

COMMENTS ON THE U.S. DEPARTMENT OF AGRICULTURE’S PROPOSED LAND MANAGEMENT PLAN DIRECTION FOR OLD-GROWTH FOREST CONDITIONS ACROSS THE NATIONAL FOREST SYSTEM

February 2, 2024

On December 20, 2023, the U.S. Department of Agriculture (USDA) published a notice of intent to prepare an environmental impact statement (EIS) in connection with its proposed nationwide amendments to all 128 land management plans for the National Forest System (Forest Plan Amendments). 88 Fed. Reg. 88042 (Dec. 20, 2023) (Scoping Notice). The Scoping Notice states that the Forest Plan Amendments would impose uniform requirements on the long-term management of all national forests for the purpose of maintaining and expanding old-growth forest conditions throughout the National Forest System (NFS). *Id.* at 88044.

The following comments regarding the Forest Plan Amendments are provided by Chaves County, NM; Garfield County, CO; Lea County, NM; Modoc County, CA; Otero County, NM; Allegheny Forest Alliance; American Stewards of Liberty; Coalition of Arizona/New Mexico Counties; Committee for a Constructive Tomorrow; and the Kansas Natural Resource Coalition (collectively, the Multiple Use Coalition).

I. INTRODUCTION

Last July, the Multiple Use Coalition submitted timely comments on the USDA Forest Service’s Advance Notice of Proposed Rulemaking Regarding Managing the National Forests for Climate Resilience, Docket No. FS-2023-0006-0002. *See* 88 Fed. Reg. 24497 (April 21, 2023) (the ANPR). Those comments and their attachments are attached hereto and incorporated by reference. The Multiple Use Coalition explained that the health of our national forests has been deteriorating for decades, and to address these forest health problems, the Forest Service must increase timber harvesting and other treatments to reduce fuel loads and remove older dying and diseased trees. Limiting treatment of NFS forested lands under the guise of responding to climate change will exacerbate these forest health problems and lead to extensive forest destruction from fires, insects and disease.

The Forest Service has long recognized these serious forest health problems, including the need to increase timber harvest and fuel management activities. In a report entitled *Changing Conditions in Southwestern Forests and Implications on Land Stewardship* (1993), for example, the agency explained that wood volume had increased significantly on national forests in the region, the number of trees had increased in virtually all size classes, and the forests had become much denser and susceptible to catastrophic wildfires, insects, and disease.¹ “Today’s forests have more volume, more trees in nearly every diameter class, and more canopy layers than ever before. Recent research verifies this fact. Dense stands are difficult to maintain in a healthy condition and, in unmanaged condition, are susceptible to catastrophic crown fires and pest/beetle epidemics

¹ A copy of *Changing Conditions in Southwestern Forests and Implications on Land Stewardship* was attached to the comments submitted by the Multiple Use Coalition last July.

when they are not properly managed.” *Changed Conditions*, at 3. The Forest Service also explained:

Because of extreme fuel loading most stands cannot be safely burned to return them to a sustainable condition. In dense stands wildfires are extremely large, hot, and catastrophically destructive to the forest, soil, and endangered wildlife. The most practicable and controllable way to return forests to a healthy, sustainable condition and to maintain and enhance threatened and endangered species habitat is through timber harvest. ***Thus, the forest management tool best suited to provide long-term health of the forests and for endangered species habitat is tree harvest. Providing jobs and multiple resources is an additional, important benefit of these harvests.***

* * *

The current low level of harvest and cultural (pre-commercial thinning) treatments cannot prevent aging and increasing small-tree density of Southwestern forests. They will become older, denser, and perhaps more extensive. However, at some point, ecological limits will be reached, resulting in extensive forest destruction from insects, diseases, and fires. Similar losses are well-documented throughout the Interior West where the same circumstances have prevailed, such as most recently in the Blue Mountains of eastern Oregon.

Id. at 5 (emphasis added).

The Scoping Notice suggests that USDA intends to ignore the deteriorating condition of our national forests, including the need for fuel reduction and forest restoration projects, and restrict timber harvesting and other fuels treatments on “old growth” forests as well most mature forests. According to USDA’s Scoping Notice, this new regulatory policy will affect an estimated 24.7 million acres of old-growth forests and 68.1 million acres of mature forests, or about 65% of all forested NFS lands. This is an area equivalent to the State of Montana, our fourth largest state.

