as the Bureau of Land Management. According to that same study, it takes the Forest Service longer to complete all types of NEPA analyses than other Federal agencies.ⁱⁱ

It is worth noting that the Forest Service, while doing this exhaustive NEPA analysis, is usually proposing management of renewable forest and range resources on lands that have been designated either as suited for timber production, or on which timber production is allowed under existing forest plans (which themselves go through extensive public involvement, including NEPA). These management projects are not generally conducted on the extensive network of “protected” (i.e. – reserved from management) lands under its jurisdiction.

There is no question that the Forest Service has statutory obligations to use NEPA to analyze and disclose the impacts of proposed projects. The modernization effort found in the proposed rule is necessary and perhaps overdue.

We submit the following comments on the Proposed Rule:

220.3: Definitions:

Adaptive Management: We strongly support the inclusion of the new term “adaptive management.” (Proposed Rule, 84 Fed. Reg. 27552 220.3). We look forward to engaging with the development of Forest Service handbook guidance to ensure this approach can be implemented by line officers.

Condition-based management: We strongly support the proposed inclusion of “condition-based management” (Proposed Rule, 84 Fed. Reg. 27552 220.3). There are many routine forest management activities – including activities intended to implement land use allocations in National Forest management plans (“forest plans”) – which are well understood. We look forward to reviewing additional guidance on this subject in changes to the Forest Service handbook, as the Proposed Rule does not – in our view – provide enough information for this approach to be readily usable by on the ground managers.

Environmentally Preferable Alternative: We support the proposed change which defines this as the alternative that will best promote the national environmental policy as expressed in NEPA Section 101 (42 U.S.C. 4321) (Proposed Rule, 84 Fed. Reg. 27552, 220.3). We object, however, to the inclusion of the sentence which alleges that the environmentally preferable alternative is ordinarily the alternative “which causes the least harm”. With this addition, the Forest Service introduces ambiguity and attempts to introduce – in however a nuanced fashion – a “precautionary” approach which is bound to cause confusion and which has no basis in statute. The idea of “harm” isn’t well defined here and ignores the fact that the Forest Service must always view forest conditions over the long term, or at least over the term of the forest plan. In the short-term, a clear cut or heavy shelterwood harvest may reduce the use of a specified area by species who prefer closed canopy forests for a part of their life cycle. However, over the reasonably foreseeable future, a project like this will likely provide habitat that would not otherwise be available for other species which prefer open stand or non-forest conditions. The term “harm” here doesn’t help guide decision makers or

show how a project meets either its own purpose and need or longer-term forest plan objectives. It also feeds into inaccurate perceptions of active forest management as being equivalent to “harm.” This phrase should be dropped from the final rule.

220.4 General Requirements: The Purpose and Need statement for all projects should recognize the forest plan land use designations that apply in the project area. When conducting projects on National Forest acres that are designated in current forest plans as suited for timber production, the Forest Service should acknowledge that fact in the Purpose and Need Statement and in the discussion of the proposed project. The National Forest Management Act of 1976 (P.L. 94-588) requires the Forest Service to identify National Forest acres which are suited for timber production. These acres make up roughly 24 percent of the National Forest System. The level of scrutiny on these lands should be appropriate and reflect the fact that they have already been determined to be suited for commercial activity in the Forest Plan – and the expectation of harvest impacts on the landscape should be built into the NEPA analysis.

All Purpose and Need statements should recognize the importance of maintaining local forest products infrastructure. Without this infrastructure, none of the treatments the Forest Service wants to accomplish would be possible. These statements should also recognize the importance of designing projects that are economically feasible.

The Purpose and Need for projects on General Forest land (known as “Matrix lands” in areas covered by the Northwest Forest Plan) should include managing these lands to meet the sustained-yield requirements of the Multiple Use Sustained Yield Act and the adopted Land and Resources Management Plans.

Purpose and Need statements should not require an ecological objective; they simply must accurately describe the aims of the project. Accuracy and clarity in the economic or other objectives of a project will build public trust, whereas inaccurate (or debatable) claims of ecological benefit diminish it. Such transparency is more in line with NEPA, which is a procedural statute requiring disclosure of the effects of a proposed action.

Purpose and need statements should use easily measured metrics, such as acres of early seral habitat created or acres reduced to acceptable basal area.

