



August 26, 2019

**Submitted via <https://www.regulations.gov/>
and email to nepa-procedures-revision@fs.fed.us**

NEPA Services Group
c/o Amy Barker
USDA Forest Service
125 South State Street, Suite 1705
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RE: National Environmental Policy Act Compliance, Proposed Rule; Request For Comment; 84 Fed. Reg. 27544 (June 13, 2019) (36 C.F.R. Part 220—Docket No. FS-2019-0010, RIN 0596-AD31)

Dear NEPA Services Group:

The Western Urban Water Coalition (“WUWC” or the “Coalition”) appreciates this opportunity to provide comments in response to the above referenced Proposed Rule, which states that the Forest Service is proposing to revise its National Environmental Policy Act (“NEPA”) procedures with the goal of increasing efficiency of environmental analysis while meeting NEPA’s requirements. This comment letter follows and builds upon the WUWC comment letter submitted on February 2, 2018, in response to the Forest Service Advance Notice of Proposed Rulemaking (“ANPR”), published at 83 Fed. Reg. 302 (Jan. 3, 2018), that preceded the Proposed Rule (the WUWC “ANPR Comment Letter”).

Established in 1992 to address the West’s unique water supply and water quality challenges, WUWC consists of the largest urban water utilities in the West, serving more than 40 million western water consumers in major metropolitan areas in seven western states. WUWC includes the following urban water utilities:

- *Arizona* – Central Arizona Project, City of Phoenix and Salt River Project;
 - *California* – Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District and City and County of San Francisco Public Utilities Commission;
 - *Colorado* – Aurora Water, Colorado Springs Utilities, and Denver Water;
 - *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority;
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- *New Mexico* –Albuquerque Bernalillo County Water Utility Authority;
- *Utah* – Salt Lake City Public Utilities, and
- *Washington* – Seattle Public Utilities.

A. WUWC’s Interest in Efficient NEPA Environmental Analysis

WUWC members engage regularly with the Forest Service in obtaining and operating under rights of way, special use, and other authorizations for water infrastructure facilities and operations that provide critical water supplies to the citizens and areas served by WUWC members. WUWC members are active collaborating partners with the Forest Service and other agencies and stakeholders in forest resiliency, watershed restoration, and other vegetation management and “green” infrastructure initiatives and activities. The Coalition members have decades of experience participating in NEPA and related environmental analyses with the Forest Service.

B. General Comments

As indicated in WUWC’s ANPR Comment Letter, we generally support updating and improving the Forest Service NEPA regulations at 36 C.F.R. Part 220 and associated Forest Service Manual (“FSM”) and Handbook (“FSH”) NEPA directives to more efficiently complete NEPA environmental analysis within the existing NEPA statute and case law framework. The NEPA process as conducted by the Forest Service and other federal agencies has become far too burdensome and costly and is in dire need of reform to cost-effectively meet NEPA’s objective of facilitating reasonably informed decision making regarding proposed federal agency actions with significant environmental effects. Changes to the Council on Environmental Quality (“CEQ”) regulations, codified at 40 C.F.R. §§ 1500-1508, and the regulations of other federal agencies who are involved with national forest programs and projects will also help complete NEPA procedures more efficiently and are hopefully underway. But the Forest Service need not await such changes to update its own regulations. In conjunction with revising its NEPA regulations, the Forest Service should also address National Forest Management Act (“NFMA”) forest plan revision, amendment, consistency, and resource requirements so that NEPA procedures for forest plan amendments and revisions are completed more efficiently and NEPA procedures for projects or activities more efficiently meet NFMA as well as NEPA requirements. Further changes to the Forest Service planning regulations at 36 C.F.R. Part 219 and objection process regulations at 36 C.F.R. Part 212 may be needed to fully implement the NEPA and related process efficiency improvements that are needed.