By definition, old growth forests have gone beyond active growth and have begun to decline and decay. As a result, these forests are more susceptible to insects, disease and adverse environmental conditions, and are prime candidates for stand-destroying wildfires that release huge volumes of carbon into the atmosphere. Furthermore, restrictions on active management of mature forests, including timber harvesting, will allow those forests to become older, denser, and more susceptible to disease, insect infestation, parasites, and catastrophic fire events. In effect, old growth and mature forests would be managed to burn.

The Multiple Use Coalition urges USDA to rethink this terrible proposal. The Scoping Notice acknowledges that the biggest risk to old growth and mature forests is wildfire followed by insects and disease. At a minimum, USDA must provide a credible scientific justification, backed by legitimate forestry experts, for asserting that old growth and mature forests are best managed as “no touch” zones that allow hazardous fuel loads, insects and disease to remain untreated.

The next section of these comments addresses specific problems and issues that USDA must address as part of the NEPA/forest plan amendment process.

II. SPECIFIC PROBLEMS THAT PRECLUDE THE PROPOSED ACTION

1. USDA Has Ignored Its Obligation to Coordinate with State and Local Governments, Violating the National Forest Management Act and its Implementing Regulations.

The National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1614, provides the framework by which the USDA Forest Service manages the NFS. NFMA requires USDA to develop and implement land management plans for the national forests and grasslands, set standards for timber sales, and create policies to regulate timber harvesting. Section 6 of NFMA, 16 U.S.C. § 1604, establishes the framework for the development, maintenance, and revision of land management plans, including amendments. That statute requires the Secretary of Agriculture to coordinate his planning activities with the land and resource management planning processes of State and local governments. 16 U.S.C. § 1604(a). As explained below, coordination is an important requirement that is intended to ensure that States and local governments play a significant role in the planning and management of NFS resources. But in proposing to adopt the Forest Plan Amendments, USDA has ignored this requirement, violating federal law.

The coordination requirement was initially imposed in the Forest and Rangeland Renewable Resources Planning Act of 1974 (FRRRPA), Pub. L. No. 93-378, § 5, 88 Stat. 476 (1974). It strengthened the state-federal cooperation requirement provided by the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528-531. The MUSYA “authorized” the Secretary of Agriculture to “cooperate with interested State and local governmental agencies.” 16 U.S.C. § 530. With the FRRRPA, Congress went beyond the discretionary authority provided in the MUSYA and expressly *required* the Secretary to “coordinate”² Forest Service planning with State and local planning processes. The FRRRPA provided:

[T]he Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

Pub. L. No. 93-378, §5(a), 88 Stat. 476 (codified at 16 U.S.C. § 1604(a)).

In its “Section-by-Section Explanation and Justification” of the FRRRPA, the United States Senate Committee on Agriculture and Forestry described its intent:

National Forest System plans are to be coordinated with the land use planning processes of state, local and other Federal agencies to the extent that they have such plans. This will prevent overlap and wasteful duplication. It will give the states a greater opportunity to be aware of the land use planning process within the National

² The verb “coordinate” means “to put in the same order or rank” or, alternatively, “to bring into common action, movement, or condition: HARMONIZE.” Merriam-Webster’s Collegiate Dictionary 255 (10th ed. 2000). In other words, the duty to “coordinate” requires that the Forest Service treat the land use planning and management activities of State and local governments as equal in rank and harmonize the Forest Service’s land and resource management planning activities with the activities of State and local governments.

Forest System, and it will insure more effective coordination with this planning. Land use planning within the National Forest System is already authorized, and is being carried out under the provisions of the Multiple-Use Sustained-Yield Act of 1960. It is desirable that plans on the lands within the System give *major consideration* to their impact on plans developed by state or local governments.

S. Rep. 93-686 (Feb. 18, 1974) (emphasis added); *see also* 93 Cong. Rec. S14175 (Aug. 2, 1974) (statement of Sen. Humphrey) (“It is the intent of the bill that the Secretary will be free to proceed in developing management plans, but *a duty is imposed on him to consult and give careful consideration to the impact of these plans on State and local jurisdictions.*” (emphasis added)).

In 1976, the RPA was reorganized and amended by the enactment of NFMA. However, the requirement to coordinate land and resource planning and management provided in the RPA was retained, unchanged, as Section 6 of NFMA. *See generally* National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976).