We strongly support the Proposed Rule's provision which make it clear that responsible officials have the obligation to lead the NEPA process (Proposed Rule, 84 Fed. Reg. 27552; 220.4(c)(1)). Currently, many Forest Service NEPA analyses are staff led, without active engagement from the Forest Supervisor or District Ranger. Emphasizing the active leadership of line officers enhances accountability. We're hopeful that further revisions to the handbook will substantively connect completion of NEPA to accomplishment of forest plan objectives. Accountability for management of the NEPA process will not be meaningful absent accountability for meeting forest plan objectives – including timber targets and management of suitable timberlands.

The General Requirements section of the rule would be the appropriate place to incorporate existing CEQ guidance and regulation on the appropriate scope and scale of NEPA analysis required on specific projects. While the section-by-section says that the Proposed Rule “outlines an approach for right-sizing” (Proposed Rule, 84 Fed. Reg. 27545) public engagement, we believe that closer adherence to existing CEQ guidance and regulations will result in faster, easier to understand processes that will lead to better management outcomes on the ground.

Specifically, the March 6, 2012 Memorandum from the White House Council on Environmental Quality, cites the following CEQ regulations which are pertinent to the scoping process: 40 CFR 1501.7(a)(3) allows an agency to “use scoping to identify and eliminate from detailed study issues that are not significant or have been covered by prior environmental review.” Other sections of CEQ regulation specifically allow agencies to establish page (40 CFR 1501.7(b)) and time (40 CFR 1501.8) limits for NEPA reviews and completion of NEPA processes.

40 CFR 1500.5(e) establishes “appropriate and predictable time limits” and “promotes efficiency of the NEPA process;” 40 CFR 1506.10 40 and 1501.8, “encourage Federal agencies to set appropriate time limits for individual actions, however, and provide a list of factors to consider in establishing timelines.” The Proposed Rule should incorporate those regulations at 220.4(d), much like 220.4(e) incorporates other specific CEQ regulations (Proposed Rule, 84 Fed. Reg. 27553). The Forest Service should look closely at

establishing specific timelines for particular type of analysis. We look forward to discussing these issues as the Forest Service issues handbook and manual guidance.

We strongly support the addition of both the Determination of NEPA Adequacy (220.4(i), (84 Fed. Reg. Proposed Rule 27553) and Adaptive Management. As with many other sections, we look forward to engaging in the development of Forest Service Handbook directives to provide further guidance on these topics. We strongly urge the Forest Service to encourage the use of existing forest plans in making these determinations, and to allow maximum geographic flexibility in making determinations of NEPA adequacy. As we noted in our comments on the ANPR last year, land use allocations are made in forest plans and forest plan revisions and amendments, and should be acknowledged and incorporated into project level NEPA analysis. Projects conducted on suited timberlands should recognize that harvest on these acres has already been considered in the forest plan development process, which also goes through NEPA review and consultation with other agencies. We are concerned that the Adaptive Management proposed regulation is too prescriptive, using the term “must” where “should” would be more appropriate.

We also urge the Forest Service to incorporate a provision specifically recognizing that a project can go forward if the responsible official determines that the project still meets the purpose and need statement, even if a changed condition exists in all or part of the project area. This could be considered part of adaptive management (220.4(j), Proposed Rule 84 Fed. Reg. 27553)

We are strongly supportive of the addition of paragraph 220.4(k) regarding condition based management (Proposed Rule 84 Fed. Reg. 27553).

We applaud the changes proposed to clarify that the mere presence of specific resource conditions does not preclude the use of a Categorical Exclusion, whether promulgated by the Forest Service or enacted into law by Congress (Proposed Rule, 84 Fed. Reg. 27554, 220.5(a) through (f)). The Proposed Rule rightly requires both a cause and effect relationship and a likelihood of substantial adverse effects. Moreover, it should be noted that short-term effects are frequently more than compensated for by long-term benefits, such as the ability to return forests to more natural stocking levels and fire regimes.

Section 220.4(c)(6) of the Proposed Rule appears to require ultimate decisions be “encompassed” within the range of alternatives for NEPA analysis. This is overly restrictive and should be changed to acknowledge that an ultimate decision is appropriate so long as it is the logical outgrowth of the alternatives considered.

FFRC strongly applauds and supports the inclusion of the proposed new Categorical Exclusions, particularly the one established for forest restoration (Proposed Rule 84 Fed. Reg. 27557 220.5(e)(26)). As the supporting statements note, the process of promulgating administrative Categorical Exclusions is established in both the NEPA statute itself and implementing regulations (Section 102 of the NEPA (42 U.S.C. 4332) and the CEQ’s implementing regulations (40 CFR 1500-1508). The proposed restoration CE was based on careful analysis of 68 randomly selected projects from over 718 projects completed under an Environmental Assessment (EA) from fiscal years 2012 to 2016.