The time is ripe for meaningful update and improvement of Forest Service NEPA procedures. Executive Order 13807 specifically calls for the establishment of streamlined NEPA and related environmental and permitting reviews.¹ The Department of the Interior (“DOI”) recently issued Secretarial Order 3355 to streamline NEPA reviews conducted by DOI agencies. Order 3355 includes a number of provisions that the Forest Service should consider in revising its NEPA regulations and directives, including: (1) completion of Environmental Impact Statements (“EIS”) within one year of issuing the Notice of Intent (“NOI”) to prepare an EIS; (2) establishing target page limits for EIS and environmental assessment (“EA”) documents; (3)

¹ Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).

more use of previous NEPA or other environmental analysis when completing related subsequent analyses, including state entity analyses (consistent with the “tiering” and “incorporation by reference” concepts in the CEQ regulations); (4) improved coordination among lead, cooperating, and other participating agencies; and (5) increased use of categorical exclusions (“CEs”) from NEPA where appropriate.²

WUWC members’ experience reflects that the processing of applications for leases, permits, and other Forest Service authorizations is often delayed because Forest Service and other federal licensing or regulatory agencies participate in the NEPA and related permitting processes sequentially rather than simultaneously. Moreover, there is often not an overall schedule, with enforceable timelines for deliverables from the agencies, that is adopted, or accountability for missing due dates in a project schedule. In addition, project opponents are able to delay projects through frivolous appeals. All of these unconstructive practices can be remedied or alleviated through updated regulations and other administrative actions. Finally, special attention should be focused on providing CEs for forest and watershed health projects designed to improve water flow and quality and to implement measures that prevent or reduce the risk of destructive forest fires or insect and disease infestations or that rehabilitate burned or infested areas.

The Proposed Rule includes positive changes to existing 36 C.F.R. Part 220 regulations that address many, although not all, of the above needs and concerns. We generally support the changes included in the Proposed Rule, noting in particular the following:

- elimination of mandatory “scoping” for projects for which either a CE or EA is prepared (proposed 36 C.F.R. § 220.4(d)(1), (2), 84 Fed. Reg. at 27553);
- the Determination of NEPA Adequacy (“DNA”) provision to enable more reliance on CE, EA, or EIS documents, tracking the established practice of the Bureau of Land Management (proposed 36 C.F.R. § 220.4(i), 84 Fed. Reg. at 27553);
- codification of the “supplemental information report” approach and documentation regarding whether new information or changed circumstances warrants supplementation of an existing EIS or EA (proposed 36 C.F.R. § 220.4(l), 84 Fed. Reg. at 27553-54);
- adjusting and refining instructions for evaluating “extraordinary circumstances” that could require an EA or EIS to be prepared for a proposed action that would otherwise qualify for a CE, including clarifying the degree of effects threshold for determining whether preparation of at least an EA is warranted (proposed 36 C.F.R. § 220.5(a)-(c), 84 Fed. Reg. at 27554); and
- new or modified CEs, such as those for issuance, reissuance or amendment of special use authorizations (proposed 36 C.F.R. § 220.5(d)(12) and 220.5(e)(3), 84 Fed. Reg. at 27555), construction or realignment of National Forest System roads, parking areas, culverts and bridges (proposed 36 C.F.R. § 220.5(e)(24), 84 Fed. Reg. at 27557), ecosystem restoration or resilience activities (proposed 36 C.F.R. § 220.5(e)(26), 84 Fed. Reg. at 27557), and Forest Service actions that will be implemented jointly with another

² Interior Sec’y Order No. 3355 (Aug. 31, 2017), <https://elips.doi.gov/elips/0/doc/4581/Page1.aspx>.

Federal agency where the action qualifies for a CE of the other agency (proposed 36 C.F.R. § 220.5(e)(27), 84 Fed. Reg. at 27557).

However, we offer more particular comments below to clarify, refine, add to, and otherwise improve these proposed changes in a final published rule, which we urge the Forest Service to expedite. Nearly a year and a half elapsed from the publication date of the ANPR to the publication date of the Proposed Rule; we hope that publication of a final rule can occur within a few months, so that use and implementation of the updated regulations can commence in 2019 or at least early 2020.