In order to implement NFMA’s mandate to develop and maintain land management plans, USDA promulgated a series of planning rules. The first generation of management plans issued pursuant to NFMA were issued under the 1982 Planning Rule, codified at 36 C.F.R. part 219 (1982). In accordance with NFMA Section 6, the 1982 Planning Rule contained detailed requirements for coordination with State and local governments. 36 C.F.R. § 219.7 (1982).

Beginning in 1997, the Forest Service began efforts to revise the 1982 Planning Rule, culminating in revised planning rules being published in 2000, 2005, and 2008. Each of these planning rules was challenged, and federal courts found each one to be legally insufficient on various grounds. However, these rules continued to recognize USDA’s obligation to coordinate its land management planning with State and local governments. For example, the 2005 land management planning rule provided:

The Responsible Official must provide opportunities for the coordination of Forest Service planning efforts undertaken in accordance with this subpart with those of other resource management agencies. The Responsible Official also must meet with and provide early opportunities for other government agencies to be involved, collaborate, and participate in the planning for National Forest System lands. The Responsible Official should seek assistance, where appropriate, from other State and local governments, Federal agencies, and scientific and academic institutions to help address management issues or opportunities.

36 C.F.R. § 219.9(a)(2) (2005).

The current iteration of the land management planning rule was adopted in 2012. Consistent with Section 6 of NMFS, it requires USDA to coordinate its NFS planning activities with other public planning efforts: “The responsible official shall coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments.” 36 C.F.R. § 219.4(b)(1). The Federal Register notice for the 2012 Planning Rule explained that “Many of

the coordination requirements of the 1982 planning rule have been carried forward into § 219.4(b)(1) and (2) of the final rule.” 77 Fed. Reg. 21,162, 21,196-97 (Apr. 9, 2012).

In addition to requiring coordination, the 2012 Planning Rule distinguishes between coordination under NFMA’s Section 6 mandate (36 C.F.R. § 219.4(b)), and cooperating agency status under NEPA (*id.* § 219.4(a)). This conclusion is supported by the environmental impact statement prepared in support of the 2012 Planning Rule, which stated:

Section 6 of NFMA requires land management planning to be “coordinated with the land and resource management planning processes of State and local governments and other Federal agencies” (16 U.S.C. 1604 (a)). State, local, or tribal governments may request, or be invited, to be a cooperating agency [under NEPA] *as well*.

Final Programmatic Environmental Impact Statement, National Forest System Land Management Planning 262 (Jan. 2012) (emphasis added). This statement reflects the fact that NEPA cooperating agency status is in addition to, and not in substitution of, NFMA Section 6 coordination.³

In this case, USDA has ignored its duty to coordinate with State and local governments. The duty to coordinate is triggered by amending a land management plan, which is an action that maintains the effectiveness of the plan. In this case, USDA is amending 128 land management plans at the same time for the purpose of:

[E]stablish[ing] consistent plan direction to foster ecologically appropriate management across the National Forest System by maintaining and developing old-growth forest conditions while improving and expanding their abundance and distribution and protecting them from the increasing threats posed by climate change, wildfire, insects and disease, encroachment pressures from urban development, and other potential stressors, within the context of the National Forest System’s multiple-use mandate.

Scoping Notice, 88 Fed. Reg. 88044-45. Thus, the Forest Plan Amendments will result in dramatic changes in management direction in forested regions and have far-reaching consequences within and outside of NFS units. Indeed, the USDA’s emphasis on creating decadent, old-growth forest conditions is likely to lead to dramatic increases in the magnitude and number of wildfires, damaging non-federal property and land, destroying merchantable timber, polluting waters, and harming wildlife and other natural resources. Coordination with State and local governments is necessary to develop and implement consistent and complimentary land management plans and programs that minimize these adverse impacts, particularly in light of the radical forest management change being proposed.

In short, by failing to coordinate, USDA is proceeding in violation of NFMA and USDA’s planning regulations. Coordination with State and local governments should have been initiated

³ The failure of USDA to invite States and local governments in areas with NFS lands to be cooperating agencies under NEPA is addressed in more detail below. The differences between coordination pursuant to NFMA Section 6 and cooperating agency status under NEPA is also discussed.

before USDA published its Scoping Notice. Coordination would have informed the development of the management plan amendments by allowing the USDA to take into account State and local forest management plans and policies and ensuring the development of locally informed management requirements and strategies. Coordination would also properly recognize the unique role of local governments, whose residents depend on their ability to use the national forests and their resources for a variety of purposes, including timber production, livestock grazing, energy and mineral development, outdoor recreation and habitat for fish and wildlife.