We note that the supporting documents provided for the restoration Categorical Exclusion (CE) provide strong documentary backing for adoption of this important new tool. As noted, the term “restoration” is defined within agency guidance documents as “the process of assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed. Ecological restoration focuses on reestablishing the composition, structure, pattern, and ecological processes necessary to facilitate terrestrial and aquatic ecosystems sustainability, resilience, and health under current and future conditions.”

One example, gleaned from the supporting documentation, helps illustrate the need for the new Categorical Exclusion for restoration. The French Fire burned in California’s Sierra National Forest in the summer of 2014. The Forest Service proposed restoration work after the fire, which burned over 13,000 acres, on about 5,900 acres total. In order to accomplish this project, the Forest Service spent about 1 year, producing a 303 page Environmental Assessment, as well as over 16 specialist reports and appendices which totaled over 1,300 additional pages. Keep in mind that CEQ’s guidelines state that EA’s should generally be no more than 15 pages, and Environmental Impact Statements (EIS) can range up to 300 pages “for proposals of unusual scope or complexity.” This was a restoration project being conducted on 0.5 percent of the Sierra National Forest.

In the final rule, the Forest Service should clarify the relationship of subsection (H) to the CE established by this section (220.5(e)). Timber harvest, particularly harvests designed to accomplish specific forest plan objectives such as stocking levels or creation of early seral habitat, should be viewed as a restoration activity and be allowed on the full complement of acres covered by this Categorical Exclusion.

The proposed new CE for roads (Fed. Reg. 27557, 220.5(e)(24) allowing the construction or realignment of up to 5 miles of NFS roads, reconstruction of up to 10 miles of NFS roads and associated parking lots, opening or closing an NFS road, and culvert or bridge rehabilitation or replacement along NFS roads is an important new tool. We support its inclusion in the final rule. This CE was based on a review of previously implemented actions. The Forest Service should ensure that State partners are aware of this CE when implementing projects authorized under Good Neighbor Authority (16 USC 2113a et. seq.)

The categorical exclusions established in 220.5 should be prefaced with a statement that categorical exclusions should be the first choice for responsible officials and should be used whenever possible. Generally, responsible officials should be reminded to comply with the directives found in Executive Order 13855 (dated December 21, 2018) when developing their approach to NEPA compliance.

We strongly support the direction provided for alternatives in Section 220.7 regarding preparation of Environmental Impact Statements (Proposed Rule, 84 Fed. Reg. 27558 – 27559). As noted, the action alternatives considered should “meet the purpose and need of the proposed action.” We would urge inclusion of language referencing forest plan land management objectives – not simply restrictive land use designations – including suitability for timber production and creation of early seral habitat in the development of alternatives. Alternatives should also meet project objectives as efficiently as possible: for instance, if a project proposes to reduce basal area to a certain level, alternatives which unnecessarily delay accomplishing that level or which would require multiple entries (and likely development of future NEPA analysis) should not be considered.

Regarding both Section 220.6 (Environmental Assessment and decision notice) and Section 220.7 (Environmental Impact Statement and Record of

Decision) (Proposed Rule 84 Fed. Reg. 27558 – 27559), the Forest Service should incorporate existing CEQ guidance explicitly into its own NEPA procedures. Specifically, 40 CFR 1502.7 states that adequate EIS's "should normally be less than 150 pages" and that EIS's may range up to 300 pages "for proposals of unusual scope or complexity." Specifically including these existing regulations, which were reiterated by CEQ in March of 2012, will help establish a culture of efficiency and focus in NEPA work within the Forest Service. Likewise, both both EA's and EIS's, the Forest Service should specifically cite and incorporate CEQ's regulations requiring NEPA documents be written in plain language (40 CFR 1502.1).

In addition to this, the Forest Service should place a firm page limit of 15 pages on EAs for projects on Condition Class 2 or 3 lands in order to expedite action. Chapter 40 of the Forest Service's NEPA Handbook (FSH 1909.15) repeatedly uses terms such as "brief," "briefly," and "concise" in the discussion of EAs, as well as references CEQ advice "that [EAs] should be concise and normally not exceed 15 pages" (which is noticeably less constraining than CEQ's actual advice "to keep the length of EAs to not more than approximately 10-15 pages").ⁱⁱⁱ There are numerous examples of EAs that are hundreds of pages in length. The Forest Service must emphasize the appropriate purpose, level of detail, and length of EAs.