C. Specific Comments

1. Add further direction to encourage more straightforward, focused, concise, and less time-consuming environmental reviews and documentation when an EIS or EA is prepared

The Proposed Rule does include some changes in this arena, perhaps most notably limiting “scoping” as a required element of the NEPA process to when an EIS will be prepared and emphasizing that public participation and other components of the NEPA process should be tailored to the scope, scale, and character of the proposed action. Proposed 36 C.F.R. § 220.4(d); 84 Fed. Reg. at 27545, 27553. As indicated in WUWC’s ANPR Comment Letter, Forest Service can further clarify and improve NEPA procedures by adding more specific guidance in its regulations (including the objection process and NFMA planning regulations as appropriate) or FSM and FSH directives regarding the following:

- a. Provide guidance similar to that in Order 3355 and CEQ guidance that EISs should normally be less than 150 pages, and even for proposals of unusual scope or complexity should be less than 300 pages.³ Forest Service EISs commonly reach several hundred pages, with hundreds of pages more of referenced supporting documents.
- b. Similarly, provide guidance that EAs should be brief, be concise, and normally not exceed 15 pages.⁴ Forest Service EAs too frequently themselves are several hundred pages long.
- c. Incorporate direction that EISs, at least for project level decisions, must be completed within one year from NOI to final EIS and Record of Decision (“ROD”) absent documented need for additional time for a proposal of unusual scope or complexity and a similar time limit of two years or less for EISs for Forest Plan revisions.
- d. Incorporate direction that EAs must be completed with a final Decision Notice (“DN”) issued within six months of commencement of scoping.
- e. Recognize Forest Plan land use designations (LUDs) such as municipal watersheds in EIS and EA “Purpose and Need” statements for the project or activity being considered, and focus the environmental analysis on likely specific environmental impacts within the

³ Interior Sec’y Order No. 3355 (Aug. 31, 2017), <https://elips.doi.gov/elips/0/doc/4581/Page1.aspx>.

⁴ *Id.*

context of the project being permissible under the LUD (and any project-specific amendments to the Forest Plan being considered for project/Plan consistency), tiered to the Forest Plan EIS and other prior broader environmental analysis.

- f. In the objection process regulations, eliminate any objection time period when no negative or questioning comments have been received on a proposed project or activity during any NEPA or other comment period for the proposal, allowing implementation to commence immediately after the approval decision.
- g. Clarify that when a final EIS or EA is released with a draft ROD or draft DN, respectively, for an objection comment period, there will be no additional 30-day delay in issuance of a final ROD or DN after the close of the objection period. We understand that on at least some Forests, final EISs released with a draft ROD for an objection period are apparently being treated as “proposed” or “draft” final EISs. The agency is then apparently issuing a “final” EIS at the end of the objection process, and then delaying issuance of a final ROD an additional 30 days after the end of the 100+ day total objection period, based on the apparent presumption that CEQ NEPA regulations might require that additional 30-day delay.
- h. Encourage more preparation of EISs and EAs by non-federal applicants or proponents of proposed projects such as WUWC members or their contractors and communication among the proponent and third party contractor and agency project leaders. Even where current CEQ NEPA regulations require a third party contractor or the agency to prepare an EIS rather than the project applicant, communication on technical, economic, and environmental issues with the applicant is allowed and important. The applicant is usually the most knowledgeable about what is feasible and reasonable for its proposed project and the CEQ NEPA regulations do not restrict the applicant to commenting like a member of the public. Restricting the applicant to commenting like a member of the public is counter to cost-effective environmental analysis. The Forest Service will remain responsible for final review and acceptance of any EIS or EA completed for a Forest Service decision subject to NEPA. Note that this does not require assigning a Forest Service resource specialist to duplicate reports prepared by applicant or contractor specialists.
- i. Encourage more cost-recovery and reimbursable agreements with willing project applicants for funding of environmental analysis and other permitting processes. Under current legal authorities, this can generally include the funding of Forest Service employee or contractor personnel dedicated in whole or part to performing, reviewing, or managing the process and can be an effective tool in timely and cost-effective completion of NEPA work in times of limited agency budgets and staffing. WUWC members already have substantial experience in participating in such agreements for projects and initiatives in which they an interest. WUWC and its members can work with the Forest Service to help assure these agreements include provisions for timely, cost-effective, and objective completion of environmental analysis and other NEPA and related process steps.

