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MANAGEMENT BY EXCLUSION: THE FOREST SERVICE USE OF CATEGORICAL EXCLUSIONS FROM NEPA

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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OVERSIGHT HEARING ON "MANAGEMENT BY EXCLUSION: THE FOREST SERVICE USE OF CATEGORICAL EXCLUSIONS FROM NEPA"

Thursday, June 28, 2007
U.S. House of Representatives
Subcommittee on National Parks, Forests and Public Lands
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:03 a.m. in Room 1334, Longworth House Office Building, Hon. Raúl M. Grijalva [Chairman of the Subcommittee] presiding.

Present: Representatives Grijalva, Bishop, Holt, DeFazio, Herseth Sandlin, Sali, Lamborn and McCarthy.

STATEMENT OF THE HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Let me call the Subcommittee on National Parks, Forests and Public Lands oversight hearing to order on "Management by Exclusion." Welcome to all our witnesses and thank you very much for being here. Today's hearing involves a very, very important topic, and so I appreciate very much the presence of our witnesses today, both on the first panel and the second panel.

The Forest Service use of categorical exclusions from the National Environmental Policy Act or NEPA is in serious need of oversight. Under the Bush Administration, the Forest Service has vastly expanded the use of categorical exclusions from NEPA. This includes categorical exclusions both at the planning and project levels. In fact, the Forest Service made more administrative changes to NEPA procedures than any other Federal land management agency.

NEPA is important because it sets up a process to protect ordinary citizens from harm by Federal agencies. NEPA is a tool, but perhaps it is a shield to force Federal agencies to assess the consequences of its actions and stop and listen to the advice of average Americans. The title of this hearing is "Management by Exclusion" because by categorically excluding forest plans and projects from NEPA, the Forest Service is excluding the ability of the public to be involved in the management of their publicly owned national forests.

Furthermore, by categorically excluding forest plans and projects from NEPA, the Forest Service is excluding the cumulative

analysis of land management decision. In December 2006, the Forest Service announced a finalization of their forest planning rule to categorically exclude forest plans from NEPA. The proposal took two years to be finalized based on strong concerns raised by the Council on Environmental Quality and numerous other individuals and organizations.

The forest planning rule is premised on a narrow interpretation that forest plans do not constitute a Federal action triggering NEPA. I believe that both the public involvement and environmental analysis requirements of NEPA are critical to providing the balanced use of Federal lands. Furthermore, categorically excluding forest plans from NEPA will likely result in the failure to evaluate the cumulative effects of and impacts of land management decisions, which was a clear intent of the National Forest Management Act.

The Forest Service has justified the categorical exclusion of forest plans from NEPA by claiming that NEPA analysis should be undergone at the project level not the plan level. However, the Forest Service has also expanded the use of categorical exclusions for forest projects dealing with timber, oil and gas and grazing. Today we are joined by Robin Nazzaro from the Government Accountability Office. The GAO found that nearly three-quarters of Forest Service vegetation management projects are categorically excluded from NEPA. This accounts for nearly half of the acreage treated for vegetation management nationwide.

My strong concern is that the whole picture shows a weakening of the NEPA process forest-wide under the Bush Administration. The result is less public involvement in their publicly owned national forests, less analysis of decisions affecting individual national forests, and the National Forest System as a whole. I share the concerns with many others.

Today we are joined by Deputy Attorney General of California, recreationists, conservationists and scientists to share their concerns with us about this topic. I would add that it is clear that the Forest Service is overreaching. If their policies were sound and valid, they would not be continuously losing in the Courts. The Courts have enjoined the forest planning rule, overturned Forest Service efforts at limiting public comment and appeal.

I look forward to hearing from all our witnesses and thank those who have traveled from afar to be here today. I would now recognize the Ranking Member Bishop for any opening statements he may have. Sir.

STATEMENT OF THE HON. ROB BISHOP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. BISHOP. Thank you, Mr. Chairman and members of the Committee who are here. The title of today's hearing suggests that the Forest Service uses categorical exclusions to exclude decisions from analysis that were required by the National Environmental Policy Act, otherwise known as NEPA, or to exclude public involvement from project planning. The Majority has a steep burden to prove that.

The fact is—and I think the facts will show—that categorical exclusions do not eliminate the NEPA analysis. They are part of the

NEPA analysis process. They merely serve as an initial screen in determining what level of environmental analysis is appropriate for individual projects.

Categorical exclusions is a tool. It is neither inherently good or evil. It can be abused. It can be used properly. I think history will be on the side of the agency's use. Nothing is perfect. No one is perfect, and if that indeed was the standard, I do not think Congress would be here today. But we will hear testimony from those who prefer to say no to any land management activity. These individuals will say that the use of categorical exclusions prevents members of the public from becoming involved in NEPA analysis of individual projects. All NEPA analysis completed by the Forest Service, including those completed under categoric exclusions from documentation in environmental assessments or environmental impact statements, must include some form of public involvement.

Further, public involvement is documented in the final agency decisions. Mr. Chairman, just last week we heard almost unanimous statements from members of this subcommittee regarding the need to quickly reduce wildfire hazards. The Chair called for the need for more thinning in order to reduce fire loads. He was impeccably correct in his statements. Congratulations. You got it right, Mr. Chairman. The use of categorical exclusions though is needed to do these projects. You cannot have one without the other.

I would like to remind the Committee that in the 109th Congress, Mr. Udall introduced H.R. 4875, a bill that recognized the efficiency of categorical exclusions by including one of those, one that promoted treatment of forest insect infestations. Use of categorical exclusions is a valuable tool that allows efficient use of the government, financial and human resources.

Today we will hear testimony from Mr. Stavros from Utah about how the effectiveness of a hazardous fuel treatment project analyzed under a categorical exclusion and quickly implemented was able to protect his home and community from a wildfire. Mr. Stavros' testimony offers an example of how our actions here in this committee directly affect the lives of millions of people.

We often go off on esoteric flights of fancy where decisions are based on dogma that actually hurt people. Our goal ought to be to eliminate that harm done from individuals. The situation in Lake Tahoe is a reminder to us all of what happens when the Forest Service is prevented from acting. I am required to look forward to today's hearing, and the testimony—much of which will rehash the obvious—regarding the use of categorical exclusions by the Forest Service, and I would like to thank all of our witnesses—regardless of what they may say—for coming here today.

It is not easy to be a witness before this committee and come to this city of excessive humidity for anyone, and I do appreciate your kindness in coming here and sharing your efforts and testimony with us here today. Thank you, Mr. Chairman. I will yield back.

Mr. GRIJALVA. Thank you, Mr. Bishop. Let me begin with the first panel. Under Secretary Rey, Director Nazzaro, Deputy Attorney General Pollak, and I will begin with the Under Secretary, Mr. Rey, and I should note for the record that all written testimony and extraneous material that will be submitted by the witness will be accepted as part of the record. With that, Under Secretary.

STATEMENT OF MARK REY, UNDER SECRETARY, NATURAL RESOURCES AND ENVIRONMENT, U.S. DEPARTMENT OF AGRICULTURE

Mr. REY. Thank you, Mr. Chairman. As defined in the Council on Environmental Quality Regulations, a categorical exclusion is a category of actions which experience has indicated will not have a significant environmental effect on the environment, and can be categorically excluded from additional documentation, an environmental assessment or an environmental impact statement. Categorical exclusions are an integral part of the implementation of NEPA and promote the cost effective use of agency NEPA related resources.

The Forest Service implementation of categorical exclusions considers effects, including cumulative effects which result from implementation of management actions. The important distinctions for categorical exclusions is that the agency has determined in establishing the categorical exclusion that these effects for the category of actions are not significant absent extraordinary circumstances.

Using the terminology of the Council on Environmental Quality Regulations, a categorically excluded project is exempt from the more lengthy analysis and documentation in an EA or EIS because it does not have significant effects. When using a categorical exclusion, Federal agencies must still comply with all of the requirements of any applicable laws, regulations and policies, including NEPA and including the separate and more extensive public participation regulations of the National Forest Management Act.

My statement for the record describes the administrative process the Forest Service uses to create categorical exclusions generally and specifically. Let me give you one example as to how we arrived at a particular categorical exclusion. Under the healthy forest initiative, the Forest Service and the Department of the Interior administratively created two new categorical exclusions in 2003 for fire management activities.

The activities permitted under these categories include hazardous fuel reduction and post fire rehabilitation. These categories were published as proposals for notice and comment on December 16, 2002. The comment period was open for 45 days, and nearly 39,000 comments were received and evaluated. In developing this proposal, the Forest Service and the Department of the Interior reviewed over 2,500 hazardous fuel reduction and fire rehabilitation projects to establish the basis for proposing these categorical exclusions.

Of those preexisting 2,500 project records, 28 were documented with an environmental impact statement, 1,434 were documented with environmental assessments, and 1,097 were documented under existing categorical exclusions. In addition to reviewing the over 2,500 existing projects, the agencies also reviewed 153 peer reviewed scientific publications and analyzed the influence of forest structure on wildfire behavior and the severity of its effects.

So you can see that the development of a categorical exclusion administratively is an exhaustive process that does involve a substantial amount of public involvement. Additionally, Congress has seen fit to legislatively create categorical exclusions. Recently enacted laws have established or directed the establishment of sev-

eral categorical exclusions including the Energy Policy Act of 2005 with regard to certain oil and gas development projects and the Fiscal Year 2005 of Consolidated Appropriations Act with regard to the development of grazing lease renewals.

In these cases and in others, Congress has stated legislatively that the effects of particular activities are insignificant and so that therefore a legislative categorical exclusion has been created. Even though Congress rendered the agency's responsibility largely ministerial in making those determinations, we still do a considerable amount of analysis on the projects covered under those legislative categorical exclusions.

These binders are the analytical record for one grazing lease renewal under the legislative categorical exclusion. Under administrative categorical exclusions there would be more binders. Under an environmental assessment, there would be many more binders, and under an environmental impact statement there would be a record that would start on the floor and be about this high.

Typically to do this costs us about $50,000 on the average. To do an environmental assessment costs us $200,000 on the average, and to do an environmental impact statement costs us a million dollars on the average. That, given the analysis in defining the categories covered by categorical exclusions, is I think ample justification in these times of budget needs and the need for quick action to reduce environmental risks to use the processes provided by NEPA wisely and fairly.

Again, categorical exclusions are an integral part of the National Environmental Policy Act. They do not absolve the agency from doing scoping, cumulative effects analysis or public participation. Indeed the public participation requirements of the National Forest Management Act, which passed seven years after NEPA, were modeled after NEPA and made more specific with regard to what the Forest Service must do to involve the public however we organize our obligations to comply with NEPA. With that I would be happy to answer any questions you have after the panel is completed.

[The prepared statement of Mr. Rey follows:]

Statement of Mark Rey, Under Secretary for Natural Resources and Environment, U.S. Department of Agriculture

Mr. Chairman and members of the subcommittee, thank you for the opportunity to discuss Forest Service use of categorical exclusions. I am pleased to be here with you today.

First, I would like to clarify that categorical exclusions (CEs) are a part of National Environmental Policy Act implementation, not an exclusion from NEPA, as provided for by the Council on Environmental Quality (CEQ) regulations. The purpose of a categorical exclusion is to eliminate the need for unnecessary paperwork and effort to assess the environmental effect of actions that normally do not warrant preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

As defined by the CEQ regulations, a categorical exclusion is a category of actions which experience has indicated will not have a significant environmental effect on the environment and can be categorically excluded from documentation in an Environmental Assessment or Environmental Impact Statement (40 CFR 1508.4). Categorical exclusions (CEs) are an integral part of the implementation of NEPA and promote the cost-effective use of agency NEPA related resources.

The Forest Service implementation of categorical exclusions considers effects, including cumulative effects, which result from implementation of management actions. The important distinction for categorical exclusions is that the agency has de-

termined, in establishing the categorical exclusion, that these effects for the category of actions are not significant, absent extraordinary circumstances. Using the terminology of the CEQ regulations, a categorically excluded project is exempt from the more lengthy analysis and documentation in an EA or EIS because it does not have significant effects. When using a categorical exclusion, federal agencies must still comply with all requirements of any applicable laws, regulations, and policies including NEPA.

Development of Categorical Exclusions

Categorical exclusions promote the cost-effective use of agency NEPA-related resources. The CEQ, in 1983, encouraged agencies to create additional categorical exclusions because they are perceived to be less of a burden on agency resources than EAs or EISs (CEQ "Guidance Regarding NEPA Regulations", 48 FR 34263 (July 28, 1983)). The CEQ issued draft guidance in 2006, again encouraging agencies to designate more categorical exclusions (71 FR 54816 (2006)).

When establishing implementing procedures, CEQ regulations direct federal agencies to identify those actions which experience has indicated will not have a significant environmental effect and categorically exclude them from documentation in an EA or EIS (40 CFR 1507.3(b)(2)(ii) and CEQ "Guidance Regarding NEPA Regulations", 48 FR 34263 (July 28, 1983)). Agencies have been encouraged to identify CEs using broadly defined criteria rather than developing lists of specific activities. By taking this approach, the CEQ believes agencies will have sufficient flexibility to make decisions on a project-by-project basis with full consideration of the issues and impacts that are unique to a specific project. CEQ has used an interagency work group to develop guidance to Federal agencies for establishing and for using categorical exclusions in meeting their responsibilities under NEPA. 71 Fed. Reg. 5418 (September 19, 2006). CEQ is currently considering public comments on that draft guidance.

To establish a categorical exclusion, various sources of information relevant to the proposed category of actions and its environmental effects may be used. Sources may include, but are not limited to: evaluation of implemented actions, impact demonstration projects, information from professional staff and expert opinion or scientific analyses, and others' experiences (benchmarking). The information used to support establishing a categorical exclusion demonstrates how the agency determined that the proposed category of actions does not typically result in significant environmental effects.

Agencies must consult with and obtain a conformity determination from CEQ for compliance with NEPA and its implementing regulations before establishing a new categorical exclusion. CEQ regulations require federal agencies to publish any proposed categorical exclusion in the Federal Register and provide a period during which the public may submit comments on the proposal (40 CFR 1507.3(a)). The Forest Service provides for public notice and comment on every categorical exclusion it develops.

Administratively Created Categories

In addition to the legislated CEs, the Forest Service has administratively created CEs for a variety of activities, including limited timber harvest, Healthy Forest Initiative, special uses and limited oil and gas exploration and development. All agency documentation for these categories was made available for notice and comment.

Limited Timber Harvest

In 2003, the Forest Service administratively created new categories for limited timber harvest. The activities permitted under the category include limited timber harvest of live trees to maintain forest health and improve stand condition, salvage of dead and dying trees and sanitation harvests in response to ongoing insect and disease infestations. These categories were published as proposals for notice and comment in the Federal Register on January 8, 2003. The comment period was open for 60 days and approximately 16,700 comments were received.

In examining the basis for proposing categorical exclusions for limited timber harvest, the Forest Service looked at two sets of data. In 2001, the Forest Service reviewed 154 timber harvest projects for which monitoring had validated the predicted environmental effects. The Forest Service also analyzed all categorically excluded timber harvest activities reported for 1998, the last year the timber harvest categorical exclusion was available to the Forest Service.

Of the 154 projects reviewed for establishing these categories, 122 were categorical exclusions documented with decision memos and 32 were documented with an environmental assessment. None of the 154 projects reviewed predicted significant effects on the human environment before the project was implemented. After implementation, on-site reviews of environmental effects of these projects were conducted

by interdisciplinary teams of resource specialists. The interdisciplinary review teams' measurements and observations were documented in a database. These data remain available on the world wide web and may be viewed at http://www.fs.fed.us/emc/lth.

The 1998 data analysis involved 306 categorically excluded timber harvest projects. The analysis was conducted to estimate to what extent the old timber harvest categorical exclusion was used and to determine average project size and harvest volume. (The last year that categorical exclusion could be used was 1998.) Each Forest Service Region provided acreage and volume information for each categorically excluded timber harvest conducted in 1998.

The Forest Service found that the categories of actions defined under the limited timber harvest CE did not individually or cumulatively have significant effects on the human environment. The agency's finding is first predicated on data representing the expert judgment of the responsible officials who made the original findings and determinations for the 154 projects reviewed in 2001; the resource specialists who validated the predicted effects of the 154 reviewed activities after the projects were completed; and a belief that the profile of past timber harvest activities drawn from the 1998 data represents the agency's past practices and is indicative of the agency's future activities. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. The final guidance for the Limited Timber Harvest CEs was published on July 23, 2003.

Healthy Forest Initiative CEs

Under the Healthy Forests Initiative, the Forest Service and the Department of the Interior administratively created two new categorical exclusions in 2003 for fire management activities. The activities permitted under these categories include hazardous fuels reduction and post-fire rehabilitation. These categories were published as proposals for notice and comment in the Federal Register on December 16, 2002. The comment period was open for 45 days and nearly 39,000 comments were received.

The Forest Service and the Department of the Interior reviewed over 2,500 hazardous fuels reduction and fire rehabilitation projects to establish the basis for proposing these categorical exclusions. Of the 2,559 project records reviewed, 28 were documented with environmental impact statements, 1,434 were documented with environmental assessments, and 1,097 were documented under existing categorical exclusions.

In addition to reviewing 2,559 projects, the agencies also reviewed 153 peer-reviewed scientific publications analyzing the influence of forest structure on wildfire behavior and the severity of its effects. This literature review found that forest thinning and prescribed burning have been long employed by land managers to maintain forest health and reduce wildfire risk. These benefits are supported by hundreds of scientific investigations and years of professional field experience. The review also found that thinning and prescribed burning, when conducted properly with safeguards, can reduce wildfire risk.

Based on site-specific project-level analysis of environmental effects, post-activity validation of those effects, the synthesis of scientific publications, and the belief that the profile of projects reviewed represents the agencies' past practices and is indicative of the agencies' future activities, the agencies concluded that category of actions covered by the Healthy Forest Initiative CEs do not individually or cumulatively have a significant effect on the human environment. While confident in this conclusion, the agencies, nevertheless, have established acreage limitations for these categories and Forest Service Research and Development is continuing to study these relationships. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. The final guidance for the Healthy Forests Initiative CEs was published on July 23, 2003.

Special Use Permit CE

In 2004, the Forest Service administratively created a categorical exclusion for the issuance of a new special use authorization to replace an existing or expired special use authorization. This CE can only be used when the issuance of a new special use authorization is ministerial, that is when there are no changes to the authorized facilities or increase in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization. This category was published as a proposal for notice and comment in the Federal Register on September 20, 2001. The comment period was open for 60 days and nearly 26,000 comments were received.

To document rationale for the CE, the Agency's Special Uses Program approached its Regional Lands and Recreation Special Use Program Coordinators to obtain their

input and feedback on why they believe the proposed categorical exclusion was appropriate. Moreover, the Forest Service wanted to more clearly validate its rationale based on the experience of these program experts.

Responses indicated that the categorical exclusion would primarily be used to continue the authorization of a variety of "static" non-ground disturbing facilities or activities, which based on their past experience, do not have significant environmental effects. Furthermore, the Forest Service determined that the evaluation for extraordinary circumstances would ensure appropriate use of the categorical exclusion.

The program managers who provided written responses to questions posed at the annual special uses coordinators meeting represent over 550 years of combined experience in Forest Service special uses administration. The NEPA specialists queried represent over 250 years of combined experience with NEPA policy and compliance. Based on over 800 person-years of experience with special use authorizations and NEPA compliance; and considering the provisions of law, regulation, agency policy; and the effects of past actions; the activities authorized in decisions documented under the new categorical exclusion would not individually or cumulatively have a significant effect on the human environment. Accordingly, the Agency determined it appropriate to identify this category of action as excluded from requirements for documentation in an EA or EIS. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. The final guidance for the special use permit CEs was published on July 6, 2004.

Oil and Gas Exploration CE

The Forest Service has promulgated a new CE for limited oil and gas exploration and development activities in newly identified fields. This CE does not, and is not intended to, overlap or duplicate the activities contained in the CEs provided under Section 390 of the Energy Policy Act of 2005. It is complementary to Section 390 and taken in concert, this CE and the five statutory CEs provide the ability to analyze and approve a full range of small projects with non-significant environmental effects in existing and new fields or corridors. In approving this CE, the Forest Service followed a public notice and comment process. This category was published as a proposal for notice and comment in the Federal Register on December 13, 2005. The comment period was open for 60 days and 108 comments were received.

In establishing this CE, the Forest Service reviewed the effects of every small oil and gas exploration and development project authorized over a five year period. Based on general program experience and the results of this review, the Forest Service determined that activities with limited road-building and utility-laying do not have significant effects and therefore would not require documentation in an environmental assessment or environmental impact statement. This CE covers decisions to approve a surface use plan of operations for oil and gas exploration and initial development activities, associated with or adjacent to a new oil and/or gas field or area, so long as the approval will not authorize activities in excess of any of the following: one mile of new road construction; one mile of road reconstruction; three miles of individual or co-located pipelines and/or utilities disturbance; and four drill sites. The CEQ, upon review of this CE, found that the CE conformed with NEPA and its implementing regulations. Since approval of this new CE on February 15, 2007, the category has been used two times.

Legislated Categorical Exclusions

Recently enacted laws have established or directed the establishment of several categorical exclusions. The Energy Policy Act of 2005 (P.L. 109-58) included statutory categorical exclusions for certain oil and gas development for projects disturbing fewer than five acres. The FY2005 Consolidated Appropriations Act (PL 108-447) included a categorical exclusion for decisions made to authorize grazing on an allotment. In addition, section 404 of the Healthy Forests Restoration Act (P.L. 108-148) of 2003 established a categorical exclusion for applied silvicultural assessments.

Section 390 of the Energy Policy Act directs the Secretaries of the Interior and Agriculture to use five new categorical exclusions (CEs) for approving oil and gas activities conducted pursuant to the Mineral Leasing Act. The Section 390 CEs are limited to oil and gas activities in existing areas of development that have had previously approved development analyzed through a NEPA process. The new activities must either be within areas covered by a land use plan approved within the previous five years, or with surface disturbance limited to 5 acres and a previous project with a NEPA process decision. To date, the Forest Service has used the Section 390 CEs to approve about 300 projects.

Section 339 of the FY2005 Consolidated Appropriations Act provided the Secretary of Agriculture with authority to categorically exclude decisions to authorize

grazing and reissue grazing permits for 900 grazing allotments nationally through FY2007. The CEs may be used if: (1) the decision continues current grazing management; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances. To date, the Forest Service has used this category to authorize grazing on 272 allotments.

Title IV, section 404 of the Healthy Forests Restoration Act provided the Secretaries of Agriculture and the Interior authority to carry out applied silvicultural assessments and research treatments on not more than 1,000 acres. The silvicultural assessments and research treatments allowed under this category are not to be adjacent and are subject to the extraordinary circumstances established by the agency. To date, the Forest Service has used this category to approve 7 projects.