Therefore, USDA must halt the NEPA scoping process and immediately initiate a robust coordination effort. This should include directly contacting States that contain forested NFS units and local governments that have planning and zoning authority over lands within or in the vicinity of a NFS unit containing forested lands that would be subject to the Forest Plan Amendments. We suspect that many of State and local governments are unaware of the dramatic management changes that USDA is proposing and the adverse impact these changes will have on hazardous fuel loads and wildfire risk. Once this coordination effort has been completed, a new notice of intent should be published, with a new and extended comment period that ensures that interested parties will have a reasonable amount of time to comment.

2. The Forest Plan Amendments Are an Administrative Rule Which Must Be Adopted Through Rulemaking Pursuant to the Administrative Procedure Act.

The Administrative Procedure Act (APA) defines the term “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). The Forest Plan Amendments satisfy that definition and must be adopted as a rule in accordance with the APA’s rulemaking process, and not as an amendment to 128 different land management plans. The Forest Plan Amendments impose binding requirements on the Forest Service that apply to the management of all NFS forested lands and are designed to implement the Biden Administration’s new policy of maintaining and expanding old-growth forest conditions. Once adopted, the Forest Plan Amendments will govern how every national forest manages old growth and mature forests. Moreover, the Forest Plan Amendments will elevate the Biden Administration’s policy of maintaining and expanding old-growth forest conditions above other multiple use management objectives and uses, including timber production, livestock grazing, energy and mineral development, outdoor recreation, and habitat for fish and wildlife throughout over 100 million acres of NFS forested lands.

USDA appeared to understand that adoption of the Forest Plan Amendments requires an APA rulemaking. In April 2023, USDA Forest Service published the ANPR and sought comments on how the Forest Service should adapt its current policies to manage the national forests for climate resilience. 88 Fed. Reg. 88042 (Dec. 20, 2023). Thus, USDA certainly appeared to be intending to initiate a rulemaking, rather than a management plan amendment of unprecedented scope and nationwide effect.

In short, given the dramatic forest management changes being proposed, USDA must proceed through an APA rulemaking, as opposed to amending 128 individual land management plans. The latter approach is contrary to NFMA’s fundamental goal of developing and maintaining individual plans for each national forest, developed in collaboration with State and local

governments and local landowners and resource users. *See, e.g.*, 36 C.F.R. §219.4(a)(1), (b). USDA must halt the NEPA scoping process, and initiate a rulemaking by developing a proposed rule to address the management of old-growth forests. At that time, a new notice of intent to prepare an EIS can be published and the scoping process initiated on the impacts of the proposed rule.

3. The Forest Plan Amendments Violate the Requirements of the USDA's NFS Land Management Planning Regulations.

The process for amending a land management plan is governed by the 50 C.F.R. § 219.13. That regulation at § 219.13(b) establishes a series of requirements that the responsible official must comply with in amending a management plan. These include requiring that the responsible official:

Follow the applicable format for plan components set out at §219.7(e) for the plan direction added or modified by the amendment, except that where an amendment to a plan developed or revised under a prior planning regulation would simply modify the area to which existing direction applies, the responsible official may retain the existing formatting for that direction

50 C.F.R. § 219.13(b)(4). The plan components “guide future project and activity decisionmaking,” and must specify the geographic areas in which they apply. *Id.* § 219.7(e). In this case, USDA has not complied with this requirement.

The mandatory plan components are (i) desired conditions, (ii) objectives, (iii) standards, (iv) guidelines, and (v) suitability of lands. 50 C.F.R. § 219.7(e)(i)-(v). The Forest Plan Amendments' plan components include desired conditions, standards for management actions within old-growth forest conditions, and guidelines, as well as plan monitoring (as required by § 219.12), optional goals, and a “statement of distinctive roles and contributions.” 88 Fed. Reg. 88046-68.

Critically, however, USDA's Forest Plan Amendments fail to address suitability of lands. This plan component is described as:

Specific lands within a plan area will be identified as suitable for various multiple uses or activities based on the desired conditions applicable to those lands. The plan will also identify lands within the plan area as not suitable for uses that are not compatible with desired conditions for those lands. . . . Every plan must identify those lands that are not suitable for timber production (§219.11).

