

## Forest Service Draft NEPA Rule Would Sharply Curtail Environmental Analysis and Public Review of Forest Management

On June 13, 2019, the Forest Service released a [proposed rule](#) amending its National Environmental Policy Act (NEPA) procedures.<sup>1</sup> The public has 60 days – until August 12, 2019 – to comment on the proposed rule. Information about the proposed rule, how to comment, and upcoming informational webinars are available on a [Forest Service webpage](#). The agency is also revising its directives, Forest Service Manual 1950 and Handbook 1909.15, to reflect the proposed rule, with the proposed directives to be published in the Federal Register at an unspecified later date for public review and comment.<sup>2</sup>

According to the Forest Service, the proposed rule is designed to “increas[e] the pace and scale of work accomplished on the ground” – with a focus on removing hazardous fuels – by “complet[ing] project decision making in a timelier manner.”<sup>3</sup> The proposal, however, is much broader than its stated goals, exempting unqualified commercial timber harvest and a breathtaking range of other forest management activities from environmental analysis or public review via a suite of new and expanded categorical exclusions and other mechanisms that fundamentally undermine NEPA’s bedrock principles of government transparency, accountability, public involvement, and science-based decision-making. Rather than focusing on and addressing the actual causes of agency inefficiency in environmental decision-making (e.g., funding, staffing, training, and turnover), the Forest Service has targeted America’s “magna carta” of environmental laws with its radical proposal. Ironically, the result is likely to be increased litigation and poorer management of our shared national forests, as corners are cut, laws are broken, and the public is cut out of decision-making.

### The proposed rule would:

- **Adopt seven new categorical exclusions (CEs) and expand two existing CEs<sup>4</sup>** to shield from any environmental review or public process a wide array of projects. The Forest Service estimates that up to ¾ of decisions that currently receive public input could proceed under CEs in the future.<sup>5</sup> These include, but are not limited to:
  - Broadly defined “ecosystem restoration and/or resilience activities” on up to 7,300 acres, including commercial logging of up to 4,200 acres, as long as it includes at least one restoration add-on (e.g., replacing a culvert to restore fish passage). The CE could be used to authorize up to 6.6 square miles of logging with *no* public input or environmental analysis;
  - Converting illegal off-road vehicle (ORV) routes to official Forest Service System roads or trails – contrary to decades of Forest Service travel and transportation management policy designed to make more ecologically and fiscally sustainable the agency’s bloated transportation system and ensure that any ORV route designations “minimize” impacts to resources and conflicts with other recreational uses; and
  - Construction of up to 5 miles or reconstruction of up to 10 miles of Forest Service System roads – also contrary to long-standing policy that the agency is no longer in the business of building permanent system roads and that projects may be implemented via construction of only temporary roads that must be decommissioned.

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<sup>1</sup> 84 Fed. Reg. 27,544. If finalized, the regulations will be codified at 36 C.F.R. Part 220.

<sup>2</sup> 84 Fed. Reg. at 27,550.

<sup>3</sup> 84 Fed. Reg. at 27,544.

<sup>4</sup> 84 Fed. Reg. at 27,546-49 and proposed rule § 220.5(d) & (e).

<sup>5</sup> 84 Fed. Reg. at 27,550-51.

- **Eliminate the requirement to conduct public scoping<sup>6</sup>** for 98% of all proposed actions, including those covered by CEs.<sup>7</sup> The agency would be required to provide notice of CE projects only in its Schedule of Proposed Actions or SOPA, which may not be published until after the decision has been made and the project completed. Without an opportunity to weigh in on proposed CE projects, the only option for the public to have its voice heard would be to resort to the federal courts.
- **Weaken the “extraordinary circumstances” backstop for CE proposals.<sup>8</sup>** If a proposal implicates “extraordinary circumstances,” it is ineligible for a CE, even if it would otherwise qualify. The proposed rule would eliminate the presence of sensitive species as an extraordinary circumstance. Even worse, the proposal would impose a significantly higher threshold for when extraordinary circumstances exist, requiring a “likelihood of *substantial* adverse effects to the listed resource condition” and allowing a Forest Service line officer to make this science-based determination without the benefit of any environmental analysis or public oversight.
- **Permit the use of multiple CEs to carry out land management decisions.<sup>9</sup>** The Forest Service would have discretion to authorize larger, complex projects without preparing any NEPA analysis by breaking apart the various project elements and picking and choosing CEs from the agency’s expansive list to cover each element, resulting in a far greater likelihood of significant effects.
- **Adopt “determinations of NEPA adequacy”<sup>10</sup>** or DNAs, which are a mechanism that the Department of the Interior has long used to claim that an existing environmental assessment (EA) or environmental impact statement (EIS) adequately analyzed a new/different proposed action and so no EA, EIS, or CE is necessary. Often the existing EA or EIS is outdated and/or never contemplated or analyzed the specific impacts of the new proposed action.
- **Remove Inventoried Roadless Areas (IRAs) and potential wilderness areas from the classes of actions that normally require preparation of an EIS.<sup>11</sup>** The proposed rule reasons that the Roadless Area Conservation Rule provides adequate protections for IRAs. A robust body of caselaw demonstrates that damaging projects are often proposed in IRAs, despite the Roadless Rule. Moreover, the Roadless Rule itself is under significant threat. The proposed rule would similarly remove projects in potential wilderness areas (i.e., areas identified in a Forest Service wilderness inventory) from increased public scrutiny and environmental analysis.
- **Embraces “condition-based management,”<sup>12</sup>** which allows the Forest Service to authorize land management activities – usually including timber harvest – without first gathering information about the resources that would be affected on the ground. Under this approach, the public would lose a fundamental right under NEPA – the chance to speak up for specific places or resources when they are proposed for logging.

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<sup>6</sup> 84 Fed. Reg. at 27,545 and proposed rule § 220.4(d).

<sup>7</sup> Under the proposal, scoping would be required only for EISs. Between 2006 and 2016, only 678 of the Forest Service’s 29,746 decisions (about 2.3%) were analyzed with an EIS.

<sup>8</sup> 84 Fed. Reg. at 27,546 and proposed rule § 220.5(a) & (b).

<sup>9</sup> 84 Fed. Reg. at 27,546 and proposed rule § 220.5(a).

<sup>10</sup> 84 Fed. Reg. at 27,546 and proposed rule § 220.4(i).

<sup>11</sup> 84 Fed. Reg. at 27,549 and proposed rule § 220.7(a).

<sup>12</sup> 84 Fed. Reg. at 27,545 and proposed rule §§ 220.3 & 220.4(k).