Use of Categorical Exclusions

The procedure by which the Forest Service identifies important issues and determines the extent of analysis necessary for an informed decision on a proposed action is termed scoping (40 CFR 1506.6). Although the CEQ regulations require scoping for only EIS preparation, the Forest Service has broadened the concept to apply to all proposed actions, including those that would appear to be categorically excluded (FSH 1909.15 30.3(3)).

In determining the scope of a proposed action, the responsible official is required to consider the action's environmental effects, including the direct, indirect and cumulative impacts (see 40 CFR 1508.25). Section 30.3(3) of FSH 1909.15 adds this consideration before categorically excluding an action from documentation in an environmental assessment or an environmental impact statement:

> "Scoping is required on all proposed actions, including those that would appear to be categorically excluded. If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS."

The Forest Service Manual provides direction to line officers that the degree of the potential direct, indirect, and cumulative effects on extraordinary circumstances must be considered when scoping a proposed action that might be categorically excluded.

Scoping influences the appropriate level of documentation. After the nature of the proposed action is determined, preliminary issues and interested and affected agencies, organizations, and individuals are identified and the extent of existing documentation determined, the responsible official should have sufficient data to establish whether the proposed action can be categorically excluded from further documentation in an EIS or an EA.

In addition to scoping, notice is given to the public of all upcoming proposals, including proposals that may be authorized with CEs, and those which may undergo analysis and documentation in an EA and EIS, through the use of a quarterly schedule of proposed actions. The purpose of the schedule is to give the public an early informal notice of projects of which they may have an interest (FSH 1909.15, 07).

In determining whether a categorical exclusion may be used, the Forest Service applies a two prong test: (1) whether the proposed action fits within an existing categorical exclusion, and (2) whether there are any extraordinary circumstances that would preclude the proposed action from qualifying to be categorically excluded (FSH 1909.15, 30.3).

In accordance with CEQ regulations, a federal agency's NEPA procedures for categorical exclusions must provide for extraordinary circumstances (40 CFR 1508.4). Extraordinary circumstances function to identify the atypical situation or environmental setting where an otherwise excluded action merits further analysis and documentation in an EA or EIS.

The Forest Service NEPA procedures at FSH 1909.15, Chapter 30, list the extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Extraordinary circumstances, listed as resource conditions in the agency's handbook, that should be considered in determining whether the proposed action warrants further analysis and documentation in an EA or an EIS are:

a. Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species.
b. Flood plains, wetlands, or municipal watersheds.

c. Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas.
d. Inventoried roadless areas.
e. Research natural areas.
f. American Indians and Alaska Native religious or cultural sites.
g. Archaeological sites, or historic properties or areas.

Section 30.3 of the Forest Service Handbook also states, "The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion. It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist."

Categorical exclusions are used to analyze a variety of projects implemented by the Forest Service. There are 15 administratively created and 7 legislated categories of actions for which a project or case file and decision memo are required and 15 categories for which a project or case file and decision memo are not required. The categories for which a project or case file and decision memo are required include trail construction and reconstruction, timber stand and/or wildlife habitat improvement, hazardous fuels reduction, limited timber harvest, authorization of grazing and approval of limited oil and gas activities.

Currently, available data indicates that over the last two fiscal years the agency has used categorical exclusions for roughly 80% of its NEPA documentation (See Table 1). These percentages are similar to those documented by the Congressional Research Service for categorical exclusions used by the Federal Highway Administration in 2005.

Table 1
Decision Type for FY 2005 - 2006

	FY2005	FY2006
EIS Record of Decision (ROD)	73 (2%)	72 (2%)
EA Decision Notice (DN)	574 (18%)	544 (17%)
CE Decision Memo (DM)	2489 (80%)	2677 (81%)
Total	3136	3293

The Government Accountability Office (GAO) produced a report in 2006 on the Forest Service's use of categorical exclusions for vegetation management projects for calendar years 2003 through 2005. The GAO examined the Forest Service's use of five specific types of categorical exclusions, environmental assessments, and environmental impact statements to approve vegetation management projects. The audit included 155 national forests, representing 509 ranger districts.

During the study period categorical exclusions were used to approve 72% of the studied projects (2,187 projects); Environmental assessments and environmental impact statements were used to approve 28% of the studied projects (831 projects). The majority of the studied projects were approved using categorical exclusions. The total acres treated under decisions analyzed and documented under CEs was slightly less than that treated under decisions analyzed and documented under environmental assessments and environmental impact statements.

Categorical exclusions were used to approve 46% of the acreage within the studied projects (2.9 million acres); Environmental assessments and environmental impact statements were used to approve 54% of the acreage within the studied projects (3.4 million acres).

Recent court rulings on the Forest Service use of CEs have had a significant impact on a range of management activities throughout the country. Thousands of projects that we had found to have insignificant environmental impacts are now subject to formal notice, comment and appeal under the rules implementing the Appeals Reform Act, 36 CFR 215, lengthening the time to conduct such activities, increasing their costs and increasing the amount of information needed to document decisions.

The Forest Service is the only federal agency with a statutory notice, comment, and appeal process applied to CEs. As a result of a 2005 District Court ruling, that legislated process now applies to Forest Service categorical exclusions. On October 9, 2005, U.S. District Judge for the Eastern District of California James Singleton in Earth Island v. Pengilly, 376 F. Supp. 2d 994 (E.D. Cal. 2005); affirmed in part Earth Island Institute v. Ruthenbeck, No. 05-16975 (9th Cir. amended opinion June 8, 2007) ruled that categorically excluded timber sales and ten other categorically excluded activities are subject to notice, comment, and appeal under the 36 CFR 215 rules. As a result of that ruling, items usually covered under categorical exclusions are now required to undergo notice, comment, and appeal; a process that

can take over 135 days to complete. Prior to this court decision, categorical exclusions for vegetation management projects were not subject to this additional time.

The procedural changes brought on by rulings in the Earth Island Institute case have had important consequences on our ability to conduct routine operations where there are no adverse effects to extraordinary circumstances. Being able to move swiftly to accomplish project work is essential to people whose livelihood is dependent upon time-sensitive decision making. In fact, the risk of not taking action may often exceed the environmental effects of project implementation.

The following are examples of projects analyzed and documented using CEs prior to the Earth Island Institute case. These projects illustrate the utility of CEs to accomplish a variety of objectives on National Forests.

In response to the devastation of Hurricane Katrina, District Rangers on the De Soto National Forest in Mississippi signed multiple decision memos to remove hazardous trees from along roadsides, trails, recreation areas, and boundary lines beginning in November 2005 and continuing through 2007. The decisions included identification of hazard trees by Forest Service employees and mitigation of hazards by felling or follow-up tree disposal methods, to minimize health and safety concerns for the public, as well as for the protection of both Forest Service and privately owned resources.

Because Hurricane Katrina blew down trees and created heavy fuels buildup, the forest revisited existing decisions using categorical exclusions for prescribed fire and establishing fire control lines. This facilitated a swift response to the threat of catastrophic wildland fire and the unit's ability to quickly establish fuel breaks in areas near the wildland urban interface.

Using categorical exclusions expedited the response to the catastrophic impacts of Hurricane Katrina. They were instrumental in providing for public safety and support of emergency response operations. Although most of these activities took place in the middle of a disaster, the Forest made every effort to keep the public informed throughout the recovery effort.

Using categorical exclusions to analyze and document the environmental effects enabled the forest to open 1304 miles of roads for emergency support access and wildland fire suppression response. Over 750 miles of fuel breaks were established to protect adjacent high values at risk from a catastrophic wildland fire in the wildland urban interface. Hazardous fuels were removed from developed recreation and administrative sites. Developed recreation areas were reopened for public use within 10 months after Hurricane Katrina landed. To date, over 80 miles of trails are open for public use on the De Soto National Forest as a result of decisions documented using CEs.

In southwest Utah, the rapidly growing community of New Harmony has expanded along the boundaries of the Dixie National Forest (Dixie NF), the Bureau of Land Management (BLM), and Zion National Park (Zion NP). Many homes and subdivisions now border the heavily vegetated foothills of the Pine Valley Mountains. Large wildland fires, such as the Sequoia Fire (8,100 acres) in 2002 and the Harmon Creek Fire (493 acres) in 2000, and numerous small wildland fires have burned around New Harmony and several of the outlying subdivisions. In the summer of 2003, planning was initiated for the Dixie NF to extend and expand the fuel break that was started during the 2002 Sequoia Fire. This would strengthen the existing fuel break and link it to the Ash Creek Project on BLM lands. The Dixie National Forest used the newly released Healthy Forests Initiative Categorical Exclusion. Scoping letters were mailed to 559 members of the public, government entities and interested organizations. A decision memo was signed on the project in 2003 and the fuels treatments were completed in 2004. On June 25, 2005, at 1:49 p.m., lightning ignited the Blue Spring fire south of New Harmony. It grew over 5 days to 12,286 acres, ending in the backyards of Harmony Heights. Dixie National Forest and BLM fuel treatments influenced the movement of the fire, allowing firefighters to protect homes from destruction. While the Blue Spring fire was by no means the largest fire in southern Utah in 2005, it was significant in that the fuels projects were dominant factors in the rate and direction of spread. Homes were preserved because of the fuel breaks created under these categorical exclusions.

Summary

In summary, CEs are part of full compliance with the National Environmental Policy Act (NEPA). Categorical exclusions are not an exclusion from NEPA. The CEQ regulations (40 CFR 1500 et seq.) for implementing NEPA allowed agencies to include categorical exclusions in agency NEPA procedures. Agencies are to reduce excessive paperwork and delay by using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the

human environment and which are therefore exempt from requirements to prepare an EA or EIS (§ 1500.4(p)) and (§ 1500.5(k)).

The Department considers categorical exclusions an integral tool for NEPA compliance used to meet its mission of "Caring for the Land and Serving People." I would be happy to answer any questions you may have.

Mr. GRIJALVA. Thank you, Mr. Under Secretary. Let me turn now to Robin Nazzaro, Director of Natural Resources and Environment, Government Accountability Office. Ms. Nazzaro.

STATEMENT OF ROBIN NAZZARO, DIRECTOR OF NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. NAZZARO. Thank you, Mr. Chairman, and members of the Subcommittee. I am pleased to be here today to discuss the Forest Service's use of categorical exclusions to approve vegetation management projects. The extent to which the Forest Service approves vegetation management projects using categorical exclusions has been controversial. Critics assert that the Forest Service's use of them is an attempt to circumvent NEPA by precluding the need to perform an EA or an EIS. In contrast, supporters say that current analysis and documentation requirements for an EA or EIS under NEPA are too burdensome and that categorical exclusions allow the agency to more efficiently implement vegetation management projects.

Prior to our report that was performed for this committee and released last year, little was known, however, about the Forest Service's use of vegetation management projects under categorical exclusions because prior to 2005, the agency did not maintain nationwide data on their use. My testimony today summarizes the findings of that report from October 2006, which discusses calendar years 2003 through 2005, how many vegetation management projects the Forest Service approved, including those approved using categorical exclusions, which categorical exclusions the agency used to approve projects and, if categorical exclusions are not being used in any Forest Service ranger district, why.

To answer these questions we surveyed Forest Service officials at all 155 national forests representing 509 ranger districts. In summary, for calendar years 2003 through 2005, the Forest Service approved 3,018 vegetation management projects to treat about 6.3 million acres. Most of the projects, about 72 percent, were approved using categorical exclusions to treat slightly less than half of the acres, 2.9 million, while about 28 percent were approved using EA or EIS to treat the remaining 3.4 million acres.

Even though more projects were approved using categorical exclusions than using an EA or EIS, the total treatment acreage was about the same because the relative size of projects approved using categorical exclusions was much smaller than those approved using an EA or an EIS. According to Forest Service officials, the number and size of vegetation management projects and the type of environmental analysis used varied depending on the forest size, ecology and location.

Of the nearly 2,200 vegetation management projects approved using categorical exclusions, half were approved using the categorical exclusion for improving timber stands or wildlife habitat. For

the remaining projects, the Service primarily used the exclusion for reducing hazardous fuels, followed by salvaging dead or dying trees, conducting limited timber harvests of live trees, and removing trees to control the spread of insects or disease.

While the categorical exclusion for timber stand or wildlife improvement was the most frequently used and included the most treatment acres, about 2.4 million of the 2.9 million acres included in all projects using categorical exclusions, 92 percent of the projects approved using this exclusion were smaller than 5,000 acres.

Of the 509 ranger districts about 11 percent had not used any of the five vegetation management categorical exclusions during the three-year period of our study. The percentage of ranger districts not using a specific categorical exclusion varied by type of categorical exclusion however. Just over 90 percent of the 509 ranger districts had not used the exclusion for removal of trees to control the spread of insects or disease and about 32 percent had not used the exclusion to improve timber stand or wildlife habitat.

Reasons cited for not using these exclusions varied by the type of exclusion and ranger district. For example, not all ranger districts have used the exclusion for removing insect and disease infested trees because they did not have a sufficient number of such trees. Because four of the five categorical exclusions have only been available since 2003, it is premature to draw any conclusions about trends in the Forest Service's use of them to improve vegetation management projects.

More information over a longer period of time will be useful in addressing some of the controversial issues such as whether categorical exclusions individually or cumulatively have any significant effect on the environment or whether their use is enabling more timely Forest Service vegetation management. Thank you, Mr. Chairman. This concludes my statement, and I would be pleased to answer any questions that you or other members of the Committee may have.

[The prepared statement of Ms. Nazzaro follows:]

Statement of Robin M. Nazzaro, Director, Natural Resources and Environment, U.S. Government Accountability Office

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the Forest Service's use of categorical exclusions to approve vegetation management projects.[1] As you know, under the National Environmental Policy Act of 1969 (NEPA), agencies evaluate the likely environmental effects of proposed projects using an environmental assessment (EA) or a more detailed environmental impact statement (EIS) if the projects are likely to significantly affect the environment. However, if an agency determines that the activities of a proposed project fall within a category of activities that it has already determined have no significant environmental impact, it may approve the project without an EA or EIS—instead granting the project a categorical exclusion. As of 2003, the Forest Service had established one categorical exclusion for vegetation management activities that covered certain activities intended to improve timber stands or wildlife habitat. In 2003, it added four more categorical exclusions to (1)

[1] Vegetation management projects may include, but are not limited to, activities such as using prescribed burning, timber harvests, or herbicides; or thinning trees, grass, weeds, or brush. Projects that include these types of activities are intended to, among other things, maintain healthy ecosystems, reduce the risk of catastrophic wildland fire, and manage the nation's forests for multiple uses, such as timber, recreation, and watershed management.

reduce hazardous fuels, (2) allow the limited harvest of live trees, (3) salvage dead or dying trees, and (4) remove trees to control the spread of insects or disease.

The extent to which the Forest Service approves vegetation management projects using categorical exclusions has been controversial. Critics assert that the Forest Service's use of them is an attempt to circumvent NEPA by precluding the need to perform an EA or EIS. In contrast, supporters state that current analysis and documentation requirements for an EA or EIS under NEPA are too burdensome and that the categorical exclusions allow the agency to more efficiently implement vegetation management projects. Little is known about the Forest Service's use of the vegetation management categorical exclusions because, prior to 2005, the agency did not maintain nationwide data on their use.

My testimony today summarizes the findings of our October 2006 report that discusses for calendar years 2003 through 2005, how many vegetation management projects the Forest Service approved, including how many were approved using categorical exclusions; which categorical exclusions the agency used; and the primary reasons why Forest Service ranger districts are not using the categorical exclusions for vegetation management.[2] This report is based on information we collected from all 155 national forests representing 509 ranger districts that manage National Forest System lands. It is also based on interviews we conducted at 23 ranger districts at 12 national forest units.

Summary

In summary, from calendar years 2003 through 2005, the Forest Service approved 3,018 vegetation management projects to treat about 6.3 million acres. Most of these projects—about 72 percent—were approved using categorical exclusions to treat slightly less than half of the acres—2.9 million—while about 28 percent were approved using an EA or EIS to treat the remaining 3.4 million acres. Even though more projects were approved using categorical exclusions than using an EA or EIS, the total treatment acreage was about the same because the relative size of projects approved using categorical exclusions was much smaller than those approved using an EA or EIS. According to Forest Service officials, the number and size of vegetation management projects and type of environmental analysis used varied depending upon the forest's size, ecology, and location.

Of the nearly 2,200 vegetation management projects approved using categorical exclusions during calendar years 2003 through 2005, the Forest Service most frequently used the categorical exclusion for improving timber stands or wildlife habitat. This categorical exclusion accounted for half of the projects approved using the five vegetation management categorical exclusions. For the remaining projects, the Forest Service primarily used the categorical exclusion for reducing hazardous fuels, followed by salvaging dead or dying trees, conducting limited timber harvests of live trees, and removing trees to control the spread of insects or disease. While the categorical exclusion for timber stand or wildlife habitat improvement was the most frequently used and included the most treatment acres—about 2.4 million of the 2.9 million acres included in all projects approved using categorical exclusions—92 percent of the projects approved using this categorical exclusion were smaller than 5,000 acres.

Of the 509 ranger districts, about 11 percent had not used any of the five vegetation management categorical exclusions during the 3-year period. The percentage of ranger districts not using a specific categorical exclusion varied by type of categorical exclusion, however. Just over 90 percent of the 509 ranger districts had not used the categorical exclusion for the removal of trees to control the spread of insects or disease and about 32 percent had not used the categorical exclusion to improve timber stands or wildlife habitat. Reasons cited for not using a categorical exclusion varied by type of categorical exclusion and ranger district. For example, not all ranger districts had used the categorical exclusion for removing insect- or disease-infested trees because they did not have these types of trees or because projects for removing such trees had already been or were to be included in an EA or EIS.

Background

The Forest Service is responsible for managing over 192 million acres of public lands—about 30 percent of all federal lands in the United States. In carrying out its responsibilities, the Forest Service traditionally has administered its programs through 9 regional offices, 155 national forests, 20 national grasslands, and several hundred ranger districts.

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[2] GAO, Forest Service: Use of Categorical Exclusions for Vegetation Management Projects, Calendar Years 2003 through 2005, GAO-07-99 (Washington, D.C.: Oct. 10, 2006).

Under NEPA, agencies such as the Forest Service generally evaluate the likely effects of projects they propose using a relatively brief EA or, if the action would be likely to significantly affect the environment, a more detailed EIS. However, an agency may generally exclude categories of actions from the requirement to prepare an EA or EIS if it has determined that the actions do not individually or cumulatively have a significant impact on the environment—these categories are known as categorical exclusions. The agency may then approve projects fitting within the relevant categories using these predetermined categorical exclusions rather than carrying out project-specific environmental analyses. For a project to be approved using a categorical exclusion, the agency must determine whether any extraordinary circumstances exist in which a normally excluded action may have a significant effect.[3,4]

As of 2003, the Forest Service had one categorical exclusion available for use in approving certain vegetation management activities—timber stand or wildlife habitat improvement—that has no acreage limitation.[5] In 2003, after reviewing and evaluating data on the environmental effects of vegetation management projects that had been carried out by the national forests, the Forest Service added four new vegetation management categorical exclusions, each of which has acreage limitations: (1) hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres, and mechanical methods such as thinning, not to exceed 1,000 acres; (2) limited timber harvests of live trees, not to exceed 70 acres; (3) salvage of dead or dying trees, not to exceed 250 acres; and (4) removal of trees to control insects and disease, not to exceed 250 acres.[6] Appendix I provides more detailed information on the Forest Service's five vegetation management categorical exclusions.

Categorical Exclusions Were Used to Approve the Majority of Vegetation Management Projects and about Half of the Total Treatment Acres

For calendar years 2003 through 2005, the Forest Service approved about 3,000 vegetation management projects to treat about 6.3 million acres. Of these projects, the Forest Service approved about 70 percent using categorical exclusions and the remaining projects using an EA or EIS. Although a majority of projects were approved using categorical exclusions, these projects accounted for slightly less than half of the total treatment acres because the size of these projects was much smaller than those approved using an EA or EIS. Table 1 provides this information in greater detail.

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[3] Resource conditions that should be considered in determining whether extraordinary circumstances exist include, among other things, the existence of federally listed threatened or endangered species or designated critical habitat; congressionally designated wilderness areas; inventoried roadless areas; and archaeological sites or historic properties. The mere presence of one or more of these conditions does not preclude the use of a categorical exclusion. Rather, it is the degree of the potential effect of the proposed action on these conditions that determines whether extraordinary circumstances exist.

[4] The Forest Service may decide to prepare an EA for a project that could qualify for approval using a categorical exclusion.

[5] In addition to the timber stand and wildlife habitat improvement categorical exclusion, the Forest Service previously had a categorical exclusion for timber sales of 250,000 board-feet or less of merchantable wood products or 1 million board-feet of salvage. In 1999, a federal district court issued a nationwide injunction barring use of this categorical exclusion, holding that the agency did not provide any rationale for why the specified magnitude of timber sales would not have a significant effect on the environment. Heartwood v. U.S. Forest Service, 73 F. Supp. 2d 962,975 (S.D. Ill. 1999), aff'd on other grounds, 230 F. 3d 947 (7th Cir. 2000).

[6] 68 Fed. Reg. 33814 (June 5, 2003) and 68 Fed. Reg. 44598 (July 29, 2003).

[7] Of the 1,094 projects approved using the categorical exclusion to improve timber stands or wildlife habitat, 40 had no acreage or an unknown acreage, according to the Forest Service.

[1] Vegetation management projects may include, but are not limited to, activities such as using prescribed burning, timber harvests, or herbicides; or thinning trees, grass, weeds, or brush. Projects that include these types of activities are intended to, among other things, maintain

Table 1: Number of Vegetation Management Projects Approved and Treatment Acres for Different Types of Environmental Analyses (Calendar Years 2003 through 2005)

	Type of environmental analysis			
	Environmental impact statement	Environmental assessment	Categorical exclusion	Total
Number of projects (percent of total)	141 (4.7)	690 (22.9)	2,187 (72.5)	**3,018 (100.0)[a]**
Number of treatment acres (percent of total)	899,225 (14.4)	2,506,984 (40.0)	2,856,472 (45.6)	**6,262,681 (100.0)[a]**
Median number of treatment acres (range)[b]	2,768 (51 to 60,000)	1,366 (1 to 124,971)	215 (1 to 97,326)	**375 (1 to 124,971)**

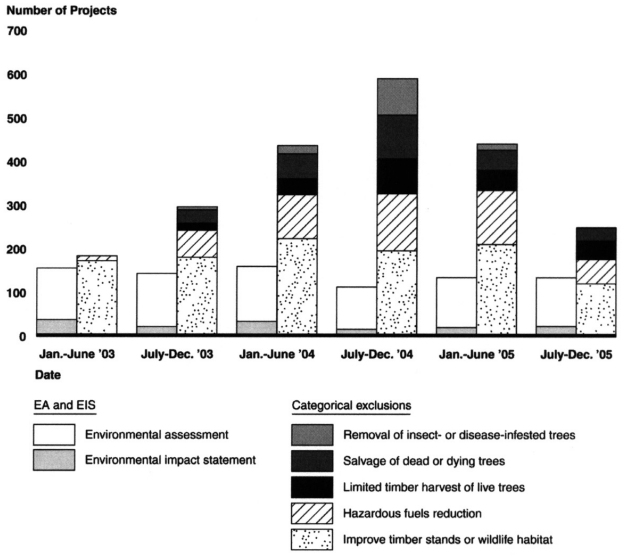
Source: GAO.