Proposed Additions to the Final Rule:

While FFRC supports the Proposed Rule per the forgoing comments, we believe that additional CE's should be promulgated, and some existing CE's expanded, in order to give front line forest managers the ability to begin making headway in addressing the myriad forest health crisis facing the National Forest System. We suggested these in our comments on the ANPR for this rule, but we reiterate them here for emphasis:

Create a managed-stand thinning CE: Develop a Categorical Exclusion that permits thinning treatments up to 5,000 acres on previously managed forest stands less than 80-years old.

Clarify the existing road maintenance CE: Amend 36 C.F.R. 220.6(d)(4) to make clear that this CE includes removal of hazard trees within striking distance of National Forest System roads.

Expand existing thinning CE: Amend 36 C.F.R 220(e)(12) (Proposed Rule 84 Fed. Reg. 27556) to increase allowable acreage of live tree harvest from 70 acres to 250 acres and increase the allowable length of temporary road construction from ½ mile to 2 miles.

Expand Existing Post-Fire Recovery CE: Amend 36 C.F.R. 220.6(e)(11), the existing CE for post-fire rehabilitation activities of up to 4,200 acres, and to explicitly include a broader range of activities.

Expand existing salvage CE: Amend 36 C.F.R. 220.6(e)(13) (Proposed Rule, 84 Fed. Reg. 27556), to increase allowable acreage of salvage from 250 acres to 1,000 acres and to increase the allowable length of temporary road from ½ mile to 3 miles.

Expand Roadside Salvage CE: The Forest Service should expand the road side salvage CE, 36 C.F.R. 220.6(e)(13) (Proposed Rule 84 Fed. Reg. 27556), to be of unlimited size in order to protect campground, roads, and other infrastructure from dead and dying hazard trees following a wildfire or other catastrophic event.

Allow Use of State Exemptions Where Available: Where available, allow the Forest Service to utilize exemptions and expedited procedures found in State law or regulation that would expedite action to recover fiber, restore, and reforest lands damaged during wildfires.

Conclusion: We appreciate the opportunity to comment on these important draft rules. We look forward to commenting further on proposed changes to the Forest Service Handbook and other directives that will give forest managers clearer guidance on how to implement some of the new tools provided by the Proposed Rule.

The final rules should take this opportunity to incorporate existing CEQ guidance and regulations which emphasize timeliness, concision, and clarity as key elements of the NEPA process, emphasizing those elements and making them explicit as the dominant approach to NEPA compliance at the Forest Service. The Forest Service should create an expectation that streamlined approaches to NEPA are preferred under existing laws and regulations.

By more fully and explicitly incorporating existing CEQ guidance and regulations into the final NEPA rules as outlined above, and strengthening the rule by adding additional CE's and expanding existing ones, the Forest Service can and will accomplish more needed management, on more acres, more quickly.

Sincerely,

William G. Imbergamo
Federal Forest Resource Coalition
2000 Pennsylvania Ave., NW
Suite 3000
Washington, DC 20006
202-518-6380
bimbergamo@ofwlaw.com

On behalf of our members and the following undersigned organizations:

American Forest Resource Council
American Loggers Council
Allegheny Hardwood Utilization Group
Associated Contract Loggers – Idaho
Associated Oregon Loggers
Black Hills Forest Resource Association
Colorado Timber Industry Association
Forest Resources Association
Great Lakes Timber Professionals Association
Hardwood Federation
Idaho Forest Group
Intermountain Forest Association
Michigan Forest Products Council
Minnesota Forest Industries
Minnesota Timber Producers Association
Montana Logging Association
Montana Wood Products Association

ⁱ [“Memorandum for Heads of Federal Departments and Agencies: Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act, 6 March 2012.”](https://ceq.doe.gov/guidance/guidance.html) <https://ceq.doe.gov/guidance/guidance.html> (accessed January 10, 2018)

ⁱⁱ National Environmental Policy Act: Little Information Exists on NEPA Analyses: U.S. Government Accountability Office, Report to Congressional Requesters, April 2014. GAO-14-369

iii FSH 1909.15 – National Environmental Policy Act Handbook, Chapter 40. “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations – Question 36. 46 FR 18026, -01 (Mar. 23, 1981).