Id. § 219.7(e)(v). Obviously, suitability of lands for specific multiple uses and, in particular, for timber production is an important requirement generally, and is even more important in this case because the Forest Plan Amendments appear intended to restrict (or prohibit) timber production to maintain and promote old-growth forest conditions. Other land uses (e.g., livestock grazing) may be restricted as well. Therefore, the Forest Plan Amendment must comply with § 219.7(e)(v) and include, for each NFS unit, a description of the suitability of the unit's lands for various multiple uses, including timber production. If portions of the lands will no longer be suitable for timber production or other multiple uses, then those areas must be identified as part of the amendment.

Because the identification of the suitability of lands for particular multiple uses and activities is a critical plan component that is required by agency rule, USDA should terminate the scoping process and issue a revised proposal that identifies the suitability of lands in accordance with § 219.7(e)(v) for each of the land management plans listed in the Scoping Notice. See 88 Fed. Reg. 88046. Without this information, the public is deprived of the opportunity to meaningfully comment on the proposed action because its impacts are not adequately disclosed. Once a revised amendment is available, a new notice of intent to issue an EIS should be published and the scoping process initiated.

4. USDA Must Complete Section 7 Consultation Prior to Amending Each Land Management Plan.

Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, requires each federal agency to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the adverse modification of such species' critical habitat. To comply with this requirement, federal agencies must consult with the Fish and Wildlife Service or, in the case of marine species, the National Marine Fisheries Service when a proposed action may affect an endangered or threatened species or its critical habitat. See 50 C.F.R. § 402.14 (describing the requirements for formal consultation). In cases where a proposed federal action has significant environmental impacts, requiring the preparation of an EIS, the agency proposing the action normally prepares a biological assessment to evaluate the potential effects of the action on species and their habitat. See *id.* § 402.12. Proposed actions subject to Section 7 include NFS land management plans. See *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994) (citing *Lane Cnty. Audubon Soc. v. Jamison*, 958 F.2d 290, 293-94 (9th Cir. 1992)); see also *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1019-22 (9th Cir. 2012).

In this case, there is little doubt that the Forest Plan Amendments will adversely affect listed species of fish, wildlife and plants and their critical habitat. By redirecting forest management to creating and maintaining old-growth forest conditions, USDA will accelerate the movement of tree stands to denser conditions, and increase the probability, extent, and intensity of wildfires. This in turn will destroy habitat for listed species. As explained in the Multiple Use Coalition's 2023 comments, in 2011 wildfires in Arizona burned over one million acres of forested land and destroyed a significant portion of the critical habitat designated for the Mexican spotted owl. Other listed species and their critical habitat were also adversely impacted. The promotion of overstocked, decadent forests with hazardous fuel loads, insect infestation, and disease will result in further destruction of habitat for listed species of fish and wildlife.

Consequently, before proceeding with the Forest Plan Amendments, USDA must prepare a biological assessment that describes the impacts of managing NFS forests to maintain and expand old-growth forest conditions, including the increased likelihood of stand-destroying wildfires, disease, insect infestation, decreased streamflow and groundwater recharge, degraded water quality, and other adverse changes in habitat quantity and quality for fish and wildlife.

III. COMMENTS SPECIFIC TO USDA'S NEPA PROCESS

1. USDA's Scoping Notice Is Defective.

The requirements for scoping are set forth 50 C.F.R. § 1501.9. Subsection (d) requires the lead agency—USDA—to publish a notice of intent in the Federal Register when a proposal has been developed and requires the preparation of an EIS. Among other things, the notice should include a brief summary of the expected impacts of the proposal. USDA's Scoping Notice, while generally complying with § 1501.9(d), fails to contain any discussion of the Forest Plan Amendments' expected impacts. This is another significant omission, as it prevents the public from understanding and appreciating the potential impacts of the proposed action and from providing comments on the scope of issues for analysis in the EIS

To remedy this oversight, USDA should revise its Scoping Notice to include a reasonably detailed summary of the likely impacts of implementing the Forest Plan Amendments, and allow the public an additional period of time, not less than 45 days, to submit comments to the agency.

2. To Properly Evaluate the Environmental Impacts of the Forest Plan Amendments, the Forest Service Must Develop and Consider a Reasonable Range of Alternatives.