[a]Numbers may not total to 100 percent due to rounding.

[b]Of the 3,018 vegetation management projects, 113 had no acreage or an unknown acreage, according to the Forest Service. The acreage associated with a vegetation management project may be zero or unknown because, among other reasons, the unit of measure for the project is in miles of roadside to be treated or number of trees to be removed. These projects were not used in calculating the median or range of treatment acres.

Our analysis of the project data also revealed that the total number of vegetation management projects approved, including those approved using categorical exclusions, varied over the 3-year period, while the number of treatment acres did not. As can be seen in figure 1, the number of projects approved using an EA or EIS varied little over the 3-year period; however, the number of projects approved using categorical exclusions increased from January 2003 through December 2004—primarily because of an increased use of the four new categorical exclusions—and then decreased from January through December 2005. Forest Service officials said that any number of factors could have influenced the increase and subsequent decrease in the use of categorical exclusions over the 3-year period. However, given the relatively short period of time during which the four new categorical exclusions were in use, these officials said that it was not possible to speculate why the decrease had occurred.

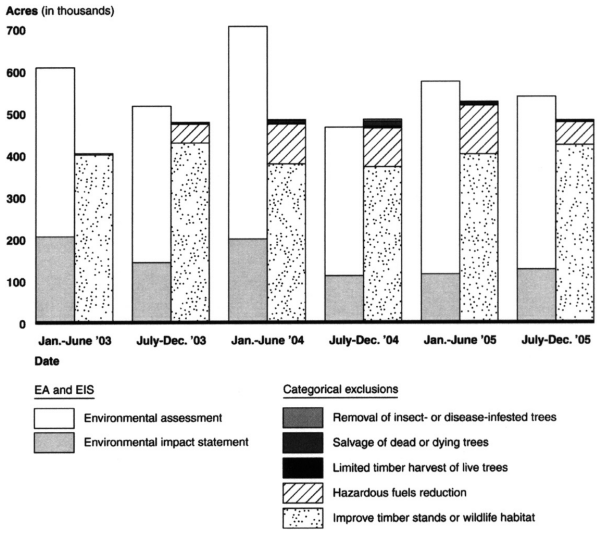
Figure 1: Number of Vegetation Management Projects Approved Using an EA, EIS, or Categorical Exclusion (Calendar Years 2003 through 2005)



Source: GAO.

In contrast, as can be seen in figure 2, an analysis of the total treatment acres included in projects approved using an EA, EIS, or a categorical exclusion did not reveal any notable change over the 3-year period.

Figure 2: Number of Treatment Acres Included in those Projects Approved Using an EA, EIS, or Categorical Exclusion (Calendar Years 2003 through 2005)



Source: GAO.

We also found that the number of vegetation management projects approved, including those approved using categorical exclusions, varied by Forest Service region and forest. For example, of all vegetation management projects approved nationwide, Region 8—the Southern Region—accounted for about 29 percent, of which just over two-thirds were approved using categorical exclusions. In contrast, Region 10—Alaska—accounted for about 2 percent of all vegetation management projects, about 60 percent of which were approved using categorical exclusions. According to several Forest Service officials, the number of vegetation management projects approved and the type of environmental analysis used in approving them depended on the forest's size, ecology, and location, as the following illustrates:

At the 1.8 million-acre Ouachita National Forest, a pine and hickory forest in western Arkansas and southeastern Oklahoma, 163 projects were approved—119 using categorical exclusions. Forest officials said the forest has a very active vegetation management program because, among other things, the types of trees located on the forest tend to regenerate quickly and are an excellent product for milling. In addition, a large timber harvest infrastructure is located nearby, which helps ensure that timber sale contracts can be readily competed and awarded.

At the 28,000-acre Caribbean National Forest, a humid tropical forest in Puerto Rico, no vegetation management projects were approved. According to forest officials, the forest does not have an active vegetation management program because the forest focuses more on developing recreational sites and wildlife habitat and because the island has no commercial infrastructure to support harvesting or milling timber.

Appendix II provides detailed information on the number of vegetation management projects and acres Forest Service regions approved using different types of environmental analysis, for calendar years 2003 through 2005.

The Categorical Exclusion for Improving Timber Stands or Wildlife Habitat Was the Most Frequently Used

Of the almost 2,200 projects approved using categorical exclusions over the 3-year period, the Forest Service most frequently used the vegetation management categorical exclusion or wildlife habitat; this categorical exclusion was used on half of the projects to treat about 2.4 million acres. As shown in table 2, for the remaining projects, the Forest Service primarily used the categorical exclusion for reducing hazardous fuels, followed by salvaging dead or dying trees, conducting limited timber harvests of live trees, and removal of trees to control the spread of insects or disease; in all, these categorical exclusions were used to approve treatments on

about a half-million acres. In addition, the size of approved projects varied depending on the categorical exclusion and any associated acreage limitation.

Table 2: Number of Vegetation Management Projects Approved and Treatment Acres for Different Types of Categorical Exclusions (Calendar Years 2003 through 2005)

	Improve timber stands or wildlife habitat (no acre limitation)	Hazardous fuels reduction (5,500-acre limitation)	Salvage of dead or dying trees (250-acre limitation)	Limited timber harvest of live trees (70-acre limitation)	Removal of insect- or disease-infested trees (250-acre limitation)	Total
Number of projects (percent of total)	1,094 (50.0)	485 (22.2)	264 (12.1)	220 (10.1)	124 (5.7)	**2,187 (100.0)**[a]
Number of treatment acres (percent of total)	2,402,188 (84.1)	405,546 (14.2)	28,939 (1.0)	10,541 (0.4)	9,258 (0.3)	**2,856,472 (100.0)**[a]
Median number of treatment acres (range)[b]	433 (1 to 97,326)	450 (1 to 4,637)	96 (1 to 250)	59 (1 to 70)	8 (1 to 250)	**215 (1 to 97,326)**

Source: GAO.

[a]Numbers may not add to 100 percent due to rounding.

[b]Of the 2,187 vegetation management projects approved using categorical exclusions, 71 had no acreage or an unknown acreage, according to the Forest Service. The acreage associated with a vegetation management project may be zero or unknown because, among other reasons, the unit of measure for the project is listed as miles of roadside to be treated or number of trees to be removed. These projects were not used in the calculation of the median or range. In addition, the Forest Service indicated that for 38 projects, in addition to the categorical exclusion cited as being used, one or more of the remaining four categorical exclusions was also used. We counted only the first categorical exclusion cited.

According to Forest Service officials, a number of factors influenced the reasons that the categorical exclusion for timber stand or wildlife habitat improvement was used most frequently for the most treatment acreage. For example, officials at the George Washington and Jefferson National Forests and the Monongahela National Forest said they relied on this categorical exclusion more than others because the use of this category was consistent with their forest management plans, which dictate the types of activities that may take place on their forests. Santa Fe National Forest officials said that the forest has relied heavily on this categorical exclusion because it does not have an acreage limitation.

We also analyzed the categorical exclusion for timber stand or wildlife habitat improvement to determine whether its lack of size limitation resulted in projects that are larger than those undertaken using the other four exclusions that have acreage limitations. We found that almost 92 percent of the 1,054 projects[7] approved using the categorical exclusion for timber stand or wildlife habitat improvement were smaller than 5,000 acres—which is the approximate size limitation of the categorical exclusion for hazardous fuels reduction, the largest size limitation of the four more recent categorical exclusions.

Primary Reasons for Not Using Vegetation Management Categorical Exclusions Varied Depending on the Ranger District and Type of Categorical Exclusion

Eleven percent of the 509 ranger districts had not used any of the five vegetation management categorical exclusions during the 3-year period. The percentage of ranger districts that did not use specific categorical exclusions ranged widely, from 91 percent not using the category for the removal of trees to control the spread of insects or disease, to 32 percent not using the category for timber stand or wildlife habitat improvement. Ranger districts— reasons for not using a specific categorical exclusion also varied. The primary reason cited for not using the categorical exclusion for the removal of trees to control the spread of insects or disease was that their forests did not have insect- or disease-infested trees and that projects that could have fit the category had already been or were to be included in an EA or EIS. Similarly, the primary reasons cited for not using the categorical exclusion for timber stand or wildlife habitat improvement were that projects that could have fit the category had already been or were to be included in an EA or EIS and no projects were undertaken to improve stands or wildlife habitat. Appendix III provides the number of ranger districts not using one of the five vegetation management categorical exclusions and primary reasons cited for not doing so.

Ranger district officials we interviewed offered some reasons for why specific vegetation management categorical exclusions may not be used. For example,

The Tonasket Ranger District, located in north-central Washington State in the Okanogan-Wenatchee National Forests, had not used the categorical exclusion for the removal of trees to control the spread of insects or disease because, according to district officials, the 250-acre size limitation of the categorical exclusion constrains its use. The district has huge areas infested with beetles and mistletoe and, to be effective, any salvage would have to cover a much larger area.

[7] 68 Fed. Reg. 33814 (June 5, 2003) and 68 Fed. Reg. 44598 (July 29, 2003).

The Canyon Lakes Ranger District, located in north-central Colorado in the Arapaho-Roosevelt National Forests, had not used the categorical exclusion for timber stand or wildland habitat improvement. According to ranger district officials, they have not used this categorical exclusion because project planning typically consists of an EA or EIS. These types of environmental analysis allow the district to better evaluate multiple activities over large geographic areas using a single analysis—which is more efficient than approving different projects using several vegetation management categorical exclusions.

Concluding Comments

Because four of the five categorical exclusions have only been available since 2003, it is premature to draw any conclusions about trends in the Forest Service's use of them to approve vegetation management projects. More information over a longer period of time will be useful in addressing some of the controversial issues, such as whether categorical exclusions, individually or cumulatively, have any significant effect on the environment or whether their use is enabling more timely Forest Service vegetation management.

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions that you or other Members of the Subcommittee may have at this time.

GAO Contacts and Staff Acknowledgements

For further information about this testimony, please contact me at (202) 512-3841 or nazzaror@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. David P. Bixler, Assistant Director; Rich Johnson; Marcia Brouns McWreath; Matthew Reinhart; and Carol Herrnstadt Shulman made key contributions to this statement.

Appendix I: Forest Service's Vegetation Management Categorical Exclusions

Type of categorical exclusion for vegetation management and conditions	Examples of activities
Timber stand or wildlife habitat improvement	
No acreage restrictions. May not use herbicides. No more than 1 mile of low standard road construction.[a]	Girdling trees to create snags.[b] Thinning or brush control to improve growth or reduce fire hazard, including the opening of an existing road to a dense timber stand. Prescribed burning to control understory hardwoods in stands of southern pine. Prescribed burning to reduce natural fuel build-up and improve plant vigor.
Hazardous fuels reduction activities using prescribed fire; and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing	
Prescribed fire not to exceed 4,500 acres and mechanical methods not to exceed 1,000 acres. Activities are limited to (1) areas in the wildland-urban interface or (2) designated areas outside the wildland-urban interface.[c] Activities must be identified through a collaborative framework as described in *A Collaborative Approach for Reducing Wildland Fire Risks to Communities and Environment 10-Year Comprehensive Strategy Implementation Plan*, May 2002; be conducted consistent with agency and departmental procedures and applicable land and resource management plans; not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure, and may include the sale of vegetative material if the primary purpose of the activity is hazardous fuels reduction; and not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness.	Prescribed burning. Mechanically crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing.
Limited harvest of live trees	
Not to exceed 70 acres. No more than one-half mile of temporary road construction. This categorical exclusion is not to be used for harvesting or generating same-aged trees or converting to a different type of vegetation. May include incidentally removing trees for landings, skid trails, and road clearing.	Removing individual trees for saw logs, specialty products, or fuel wood. Commercial thinning of overstocked stands to achieve the desired stocking level to increase health and vigor.
Salvage of dead and/or dying trees	
Not to exceed 250 acres. No more than one-half mile of temporary road construction. May include incidentally removing trees for landings, skid trails, and road clearing.	Harvesting a portion of a stand damaged by a wind or ice event and construction of a short temporary road to access the damaged trees. Harvesting fire-damaged trees.

Type of categorical exclusion for vegetation management and conditions	Examples of activities
Removal of insect- or disease-infested trees	
Not to exceed 250 acres. No more than one-half mile of temporary road construction. Includes removing infested or infected trees and adjacent live un-infested or uninfected trees as determined necessary to control the spread of insects or disease. May include incidentally removing trees for landings, skid trails, and road clearing.	□ Felling and harvesting trees infested with southern pine beetles and immediately adjacent un-infested trees to control expanding spot infestations. □ Removing and destroying infested trees affected by a new exotic insect or disease, such as emerald ash borer, Asian long horned beetle, and sudden oak death pathogen.

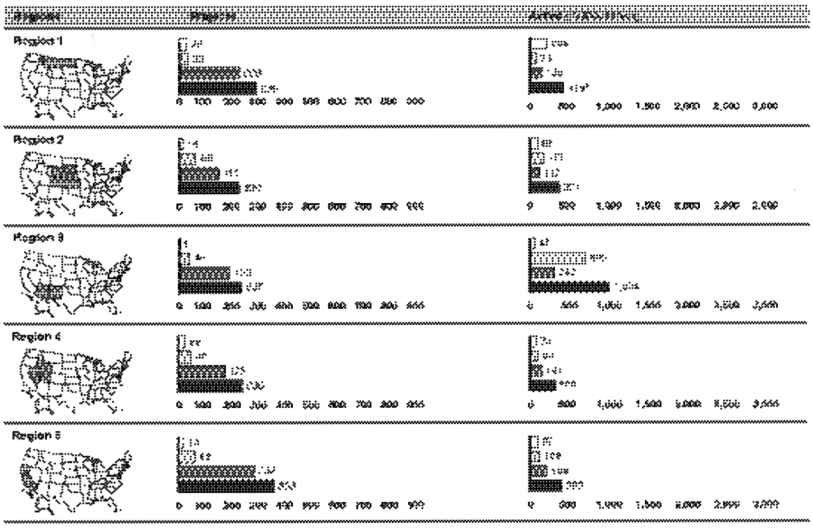
Source: Forest Service Handbook.

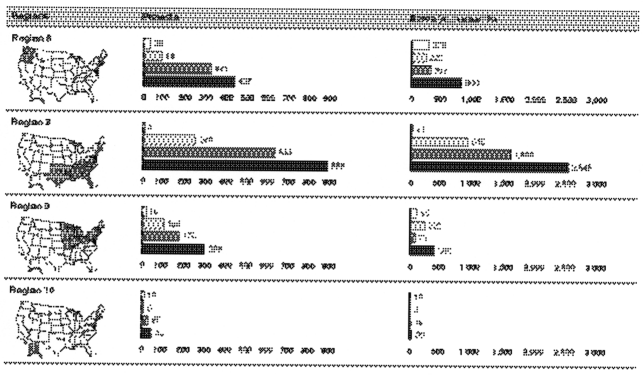
[a]A low standard road is one which has a rough and irregular surface where traffic flow is slow and two-way traffic is difficult. While the road can accommodate high clearance vehicles, it may not provide safe service to all traffic.

[b]Girdling is a process whereby tree trunks are severed to remove the outer layers of bark and other woody material. This constricts the level of nutrients available to support tree life and can result in a snag—a standing, dead tree.

[c]These include certain areas with fire regimes that have been moderately or significantly altered from historical ranges.

Appendix II: Number of Projects and Acres by Type of Environmental Analysis and Forest Service Region (2003 - 2005)





Note: Of the 3,018 vegetation management projects, 113 had no acreage or an unknown acreage, according to the Forest Service. The acreage associated with a vegetation management project may be zero or unknown because, among other reasons, the unit of measure for the project is listed as miles of roadside to be treated or number of trees to be removed.

[a]Numbers do not add due to rounding.

Appendix III: Number of Ranger Districts Not Using One of the Five Categorical Exclusions and Reasons Why (2003 – 2005)

	Categorical exclusion				
	Removal of insect- or disease-infested trees (250-acre limitation)	Limited timber harvest of live trees (70-acre limitation)	Salvage of dead or dying trees (250-acre limitation)	Hazardous fuels reduction (5,500-acre limitation)	Improve timber stands or wildlife habitat (no acreage limitation)
Number of the 509 (percent of total) ranger districts that had not used the categorical exclusion	462 (90.8)	395 (77.6)	353 (69.4)	256 (50.3)	165 (32.4)
Primary reason for not using an exclusion	**Number of ranger districts not using the categorical exclusion that cited the primary reason**				
Lack of insect- or disease-infested trees	114 (24.7)	[a]	[a]	[a]	[a]
Size (acreage) of potential projects is larger than that allowed	27 (5.8)	110 (27.9)	36 (10.2)	22 (8.6)	[a]
Lack of dead or dying trees to salvage	[a]	[a]	95 (26.9)	[a]	[a]
Projects that could fit the category have already been or will be included in an environmental assessment or impact statement	108 (23.4)	100 (25.3)	66 (18.7)	62 (24.2)	59 (35.8)
No projects undertaken to improve timber stands or wildlife habitat	[a]	[a]	[a]	[a]	61 (37.0)
Have insect- or disease-infested trees, but other priorities precluded its use	88 (19.1)	[a]	[a]	[a]	[a]
Lack of internal Forest Service resources to propose and plan a vegetation management project	27 (5.8)	55 (13.9)	28 (7.9)	33 (12.9)	26 (15.8)
Lack of required wildland fire risk reduction plan for using the category	[a]	[a]	[a]	46 (18.0)	[a]
Have dead or dying trees, but other priorities precluded its use	[a]	[a]	47 (13.3)	[a]	[a]
Other categorical exclusion used	14 (3.0)	16 (4.1)	13 (3.7)	21 (8.2)	2 (1.2)
Lack of commercial infrastructure to harvest or salvage trees	14 (3.0)	21 (5.3)	16 (4.5)	2 (0.8)	2 (1.2)
No hazardous fuels	[a]	[a]	[a]	13 (5.1)	[a]
Ranger district or national forest preference to use an environmental assessment as opposed to the categorical exclusion	5 (1.1)	13 (3.3)	8 (2.3)	6 (2.3)	5 (3.0)
Other reasons	64 (13.9)	80 (20.3)	45 (12.7)	51 (20.0)	10 (6.1)

Source: GAO.

[a]The primary reason listed was not applicable to the categorical exclusion and, thus, was not an option for the Forest Service to choose.

Mr. GRIJALVA. Thank you very much. Let me now turn to Deputy Attorney General, State of California, Mr. Harrison Pollak. Sir.

STATEMENT OF HARRISON POLLAK, DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA

Mr. POLLAK. Thank you, Chairman Grijalva, Ranking Member Bishop and the Subcommittee members for this opportunity to testify. My name is Harrison Pollak, and I am here as a representative of California Attorney General Gerry Brown. The Attorney General is deeply concerned over the Forest Service's increased use of so-called management by exclusion. That is, its reliance on categorical exclusions to exempt forest management decisions of every size and scope from environmental review.

There are 19 national forests in California that cover roughly 20 percent of the total land area in the state. These forests are of tremendous economic, recreational and environmental value, and decisions about how to manage them have far reaching implications. Because of this, for more than 20 years the Attorney General has participated extensively in the forest management process to protect forest resources.

A consistent theme of our work in this area has been the importance of providing the public with meaningful opportunities to participate in forest planning which the indiscriminate use of categorical exclusions threatens. Now for purposes of this discussion there are really two types of categorical exclusion. There are the project-level categorical exclusions that apply to individual discrete projects, and then there is the new program level categorical exclusion that would apply to developing, revising and amending land and resource management plans or LRMPs under the National Forest Management Act or NFMA.

This program level categorical exclusion will take effect if and when the Bush Administration's revamped 2005 NFMA regulations go into effect. They have currently been enjoined by a Court in California but the Forest Service intends to go forward with issuing them once it addresses the issues the Court identified.

Let me stop for a moment here, however, to point out that we understand that categorical exclusions play a crucial role in the Forest Service's operations. For instance, they can be used to promptly respond to emergencies and to imminent hazards when necessary, which everybody agrees is of the utmost importance. Unfortunately, the Forest Service is abusing this tool by applying categorical exclusions to increasing numbers of project-level approvals and now by laying the groundwork to fast track program level decisions using the new categorical exclusion.

This latter development is especially troubling. The Forest Service claims that under the new NFMA rules, LRMPs will have no significant environmental impacts because the LRMPs are merely strategic and aspirational but the Forest Service cannot shirk its obligation to engage in meaningful project-level planning by pretending that LRMPs make no difference. They do make a difference, and they must be treated as such under NFMA and under NEPA.

The Forest Service's increasing reliance on categorical exclusions at the program and the project level not only is illegal in many

cases, it often will lead to poor planning decisions and to increased controversy over decisions and how they are implemented. I want to give two examples of how public participation through the NEPA process can play an important role and constructive role in forest planning.

The first example is the Sequoia National Forest at the southern tip of the Sierra Nevada mountain range. In 1988, the Forest Service completed the LRMP for the Sequoia National Forest, and as was the practice then, it issued a final environmental impact statement. There were comments, including by the Attorney General, and an administrative appeal which resulted in a mediated settlement agreement that identified groves of old growth sequoia trees for additional protections.

The first President Bush issued a proclamation to protect these groves, and in 2000 President Clinton further protected them by establishing the Giant Sequoia National Monument. Unfortunately, the present administration is trying to undo this tremendous accomplishment. But my point is this, NEPA and the Forest Service's commitment at that time to address public concerns through the planning process gave us the spectacular national treasure that the Sequoia National Monument has become.

The second example of how the Forest Service and the public stand to gain from public participation at the planning level relates to a subject that is on all of our minds these days, global warming. There is increasing evidence of a connection between forests and climate change. Before long the Forest Service will have to consider the implications of global warming on forest management and of forest management on global warming.

Public participation in the planning process is one way to help the Forest Service do this. Indeed there is a perfect opportunity to consider the implications of global warming at the program level of forest planning instead of reserving this complex issue for consideration with each individual project. In conclusion, forest planning under NFMA and especially program level planning through the development, revision and amendment of LRMPs is precisely the type of government action for which NEPA is best suited.

NEPA provides a mechanism for consideration of the likely environmental impacts of far reaching decisions early in the planning process. While the Attorney General understands that the Forest Service will and indeed should continue to use categorical exclusions where appropriate, the Attorney General also urges the Forest Service to embrace environmental review under NEPA instead of continuing to try to avoid it.