- j. In addition to CEs that can be applied to projects in response to wildfires or other catastrophic events, adopt further updated emergency procedures to allow rapid response to such events. The Forest Service should consider declaring an emergency on all federal lands designated as Fire Regime Condition Class (“FRCC”) II or III on wildfire risk maps, as well as lands identified as priorities for treatment in a Community Wildfire Protection Plan and adopt streamlined NEPA compliance mechanisms for such areas, such as:
- Allow any hazardous fuel reduction project, such as creating fuel breaks, thinning, defensible spaces around built infrastructure, to be carried out in advance of or concurrent with preparation of any required NEPA documentation.
 - Use Healthy Forest Restoration Act authorities for any fuels reduction project on FRCC II or III lands, such that no more than one action alternative is considered, and expressly limit required cumulative effects analysis to known effects of previous management in the project area.

2. Add further direction regarding landscape-scale analysis and decision making

The Proposed Rule includes a definition and other provisions regarding “condition-based management” that it indicates reflects an established Forest Service approach and practice to environmental analysis and NEPA compliance, which the agency wishes to codify as a useful approach to encourage for landscape-scale projects. However, we are aware of only limited use of this approach to date by the Forest Service or other agencies, and the Proposed Rule condition-based management definition and other provisions are very generalized. Perhaps the Forest Service anticipates providing more specific and useful guidance regarding this approach in its upcoming revisions to the FSM and FSH NEPA directives. In any case, we believe more concrete, understandable direction regarding application of this approach will assist its defensibility and efficiency. The following, as indicated in our ANPR Comment Letter, should be kept in mind in constructing further guidance regarding “conditioned-based management.”

- a. The Forest Service should clearly limit its “landscape-scale” analysis and decision making to Forest Plan revisions and significant amendments, with the NEPA and other analysis focused on the federal National Forest System lands to which the Plan applies. Environmental analysis for watershed or other projects and activities within each National Forest System unit or units can be tiered to the relevant programmatic Forest Plan EIS for each unit involved. The Forest Service abandoned “Regional Plans” under its planning regulations years ago based on their costs and lack of usefulness. Congress has recently indicated its disapproval of “landscape-level” approaches to federal land and resource management planning and NEPA compliance with its repeal of the proposed U.S. Bureau of Land Management (“BLM”) “Planning 2.0” revised planning regulations under the Congressional Review Act.⁵

⁵ H.R.J. Res. 44, 115th Cong. (2017).

- b. Any required NEPA analysis for “landscape-scale” watershed restoration or other initiatives within the framework of applicable Forest Plans should be for project-level decision making for particular activities such as forest thinning, road upgrades or other erosion control measures and focused upon the environmental effects of implementing Forest Service authorized actions on the ground, rather than more general programmatic concepts. The NEPA process for such initiatives should provide sufficient site-specific analysis of environmental effects and otherwise result in a decision that authorizes implementation of the activities that it includes without further NEPA process being needed. The Forest Service should scale its project-level activities requiring NEPA environmental analysis to be achievable within the timelines for EIS and EA completion recommended above. The Forest Service should not tie up its personnel and other resources and those of stakeholders like WUWC members in large-scale “mega-project” or other “landscape-scale” initiatives that add an extra layer of NEPA process or otherwise risk extensive cost and delay to the included activities, and also to other priorities on the Forest getting done on the ground.