NEPA requires that USDA include in its EIS a discussion of alternatives to the proposed action. *See* 42 U.S.C. § 4332(2)(C). In addition, the statute requires USDA to “study, develop, and describe appropriate alternatives to recommended alternatives to recommended courses of action in any proposal.” *Id.* § 4332(2)(E). In this case, USDA has thus far proposed only the Forest Plan Amendments and the no action alternative, under which each NFS unit would continue to be managed under existing standards and guidelines.

In order to properly analyze the effects of the proposed action, USDA must consider a range of management prescriptions for old growth and mature forest conditions. These should include alternatives with different timber management intensities, such as an alternative involving aggressive timber harvesting (including pre-commercial thinning) to reduce fuel loads and create more open forest conditions; another alternative involving moderate timber harvesting that reduces fuel loads in certain areas and creates some open forest conditions; and a third alternative under which timber harvesting occurs on a limited basis. Under all alternatives, USDA should address the need to harvest timber for salvage purposes, for sanitation purposes, and for public health and safety reasons (e.g., snag removal).

In addition to a range of alternatives based on timber harvest intensity, USDA should consider alternatives that involve the aggressive harvest of smaller-sized trees and harvesting trees in a manner that creates a mixture of uneven age stands of varying densities and open areas, similar to pre-European settlement conditions.

Finally, as discussed above, each alternative should identify the lands that would be available for timber production and for other multiple uses and activities, as required by 50 C.F.R. § 219.7(e)(v). This will improve USDA's analysis of the impacts of the different alternatives and while properly disclosing the effects of the action to the public.

These alternatives will allow USDA to evaluate a range of impacts resulting from different timber harvest levels on various environmental issues and concerns, including fuels and fire management, surface water quantity and quality, groundwater quantity and recharge, biological resources, local and regional economic and social impacts, air quality and climate change, and recreation.

In short, in order to properly evaluate the effects of the proposed action, a range of alternatives with different management prescriptions should be developed and their effects compared. In the last section of these comments, the Multiple Use Coalition provides a list of issues that USGA should address in connection with that analysis.

3. The Forest Service Must Invite Affected State and Local Governments to Participate in the NEPA Process as Cooperating Agencies.

The CEQ's scoping regulation provides that as part of the scoping process, USDA, as the lead agency, "shall invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action)" as cooperating agencies. 50 C.F.R. § 1501.9(b). The Multiple Use Coalition is not aware of any efforts by USDA to invite the participation of any State and local governments as cooperating agencies. This is a serious oversight. The NEPA process should be halted until State and local governments that are likely to be affected by USDA's new policy for managing NFS lands to maintain and expand old-growth forest conditions are invited to participate as cooperating agencies.⁴

As noted above, the participation of States and local governments as cooperating agencies in the NEPA process differs from, and is not a substitute for, coordination under NMFA. Under NEPA, cooperating agencies normally work under the direction of the lead agency—here, USDA—to satisfy the procedural requirements imposed by NEPA, including development of alternatives to the proposed action and regional and local conditions and environmental impacts that may be overlooked. *See, e.g.*, 40 C.F.R. § 1501.8(b) (describing the duties of cooperating agencies); James Connaughton, Council on Environmental Quality, *Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act* (Jan. 30, 2002). The Connaughton Memorandum, however, cautions that "cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage in other governmental entity in a consultation or *coordination* process" *Id.* at p. 1, n. 1 (emphasis added). Thus, coordination under Section 6 of NMFA is a separate obligation of USDA and must be satisfied prior to adopting the Forest Plan Amendments.

4. Significant Issues and Concerns that Should Be Analyzed in the EIS.

The Forest Plan Amendments will cause a wide range of significant impacts to the human environment as they would make fundamental changes to how old growth and mature forests will

⁴ As noted above, the participation of States and local governments as cooperating agencies in the NEPA process is different than, and is not a substitute for, cooperation on the Forest Plan Amendments under NMFA.

be managed. According to the Forest Service, old growth and mature forest conditions currently constitute some 103 million acres of forested NFS lands, which represent nearly 65% of all NFS forested lands. As a result, there are a number of significant issues and concerns that should be analyzed in connection with the NEPA process. These issues are summarized below.