Returning to the title of this hearing, management by exclusion is a poor management strategy. Thank you, and I am prepared to answer any questions.

[The prepared statement of Mr. Pollak follows:]

Statement of Harrison M. Pollak, Deputy Attorney General, on behalf of California Attorney General Edmund G. Brown, Jr.

I. Introduction

Thank you Chairman Grijalva, Ranking Member Bishop, and the Committee Members for this opportunity to testify before the National Parks, Forests and Public Lands Subcommittee at today's hearing, entitled "Management by Exclusion: The Forest Service Use of Categorical Exclusions from NEPA." My name is Harrison Pol-

lak, and I am a Deputy Attorney General in the Office of the California Attorney General. I am here as a representative of California Attorney General Edmund G. Brown, Jr. I am because the Attorney General is deeply concerned over the Forest Service's increased use of so-called "Management by Exclusion" that is, its reliance on categorical exclusions to exempt forest management decisions of every size and scope from environmental review.

My testimony today will focus on three points. First, I will describe the immense importance of national forests to the People of the great State of California, and why the California Attorney General has taken a profound interest in national forest planning issues for more than two decades. Second, I will explain why it is the Attorney General's view that, while categorical exclusions are an important tool for some aspects of forest planning, such as certain fire suppression activities, the Forest Service has gone too far. Its broad use of categorical exclusions to preclude meaningful public participation at all levels of forest planning violates the letter and the spirit of the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"). Finally, I will argue that eliminating the type of public participation from the planning process that NEPA guarantees will lead to poor planning and to increased controversy. I will give two examples where public participation has made an important difference in the past and where it can make a difference in the future.

II. National Forests in California and the Attorney General's Involvement in Forest Planning

It is hard to overstate the importance of national forests and how they are managed to the People of California. The 19 national forests in California cover roughly 20 million acres of land, or approximately 20 percent of the total land area in California. National forests supply well over half of our water resources, and they form the watershed of most major aqueducts and more than 2,400 reservoirs throughout the State. National forests in California provide recreational opportunities for hiking, camping, motorized travel, hunting, skiing, and much more. More than 600 of the 800 species of fish and wildlife in California inhabit the national forests, and national forests are home to nearly 4,000 of the 6,500 native plants in California.

The forests are of tremendous economic, recreational, and environmental value to the State. In addition, decisions about how to manage forests and other federal lands, of which there are approximately 50 million acres in California, have effects far beyond the forest boundaries. Water supplies for agriculture, industry, and human consumption, water and air quality, fisheries, fire hazards, are just a few examples of where forest management decisions make a difference on the lives of the citizens of California and beyond.

Because of this, for more than twenty years the California Attorney General has participated extensively in the forest management process for national forests located in California. Our office has commented on, and where necessary, challenged in court, forest plans and projects in the Plumas, Sequoia, Tahoe, Modoc, Shasta-Trinity, and Lassen National Forests, to name a few, in order to protect forest resources. We also have taken a keen interest in broader planning issues. For instance, most recently the California Attorney General commented on, and then successfully challenged in court, the Forest Service's attempt to rewrite and dilute the NFMA regulations without complying with the Administrative Procedures Act ("APA"), NEPA, or the Endangered Species Act ("ESA"). Citizens for Better Forestry v. United States Department of Agriculture, 481 F. Supp. 2d 1059 (N.D. Cal. 2007). And we presently are awaiting a ruling on a challenge to the Bush administration's attempt to replace the 2001 Sierra Nevada Framework Plan—which was the culmination of a decade-long consensus-building process to develop an overarching management plan for the 11 national forests in the Sierra Nevada—with its own version of the document that guts basic wildlife, habitat and riparian protections, increases green timber harvesting by more than four-fold, and authorizes fragmentation of wildlife corridors that were a centerpiece of the 2001 Framework. People v. United States Department of Agriculture, No. 05-CV-0211 DFL/GGH (N.D. Cal.).

A consistent theme of the Attorney General's work in this area has been the paramount importance of providing the public with an opportunity to participate in the forest planning process. Eliminating such opportunities, or rendering them meaningless by insulating officials from having to respond meaningfully to issues that the public identifies, deprives decision makers of critical information about the scientific and social effects of management choices, and leads to decisions that are contrary to the best science and that do not reflect an appropriate balancing of interests. And as the actions mentioned above demonstrate, the Forest Service's repeated attempts

to eliminate the public from the planning process lead to increased controversy and to delays in the planning process.

This is not what Congress intended when it enacted NFMA in 1976, to guarantee that "land management planning and the formulation of regulations to govern the planning process shall be accomplished with improved opportunity for public participation at all levels." S. Rep. No. 94-893, 94th Cong., 2d Sess, reprinted in 1976 U.S.C.C.A.N. 6693 (1976). Nor is it consistent with the primary purposes of NEPA, which are "to allow for informed public participation and informed decision making." Earth Island Inst. v. United States Forest Service, 442 F.3d 1147, 1160 (9th Cir. 2006). That is why I am here today, on behalf of Attorney General Brown, to testify against the Forest Service's indiscriminate use of categorical exclusions in the forest planning process.

III. The Legal Argument Against Management by Exclusion

A. The Forest Service's Issuance of New Project Categorical Exclusions Beginning in 2003

It is beyond dispute that categorical exclusions from NEPA play a crucial role in the Forest Service's ability to manage the 192 million acres of federal lands in the United States that it oversees. Every year the Forest Service makes thousands upon thousands of routine decisions that, if required to undergo NEPA review in every case, would bring the organization to a halt—from mowing the lawn at a picnic area, to repairing trails and buildings, to temporarily closing roads, and so on. Categorical exclusions also allow the Forest Service promptly to respond to emergencies and to imminent hazards when necessary. The Attorney General recognizes that categorical exclusions are an appropriate and necessary part of the Forest Service's management activities.

Unfortunately, the Forest Service is abusing this tool. Prior to 2003, the Forest Service had only one categorical exclusion for use in approving projects that involved vegetation management activities, namely, timber stand or wildlife habitat improvement projects of any size that do not use herbicides or involve more than one mile of road construction. See Forest Service, Environmental Policy and Procedures Handbook ("Forest Service Handbook") at § 31.2(6). Then, in 2003, the Forest Service introduced four new categorical exclusions for vegetation management activities: 1) hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres, and mechanical methods such as thinning, not to exceed 1,000 acres; 2) limited logging of live trees, not to exceed 70 acres; 3) salvage of dead or dying trees, not to exceed 250 acres; and 4) removal of trees to control the spread of insects or disease, not to exceed 70 acres. Id. at §§ 31.2(10), (12), (13), (14). In addition, in 2003 the Forest Service issued a categorical exclusion for post-fire rehabilitation activities not to exceed 4,200 acres, which are defined broadly to include various activities that take place in an area within three years following a fire. Id. at § 31.2 (11).

If these new categorical exclusions were used sparingly, there would be no issue. But, as this Subcommittee is aware, the Government Accountability Office ("GAO") has reported that from 2003 to 2005, the Forest Service used categorical exclusions for more 70 percent of the 3,018 vegetation management projects that it approved during that period. GAO Report No. 07-99, Use of Categorical Exclusions for Vegetation Management Projects, Calendar Years 2003 through 2005 (Oct. 2006) at 12. These projects took place on more than 2.8 million acres of land, or slightly less than half of the total treatment acres the Forest Service approved from 2003 to 2005. Id. The Forest Service is thus using categorical exclusions to remove the majority of project-level management decisions about vegetation management activities from public purview.

At the same time, the Forest Service is attempting to overhaul the forest planning process to exclude program-level planning decisions from NEPA review as well. Under NFMA, the Forest Service must develop and maintain for each national forest unit a Land and Resource Management Plan ("LRMP"). 16 U.S.C. § 1604(a). Prior to 2005, the NFMA regulations required the Forest Service to prepare an environmental impact statement every time it developed or revised an LRMP, and for amendments that resulted in a "significant change" to the LRMP. 47 Fed. Reg. 43026, 43043-44 (Sep. 30, 1982) (final rule adopting 1982 NFMA Rule, subsequently published at 36 Code Fed. Regs. §§ 219.10(b), (f), (g)). In 2005, however, the Forest Service issued a revamped set of NFMA regulations. 70 Fed. Reg. 1023 (Jan 5, 2005) ("2005 NFMA Rule"). Under the 2005 NFMA Rule, "[a]pproval of a plan, plan amendment, or plan revision...will be done in accordance with the Forest Service NEPA procedures and may be categorically excluded from NEPA documentation under an appropriate category provided in such procedures." 70 Fed. Reg. at 1056 (§ 219.4(b) (emphasis added).) To accompany this dramatic loosening of the require-

ment to prepare an environmental impact statement for program-level planning in the LRMP, the Forest Service issued a new categorical exclusion that excludes from NEPA review "final decisions on proposals to develop, amend, or revise land management plans," except under extraordinary circumstances. 71 Fed. Reg. 75481 (Dec. 15, 2006); see also Forest Service Handbook at §§ 30.3, 31.2(16).

In March 2007, Judge Hamilton of the Northern District of California enjoined the Forest Service from implementing the 2005 NFMA Rule, after holding that it violated provisions of the APA, NEPA, and the ESA when it promulgated the rule. Citizens for Better Forestry, supra, 481 F. Supp. 2d at 1100. However, the Forest Service recently announced that it will prepare an environmental impact statement for the 2005 NFMA Rule by November 2007, which suggests that it still plans to move forward with the new NFMA procedures. 72 Fed. Reg. 26775 (May 11, 2007).

Therefore, to be absolutely clear, if the Forest Service manages to overcome the legal hurdles to implementing the 2005 NFMA Rule, then, together with the new LRMP categorical exclusion that already is in place, the Forest Service will be positioned to make program-level forest management decisions without any environmental review or public participation under NEPA, just as it has done for the majority of individual forest management projects that it approves.

B. NEPA Requires the Forest Service to Take a "Hard Look" at the Potential Environmental Impacts of Proposed Actions

NEPA is a procedural statute designed to ensure that federal agencies taking major actions affecting the quality of the human environment "will not act on incomplete information, only to regret its decision after it is too late." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). It requires federal agencies to consider and take a "hard look" at the environmental consequences of their actions. 42 U.S.C. § 4332(2)(c); Robertson v. Methow Valley Citizen Council, 490 U.S. 332, 348 (1989). In enacting NEPA, Congress mandated that it is the federal government's responsibility to "use all practicable means and measures" to protect environmental, historic, and cultural values. 42 U.S.C. § 4331(b). An agency cannot simply exempt itself from NEPA through its own regulations. Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Committee, Inc., 449 F.2d 1109 (D.C. Dir. 1971).

Federal agencies have identified three types of activities receiving varying levels of environmental review: (1) those that require preparation of an environmental impact statement; (2) those for which preparation of an environmental assessment is sufficient; and (3) those that are categorically excluded from further analysis. A federal agency may adopt a categorical exclusion for a "category of actions which do not individually or cumulatively have a significant effect on the human environment." 40 Code Fed. Regs. § 1508.4 (2001); Metcalf v. Daley, 214 F.3d 1135, 1141 (9th Cir. 2000). By definition, categorical exclusions are limited "to situations where there is an insignificant or minor effect on the environment." Alaska Center for the Env't v. United States Forest Service, 189 F.3d 851, 859 (9th Cir. 1999).

C. Most Aspects of Forest Planning Require an Environmental Impact Statement or an Environmental Assessment

It is pure fiction that developing and revising LRMPs will not result in significant effects on the environment, as the Forest Service claims in the 2005 NFMA Rule. The National Forest System covers 192 million acres of land across the nation. It includes forests of every type, grasslands, rivers, streams, estuaries. Forests in the system are home to abundant plant and animal species, many of which are listed as sensitive or endangered. There are homes in national forests, and forests surround or are adjacent to cities and towns. Developing and amending the guidelines for how each forest unit will be managed may have significant effects on the environment, which means that the Forest Service cannot exclude program-level forest planning from NEPA. Rather, it must take the requisite "hard look" at the environmental consequences of the land-use decisions that it makes when it develops, revises, or amends LRMPs.

At the same time, however, we recognize that some project-level planning properly is exempt from NEPA review because there are no significant impacts. Moreover, categorical exclusions are a critical tool for the Forest Service to use in its efforts to efficiently and effectively reduce the threat of catastrophic wildfires which, as the fire burning right now near Lake Tahoe so painfully demonstrates, is of the utmost importance. But the Forest Service went too far in 2003, when it adopted four broad categorical exclusions under the guise of fire suppression and restoration activities that allow it to do much more than that. The way in which the exclusions are formulated make them ripe for abuse, and the Attorney General is not aware of anything the Forest Service has done in practice to limit their application. To take one

example, "mechanical thinning" is excluded from review for projects that are less than 1,000 acres, but not for bigger projects. Forest Service Handbook at § 31.2(10). In practice, this means that five separate 900-acre projects might not be reviewed, even though a project that is 4,500 acres would require review. There is no rational basis to conclude a priori that the five projects will have no impacts, while the larger project may have impacts. Further, parsing projects into smaller units avoids the analysis that NEPA requires of the cumulative impacts that the individual projects, considered together, will produce. See 40 Code Fed. Regs. § 1508.27(b)(7) (agency must consider whether a project has "individually insignificant, but cumulatively significant impacts").

Therefore, while categorical exclusions are appropriate for some types of forest management decisions—particularly at the individual project level, and for projects narrowly designed to reduce the threat of catastrophic wildfires—the Forest Service appears to view them in a manner that is contrary to the law.

D. The Forest Service Cannot Avoid NEPA by Defining Land Management Plans as Mere "Strategic Documents"

The Forest Service attempts to exclude LRMPs from NEPA review by casting them under the 2005 NFMA Rule as "strategic in nature," instead of as "prescriptive" documents. 70 Fed. Reg. at 1024-25. In the preamble to the final rule, the Forest Service claims that forest management plans no longer will contain "final decisions that approve projects or activities except under extraordinary circumstances." Id. By removing consideration and approval of specific projects from the forest management plans, the Forest Service thus seeks to defer environmental review to the project-planning stage. It explains that "specific projects and activities will be proposed, approved, and implemented depending on specific conditions and circumstances at the time of implementation." 70 Fed. Reg. at 1025 (emphasis added). This is echoed in the categorical exclusion that the Forest Service adopted for LRMPs, where it reiterated that "[l]and management plans developed under the 2005 planning rule will typically be strategic and aspirational." 71 Fed. Reg. 25,481, 75,483.

In attempting to redefine LRMPs as mere strategic and aspirational documents, the Forest Service places undue reliance on two Supreme Court decisions: Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998), and Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. 55 (2004). In both cases, the Supreme Court acknowledged the strategic nature of management plans. But the Court did not suggest, as the Forest Service maintains, that this removes management plans from the ambit of NEPA review. To the contrary, in both cases it affirmed that the federal agencies must comply with the procedural safeguards in NEPA notwithstanding the strategic nature of management plans.

In Ohio Forestry, the Court considered the Sierra Club's legal challenge to a land management plan that allegedly was biased in favor of clear cutting. 523 U.S. 726 (1998). The Court held that the challenge was not ripe, because the plan itself did not "authorize the cutting of any trees." Id. at 730. However, the Supreme Court distinguished the Sierra Club's substantive challenge to elements of the plan, which were not ripe, from a hypothetical NEPA challenge to the procedure by which the Forest Service adopted the plan, which would be ripe at soon as the plan is adopted: "Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." Id. at 737.

In SUWA, the Supreme Court considered an environmental alliance's claim that the Bureau of Land Management ("BLM") failed to comply with certain provisions of its resource management plans, which are similar to LRMPs, by allowing increased use of off-road vehicles in certain parts of BLM lands. SUWA, 542 U.S. at 2377-78. The Court held that resource management plans under the Federal Land Policy and Management Act do not create a "binding commitment" to a particular course of action, and it therefore refused to order BLM to take specific actions otherwise contemplated in the plans. Id. at 69. The Court described resource management plans as "a preliminary step in the overall process of managing public lands—'designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.'" Id., quoting 43 Code Fed. Regs. § 1601.0-2 (2003). However, as was the case in Ohio Forestry, the Supreme Court recognized that adopting a resource management plan triggers NEPA requirements. SUWA, 542 U.S. at 74, citing 43 Code Fed. Regs. § 1601.0-6 (approval of a land use plan is a major federal action requiring an environmental impact statement). The Court simply declined to order BLM to supplement the environmental impact statement in that instance. Id.

In short, neither of these cases provides a legal basis to exclude program-level planning from NEPA review. The Forest Service is incorrect to read these cases as supporting its efforts to turn LRMPs into mere "aspirational" documents that make no firm commitments to a specific course of action and that are exempt from NEPA. The Forest Service cannot shirk its obligation to engage in meaningful project-level planning by pretending that LRMPs have no environmental impacts.

In fact, Judge Hamilton rejected a similar argument when she enjoined the Forest Service from implementing the 2005 NFMA Rule. In Citizens for Better Forestry, the Forest Service claimed that the new rules would not "change the physical environment in any way;" that there would be "no direct environmental impacts" from adopting the rule; and that "it is only after new forest plans are adopted and site-specific projects are proposed that effects will become identifiable." 481 F. Supp. 2d at 1084. The court disagreed. It ruled that NEPA does indeed contemplate environmental review at the program level. Id. at 1085. "[A]t least in this circuit, NEPA's requirement of an [environmental impact statement] is not necessarily limited to site or project-specific impacts or activities, as defendants suggest." Id. at 1086 (emphasis in original). While the court acknowledged that evaluating the environmental effects of programmatic actions could be difficult, which is one of the Forest Service's principal reasons for seeking to defer NEPA review to the project level, it concluded that "this does not mean that environmental analysis regarding broad programmatic changes cannot take place." Id. at 1089.

Moreover, in spite of the Forest Service's efforts in the 2005 NFMA Rule to reduce LRMPs to vague and nonbinding statements of general management objectives, Congress clearly intends for plans to be substantive documents that guide specific land-use decisions in national forests. See 16 U.S.C. § 1604. NFMA's species-diversity provision alone—which requires each LRMP to provide for diversity of plant and animal communities—ensures that the Forest Service cannot develop or revise an LRMP without environmental review. 16 U.S.C. § 1604(g)(3)(B). Even under the Forest Service's reworked description of LRMPs in the 2005 NFMA Rule, each plan must define the "desired conditions" (i.e. the "social, economic, and ecological attributes toward which management of the land and resources of the plan area is to be directed"); contain "concise projections of intended outcomes of projects and activities"; provide "guidance for the design of projects and activities"; evaluate the suitability of areas for different uses, designate "special areas" such as wilderness or wild and scenic river corridors; and more. 70 Fed. Reg. at 1026-27. An LRMP that contains these elements is not merely "strategic in nature," as the Forest Service claims. 70 Fed. Reg. at 1024. It still would embody substantive decisions that will guide project-level decisions in the future and will thus have potentially significant environmental impacts. See Ohio Forestry, 523 U.S. at 731 ("Despite the considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place.").

Therefore, the Forest Service cannot, consistent with its statutory mandate, engage in do-nothing land management planning at the program level. Because land management planning does have meaning, it may affect the environment and therefore is not exempt from NEPA.

IV. The Forest Service Should Not Eliminate the Public From the Forest Planning Process

The final point that I will make today is that the Forest Service's increasing reliance on categorical exclusions not only is illegal in many cases, it often will lead to poor planning decisions and increased public controversy over decisions and how they are implemented. This is a bad result for the Forest Service, for the environment, and for the public that the Forest Service serves.

I want to give two examples of how public participation plays an important role in forest planning. Of course, there are countless examples from which to choose. I have selected these two to provide a specific case where public participation has made a significant difference in the past, and to illustrate the type of issue that the Forest Service might not consider in the future if it eliminates NEPA review from the forest planning process.

The first example is the Sequoia National Forest, which is at the southern end of the Sierra Nevada mountain range. Sequoia takes its name from the world's largest tree, which grows in more than 30 groves on the forest's lower slopes. Its landscape is as spectacular as the trees. With elevations ranging from 1,000 to 12,000 feet, visitors experience soaring granite monoliths, glacier-torn canyons, roaring whitewater, spectacular mountain views, and more. See http://www.fs.fed.us/r5/sequoia/.

In 1988, the Forest Service completed its LRMP for the Sequoia National Forest. As was the practice then, it issued a final environmental impact statement at the same time. The California Attorney General submitted comments on the LRMP and the environmental impact statement, and, along with several other groups, filed an administrative appeal in order to protect the area's unique and irreplaceable resources. Following nearly two years of mediation, the parties entered into a Mediated Settlement Agreement that resolved the outstanding issues. As part of the mediation agreement, the Forest Service identified groves of old-growth sequoia trees that warranted additional protections. The first President Bush issued a proclamation to afford these groves the necessary protections, Executive Proclamation 6457 (July 14, 1992), and in 2000, President Clinton further protected them by establishing the Giant Sequoia National Monument. Executive Proclamation 7295 (Apr. 15, 2000).

If it were not for NEPA, and the Forest Service's commitment at that time to address public concerns through the planning process, the Sequoia National Forest would not be what it is today. Unfortunately, under the current Bush administration, the Forest Service has attempted to reverse the achievements of past administrations by allowing clearcutting and logging of 100-year-old trees in the Monument and adopting a Fire Plan that contemplates significant timber harvesting of large trees under cover of "fire management." Along with others, the California Attorney General successfully challenged these actions in court, but they are additional examples of how this administration's efforts to remove the public from the planning process results in delays and controversy, to the detriment of everybody. Lockyer v. United States Forest Service, 465 F. Supp. 2d 942 (N.D. Cal. 2006).

The second example of how the Forest Service and the public stand to lose from eliminating meaningful public participation from the forest planning process relates to a subject that is on all of our minds these days—global warming. Just last month, NASA's James Hansen and other scientists published an article in which they warn that "[r]ecent greenhouse gas emissions place the Earth perilously close to dramatic climate change that could run out of our control, with great dangers for humans and other creatures." James Hansen et al., Climate Change and Trace Gases, Phil. Trans. R. Soc. A (published on-line May 18, 2007). There is increasing evidence that forests are affected by climate change, and that forests can play an important role in efforts to combat climate change and to respond to its effects. For instance, in 2006 the Food and Agriculture Organization of the United Nations ("FAO") concluded that climate change and forests are intrinsically linked:

> On the one hand, changes in global climate are already stressing forests through higher mean annual temperatures, altered precipitation patterns and more frequent and extreme weather events. At the same time, forests and the wood they produce trap and store carbon dioxide, playing a major role in mitigating climate change. And on the flip side of the coin, when destroyed or over-harvested and burned, forests can become sources of the greenhouse gas, carbon dioxide.