3. Add further direction regarding Categorical Exclusions

The Proposed Rule contains several new, expanded, and refined CEs that are responsive to our comments in our ANPR Comment Letter. The Forest Service can further improve the CE component of its NEPA procedures with the following changes:

- Removal of the additional language in the Proposed Rule at 36 C.F.R. § 220.5(c)(2), 84 Fed. Reg. 27556, “In addition to public notice in the SOPA, as required at 220.4(d), the responsible official may choose to conduct additional public engagement activities to involve key stakeholders and interested parties. This additional involvement shall be conducted commensurate with the nature of the decision to be made.” Additional involvement and public engagement activities are not warranted under a Categorical Exclusion and would fall into an Environmental Assessment category.
- Clarify the CE for post-fire rehabilitation activities of up to 4,200 acres (36 C.F.R. § 220.5(e)(11), 84 Fed. Reg. at 27556 in the Proposed Rule) to allow the removal of dead and dying trees as part of rehabilitation activities. While removal of dead and dying trees appears to be included within the scope of the new Ecosystem restoration or resilience activities CE appearing as 36 C.F.R. § 220.5(e)(26), 84 Fed. Reg. 27557 in the Proposed Rule, such removal should be clearly included as part of post-fire rehabilitation activities as well.
- Eliminate the acreage limitation appearing the Proposed Rule in 36 C.F.R. § 220.6(e)(13), 84 Fed. Reg. 27556, for roadside salvage for protection of roads and other infrastructure from dead and dying hazard trees following a wildfire or other catastrophic event.
- Further refined, enlarged, and new small to moderate sized timber harvest, road, and other infrastructure project CEs.

- Expand or refine the CE for land sales or exchanges to include any sales or exchanges that do not involve large acreages or likely changes in allowed development or management that directly threaten significant adverse environmental effects. A land sale or exchange should not be required to result in essentially the same land uses as prior to the sale or exchange to qualify for a CE. See existing 36 C.F.R. § 220.6(d)(7), Proposed Rule 36 C.F.R. § 220.5(d)(7), 84 Fed. Reg. at 27544.
- Further refined, enlarged, or new CEs for watershed and other research projects.

The Forest Service should use existing CEs, including those found in the 2014 Farm Bill, or develop new CEs, for any hazardous fuels reduction project on FRCC II or III lands developed via a collaborative process. The Forest Service could expand designated insect and disease risk areas under Section 602 of the Farm Bill authority to allow greater use of the 3,000-acre legislative CE. The Forest Service could clarify that the CEs in the Proposed Rule are in addition to and complement rather than in lieu of any CEs that are enacted and available for use under statute.

In addition to allowing the Forest Service to rely on CEs of another federal agency when engaging in a project jointly with that agency, as included in the Proposed Rule, the Forest Service should also allow its personnel to use and rely upon any available exemptions and streamlined procedures found in State law or regulation that would expedite action to restore or rehabilitate lands damaged during wildfire or other catastrophic events.

4. Add further direction to expand and enhance coordination of environmental review and authorization decisions with other federal agencies and State, Tribal, or local environmental reviews.

- a. The regulations or directives should provide further instructions to be more efficient in completing any Endangered Species Act or other consultations with the U.S. Fish & Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”). The Forest Service should be able to reach “no effect” and “not likely to adversely affect” determinations based on its own fish and wildlife staff reviews, and any required concurrence letters from FWS and NMFS should be expedited.
- b. Further instruction should be added to minimize requiring more than one season or year of resource field surveys or other baseline information gathering for FWS, NMFS, and other interagency coordination, and environmental analysis in general.
- c. Further instruction should be added to coordinate consultation regarding effects on historic properties and cultural resources under the National Historic Preservation Act (“NHPA”) and other protocols with the NEPA process, and at an early stage involve the State Historic Preservation Office and any interested affected Tribes so that qualified historic and cultural resources are protected as appropriate without excessive delay in process.
- d. Further instruction should be added that encourages contracting and otherwise partnering with state and local agencies and adjacent landowners and managers to complete relevant

studies and reports and provide other data, information, and technical, and local expertise and knowledge for NEPA and other environmental analysis. WUWC members are in many instances the knowledgeable owners or managers of adjacent lands and resources.

D. Closing Remarks

In conclusion, this rulemaking is an opportunity for the Forest Service to meaningfully address our comments and those of others who support cost-effective national forest management. The WUWC looks forward to continued dialogue and collaboration as the Forest Service completes its NEPA efficiency rulemaking process.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 702-258-7166 or greg.walch@lvvwd.com, or Don Baur at 202-654-6234 or dbaur@perkinscoie.com.

Very truly yours,



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