Critically, impacts should be addressed at the local level for each NFS unit to ensure that they are adequately assessed. As USDA noted in the Scoping Notice, the structure and composition of NFS forests “is highly place-based.” 88 Fed. Reg. 88046. There are important differences between national forests and NFS regions that must be taken into account in order to comply with NEPA’s “hard look” requirement. As discussed above, a range of alternatives should be utilized to highlight and compare differences in impacts based on the intensity of timber harvesting and related management prescriptions.

Legal authority to adopt the Forest Plan Amendments. It is unclear whether USDA has legal authority to simultaneously amend all 128 land management plans. To the Multiple Use Coalition’s knowledge, neither USDA nor the Forest Service has ever attempted to adopt a nationwide amendment to all existing land management plans. As discussed above, the Forest Plan Amendments appear to be administrative rules of general applicability that will direct how each NFS unit must manage old growth and mature forests. As a result, the Forest Plan Amendments should be adopted pursuant to the Administrative Procedure Act.

In addition, the existing land management plans were adopted at different times under different sets of the NFS land management planning rules. It is unclear whether the Forest Plan Amendments properly mesh with plans adopted under older versions of the rules or whether additional amendments are needed to make the all 128 plans consistent.

Legal authority for granting Indian tribes and Alaska native corporations planning authority. The Forest Plan Amendments would vest significant forest management authority in Indian tribes and Alaska native corporations. *See* 88 Fed. Reg. 88047. Such authority does not appear in NFMA or any other statute that governs management of NFS lands, nor is any specific authority cited in the Scoping Notice for this proposed delegation of power. Instead, the Scoping Notice merely states that incorporating Indian tribes into NFS unit planning, project design, and implementation will “help meet general trust responsibilities.” 88 Fed. Reg. 88045. The Scoping Notice also references “treaties,” but no specific treaties are identified and discussed. Therefore, the Forest Plan Amendments would result in an unlawful delegation of authority over the NFS to non-federal entities. At a minimum, USDA’s legal authority for such delegation of authority must be set out in detail. If USDA believes that treaties provide such authority, the relevant treaties should be identified and discussed with respect to each relevant NFS unit and be made available for public review.

Reliance on indigenous knowledge. The Forest Plan Amendments would allow consideration of “indigenous knowledge” and other unconventional sources of “gray” information. USDA should address how the agency intends to review the quality of this information and ensure compliance with the Information Quality Act (Public Law 106-554, HR 5658) and the applicable requirements of USDA. USDA should make all influential information based on “indigenous knowledge” and similar “gray” sources available for public review and provide an opportunity for

members of the public to request scientific review and correction in accordance with USDA's guidelines to ensure scientific integrity.

Impacts to timber harvesting levels. USDA should analyze the impacts of the Forest Plan Amendments' foreseeable changes to timber harvest levels, including changes in NFS lands available for timber harvesting, changes in harvest levels, including the volume of wood harvested, tree sizes, and tree species, changes in the types and extent of silvicultural treatments authorized, and the resulting changes in forest conditions, including changes in the volume of growing stock on forested NFS lands and their long-term productivity and availability for commercial timber harvest.

Impacts to forest ecosystems. USDA should analyze the impacts of the Forest Plan Amendments' foreseeable changes to forest ecosystems throughout the NFS, such as changes to forest structure, composition and condition, including overstocked and undersized trees, increased fuel loads and dead and down material, changes in the incidence of insect infestation, parasites, and disease, increased risk of wildfire (including wildfire size and frequency) and other impacts to forest conditions and health.

Impacts on hazardous fuels treatments. Hazardous fuels treatments involve the use of management activities that reduce fuels accumulation and create resilient landscapes, reducing the likelihood of catastrophic wildfire. USDA should analyze the impacts of the Forest Plan Amendments on the Forest Service's ability to implement and complete hazardous fuels treatments and other forest restoration activities on NFS lands. Such analysis should include treatments and other projects authorized and funded under the Healthy Forests Restoration Act, as amended, and other federal laws directed at improving forest health. It is unclear how the Forest Plan Amendments will interact with these statutes and forest restoration projects authorized and funded under them. USDA should also analyze the different levels of wildfire risk, depending on the level of management protection prescribed under each land management plan alternative, and the impacts of different levels of wildfire risk on the environment.