FAO, Forests and Climate Change, www.fao.org/newsroom/en/focus/2006/1000247/index.html (March 27, 2006). Similarly, in a report by the Pew Center on Global Climate Change, the authors posit that forest location, composition, and productivity will be altered by changes in temperature and precipitation, that changes in forest disturbance regimes, such as fire or disease, could further affect the future of U.S. forests and the market for forest products, and that there may be adverse economic effects on some regions, and positive impacts on other regions. Pew Center on Global Climate Change, Forests & Global Climate Change: Potential Impacts on U.S. Forest Resources, www.pewclimate.org/global-warming-in-depth/all__reports/forests__and__climate__change/ (Feb. 2003).

It is thus becoming increasingly clear that the Forest Service must consider the implications of global warming on forest management, and forest management on global warming, as it plans for the future. Public participation in the planning process is one way to ensure that the Forest Service does so, while making available to the Forest Service the increasing body of scientific information about the causes and effects of global warming as they relate to forests. Moreover, if the Forest Service considers global warming issues at the program level, then there will be fewer delays caused by having to address it on blank slate each time the agency approves an individual project.

In sum, as occurred when the Forest Service developed the LRMP for the Sequoia National Forest, and as should occur in the future as the Forest Service grapples with how to address the nexus between forest management and global warming, NEPA affords the public an opportunity to raise important issues and to provide useful information at a time when the Forest Service can incorporate such information into its planning decisions. NEPA also requires accountability on the agency's

part that environmental considerations play a role in its decision making. The Attorney General urges the Forest Service to embrace NEPA rather than continue to try to avoid it.

V. Conclusion

Forest planning under NFMA, and especially program-level planning through the development, revision, and amendment of LRMPs, is the type of government action for which NEPA perhaps works best. NEPA provides a mechanism for informed and adequate consideration of the likely environmental impacts of decisions early in the planning process. This, in turn, leads to better decision making and to less controversy and more efficient implementation in the long run. For this reason, while the California Attorney General understands that the Forest Service will, and should, continue to use categorical exclusions where appropriate, the Attorney General opposes the Forest Service's efforts over the past several years to exclude critical program-level and project-level decisions from the purview of NEPA. Referring back to the title of this hearing, "Management by Exclusion" is a poor management strategy.

Mr. GRIJALVA. Thank you. Let me begin with the first round of questions. Let me begin with the last witness if I may, Mr. Pollak. Under Secretary Rey has argued that the Forest Service use of categorical exclusions, including the new categorical exclusions implemented by this administration are an integral tool for their NEPA compliance. Do you find that statement accurate?

Mr. POLLAK. I do find it accurate when used in the right circumstances. First of all, I agree with the witness that categorical exclusions are part of NEPA, and so using a categorical exclusion does not mean that the Forest Service is not complying with NEPA if the exclusion is used appropriately, and a categorical exclusion under NEPA can only be used if there are going to be no environmental impacts from the project including cumulative impacts, and so to use categorical exclusions even for smaller projects on such a wide scale and broad basis where you're approving the majority of projects without looking at the cumulative impacts as an environmental assessment or environmental impact statement would require, that is not consistent with NEPA, and that is what Courts are finding increasingly.

It is interesting. I mentioned how the Forest Service's 2005 NFMA rules have been enjoined. One of the reasons they were enjoined is because the Court found the Forest Service invoked a categorical exclusion to pass those rules, which completely revamped the forest management process for complying with NFMA. In that case, the Forest Service argued to the United States District Court that the NFMA rules would have no impacts on the environment. No direct or indirect impacts. Therefore, a categorical exclusion was appropriate.

The District Court disagreed and said, even the regulations for explaining how to do an LRMP can have indirect impacts on the forest and therefore NEPA compliance is required, and so this idea that something that is even closer to the ground level which is the LRMP itself could be categorically excluded, I disagree with that.

Mr. GRIJALVA. Thank you. I do think that it is an irony that the Federal Court found the Forest Service planning rule itself to be in noncompliance with NEPA. Let me turn to Ms. Nazzaro. Of the five types of categorical exclusions for Forest Service vegetation management projects your study evaluated, how many of those

were in place prior to the Bush Administration taking office in 2000?

Ms. NAZZARO. There was only one categorical exclusion that was in place prior to June 2003, and that was the categorical exclusion for reducing hazardous fuels. Excuse me. For improving timber stands and wildlife habitat. After June 2003, there were four additional ones added that addressed vegetation management.

Mr. GRIJALVA. So the conclusion can be that under this administration there has been a considerable expansion of the availability of categorical exclusions for the Forest Service vegetation management plans expanded?

Ms. NAZZARO. That would be correct but actually if you look at our report, the actual use of them declined during 2005. Now our study only went from 2003 to 2005, and it is such a short period of time we are cautioning about any trend data or making any conclusions based on that. The agency is collecting its own data now, and it would probably be worthwhile to get updated data from them before making any longer term assessment as to the use of these particular categorical exclusions for vegetation management.

Mr. GRIJALVA. OK. Just one more quick question, and then I will turn to the Ranking Member. Mr. Under Secretary, in total how many NEPA categorical exclusions have been approved by the Forest Service for plans and projects during your tenure?

Mr. REY. Well only one for plans, and I think we have approved an additional four for projects, and of course Congress has approved four during my tenure for projects as well, and that is actually not the majority of categorical exclusions that the agency operates under. So I have been relatively lax compared to my predecessors in approving new categorical exclusions.

Mr. GRIJALVA. With that, my time is up, and I will reserve some questions for the second round. Mr. Bishop?

Mr. BISHOP. My job is still to be here through the entire thing, and since my colleagues have to go, I would like to either start or yield to our newest member of this particular subcommittee and then work our way up from our side if that is OK.

Mr. GRIJALVA. Mr. McCarthy.

Mr. MCCARTHY. Thank you, Mr. Bishop. I guess my first one I will go to my home state of California, Harrison. I apologize. I served in the state assembly. I just left, and I am new here, and I have not been able to meet you yet. Are you new when the new Attorney General came in?

Mr. POLLAK. No. I came in under Attorney General Lockyer about six years ago. I am a Deputy Attorney General in the public rights division, and I serve in Oakland.

Mr. MCCARTHY. OK. I just have a couple of questions, and the Attorney General Office seems to be kind of busy. It is my understanding that the Attorney General's Office to the State of California sued the Forest Service over the development and implementation of the Giant Sequoia that you talked about, fire management plan. It was also my understanding that the Forest Service had the support of the California State Resources Agency and CalFire for implementation of this plan.

I also understand that as a result of lawsuit that the fire management plan was withdrawn. My question to you and my concern

to you especially with what is going on in Lake Tahoe because the fire management plan being withdrawn potentially leading to situations like Lake Tahoe, before you file these, do you consult with your sister agencies?

Mr. POLLAK. Yes, we do.

Mr. MCCARTHY. You consulted with Cal State Resources prior to filing?

Mr. POLLAK. Before filing litigation?

Mr. MCCARTHY. Yes.

Mr. POLLAK. Yes, we do.

Mr. MCCARTHY. And you did on that one as well?

Mr. POLLAK. Our office represents those agencies, and so whether my section spoke to somebody in the agency or spoke to somebody in our office that represents the agency, I am not sure, but we certainly do consult.

Mr. MCCARTHY. Because I am only concerned because it had the support of Cal State Resources, CalFire and if you said you consulted with them, you still moved forward with the lawsuit, I am just wondering how that works.

Mr. POLLAK. Yes. And that is a very good point, and let me address this now especially you know you have this fire raging in Tahoe right now. It is a tragedy, and I think everybody on all sides of this issue would agree that the Forest Service should do what it can to avoid that type of tragedy.

Now by filing a lawsuit challenging a fire plan, challenging a resource management plan, challenging a specific project because it does not comply with the applicable procedures certainly does not mean that the Attorney General is pro fire or thinks that anything that can be done to reduce the risk of fire should not be done.

Mr. MCCARTHY. Well I would never make that argument that he was pro fire but your actions resulted in the fire management plan being withdrawn. So if you look at the homeowners, you look at the neighbors, you look at the residents, I mean actions created other actions, and if we have California sister agencies that were working on the fire plan, supported the fire plan, you have met with them, and then you went forward with the lawsuit that pulled the whole fire plan away, to me that has implications and actually problems in the future.

Mr. POLLAK. Well there are strategies for combatting fires that would be in a fire plan that state agencies would agree with, would use, that the Attorney General certainly has no objection or problem with specific strategies. Our issue is with the planning process saying that when you develop a fire plan, you need to look at the long-range implications.

You need to involve the public. You need to have public disclosure. It is the procedure to make sure that all different strategies are considered, and I would say that the state agencies would agree that wise planning in advance is the best type of fire management you can do.

Mr. MCCARTHY. Well I would agree with you there, and if this California State Resources Agency and CalFire supported the plan, I am sure they had those same questions. I am just wondering when you meet with them do you ask them: Did they look at that? Did they ask that? Because I do not see dealing with the agencies

that I have Cal State Resources just does not sit there and approve them. They have those same tough questions, and I am just wondering if they have been along on this program.

And let me just follow up with a couple of others because I am trying to find out if there is a pattern here, and if you do consult with them, do you listen in the consultation before you go forward because there are implications? Did your office file suit challenging the state petitions rule for the roadless areas? The ruling invalidated the state petition rule and precluded the Governor from applying under the rule and seeking a California specific roadless rule.

Mr. POLLAK. Yes, we were part of that litigation.

Mr. MCCARTHY. OK. Prior to the litigation—and this is what I am trying to come to—when you consult with the sister agencies that you said you have, because there are other agencies in California working forward, what is the consultation? What are the questions you are asking? Are there answers you are getting back that make you go forward or are there not?

Mr. POLLAK. Well I personally have not been part of those consultations. What I can say though is that the Attorney General, as the attorney for the different agencies, would not take any action that is adverse to those agencies' interests.

Mr. REY. Mr. McCarthy, if I could offer an observation. I think Mr. Pollak has as much of an argument with Governor Schwarzenegger and his sister agencies as he does with me because there are several instances where we have been cooperating with the Governor's office and the resource agencies on projects that the Attorney General's Office is suing us on. But hey, if I had to choose between picking a fight with a shrimp like me and the terminator, I know what I would do. Look at that. There is nothing there.

Mr. MCCARTHY. Well I mean I will tell you this because——

Mr. BISHOP. Mr. McCarthy.

Mr. GRIJALVA. Second round. The time is up at this point.

Mr. MCCARTHY. I apologize, Mr. Chairman. I yield back what time I do not have.

Mr. GRIJALVA. What time you already took. OK. Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman. First I have a comment and then a couple of questions. Could you start the time over again? First of all a comment and then a couple of questions. People in Colorado were traumatized by the 2001 Hayman fires. In Colorado Springs, which is not out in the forest but is an urban setting, some people were evacuated because of the fire coming so close to the city limits.

I had ashes falling on my own house, and the feeling of many people after all that happened because it came out that suppression of fires through management of clearing underbrush, getting rid of dead timber, things like that was frequently blocked by the actions of environmental groups by filing lawsuits and things like that. Many, many, many people drew the conclusion that the spread of those wildfires was caused by environmental groups, and that is the conclusion that lingers today in many people's minds, and I know that some people would obviously disagree with that but that is the conclusion, and that is a concern I have. You know, how do we get to that point?

And so one question I have for you, Mr. Rey, do you think it is good policy that before individuals or organizations can file appeals to an analysis that your department has rendered that they be involved in the negotiation process up to that point?

Mr. REY. They uniformly are involved in the negotiation process up to that point or they do not thereafter have standing to file an appeal. Sometimes the negotiation process does not produce a consensus result, and then they do have the right for an administrative appeal and subsequently judicial review. I, for one, will not ascribe the fire situation to the work of environmentalists. I would more broadly say that the fire situation we face is a lack of consensus on what to do about it and how fast to move.

Last week I was before this subcommittee talking about the fire situation and talking about the progress that we have made in accelerating the rate of fuels treatment. Much of that progress is because of the tools that we have developed under NEPA to use categorical exclusions in limited cases to do that work more quickly.

Congress is going to have to decide if that is not right what your priorities are but I think that is the balancing act that we face, and we do not always reach consensus on it, and so we are appealed, and we are litigated but we win the majority of lawsuits, roughly two-thirds. It just takes a lot of time to get there, and time is not our ally in terms of this fire situation.

Mr. LAMBORN. And Mr. Rey, how much money would you say it costs when you had to go through such an appeal? Like you stated that briefly earlier but could you repeat that?

Mr. REY. The analytical costs of preparing the documents are an average or a median of $50,000 for a CE, categorical exclusion such as that. That is about $50,000 worth of work there. Two hundred thousand dollars for an environment assessment, which is the next more complex analysis. The record for those is much larger, and about $1 million on the average for an environmental impact statement which usually has a record that is longer than the median height of a Forest Service employee standing next to the administrative record stacked up on itself.

Now those costs are exclusive of appeals and litigation. Once you add appeals, then you are adding in each case to that base cost. So if a project that is covered under a categorical exclusion is appealed and thereafter litigated, you are probably adding several hundred thousand dollars to several million dollars depending on how far the litigation goes to the base cost.

Mr. LAMBORN. And how much time will that add to the entire process?

Mr. REY. The appeals process usually adds 90 to 120 days. Litigation will add years.

Mr. LAMBORN. Thank you very much.

Mr. GRIJALVA. Mr. Sali.

Mr. SALI. Thank you, Mr. Chairman. Mr. Pollak, going back to this discussion about your agency suing after consulting with the Cal State Resources and Calfire, was it the position of your office that the Attorney General's Office knew more about fire management than the other two agencies?

Mr. POLLAK. No. Our position is that there are processes in place to involve the public and scientists in decisions about fire manage-

ment. Our agency certainly does not claim that we have the expertise that needs to go into those decisions. What we do claim though is that the Forest Service needs to make processes available to take advantage of that expertise.

Mr. SALI. Would it be fair to say then that your office believes that other issues that may be involved are more important than fire planning? Would that be correct?

Mr. POLLAK. I am not sure what you mean by that.

Mr. SALI. Well, if you have the Cal State Resources and CalFire and you have agreed that they have more expertise at fire planning, and they come up with a result that you disagree with and you sue on the implementation of the plan, your office does, obviously you are putting something else that is at stake above fire planning.

Mr. POLLAK. Well, no, I disagree. As the Under Secretary just explained, there is a lack of consensus on what is the most effective way to fight fires, to reduce the risk of catastrophic fires. It is precisely because of this lack of consensus that our office feels it is critical to allow the different knowledge and opinions and priorities to come to the table and to be part of the process.

Mr. SALI. And so you think that your office does know more about fire planning than these other two agencies, and that is why you sued?

Mr. POLLAK. Well not about what the specific strategies should be but our office certainly agrees with the philosophies and the motives of NEPA that guarantee this type of process goes into planning. We are just trying to enforce the law that is out there. We are not making it.

Mr. SALI. And so your position in front of this committee today is that all of the other aspects of the NEPA process should have a higher priority than fire planning?

Mr. POLLAK. No.

Mr. SALI. Is that correct?

Mr. POLLAK. No. Fire planning is part of the NEPA. Rather, NEPA is a procedure to make sure that every agency decision including decisions about fighting fires is made with public accountability and with open access by the public, and so we are not saying that NEPA is more important than fire planning. We are saying that NEPA is an integral part of how fire planning decisions are made.

Mr. SALI. OK. But you agreed with me that Cal State Resources and CalFire has more expertise about fire planning than your office, right? You still agree with that?

Mr. POLLAK. Yes.

Mr. SALI. OK. They said, we want to go ahead and implement this plan. Your office said, no. So either you believe that your office has more expertise in fire planning or you believe that the other aspects of NEPA should have a higher priority than fire planning, and it has to be one of those two, does it not?

Mr. POLLAK. No, I disagree, and here is why I disagree. The Cal State agencies that are responsible for maintaining California state lands and fighting forest fires and whatnot, they want to do whatever is necessary, is the best strategy to do that. Now just because you have a fire plan that says here is the way we are going to re-

duce the threat of catastrophic fires does not mean that appropriate procedures were used, and let me give an example.

I mean everybody agrees that it is important to reduce the threat of catastrophic fires. However, what the Forest Service does is it often uses that to approve of projects that are not necessarily directed toward that important outcome. For example, with the Sierra Nevada framework. That is——

Mr. SALI. So you would be saying that Cal State Resources and CalFire have another agenda besides fire planning?

Mr. POLLAK. No, I am not saying that. But I am saying in some cases some of these categorical exclusions that are supposed to address fire threats are used for other purposes. For example, in the Sierra Nevada framework, there you had the Bush Administration change the framework to allow logging of larger trees, 30-inch trees instead of 24-inch trees, under the rubric of fire suppression.

Now in that case they did not use a categorical exclusion. Because of the NEPA process in response to comments, the Forest Service admitted that there was no relationship between removing the larger trees and reducing the risk of fires. Instead, this was a measure to allow the Service to raise additional revenues that it could use to implement its various works, and so all I am saying——

Mr. SALI. And was that the case with this plan that we are talking about with Cal State Resources and CalFire? They have an agenda like that as well?

Mr. POLLAK. I do not know if that was their agenda.

Mr. GRIJALVA. Mr. Sali, we will continue the questions second round. Thank you.

Mr. SALI. Thank you.

Mr. GRIJALVA. Ms. Herseth Sandlin, questions?

Ms. HERSETH SANDLIN. Yes. Thank you, Mr. Chairman. I want to thank each of our witnesses on this panel today. Under Secretary Rey, good to see you.

Mr. REY. Good to see you.

Ms. HERSETH SANDLIN. You were in South Dakota. Eastern South Dakota a week or so ago.

Mr. REY. I was getting a grant for a conservation invasion project to South Dakota State University. It is a very, very fine institution.

Ms. HERSETH SANDLIN. Thank you for saying so. I agree, and we are pleased to have received the grant there. As you know, the issues that we have discussed in the past deal with western South Dakota in the Black Hills National Forest. National Forest Management Act requires each national forest system to develop a plan revision every 15 years. The most recent revision in South Dakota for the Black Hills National Forest took over 15 years to complete. On average, do plan revision periods typically exceed 15 years across the country?

Mr. REY. I would say the average is between 10 and 15 years under the old planning rule which is what we tried to modify to bring planning to the point where we could complete a plan in two to three years. Fifteen would be close to the outer edge but not the most lengthy. On the Tongas National Forest, we are still trying to complete a plan that began in 1979 and has been interrupted by two successive acts of Congress as well as a considerable amount

of litigation. By the time we are done, there will be Forest Service employees who will retire with a full 30 years invested in the agency having worked on nothing other than the Tongas land management plan.

Ms. HERSETH SANDLIN. Well let us talk about the 2005 planning rule which allows the Forest Service to categorically exclude management plans from NEPA understanding that if the average is 10 to 15 years and certainly our experience in South Dakota has been a very frustrating one; however, if we are going to categorically exclude management plans from NEPA, arguing that the environmental analysis should occur at the project level rather than the forest plan level, then what sort of environmental analysis in your opinion should be used to shape the forest planning process?

Mr. REY. What we have proposed is an environmental management system where instead of spending all of our time or 15 years in the case of South Dakota trying to develop a very specific, predictive environmental impact statement that is usually out-of-date by the time it is complete, that we do most of our detailed project analysis at the project level for the majority of projects, which will not qualify under a categorical exclusion, and through a boosted monitoring program evaluate the environmental impacts of those projects as they go forward to make sure that we are properly evaluating the cumulative effect of doing them on a case-by-case basis.

Now that is not the result of a narrow legal reading of the current law. That approach is the result of two nine-to-nothing Supreme Court decisions that defined what plans are and what they are not, and there was a time just after the enactment of the National Forest Management Act in 1976 when the agency had great aspirations to make forest plans something that was worth taking 10 to 15 years to produce because they would govern the actions that subsequently occurred in every instance, and those actions would get very little environmental review because they were tiered to the environmental impact statement accompanying the plan.

There is 30 years of litigation where the Courts have said, you cannot do that. You cannot predict that far in the future. You have to do more detailed analysis at the project level. That was then followed by the two Supreme Court decisions that said you should not even try to do that. That is not what plans should be. They should be broader strategic aspirational documents that provide a strategic framework for proceeding and that provides a basis for evaluating individual projects thereafter.

So the simple comparison is instead of sitting around in an office for 15 years trying to anticipate and answer every environmental question about what is going to happen over the life of that plan, what we are saying is no, that is impossible. Let us do a broad evaluation, and then let us proceed prudently with each project to evaluate that project and to monitor its implementation so we can see how it is going and what we need to change.

Ms. HERSETH SANDLIN. Thank you for the elaboration. I may want to follow up with you at some point in terms of just what types of analysis and process and safeguards we have in place to ensure that type of close monitoring and how we best assess the cumulative impact but I certainly appreciate the efforts to address

the length of time it has been taking us, and in the one case you described, I mean perhaps even having folks retire with a basis of fast knowledge that went into the plan and ultimately not being able to utilize that perhaps as effectively as we would have otherwise in a more reasonable timeframe to finish the plans. Thank you, Mr. Chairman.

Mr. GRIJALVA. Mr. Bishop.

Mr. BISHOP. Thank you. Mr. Rey, what has been the effect of the Earth Island decision on Forest Service efficiency?

Mr. REY. The Earth Island decision has indicated for a certain number of categorical exclusions that the requirements of the Appeals Reform Act mandate that the Forest Service must give an opportunity for notice and comment and administrative appeal of individual activities conducted under those particular categorical exclusions. What that has done is it has extended the timeframe for doing projects under those categorical exclusions anywhere from around 90 to 120 days to something closer to eight months to a year.

Mr. BISHOP. Can I also ask why has such a large percentage of treated acreage or areas been analyzed as categorical exclusions?

Mr. REY. The reason is because we have focused most of our efforts over the last several years on the wildland urban interface developing projects that were approved by community wildfire protection plans, and therefore the general consensus, the close-in aspect to the wildland urban interface and the fact that they fit within the framework of the categorical exclusions has allowed us to use those categorical exclusions more extensively.

As Ms. Nazzaro noted, we are starting now to see a dip in that as we start to focus in areas where we have treated the wildland urban interface into more remote areas, and those will more often than not require an environmental assessment because they are going to be larger, more projects or even environmental impact statement.

Mr. BISHOP. OK. I appreciate that. Ms. Nazzaro, as you have done your summary—and I realize you said the data is not sufficient, you need newer data to make an overall decision—but as you have been reviewing the Forest Service use of categorical exclusions, have you found anything definitive to indicate that this agency is misusing its authority?

Ms. NAZZARO. The scope of our review was not to look at how they were using the categorical exclusions from the same angle that you are talking about. It was just flat out pulling together numbers. What did they do? How did they use them? You know for which ones. We did not actually look to see whether they had been appropriately applied.

Mr. BISHOP. All right.

Ms. NAZZARO. This was a first effort to just pull together numbers on how frequently they were using them and which ones were being used.

Mr. BISHOP. OK. I realize your office is to go in after the battle and count the bodies. So you have no definitive answer? You are not willing to make any kind of definitive statement as to use or misuse in any way then?

Ms. NAZZARO. There was only one area where we looked at the actual use, and that was for the improving timber harvest and wildlife habitat categorical exclusion. There is no acreage limitation. So we went in to look to see how many acres had been treated using that categorical exclusion, which could get at an issue of had it been abused, and we found that on average those were 5,000 acres or less, which is within the threshold of the largest amount of land that can be treated is for reducing hazardous fuels at 4,500 if it is a prescribed fire. So we found it was consistent with that usage, but that was probably the only area where we actually did some analysis of data and how were they using it.

Mr. BISHOP. thank you. I appreciate that. Mr. Pollak, I understand that your office filed suit to challenge the state petitions rules for roadless areas, and that the ruling invalidated the state petition rule and precluded the Governor from applying any rules in seeking a California-specific roadless rule. Was that then in consultation working with the Governor's office?

Mr. POLLAK. Well again, our office represents the Governor, and so we would not have filed it without having consulted with the appropriate state agencies.

Mr. BISHOP. And the Governor's office was in concurrence with what you were doing?

Mr. POLLAK. Well I do not know if we had direct consultation with the Governor's office. We certainly would have consulted with the agency directly responsible for——

Mr. BISHOP. How about the people in the office? Did you consult with them?

Mr. POLLAK. Again——

Mr. BISHOP. Or just the door?

Mr. POLLAK.—I was not involved directly in that case so I do not know the answer to that.

Mr. BISHOP. Mr. Pollak, I have to tell you that I think you are an extremely good lawyer. I have been impressed with your testimony. If I was ever guilty of a felony, I think I would want you to defend me.

Mr. POLLAK. Thank you.

Mr. BISHOP. But I would also want to say that especially in view of the fact the California State Resource Agency and CalFire were in support of the management plan of the Forest Service and you still sued anyway, I think your agency is doing a wonderful job in going through the process but maybe the listening skills need to be honed a slight bit there, but I appreciate you coming all the way from California to give this testimony. I do not have any more questions of these three witnesses.

Mr. GRIJALVA. Thank you. Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman. To Secretary Rey, I just want to better understand this new process for forest planning. It does take too long to revise a plan but it seems to me what you have proposed has become very polarizing. So where is the meaningful public participation in this new forest planning process that you envision?

Mr. REY. Public participation in forest planning is not fundamentally governed by NEPA. It is required by the National Forest Management Act, and we have done nothing to change that. The

public is involved at every step of the forest planning process. First during scoping, second during public comment and the draft, second in a pre-final or post-final consultation, third in an administrative appeal, and fourth, if they want, after the first are not satisfactory, to seek judicial review.

So nothing has changed in that regard. The only appreciable difference is instead of participating in the development of a draft forest plan and a draft environmental impact statement during the scoping and public comment process, they are only participating in scoping and reviewing a draft forest plan. A lot of people prefer that. A lot of the public who wants to be involved says, I cannot hang in there for 15 years. You can wear us down. You, the agency, can keep at it until we no longer can have an appreciable effect on what you do because it takes so long.

Mr. DEFAZIO. So how long do you envision under this new process it would take to revise a forest plan?

Mr. REY. Two to three years is our ideal.

Mr. DEFAZIO. OK. Now the forest plan, as developed, would still—I mean, we are still going to broadly categorize parts of the forest in terms of essentially what the public might consider—sort of like zoning? This is an area which is recreational, non-motorized recreational use. This is an area for managed forest use. This is an area for wildlife. Those sorts of things? How much more specific are you going to get?

Mr. REY. I think the linchpin will be that to the extent in the development of those strategic options we preclude future options will do a more detailed environmental analysis. That is, I think the trick is that we are not going to make any judgments in the development of a forest plan that will preclude somebody's opportunity to later say, you know more detailed project level of analysis that we would like to consider this alternative as opposed to that alternative.

Mr. DEFAZIO. But would there not have to be some sort of exclusion? I mean you are going to say we envision this to be, let us just say, a non-motorized recreation area. Do you want to have some sort of certainty with the plan or would you say the whole forest is open, and we are going to decide ranger district by ranger district or subdistrict, you know, what options?

Mr. REY. We will probably do more detailed analysis to open areas for off highway vehicle use as a project-level decision.

Mr. DEFAZIO. And then how do we get the cumulative impacts? If these are all going to be then ultimately analyzed at the project level, how are we going to relate those back to a cumulative impact analysis?

Mr. REY. You are going to do that through monitoring of how the projects are framed, conducted, and their impacts thereafter. The flaw in the 1982 regs in the current system that we are operating under is that we do not have enough time or money left to monitor the decisions that we ostensibly make in those plans. So we spend 10 to 15 years trying to develop a predictive plan that is going to predict what the outcomes are going to be, and by the time we finally exhaust ourselves doing that, two things occur.

One, those predictions are out-of-date because life goes on while you are making plans, and the second thing is that we have spent

all of our money developing this large, extensive, predictive analysis so we do not really have the energy or money left to really monitor how the projects are being conducted. Designed and conducted on the ground and what the impacts really are.

Mr. DEFAZIO. There was some Federal money invested in developing a new planning tool in Oregon. It became a big controversy. It was never actually applied because the controversy becomes what are the underlying criteria that you know evaluate your outcomes, but the point is it established something where a person could manipulate a small area of a forest, change the use, and then you would then be able to understand impacts throughout the forest or cumulatively in the forest. Are we moving toward any sort of models where it is a little more sort of user friendly for the public to rather than just looking at all of these scattered pieces of paper and maps with 17 overlays and these sorts of things?

Mr. REY. It is our hope that these plans will be substantially more user friendly in the sense that they will provide the information necessary to talk about broad strategies for what we want to do with the forest going forward as well as an assessment of what the timeline for projects are and what the monitoring program is going to be to the extent that people want to participate in the monitoring.

We expect under the environmental management system to also use a lot more multi-party monitoring so that instead of limiting our interaction with the public to a theoretical discussion over piles of paper on a table in a boardroom, we actually involve them in monitoring some of the projects on the ground so that they can see what the projects are really doing, hopefully positively, and in some cases maybe in unexpected ways that we did not anticipate that are not as positive as we would like and indicate changes that need to be made in its stream.

Mr. DEFAZIO. OK. Thank you, Mr. Chairman.

Mr. GRIJALVA. Thank you very much. I am going to have questions, and then I will turn to any member that desires to ask any follow-up questions with the panel. My questions are directed to Mr. Pollak. Since you gained a great deal of popularity from the members of the Committee, I thought I should join in as well.

As we went through the discussions, some of the testimony, and some of the questioning, simplistically part of the rationale I am hearing for categorical exclusions is delay, cost, blame and then that pesky, gets-in-the-way judicial review and decisions as we go along. So let us talk about the delay issue here for a second, counsel. You have mentioned in your testimony that the Forest Service's repeated attempts to eliminate the public from the planning process leads to more delays, and if you could elaborate on that point.

Mr. POLLAK. Sure. One way that the attempts to eliminate the public from the process can lead to delays is a way that has been brought up several times during this hearing, litigation. I take issue with this idea that delays caused by litigation need to be attributed to or blamed on the parties that brought the litigation.

Now oftentimes litigation results in invalidating what the Forest Service has done. That certainly has been the case recently, and one of the reasons for that is that the Forest Service has not prop-

erly involved the public in its processes, and so with the 2005 NFMA rules, for example, if there had been more public involvement and more response, substantive response to the public's comments, you might not have had the situation we have today where implementation of those rules has been enjoined.

Mr. GRIJALVA. I do not have any other questions. Mr. Bishop?

Mr. REY. I would like a chance to respond to that because that is not why the Court invalidated the 2005 rules.

Mr. GRIJALVA. I am done with my question, Mr. Under Secretary. Thank you. Sir.

Mr. BISHOP. Yes, Mr. Rey, would you like to respond to that?

Mr. REY. Yes. The 2005 rule was not invalidated as a consequence of a lack of public participation. There was public participation in the 2005 rule and a substantial amount of it over the course of the development of that rule. The rule was struck for procedural grounds under the Administrative Procedures Act and the National Environmental Policy Act. We think the decision was wrongly decided but you know that is the way it goes, and we will remedy the flaws that the Court found.

Mr. Pollak did put words in my mouth that I would like to reel back in because I said that there was a lack of consensus at times associated with the value of fuels treatment projects, and that is broadly speaking the case. It would be helpful to our Federal-state relations, however, if there was better consensus within the State of California agencies about the best course of action because you know the Attorney General and the Governor are separately elected under the California constitution but they are not separately elected to represent different Californias.

Mr. BISHOP. I yield back.

Mr. GRIJALVA. Thank you very much, and let me thank the panel, and invite the second panel to come forward. Thank you.

[Pause.]

Mr. GRIJALVA. Thank you very much. Let me welcome the second panel and begin with Thomas Jensen. Sir.

STATEMENT OF THOMAS C. JENSEN, SONNENSCHEIN, NATH & ROSENTHAL LLP, WASHINGTON, D.C.

Mr. JENSEN. Good morning, Mr. Chairman, Congressman Bishop. Thank you for letting me testify today. NEPA implementation deserves——

Mr. BISHOP. Sir, can you just talk into the mike? Yes, good.

Mr. JENSEN. NEPA implementation deserves this type of careful oversight. The law is at the heart of how Federal agencies make many of their decisions and, very importantly, it is a key way that agencies engage the American public in the work of governing. NEPA is a doorway. It gives Federal decisionmakers a convenient way to bring citizens in to their decisionmaking and to bring decisionmaking to the American people.

If agencies use NEPA wisely, the law helps agencies make efficient and intelligent decisions. If used correctly, NEPA helps build public credibility for the agencies themselves, their leaders and their programs. Categorical exclusions are an important and entirely legitimate part of using NEPA wisely. Not every Federal

agency decision is consequential in terms of impacts on the human environment.

Categorical exclusions are a way of making sure that agencies can comply with NEPA without requiring anyone to waste time pouring over things that do not matter. My written testimony describes the systems of categorical exclusions used by the Army, the FAA, Department of Energy and the U.S. Marshall Service. These are all sound approaches to NEPA and the use of categorical exclusions. They are readable. They make sense, and they have either withstood or not attracted litigation.

But as others have noted, categorical exclusions can be abused and when they are, they become a way for agencies to evade accountability, at least in the short term. Agencies and administrations and their leaders always have reasons to wish to do some things without accounting for them, at least at the time, and these are weaknesses inherent in government and in human beings, and it is an entirely nonpartisan problem.

The negative consequences eventually afflict every type of stakeholder, though at any given moment, the burden tends to follow the political whims. Unlawful categorical exclusions come in three different forms, and my written testimony provides specific examples of each. I think I have 11 cases cited that cover a variety of agencies and circumstances.

The first problem occurs when an agency fails to establish a rational, empirical basis for deciding that certain decisions or actions do not have significant impacts on the human environment, and the second typical case occurs when an agency disregards empirical evidence of potentially significant impacts from certain categories of actions, and usually this means that the agency has decided to ignore the fact that "significance" as that term is used in NEPA, is really a carefully nuanced term that requires agencies to consider as evidence not just things like scale or cost or toxicity or tonnage or other conventional metrics, but also context, intensity and the public controversy surrounding a planned action, and the third formulation is really not a flaw with categorical exclusions but it is the case where agencies simply disregard their own rules for using categorical exclusions.

I am a former seasonal employee of the Forest Service, and I worked closely with excellent Forest Service officials in many different contexts over the years, and I have great respect for the complexity of the agency's mission. There is no escaping the difficulty of providing stewardship for so many places and things about which so many different people care so deeply and in incompatible ways. The Courts and others on this panel are busy with the debate whether the Forest Service's recent approach to categorical exclusions is legal or not. I want to make a different point and explore a different issue.

My thought is that the agency's approach to categorical exclusions appears to have had the effect of further weakening the credibility and the capability of the agency. This is of real concern in an era when the very nature of our forest is under dramatic pressure from climate change with associated shifts in precipitation, disease, fire, species distribution and human needs.

Right now is the time when the ability of the Forest Service to lead with credibility and competence is vitally important. Exclusion of the public from involvement in decisions that the public cares about may provide short-term benefits to the agency in the form of expediency, convenience and perceived momentum, yet in our democracy, the approach has all the hallmarks of tactical advantage gained at the expense of strategic victory.

Healthy forests represent a goal for our nation that every one of us can and should endorse, but the goal will give every appearance of a potentially misleading slogan, so long as and to the extent that the Forest Service operates in a way that invites suspicion of its motives, conduct or impacts. Healthy public forests will ultimately depend on healthy public governance, and I fear that approach to public engagement that creates the impression that the Forest Service is uninterested in knowing or disclosing or discussing the impacts of its actions will cripple the Service's ability to lead for a long time to come. Thank you, Mr. Chairman.

[The prepared statement of Mr. Jensen follows:]

Statement of Thomas C. Jensen, Sonnenschein Nath & Rosenthal LLP

Mr. Chairman, Ranking Member Bishop, and members of the Subcommittee, thank you for inviting me to testify today.

The subject of National Environmental Policy Act implementation deserves careful continuing oversight from this Subcommittee and the Congress as a whole. Since its enactment in 1969, NEPA has become a fundamental feature of the architecture of American governance.

NEPA is at the heart of how federal agencies make decisions and engage the American public in the work of governing.

There is simply nothing else like NEPA Other laws, like the Administrative Procedure Act or the Freedom of Information Act, offer the American people a window into their federal government. NEPA is different. It isn't a window—it's a doorway. It provides federal decision-makers with a convenient way to bring citizens into the decision-making process and to bring decision-making to the American people.

If agencies use NEPA wisely—and, as discussed below, many do—the law helps agencies make efficient and intelligent decisions. Used correctly, NEPA helps agencies build public credibility for the agencies themselves, their leaders, and their programs.

Categorical exclusions are an important part of using NEPA wisely. The purpose of categorical exclusions is to accommodate the reality that not every federal agency decision is consequential in terms of impacts on the human environment, and thus not every decision merits incremental analysis and public engagement. There are thousands of decisions made by agencies every week that do not have consequences of a scale or nature that justify re-opening the NEPA door to re-engage the public in the agency's decision-making. Categorical exclusions boiled down to their simplest ingredient are a way of making sure that NEPA compliance does not mean that agencies or members of the public have to waste time poring over things that do not matter very much.

There are risks inherent in the use of categorical exclusions. They can be abused. Intentional or not, an ill-founded categorical exclusion is nothing more than a device by an agency to evade accountability for the impacts on the human environment of decisions the agency chooses to make.

Agencies and Administrations always have reasons to wish to do some things without accounting for them. Individual agency officials have biases and agendas that do not show well in daylight. These are weaknesses inherent in government and human beings. They are entirely non-partisan. The negative consequences eventually afflict every type of stakeholder, though at any given moment the burden tends to follow the political winds.

Federal officials who are unwilling to be honest, or allow their agencies to be honest about the potential adverse impacts of actions they intend to take are malignancies in our system of governance. Unlawful categorical exclusions are symptoms of that underlying malignancy; they tend to come in three different forms.

The first occurs when an agency fails to establish a rational, empirical basis for deciding that certain decisions or actions do not have a significant impact on the

human environment. These cases typically involve agencies that never take a serious look at the potential impacts of a category of actions pursuant to NEPA and decide simply to declare by fiat that the particular category of actions does not involve significant impacts. We can call this situation "Flying Blind."

The second typical case occurs when an agency disregards empirical evidence of potentially significant impacts from certain categories of actions. The problem usually is not that the agency pretends that documented impacts don't exist. Instead, the agency usually acknowledges the potential impacts, but decides that the impacts are not "significant" as that term is used in NEPA, and thus do not require further review under NEPA. Usually this means that the agency has decided to ignore the fact that "significance," as that term is used in NEPA, is a carefully nuanced term that requires agencies to consider as evidence not just geographic scale, toxicity, tonnage, cost or other conventional metrics, but context, intensity, and the public controversy surrounding a planned action. In other words, in this second category of unlawful categorical exclusions, the agency will to look past the controversial nature of planned action and simply declare the impacts to be insignificant. We can call this situation "Flying with Eyes Shut."

The third formulation occurs when an agency disregards its own rules governing use of categorical exclusions. This probably deserves the description of "Trying to Fly Without Wings."

It should not need saying that the federal government should not fly blind or with its eyes shut or without wings. These are reckless, unnecessary actions that manifest either incompetence in managing agency business or a willful disregard for the core functions of government.

I am a former seasonal employee of the Forest Service and have worked closely with excellent Forest Service officials in many different contexts over the years. I have great respect for the complexity of the agency's mission and the inescapable difficulty that confronts an agency responsible for stewardship of so many places and things about which so many different people care so deeply.

Without taking a position on the legality of the Forest Service's use of categorical exclusions in recent years, or the actual on-the-ground impacts of the actions taken under those categorical exclusions, I feel confident saying that at least in some respects, the agency's approach to categorical exclusions appears to have had the effect of further weakening the credibility and capability of the agency.

It is not evident how it has benefited the agency, or the agency's mission, to adopt measures that reduce the level or quality of engagement between the agency and the public that is interested in the agency's work.

This ought to be of particular concern in an era when the very nature of our forests is under dramatic pressure from climate change, with associated shifts in precipitation, disease, fire, species distribution, and human needs. Right now is a time when the ability of the U.S. Forest Service to lead with credibility and competence is vitally important.

NEPA is a tool that, used properly, brings federal agencies and the public into a shared understanding about the consequences of agency choices. It works to engage the public in the hard work of governance. Many agencies and agency leaders use NEPA in exactly that way and reap rewards in the form of better decisions, greater credibility and enhanced deference from stakeholders.

Exclusion of the public from involvement in decisions that the public cares about may provide short-term benefits to the agency in the form of expediency, convenience, and perceived momentum. Yet, in our democracy, the approach has all the hallmarks of tactical advantage gained at the expense of strategic victory. Healthy forests represent a goal for our nation that everyone of us can and should endorse. It shouldn't be a heavy lift or require a hard sell. But that goal will give every appearance of a misleading slogan so long as, and to the extent that the Forest Service operates in a way that invites suspicion of its motives, conduct, or impacts.

Healthy public forests will ultimately depend on healthy public governance. I fear, however, that today's real or perceived procedural infirmities, particularly those that create the impression that the Forest Service is uninterested in knowing or disclosing or discussing the impacts of its actions, will cripple the Forest Service's ability to lead for a long time to come.

If the Congress and the Forest Service choose to look ahead to new policy choices, it will be helpful to take guidance from concrete examples of appropriate use of categorical exclusions shown in other agency NEPA procedures and on cases where the federal courts have found agency actions involving use of categorical exclusions to be unlawful. Attachment A to this testimony describes the NEPA categorical exclusion procedures of four different agencies. These approaches have generally withstood legal challenges and show on their face carefully drawn boundaries between those activities that may cause significant impacts and those that are highly un-

likely to do so. The second major section of Attachment A also describes eleven recent federal court decisions involving agencies using categorical exclusions in ways found to be unlawful.

Thank you for this opportunity to testify. I would ask that my full statement be included in the record. I would be happy to respond to questions.

Attachment A—Testimony of Thomas C. Jensen

I. Appropriate Use of Categorical Exclusions: Four Examples

The National Environmental Policy Act (NEPA) provides a concise definition for categorical exclusions:

> "Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations...and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.... Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. [1]

Most federal agencies have incorporated use of categorical exclusions into their policies and regulations governing NEPA implementation. Examples from four very different agencies illustrate how agencies have employed categorical exclusions appropriately.

a. Department of the Army

The Department of the Army's categorical exclusion guidelines are especially relevant when considering the types of categorical exclusions that have been used with such frequency by agencies under the Bush Administration.

The guidelines for determining when it is appropriate to exempt an action from EA or EIS analysis under a categorical exclusion require that three main conditions are met: (1) the action has not been segmented; (2) no exceptional circumstances exist; (c) one (or more) categorical exclusion(s) encompasses the proposed action. [2]

The categorical exclusions approved by the Department of Army include the following broad types of activities, each of which is further described with detailed examples and restrictions:

(b) Administration/operation activities:

(1) Routine law and order activities performed by military/military police and physical plant protection and security personnel, and civilian natural resources and environmental law officers.
(2) Emergency or disaster assistance.
(3) Preparation of regulations, procedures, manuals, and other guidance documents that implement, without substantive change, the applicable HQDA or other federal agency regulations, procedures, manuals, and other guidance documents that have been environmentally evaluated (subject to previous NEPA review).
(4) Proposed activities and operations to be conducted in an existing non-historic structure which are within the scope and compatibility of the present functional use of the building, will not result in a substantial increase in waste discharged to the environment, will not result in substantially different waste discharges from current or previous activities, and emissions will remain within established permit limits, if any.
(5) Normal personnel, fiscal, and administrative activities involving military and civilian personnel.
(6) Routinely conducted recreation and welfare activities not involving off-road recreational vehicles.
(7) Deployment of military units on a temporary duty or training basis where existing facilities are used for their intended purposes consistent with the scope and size of existing mission.
(8) Preparation of administrative or personnel-related studies, reports, or investigations.
(9) Approval of asbestos or lead-based paint management plans.
(10) Non-construction activities in support of other agencies/organizations involving community participation projects and law enforcement activities.
(11) Ceremonies, funerals, and concerts.

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[1] 40 C.F.R. § 1508.4 (1978).
[2] 67 Fed. Reg. 61, § 651.29(a). (March 29, 2002).