Impacts on landscape-scale insect and disease treatment. Section 602 of the Healthy Forests Restoration Act authorized the establishment of landscape-scale insect and disease treatment areas within the NFS. To be eligible, the NFS area must be experiencing declining forest health based on forest health surveys, at risk of experiencing substantial tree mortality over the next 15 years, or contain hazard trees that pose an imminent risk to public safety. As of April 2023, some 75 million acres of NFS lands have been designated as treatment areas, indicating their deteriorating condition. USDA should discuss how these areas will be addressed under the Forest Plan Amendments and evaluate how the Forest Plan Amendments will affect the planning and implementation of treatment projects within these areas.

Impacts on commodity production. USDA should analyze the impacts of the Forest Plan Amendments' foreseeable changes in the amount and mixture of commodity production from NFS lands and their local, regional and national impacts, such as impacts on home building and other activities that utilize wood and wood products. This analysis should also consider, for each alternative, the indirect and cumulative impacts of increased costs for lumber and wood products on the economy, and the need to increase imports of lumber and wood products from Canada and other foreign countries.

Socioeconomic impacts. USDA should analyze the socioeconomic impacts of the Forest Plan Amendments, including local and regional economic and social impacts resulting from changes in timber production and related commercial activities and changes in other uses of NFS lands, including livestock grazing, mining and energy production, outdoor recreation and transportation.

Impacts to water quantity and quality. USDA should analyze the impacts of the Forest Plan Amendments on water quantity and quality, both on and off NFS forested lands. These impacts include decreased streamflow and groundwater recharge due to overgrown, unnaturally dense forest conditions, affecting downstream water users, well owners, and stock watering, as well as adverse impacts to surface water quality due to post-wildfire runoff, soil erosion, and other pollutant discharges resulting from wildfires.

Impacts to land stability and soil productivity. USDA should analyze the impacts of the Forest Plan Amendments on land stability and soil productivity, including the impact of changes in the size and intensity of wildfires.

Impacts on air quality. USDA should analyze the impacts of the Forest Plan Amendments on air quality, including changes in the magnitude and nature of emissions from wildfires resulting from restriction on timber harvesting to promote old-growth forest conditions. USDA should analyze changes in the emission of greenhouse gases, including greenhouse gas emissions from wildfires and dead, diseased, and decaying trees, under different alternatives, taking into account increased wildfire severity and destructiveness resulting from lack of timber harvesting and other treatments to reduce fuel loads.

Impacts on livestock grazing. USDA should analyze the impacts of the Forest Plan Amendments on livestock grazing and related activities, including changes in authorized stocking levels, changes in NFS lands available for livestock grazing, and changes in forage quantity and quality and utilization levels for each NFS unit.

Impacts on recreation. USDA should analyze the impacts of the Forest Plan Amendments' foreseeable changes on hunting, fishing, and other outdoor recreation activities, recreation special uses, and public access to NFS lands.

Impacts to transportation systems and access. USDA should analyze the impacts of the Forest Plan Amendments' on transportation systems and access to NFS lands, including changes in the use of NFS lands for roadways, utility corridors, and other transportation and infrastructure needs. USDA should also analyze impacts to access across NFS lands to non-federal inholdings and other uses, including mining and energy production.

Impacts to fish, wildlife, and plants. USDA should analyze the impacts of the Forest Plan Amendments on fish, wildlife, and plant species. USDA should identify key species of fish, wildlife, and plants (including, but not limited to endangered and threatened species listed under the ESA) that occupy NFS lands and evaluate changes in habitat quantity and quality expected to occur under different action alternatives. This evaluation should include species that utilize a variety of forest conditions and discuss how they would be impacted.

Impacts to cultural resources. As the Scoping Notice notes, NFS lands contain a variety of cultural sites and other resources that are tied to the cultural identity and heritage of various Indian tribes and Native corporations. USDA should make a good faith effort to identify and inventory each NFS unit's historic properties and sacred sites found within forested areas, and to analyze the impacts of the Forest Plan Amendments on those cultural resources, including the impacts of wildfire resulting from different levels and methods of timber harvest and other treatments to reduce fuel loads and prevent insect infestations and disease. This analysis is in addition to consultation with affected Indian tribes and Alaskan native corporations under Section 106 of the National Historic Preservation Act, 54 U.S.C.A. § 306108.

Attachment A

COMMENTS ON THE USDA FOREST SERVICE'S ADVANCE
NOTICE OF PROPOSED RULEMAKING REGARDING
MANAGING THE NATIONAL FORESTS FOR CLIMATE
RESILIENCE

Docket No. FS-2023-0006-0002

July 20, 2023

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