(12) Reductions and realignments of civilian and/or military personnel that: fall below the thresholds for reportable actions as prescribed by statute and do not involve related activities such as construction, renovation, or demolition activities that would otherwise require an EA or an EIS to implement.
(13) Actions affecting Army property that fall under another federal agency's list of categorical exclusions when the other federal agency is the lead agency, or joint actions on another federal agency's property that fall under that agency's list of categorical exclusions.
(14) Relocation of personnel into existing federally-owned or commercially-leased space, which does not involve a substantial change in the supporting infrastructure.
(c) Construction and demolition:
(1) Construction of an addition to an existing structure or new construction on a previously undisturbed site if the area to be disturbed has no more than 5.0 cumulative acres of new surface disturbance, not including construction of facilities for the transportation, distribution, use, storage, treatment, and disposal of solid waste, medical waste, and hazardous waste.
(2) Demolition of non-historic buildings, structures, or other improvements and disposal of debris therefrom, or removal of a part thereof for disposal, in accordance with applicable regulations.
(3) Road or trail construction and repair on existing rights-of-ways or on previously disturbed areas.
(d) Cultural and natural resource management activities:
(1) Land regeneration activities using only native trees and vegetation, including site preparation. This does not include forestry operations.
(2) Routine maintenance of streams and ditches or other rainwater conveyance structures and erosion control and stormwater control structures.
(3) Implementation of hunting and fishing policies or regulations that are consistent with state and local regulations.
(4) Studies, data collection, monitoring and information gathering that do not involve major surface disturbance.
(5) Maintenance of archaeological, historical, and endangered/threatened species avoidance markers, fencing, and signs.
(e) Procurement and contract activities:
(1) Routine procurement of goods and services (complying with applicable procedures for sustainable or "green" procurement) to support operations and infrastructure.
(2) Acquisition, installation, and operation of utility and communication systems, mobile antennas, data processing cable and similar electronic equipment that use existing right-of-way, easement, distribution systems, and/or facilities.
(3) Conversion of commercial activities under the provisions of AR 5-20. This includes only those actions that do not change the actions or the missions of the organization or alter the existing land-use patterns.
(4) Modification, product improvement, or configuration engineering design change to materiel, structure, or item that does not change the original impact of the materiel, structure, or item on the environment.
(5) Procurement, testing, use, and/or conversion of a commercially available product which does not meet the definition of a weapon system, and does not result in any unusual disposal requirements.
(6) Acquisition or contracting for spares and spare parts, consistent with the approved Technical Data Package.
(7) Modification and adaptation of commercially available items and products for military application, as long as modifications do not alter the normal impact to the environment.
(8) Adaptation of non-lethal munitions and restraints from law enforcement suppliers and industry for military police and crowd control activities where there is no change from the original product design and there are no unusual disposal requirements.
(f) Real estate activities:
(1) Grants or acquisitions of leases, licenses, easements, and permits for use of real property or facilities in which there is no significant change in land or facility use.
(2) Disposal of excess easement areas to the underlying fee owner.
(3) Transfer of real property administrative control within the Army, to another military department, or to other federal agency, including the return of public domain lands to the Department of Interior, and reporting of property as excess and surplus to the GSA for disposal.

(4) Transfer of active installation utilities to a commercial or governmental utility provider, except for those systems on property that has been declared excess and proposed for disposal.
(5) Acquisition of real property where the land use will not change substantially or where the land acquired will not exceed 40 acres and the use will be similar to current or ongoing Army activities on adjacent land.
(6) Disposal of real property where the reasonably foreseeable use will not change significantly.
(g) Repair and maintenance activities:
(1) Routine repair and maintenance of buildings, airfields, grounds, equipment, and other facilities.
(2) Routine repairs and maintenance of roads, trails, and firebreaks.
(3) Routine repair and maintenance of equipment and vehicles which is substantially the same as that routinely performed by private sector owners and operators of similar equipment and vehicles. This does not include depot maintenance of unique military equipment.
(h) Hazardous materials/hazardous waste management and operations:
(1) Use of gauging devices, analytical instruments, and other devices containing sealed radiological sources; use of industrial radiography; use of radioactive material in medical and veterinary practices; possession of radioactive material incident to performing services such as installation, maintenance, leak tests, and calibration; use of uranium as shielding material in containers or devices; and radioactive tracers.
(2) Immediate responses in accordance with emergency response plans for release or discharge of oil or hazardous materials/substances; or emergency actions taken by Explosive Ordnance Demolition detachment or Technical Escort Unit.
(3) Sampling, surveying, well drilling and installation, analytical testing, site preparation, and intrusive testing to determine if hazardous wastes, contaminants, pollutants, or special hazards are present.
(4) Routine management, to include transportation, distribution, use, storage, treatment, and disposal of solid waste, medical waste, radiological and special hazards, and/or hazardous waste that complies with agency requirements. This CX is not applicable to new construction of facilities for such management purposes.
(5) Research, testing, and operations conducted at existing enclosed facilities consistent with previously established safety levels and in compliance with applicable federal, state, and local standards. For facilities without existing NEPA analysis, including contractor-operated facilities, if the operation will substantially increase the extent of potential environmental impacts or is controversial, an EA (and possibly an EIS) is required.
(6) Reutilization, marketing, distribution, donation, and resale of items, equipment, or materiel; normal transfer of items to the Defense Logistics Agency. Items, equipment, or materiel that have been contaminated with hazardous materials or wastes will be adequately cleaned and will conform to the applicable regulatory agency's requirements.
(i) Training and testing:
(1) Simulated war games (classroom setting) and on-post tactical and logistical exercises involving units of battalion size or smaller, and where tracked vehicles will not be used.
(2) Training entirely of an administrative or classroom nature.
(3) Intermittent on-post training activities (or off-post training covered by an ARNG land use agreement) that involve no live fire or vehicles off established roads or trails.
(j) Aircraft and airfield activities:
(1) Infrequent, temporary (less than 30 days) increases in air operations up to 50 percent of the typical installation aircraft operation rate.
(2) Flying activities in compliance with Federal Aviation Administration Regulations and in accordance with normal flight patterns and elevations for that facility, where the flight patterns/elevations have been addressed in an installation master plan or other planning document that has been subject to NEPA public review.
(3) Installation, repair, or upgrade of airfield equipment.
(4) Army participation in established air shows sponsored or conducted by non-Army entities on other than Army property.

Extraordinary circumstances that preclude the use of a categorical exclusion are:
(1) Reasonable likelihood of significant effects on public health, safety, or the environment.

(2) Reasonable likelihood of significant environmental effects (direct, indirect, and cumulative).
(3) Imposition of uncertain or unique environmental risks.
(4) Greater scope or size than is normal for this category of action.
(5) Reportable releases of hazardous or toxic substances.
(6) Releases of petroleum, oils, and lubricants except from a properly functioning engine or vehicle, application of pesticides and herbicides, or where the proposed action results in the requirement to develop or amend a Spill Prevention, Control, or Countermeasures Plan.
(7) When a review of an action that might otherwise qualify for a Record of Non-applicability reveals that air emissions exceed de minimis levels or otherwise that a formal Clean Air Act conformity determination is required.
(8) Reasonable likelihood of violating any federal, state, or local law or requirements imposed for the protection of the environment.
(9) Unresolved effect on environmentally sensitive resources.
(10) Involving effects on the quality of the environment that are likely to be highly controversial.
(11) Involving effects on the environment that are highly uncertain, involve unique or unknown risks, or are scientifically controversial.
(12) Establishes a precedent (or makes decisions in principle) for future or subsequent actions that are reasonably likely to have a future significant effect.
(13) Potential for degradation of already existing poor environmental conditions. Also, initiation of a degrading influence, activity, or effect in areas not already significantly modified from their natural condition.
(14) Introduction/employment of unproven technology.[3]

A list of the environmentally sensitive resources mentioned in § 651.29(b)(9) is provided in § 651.29(c):

(1) Proposed federally listed, threatened, or endangered species or their designated critical habitats.
(2) Properties listed or eligible for listing on the National Register of Historic Places.
(3) Areas having special designation or recognition such as prime or unique agricultural lands; coastal zones; designated wilderness or wilderness study areas; wild and scenic rivers; National Historic Landmarks; 100-year floodplains; wetlands; sole source aquifers; National Wildlife Refuges; National Parks; areas of critical environmental concern; or other areas of high environmental sensitivity.
(4) Cultural Resources as defined in AR 200-4.

Of course, if an action can be excluded from environmental study under a categorical exclusion, the agency must still comply with other applicable statutes.[4]

The Department of Army encourages regular review and modification of existing categorical exclusions.[5]

b. Department of Justice

The United States Marshals Service, Department of Justice, supplemented its procedures for NEPA compliance in 2006.[6] These procedures detail the extraordinary circumstances that bar the application of a categorical exclusion as well as actions that could be eligible for a categorical exclusion. The actions that would normally qualify for a categorical exclusion are presented first in this discussion.

7. Categorical Exclusions

(c) Actions that normally qualify for a categorical exclusion include:

(1) Minor renovations or repairs within an existing facility, unless the project would adversely affect a structure listed in the National Register of Historic Places or is eligible for listing in the register;
(2) Facility expansion, or construction of a limited addition to an existing structure, or facility, and new construction or reconstruction of a small facility on a previously developed site. The exclusion applies only if:
  (i) The structure and proposed use comply with local planning and zoning and any applicable State or Federal requirements; and
  (ii) The site and the scale of construction are consistent with those of existing adjacent or nearby buildings.
(3) Security upgrades of existing facility grounds and perimeter fences, not including such upgrades as adding lethal fences or major increases in height

[3] § 651.29(b)
[4] § 651.29(d).
[5] Id. at § 651.31.
[6] 71 Fed. Reg. 236. (Dec. 8, 2006).

or lighting of a perimeter fence in a residential area or other area sensitive to the visual impacts resulting from height or lighting changes;

(4) Federal contracts or agreements for detentions services, including actions such as procuring guards for detention services or leasing bed space from an existing facility operated by a State or a local government or a private correctional corporation;

(5) General administrative activities that involve a limited commitment of resources, such as personnel actions or policy related to personnel issues, organizational changes, procurement of office supplies and systems, and commitment or reallocation of funds for previously reviewed and approved programs or activities;

(6) Change in contractor or Federal operators at an existing contractor-operated correctional or detention facility,

(7) Transferring, leasing, maintaining, acquiring, or disposing of interests in land where there is no change in the current scope and intensity of land use;

(8) Transferring, leasing, maintaining, acquiring, or disposing of equipment, personal property, or vessels that do not increase the current scope and intensity of USMS activities;

(9) Routine procurement of goods and services to support operations and infrastructure that are conducted in accordance with Department of Justice energy efficiency policies and applicable Executive Orders;

(10) Routine transportation of prisoners or detainees between facilities and flying activities in compliance with Federal Aviation Administration Regulations, only applicable where the activity is in accordance with normal flight patterns and elevations for the facility and where the flight patterns/elevations have been addressed in an installation master plan or other planning document that has been the subject of a NEPA review; and

(11) Lease extensions, renewals, or succeeding leases where there is no change in the intensity of the facility's use.

(b) Extraordinary circumstances must be considered before relying upon a categorical exclusion to determine whether the proposed action may have a significant environmental impact...the following circumstances preclude the use of a categorical exclusion:

(1) The project may have effects on the quality of the environment that are likely to be highly controversial;

(2) The scope or size of the project is greater than normally experienced for a particular action;

(3) There is potential for degradation, even if slight, of already-existing poor environmental conditions;

(4) A degrading influence, activity, or effect is initiated in an area not already significantly modified from its natural condition;

(5) There is a potential for adverse effects on areas of critical environmental concern or other protected resources including, but not limited to, threatened or endangered species or their habitats, significant archaeological materials, prime or unique agricultural lands, wetlands, coastal zones, sole source aquifers, 100-year-old flood plains, places listed, proposed, or eligible for listing on the National Register of Historic Places, natural landmarks listed, proposed, or eligible for listing on the National Registry of Natural Landmarks, Wilderness Areas or wilderness study areas, or Wild and Scenic River areas; or

(6) Possible significant direct, indirect, or cumulative environmental impacts exist.

The United States Marshals Service's approach to use of categorical exclusions seems to be especially concerned with those actions that would alter the intensity and scope of current land uses. The agency's approach also shows concern as to whether that a proposed activity is within the same scope and intensity of other activities commonly exempted under the categorical exclusion.

c. Department of Transportation-FAA

To facilitate the use of categorical exclusions for airports, the Federal Aviation Administration provides a checklist[7] to be completed when submitting a proposed activity for exemption from environmental study under a categorical exclusion. The FAA has also produced tables detailing types of categorical exclusions and extraordinary circumstances that prevent use of such exclusions from NEPA review. The

[7] Available at http://www.faa.gov/airports__airtraffic/airports/regional__guidance/central/environmental/environmental__review/catex/. Accessed 6/18/2007.

checklist mirrors the requirements set forth in the guidelines and tables provided and discussed below.

The FAA characterizes categorical exclusions as either situations that may involve extraordinary situations or those that are unlikely to involve extraordinary circumstances. The situations the FAA has determined unlikely to involve extraordinary circumstances include:

- Grants for airport planning;
- Bond retirement for terminal development;
- Conditional airport layout plan approval;
- Grants to prepare environmental documents;
- Grants to prepare noise exposure maps and compatibility programs;
- Approval of passenger facility charge;
- Issuing policy and planning documents;
- Safety equipment for airport certification
- Security equipment purchase.[8]

The list detailing categorical exclusions that may involve extraordinary circumstances is significantly longer. Included in Table 6-2, these actions center around physical airport maintenance and improvement, and other regular airport activities that affect the physical space and air near airports:

- Airfield barriers.
- Airfield improvements, aircraft parking areas.
- Airfield improvements, roads.
- Airfield improvements, runways.
- Airfield improvements, storage areas.
- Airfield lighting.
- Cargo building.
- Conveying Federally-owned airport land.
- Deicing/anti-icing facility.
- Fill activity.
- General landscaping.
- Heliport at an existing airport.
- Low emission technology equipment, including the Voluntary Airport Low Emission Program
- Non-radar facilities.
- Noise barriers.
- Noise compatibility programs.
- Non-U.S. waters, including wetlands in which categorically excluded actions are proposed.
- On-airport obstruction treatment.
- Ownership change by purchase or transfer.
- Parking areas.
- Passenger handling building.
- Radar installation.
- Releasing airport land.
- Relocation.
- Repair and maintenance.
- Replacement structures.
- Restrictions, aircraft access.
- Runway threshold.
- Security.
- Transfer land by long-term lease or acquisition.
- U.S. Waters, including wetlands, in which categorically excluded actions are proposed.
- Utility line construction, temporary.
- Wildlife Hazard Management Plan implementation.[9]

Table 6-3 details the extraordinary circumstances that may require an otherwise excluded action undergo environmental studies. Largely, these circumstances mirror those seen in the previously considered categorical exclusion guidelines. There are, however, a number that are unique to the FAA:

- Air quality.
- Coastal zone areas.
- Community disruption.
- Cumulative impacts.

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[8] FAA Order 5050.4—National Environmental Policy Act Implementing Instructions for Airport Projects. Chapter 6 Categorical Exclusions. Table 6-1.

[9] FAA Order 5050.4—National Environmental Policy Act Implementing Instructions for Airport Projects. Chapter 6 Categorical Exclusions. Table 6-2.

- Endangered species.
- Farmlands conversion.
- Floodplains.
- Hazardous materials.
- Highly controversial action.
- Historic or cultural property.
- Inconsistency with applicable laws.
- Noise.
- Traffic congestion.
- U.S. waters, including jurisdictional wetlands.
- Water quality.
- Wild and Scenic Rivers. [10]

d. Department of Energy

The Department of Energy's guidelines on categorical exclusions is an especially useful approach because the analysis required for a categorical exclusion determination is presented in a step-by-step format. [11]

First, the agency determines whether the activity falls into one of the categories of activities that can qualify for a categorical exclusion. The agency has detailed both general agency actions and specific agency actions.

Categorical exclusions applicable to general agency actions:

A1 Routine actions necessary to support the normal conduct of agency business, such as administrative, financial, and personnel actions.

A2 Contract interpretations, amendments, and modifications that are clarifying or administrative in nature.

A3 Adjustments, exceptions, exemptions, appeals, and stays, modifications, or rescissions of orders issued by the Office of Hearings and Appeals.

A4 Interpretations and rulings with respect to existing regulations, or modifications or rescissions of such interpretations and rulings.

A5 Rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

A6 Rulemakings that are strictly procedural, such as rulemaking establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.

A7 Transfer, lease, disposition, or acquisition of interests in personal property or real property, if property use is to remain unchanged; i.e., the type and magnitude of impacts would remain essentially the same.

A8 Award of contracts for technical support services, management and operation of a government-owned facility, and personal services.

A9 Information gathering, data analysis, document preparation and dissemination, but not including site characterization or environmental monitoring.

A10 Reports or recommendations on legislation or rulemaking that is not proposed by DOE.

A11 Technical advice and planning assistance to international, national, state, and local organizations.

A12 Emergency preparedness planning activities, including the designation of onsite evacuation routes.

A13 Administrative, organizational, or procedural Orders, Notices, and guidelines.

A14 Approval of technical exchange arrangements for information, data, or personnel with other countries or international organizations, including, but not limited to, assistance in identifying and analyzing another country's energy resources, needs and options.

A15 Approval of DOE participation in international "umbrella" agreements for cooperation in energy research and development activities that would not commit the U.S. to any specific projects or activities. [12]

Categorical exclusions applicable to specific agency actions are significantly more detailed. Descriptions of these activities are abbreviated here:

B1 Categorical exclusions applicable to facility operation. Representative examples include:

B1.3 Routine maintenance/custodial services for buildings, structures, infrastructures, equipment;

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[10] FAA Order 5050.4—National Environmental Policy Act Implementing Instructions for Airport Projects. Chapter 6 Categorical Exclusions. Table 6-3.

[11] § 1021.410(b). Available at http://www.eh.doe.gov/NEPA/tools/REGULATE/NEPA__REG/1021/nepa1021__rev.pdf. Accessed 6/22/2007.

[12] Appendix A to Subpart D of § 1021.

B1.4 Installation/modification of air conditioning systems for existing equipment;
B1.5 Improvements to cooling water systems within existing building, structure;
B1.7 Acquisition/installation/operation/removal of communication systems, data processing equipment;
B1.9 Placement of airway safety markings/painting (not lighting) of existing lines, antennas;
B1.13 Construction/acquisition/relocation of onsite pathways, short onsite access roads/railroads;
B1.16 Removal of asbestos from buildings;
B1.21 Noise abatement;
B1.22 Relocation of buildings;
B1.27 Disconnection of utilities;

B2 Categorical exclusions applicable to safety and health. Representative examples include:
B2.1 Modifications to enhance workplace habitability;
B2.3 Installation of equipment for personnel safety and health;

B3 Categorical exclusions applicable to site characterization, monitoring, and general research. Representative examples include:
B3.3 Research related to conservation of fish and wildlife;
B3.8 Outdoor ecological/environmental research in small area;
B3.9 Certain Clean Coal Technology Demonstration Program activities;

B4 Categorical exclusions applicable to Power Marketing Administrations and to all of DOE with regard to power resources. Representative examples include:
B4.1 Contracts/marketing plans/policies for excess electric power;
B4.2 Export of electric energy;
B4.6 Additions/modifications to electric power transmission facilities within previously developed area;
B4.7 Adding/burying fiber optic cable;
B4.11 Construction or modification of electric power substations;

B5 Categorical exclusions applicable to conservation, fossil, and renewable energy activities. Representative examples include:
B5.1 Actions to conserve energy;
B5.2 Modifications to oil/gas/geothermal pumps and piping;
B5.6 Oil spill cleanup operations;
B5.7 Import/export natural gas, no new construction;
B5.12 Workover of existing oil/gas/geothermal well;

B6 Categorical exclusions applicable to environmental restoration and waste management activities. Representative examples include:
B6.1 Small-scale, short-term cleanup actions under RCRA, Atomic Energy Act, or other authorities;
B6.4 Siting/construction/operation/decommissioning of facility for storing packaged hazardous waste for 90 days or less;
B6.8 Modifications for waste minimization/reuse of materials;
B6.9 Small-scale temporary measures to reduce migration of contaminated groundwater;

B7 Categorical exclusions applicable to international activities;
B7.1 Emergency measures under the International Energy Program;
B7.2 Import/export of special nuclear or isotopic materials. [13]

Second, the guidelines require a determination that no extraordinary circumstances exist that could affect the level of environmental impact of the activity. The extraordinary circumstances detailed by the Department of Energy differ from the types of circumstances found in the Department of the Army and U.S. Marshals' regulations:

- Unique situations presented by specific proposals, such as scientific controversy about the environmental effects of the proposal;
- Uncertain effects or effects involving unique or unknown risks;
- Or unresolved conflicts concerning alternative uses of available resources. [14]

Third, the guidelines require that the proposed action is not connected to other activities that do have substantial environmental impacts or to other proposed actions that cumulatively will have a substantial environmental impact. [15]

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[13] Appendix B to Subpart D of § 1021.
[14] § 1021.410(2).
[15] § 1021.410(b)(3).

II. Unlawful Categorical Exclusions: Eleven Examples

In recent years, the federal courts have been called on to assess the legality of categorical exclusions adopted by a variety of agencies, including the Forest Service, Department of the Interior, Department of Energy, and Department of Transportation. The following cases illustrate a range of circumstances in which the use of categorical exclusions were found to be illegal.

Heartwood v. United States Forest Service.[16] The plaintiffs here—a land owner with property adjacent to the Shawnee National Forest in Southern Illinois, a user of national forests and an environmental group—challenged a proposed Forest Service categorical exclusion concerning timber harvests. Following notice and comments in 1991, the Forest Service had issued new categorical exclusions in 1992 that had the effect of increasing by ten times the amount of salvageable wood product and by 2.5 times the amount of live trees that could be harvested without environmental analysis. The U.S. District Court for the Southern District of Illinois found that these substantial increases were simply not supported by any findings in the administrative record. The court also found that the administrative record did not provide support for, and in fact the Forest Service did not address, whether actions of this magnitude would truly have no significant individual or cumulative effects on the environment, as is required by NEPA for categorical exclusions.[17]

Riverhawks v. Zepeda.[18] This case centered around motorboat use on a wild portion of the Rogue River in Oregon. The plaintiff here, a river advocacy group, claimed that extraordinary circumstances precluded the Forest Service's use of a categorical exclusion because of evidence that motor boats on the river would significantly impact populations of juvenile salmonids and Western Pond Turtles, as well as some vegetation. The categorical exclusion in question allowed the Forest Service to grant special issue permits for commercial tour and fishing boats without engaging in NEPA analysis. The District Court for the District of Oregon found that the administrative record supported the plaintiff's argument. The Decision Memo issued by the Forest Service for the categorical exclusion specifically stated that the turtles and salmon might be affected. The court found that the level of impact was not addressed in the administrative record; the agency failed to provide justification for issuing a categorical exclusion in the face of acknowledged but unquantified impacts.[19] The court refused to uphold the agency's use of this categorical exclusion, and granted summary judgment for the plaintiff on their NEPA claim.[20]

High Sierra Hikers Assoc. v. Blackwell.[21] This 2002 case focused on the use of a Forest Service categorical exclusion to exempt one-year renewals of trail permits to commercial packstock operators in the John Muir and Ansel Adams wilderness areas. This use of a categorical exclusion failed because the Forest Service's internal regulations do not allow the use of categorical exclusions for activities in wilderness areas. Because the Forest Service acted in violation of its own regulations on the use of categorical exclusions, the court held that an EA or EIS was required for these permit renewals.[22]

Wilderness Watch v. Mainella.[23] At the district court level, summary judgment was granted in favor of the National Park Service where the plaintiff sought an injunction to disallow motor vehicle tours in a designated wildness area on Cumberland Island, Georgia.[24] The National Park Service allowed the tours without environmental analysis, arguing the action fell under a categorical exclusion. The categorical exclusion invoked by the Park Service excluded "routine and continuing government business, including such things as supervision, administration, operations, maintenance and replacement activities having limited context and intensity; e.g. limited size and magnitude or short-term effects."[25] The court rejected use of the categorical exclusion because the Park Service provided no evidence in the administrative record that the action was considered a categorical exclusion when these tours were actually permitted (that is, the categorical exclusion was a post hoc rationalization). Further, the court did not accept the Park Service's assertion that approval of such motor vehicle tours properly fell within the category of "routine and continuing government business," finding that obtaining a large van to accom-

[16] 73 F.Supp.2d 962 (S.D. Ill. 1999).
[17] Id. at 975-76.
[18] 228 F.Supp.2d 1173 (D. Or. 2002).
[19] Id. at 1189-90.
[20] Additional challenges related to this categorical exclusion were mounted by the plaintiffs; only the challenge here was successful.
[21] 390 F.3d 630 (9th Cir. 2004).
[22] Id. at 641.
[23] 375 F.3d 1085 (11th Cir. 2004).
[24] Id. at 1087.
[25] Id. at 1094.

modate fifteen tourists hardly appeared to be a routine and continuing form of administration and maintenance.[26]

California v. Norton.[27] In this 2002 case, the California Coastal Commission filed suit against the Department of the Interior's Minerals Management Service challenging a categorical exclusion drafted for suspensions of off-shore oil leases. The agency suspended the leases so they would not expire.[28] California argued that the Department of the Interior was required to prepare an EIS before suspending the leases. Interior asserted that the agency was not required to perform any environmental analysis because lease suspensions were categorically excluded from NEPA review. The plaintiffs argued that the agency had not relied upon a categorical exclusion determination when it suspended the leases and was relying on the existence of the exclusions as a post hoc rationalization for failure to perform an environmental review.[29]

The Ninth Circuit heard the case on appeal following a district court ruling in favor of the plaintiffs, who sought to enjoin the suspensions pending environmental analysis as well as a justification for the use of the categorical exclusion.[30] The court underscored the importance of an administrative record for judicial review: "It is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation."[31] Additionally, the court expressed some skepticism about the use of a categorical exclusion here. "At the very least, there is substantial evidence in the record that exceptions to the categorical exclusion may apply, and the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion."[32] The case was remanded to the district court to determine exactly what level of NEPA analysis would be required.[33]

West v. Sec'y of the Dep't of Transportation.[34] The Federal Highway Administration's categorical exclusion of a highway interchange project in Washington was challenged by a citizen. In examining whether a categorical exclusion applied to the a new highway construction project, the court found that the Federal Highway Administration's own regulations disallowed this type of categorical exclusion.[35] The court found that the agency's own regulations do not allow reliance on categorical exclusions for projects that will significantly impact travel patterns. The underlying reason for the new interchange was to relieve traffic congestion.[36] The court rejected the agency's argument that a new highway project could simultaneously relieve traffic congestion without significantly impacting travel patterns.

Citizens for Better Forestry v. United States Dep't of Agriculture.[37] In this case, the Forest Service sought to implement a programmatic rule that changed the forest management requirements related to species viability and diversity within national forests. The 2005 rule in question, which was not open to public notice or comment, eliminated special viability and diversity requirements for forest management first established in the 1982 Planning Regulations that built on the National Forest Management Act of 1976.[38] The agency took the view that the rule should be exempt from environmental analysis because the rule itself simply provided a starting point for NEPA analysis, rather than directly producing environmental effects.[39] This 2005 rule was exempted by the Forest Service under a categorical exclusion that includes "routine administrative, maintenance, and other actions."[40] The court noted that no Ninth Circuit court has ever upheld such a broad action as appropriate under a categorical exclusion.[41] The court found that the agency could not document any findings that supported the assertion that no significant effects would

[26] Id. at 1095.
[27] 311 F.3d 1162 (9th Cir. 2002).
[28] Id. at 1164-65.
[29] Id. at 1175.
[30] Id. at 1165.
[31] Id. at 1176.
[32] Id. at 1177.
[33] Id. at 1178.
[34] 206 F.3d 920 (9th Cir. 2000).
[35] Id. at 927, 929.
[36] Id. at 929.
[37] 481 F.Supp.2d 1059 (N.D. Cal 2007).
[38] Id. at 1064-67.
[39] Id.
[40] Id. at 1082.
[41] Id. at 1087.

result from the rule change, and required that the agency perform either an EA or EIS.[42]

California v. United States Dep't of Agriculture.[43] This complex case involved the replacement of a Forest Service rule limiting road construction in national forests. In 2001, the Forest Service promulgated the Roadless Rule, prohibiting road construction, road reconstruction and timber harvesting in specific roadless areas nationwide.[44] This initial rule was set to take effect on March 13, 2001, but President Bush issued a moratorium on pending Clinton administration regulations before the Roadless Rule went into effect.[45] Court proceedings were initiated in Idaho and Wyoming.[46] While these cases were pending, the Forest Service enacted the State Petitions Rule, which eliminated the uniform national protections found in the 2001 rule, reverting oversight of construction projects back to forest-by-forest analysis, and adding a state-by-state appeals process through which states could take over the forests within their borders.[47] The agency argued that the new rule fell within the scope of a categorical exclusion that covered routine administrative procedures.[48] The court found that the agency was still required to study the new rule, as it could not fall under a categorical exclusion because the new rule substantially impacted the environment.[49]

Arkansas Nature Alliance v. United States Army Corps of Eng'rs.[50] In this case from 2003, heard in the Eastern District of Arkansas, the Army Corps of Engineers approved a change to the height and length of a bridge using a so-called "Letter of Permission." This Letter of Permission was issued on January 22, 2001. Under a Corps categorical exclusion, Letters of Permission do not require individual environmental review. The plaintiffs argued and the court agreed that the proposed action could have a significant environmental effect, was not a minor action, and was likely to be met with controversy—all of which disqualified the action from coverage under categorical exclusion.[51] The new bridge, however, had already been completed when this court heard the case. Nonetheless, the court ruled that the Corps' use of the categorical exclusion, because unreasonable, should be revoked. What's more, full NEPA analysis was required of the original application. The court ordered that the bridge be returned to its original dimensions, but stayed this order pending environmental analysis of the original application.[52]

Sierra Club v. United States Dep't of Energy.[53] This case centers on an easement on Department of Energy land that was granted to a mining company for use in connection with new, then unapproved, gravel mining operations.[54] The court found that, while the easement itself may not have had significant environmental effects, the Department of Energy's internal regulations disallow a categorical exclusion that is "connected to other actions with potentially significant impacts."[55] Because the granting of the easement and establishment of the new mining operation were linked, they were required to be considered together. Agency assurances that the mine would be studied under NEPA guidelines in the future were not sufficient. The categorical exclusion was found arbitrary and capricious.[56]

Comm. for Idaho's High Desert v. Collinge.[57] The plaintiff here, an environmental group, initiated this case to enjoin a sage grouse population control program initiated by the U.S. Fish and Wildlife Service; the district court granted the plaintiff a preliminary injunction to remain in effect until the propriety of this categorical exclusion use by the Service was litigated.[58] The sage grouse control program involved killing avian predators of the sage grouse, as well as using various hunting techniques to control other predators, including coyotes, red foxes, black bears, mountain lions, bobcats, raccoons, badgers, striped skunks, ravens and magpies.[59]

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[42] Id. at 1090.
[43] 459 F.Supp.2d 874 (N.D. Calif. 2006).
[44] Id. at 879-80.
[45] Id. at 880.
[46] Id. at 880-81. Kootenai Tribe v. Veneman, 142 F.Supp.2d 1231 (D. Idaho 2001); Wyoming v. United States Dep't of Agric., 277 F.Supp.2d 1197 (D. Wyo. 2003).
[47] Id. at 881.
[48] Id. at 894.
[49] Id. at 904.
[50] 266 F.Supp.2d 876 (E.D. Ark. 2003).
[51] Id. at 886-87.
[52] Id. at 894-95.
[53] 255 F.Supp.2d 1177 (D. Colo. 2002).
[54] Id. at 1181.
[55] Id. at 1183, citing 10 C.F.R. § 1021.410(b)(3).
[56] Id. at 1185.
[57] 148 F.Supp.2d 1097 (D. Idaho 2001).
[58] Id. at 1099.
[59] Id. at 1100.

The Service categorically excluded an action to control sage grouse populations under two possible categorical exclusions:

> "(i) Activities that are carried out in laboratories, facilities, or other areas designed to eliminate the potential for harmful environmental effects-internal or external-and to provide for lawful waste disposal;"[60] or "routine measures."[61]

In choosing to issue an injunction requested by the plaintiff to enjoin these activities, the court found that the plaintiffs were likely to succeed in their case in large part because the agency failed to keep an administrative record that supported their use of the either of the proposed categorical exclusions.[62]

Mr. GRIJALVA. Thank you, sir. Let me now turn to Mr. Mark Menlove. Sir.

STATEMENT OF MARK MENLOVE, EXECUTIVE DIRECTOR, WINTER WILDLANDS ALLIANCE

Mr. MENLOVE. Thank you, Mr. Chairman. Again, my name is Mark Menlove. I live in Boise, Idaho, and I am the Executive Director with Winter Wildlands Alliance. I am testifying today on behalf of the Outdoor Alliance, which is a coalition of six national member-based organizations devoted to conservation and stewardship of our public lands through responsible human-powered outdoor recreation.

Outdoor Alliance includes Access Fund, American Canoe Association, American Hiking Society, American Whitewater, International Mountain Bicycling Association, and Winter Wildlands Alliance. Collectively, we have members in all 50 states. We have a network of nearly 2,000 local clubs and advocacy groups, 22 of which are located in Idaho where I live now, 32 in Arizona, another 21 in my home State of Utah.

As a native Utahan I grew up hiking, skiing and camping in the Wasatch Mountains. Those childhood experiences in the outdoors have had a profound impact and influence on my life, and indeed served as the catalyst for my pursuing a career in the outdoor and winter recreation industry.

I worked as a backcountry ski guide. I am a certified professional avalanche and snow safety professional. I worked for the U.S. Ski Team. Served as president of the Utah Ski Association, and in that role I was involved in Salt Lake City's successful bid for the 2002 Winter Olympic games, and then I had the privilege of going back and working for the Olympic Committee during those games. Much of my time these days is spent passing on my love of the outdoors to my three children, and I am pleased to say that they are enthusiastic partners in our outdoor adventures.

Outdoor Alliance and our members have a clear stake in forest planning. As outdoor enthusiasts, we need public lands and their topography to do what we do. Kayakers need rivers. Climbers need escarpments. Mountain bikers and hikers need trails, but what really unites our broader community is an unshakable conviction and ethic toward stewardship and conservation of our public lands.

This ethic is reflected in the thousands of volunteer hours that our members spend on their local forests each year and in our ac-

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[60] Id. at 1101.
[61] Id. at 1102.
[62] Id. at 1103.

tive involvement in management of national forest lands. Though Outdoor Alliance is a fairly new coalition, our member organizations have filed comments on river management plans, climbing management plans, travel plans and forest plans for decades. The trend to subject more Forest Service decisions to categorical exclusions causes our community concern.

In particular, we believe that excluding forest plans from NEPA review is a grave mistake for a number of reasons. Decisions made in forest plans have huge material impacts on our community. The U.S. Forest System is a multiple use land management agency, and while 192 million acres may seem like all the space in the world, it can get crowded very quickly when all these uses including timber, mining and a broad diverse spectrum of recreation are pursued in the same place or at the same time.

Thankfully, forest planning creates a framework for managing an entire forest, including designations that specifically allow or disallow different uses on all or part of a forest. The allocation of different uses in a multi-use landscape begs for the type of analysis that NEPA provides so effectively. Proper NEPA analysis in the planning stage ensures balanced management and also makes sure that individual projects fit within an overarching forest management framework for the forest-wide system.

Informed and meaningful public participation helps the Forest Service and inspires greater public confidence in agency decisions. Participation in land use decisionmaking is a two-way street. The outdoor community treasures our ability to provide our perspectives and have them considered but, more than that, our members traverse virtually every foot of trail and river and backcountry ski route in the Nation each year, which is far more than any agency can claim of their collective staff.

We thus bring not only our interests but a broad based and practical knowledge and information to the planning process, which is critical to responsible management of those lands. The ability to bring that useful perspective to the forest planning process is certainly not unique to the outdoor recreation community. Indeed it is this process of collecting and analyzing and sharing all of the various perspectives and insights that make a forest plan developed with a NEPA review one that has earned the public's trust.

Outdoor Alliance is concerned with the ambiguous administrative review process when forest planning is categorically excluded from NEPA analysis. A critically important attribute of NEPA review is an administrative appeal framework which provides meaningful opportunities to resolve differences without immediately looking to the Courts.

Many have derided NEPA review for involving too much red tape and for taking too long. Though we are all in favor of increased government efficiency and better implementation, efficiency cannot trump meaningful public input, especially on something as far reaching as a multi-year plan for an entire forest.

To be clear, the Outdoor Alliance does not oppose categorical exclusions in their proper place and time. As has already been stated, they are a useful tool, but we do believe they should be used judiciously and that they are inappropriate for a forest planning process. Responsible management and stewardship decisions require

multiple perspectives. These decisions cannot take place in a vacuum and should not take place without the informed exploration of reasonable alternatives regarding how a forest should be managed over a stretch of years.

For multiple uses to properly coexist, the forest planning process must be transparent, have robust public input, be premised on informed decisionmaking and have mechanisms to assure accountability. NEPA may not be a perfect process, but it is a process that works and enjoys the public's trust. In short, NEPA protects more than the environment. It protects our constituents' opportunity for healthy recreation on forest lands. By categorically excluding forest planning from NEPA analysis, that protection is lost. Thank you for the opportunity.

[The prepared statement of Mr. Menlove follows:]

Statement of Mark Menlove, Outdoor Alliance

Mr. Chairman and Members of the Subcommittee:

I am Mark Menlove. I live in Boise, Idaho and I serve as the Executive Director of Winter Wildlands Alliance.

I am testifying today on behalf of the Outdoor Alliance, a coalition of six national, member-based organizations devoted to conservation and stewardship of our nation's public lands and waters through responsible human-powered outdoor recreation. Outdoor Alliance includes: Access Fund, American Canoe Association, American Hiking Society American Whitewater, International Mountain Bicycling Association, and Winter Wildlands Alliance, and represents the interests of the millions Americans who hike, paddle, climb, mountain bike, ski and snowshoe on our nation's public lands, waters and snowscapes.

Collectively, we have members in all fifty states and a network of almost 2,000 local clubs and advocacy groups across the nation, including 22 in Idaho where I live, but also 32 in Arizona and 21 in Utah.

As a native Utahn, I grew up hiking, skiing and camping in Utah's Wasatch Mountains. My childhood time in the outdoors profoundly influenced my life and, indeed, served as the basis for my pursuing a career in the outdoor and winter recreation industry. Among other recreation jobs, I worked for the U.S. Ski Team and served as President of the Utah Ski Association. I've also worked as a backcountry ski guide and am a certified avalanche and snow safety professional. I was involved, through my role at Ski Utah, in the Salt Lake Olympic bid efforts and later had the honor of working for the Salt Lake Olympic Committee by running the press operation for all of the Olympic events held at Park City Resort.

Much of my time these days is spent passing on my love of the outdoors to my three children. Almost any weekend will find my family and me tent camping in the Payette or Boise National Forests, hiking the trails or fly fishing from our drift boat on one of Idaho's many rivers. Winter weekends find us at our local ski hill, Bogus Basin, located on the Boise National Forest, or backcountry skiing or snowshoeing into the Sawtooth National Recreation Area. This winter, as we do every winter, we made a family trek into one of Idaho's backcountry yurts for an overnight stay. I put my five-year-old-son, Asa, on cross-country skis for the first time and to see the sense of accomplishment and sheer joy he got from skiing all the way into the yurt and back out by himself was one of the most rewarding parenting experiences of my life.

I. Outdoor Alliance's Stake in Forest Management

As outdoor enthusiasts, we need public lands and their topography to do what we do—kayakers need rivers, climbers need escarpments and hikers and mountain bikers need trails; but what truly unifies our broader community is an unshakeable conservation and stewardship ethic towards the land. This ethic is reflected in practicing outdoor principles such as "Leave No Trace" to spending thousands of volunteer hours devoted to infrastructure design, construction and maintenance. We recognize that our pursuits depend on healthy lands and waters and that recreational access must sometimes be subordinate to resource conservation and protection of fragile ecosystems and sensitive wildlife habitats.

Our community's conservation and stewardship ethic is also reflected in our active involvement in how public lands are managed by the Federal agencies. Our central opportunity for participation is through the NEPA process. Though Outdoor Alliance

is a fairly new coalition, the member organizations have filed comments on river management plans, climbing management plans and travel plans as well as forest management plans for decades.

We recognize that the NEPA process does not mandate any particular decision and does not require an agency to favor alternatives that enhance habitat, the environment, or wildlife, let alone our outdoor pursuits. What it does require is a hard look at how decisions could impact the human environment. It requires land managers to put all pertinent information on the table in order to make sound decisions; and also brings diverse interests to the table to ensure that the public, who actually own the lands, is vested in the process.

NEPA, with its transparent process, accountability and informed, meaningful public involvement enables our community to live up to our conservation and stewardship ethic and to have a meaningful voice in management decisions impacting our respective recreational pursuits. Volunteering for a trash pick-up day at a local forest district is certainly important, but nothing can take the place of having the informed public weigh-in on critical agency decisions.

The trend to subject more and more Forest Service decisions to categorical exclusions causes our community concern. In particular, we believe that excluding forest plans from NEPA review is a grave mistake for a number of reasons.

II. Decisions Made in Forest Plans Materially Impact our Community

The U.S. Forest System is a multiple use land management agency. While 192 million acres seems like all the space in the world, it can get crowded very quickly when all these uses, including timber harvesting, mining and the spectrum of different types of recreation are pursued at the same time or at the same place. Thankfully, forest planning creates a framework for managing an entire forest, including management designations that effectively allow or disallow specific recreational use on all or part of a particular forest. The process of arriving at a final forest plan, therefore, is profoundly important to the active outdoor recreation community. The Forest Service wisely recognizes that a balanced, zoned approach, which designates different areas for different use is the best way to meet the diverse needs of the many different appropriate uses of our public forests.

Outdoor Alliance supports the Forest Service's zoned approach. However, the allocation of different uses in a multi-use landscape begs for the type of analysis that NEPA provides so effectively. How can you balance different recreation uses without first determining the needs and use patterns of these diverse groups as well as forest-wide capacity to accommodate different uses? The public needs to (1) be made aware of these zoning implications and (2) be able to share their positions as well as their own information. Proper NEPA analysis at the planning stage helps ensure balanced management at the project level and helps make sure the individual projects make sense not only for the forest, but also relative to all the other existing and future projects.

The environmental analysis that NEPA facilitates ensures informed decision-making. The collective effort and public participation embedded in the NEPA process results in better management decisions and assures the greatest good for the greatest number of people.

III. Informed and Meaningful Public Participation Helps the Forest Service and Inspires Greater Public Confidence in Agency Decisions

Participation in land use decision-making at the Forest Service is a two-way street. The outdoor community treasures the ability to have our perspectives considered. However, our perspectives can be particularly valuable to the Forest Service. Our community spends time in places few managers ever go. In fact, as a community we traverse virtually every foot of trail and river and backcountry ski route in the nation each year—something no agency can claim of their collective staff. We thus bring not only our interests to federal land management planning processes—but also practical, on-the-ground knowledge and information that is critical to responsible management of those lands. The ability to bring a useful perspective to the forest planning process is not unique to the outdoor recreation community. Indeed, it is the process of collecting, analyzing and sharing all of the various perspectives and insights that make a forest plan developed with a NEPA review one that has earned the public's trust.

NEPA facilitates intelligent, informed public input. Though the Forest Service has explored ways to secure public participation without a NEPA analysis (such as is contemplated in the recently stayed 2005 Forest Planning regulation at 36 CFR Part 219), these efforts ultimately ring hollow. Simply directing the Responsible Official at a forest to use a "collaborative and participatory approach" is of limited utility if no one has the benefit of the type of necessary information generated under

a proper NEPA analysis. NEPA provides the "critical mass" of facts necessary for collaboration between the agency and the public to transpire in a meaningful way.

Furthermore, leaving the public involvement requirement open to the interpretation of a local Responsible Official rather than a time-proven NEPA public involvement process creates confusion among the public and unacceptable disparity from one forest to another. As mentioned earlier, our constituents are knowledgeable, participatory and committed to responsible stewardship of public lands. We thus offer a valuable resource to forest managers. To cut us, or any other community, out of the forest planning process is unfair and ultimately imprudent.

The Forest Service motto is "Caring for the Land and Serving the People." To us, this means that the agency should be listening to the people it serves so that it can care for the land in a manner that best meets the people's needs.

IV. Forest Planning Developed Under a NEPA Analysis Assures Straight-Forward Administrative Review

Outdoor Alliance is concerned with the ambiguous administrative review process when forest planning is categorically excluded from a NEPA analysis. A critically important attribute of a NEPA review is the administrative appeal framework, which provides meaningful opportunities to resolve difference without immediately looking to the courts. We support the thorough administrative appeals process afforded by NEPA and appreciate the higher level of public trust that process engenders. Creating a well-informed initial plan with adequate public participation and built-in accountability will reduce conflicts down the road.

V. Forest Planning with NEPA Review—More Efficient Over the Long Term

Many have derided NEPA review for involving too much red tape and for taking too long. Though we are all in favor of increased government efficiency and better implementation, efficiency cannot trump transparent agency decision-making that takes into account informed and meaningful public input when the topic is a multi-year plan for an entire forest. This is not to say that categorical exclusions are not an important part of NEPA compliance, but we feel that their use should be judicious and that categorical exclusions are inappropriate for the forest planning process. Put more directly, it pays to do things the "right way" the first time, even if it takes a little bit longer.

In terms of doing things the "right way", take, for example, the recently developed plan for the Monongahela National Forest—which forms the headwaters of the Potomac. The draft environmental assessment that informed the forest plan drew over 13,000 public comments, many of which were based on the explicitly defined outcomes expected from the implementation of specific alternatives. These comments, coming from Outdoor Alliance member organizations as well as individual members of the outdoor community, led to several substantive changes to the forest plan, including additional protective measures for wild areas of great interest to our community. NEPA allowed the Regional Forester to balance resource extraction interests with resource conservation interests and recreation interests based on a well-defined set of alternatives and a wealth of data on anticipated effects of those alternatives. Without NEPA, these decisions on which lands should be zoned for various levels of protection, extraction or recreational use would not have undergone rigorous analysis and public scrutiny.

Conclusion

Responsible management and stewardship decisions require multiple perspectives. These decisions cannot take place in a vacuum and certainly should not take place without the informed exploration of reasonable alternatives regarding how a forest should be managed over a stretch of years. For multiple uses to properly coexist, the forest planning process must be transparent, have robust public input, be premised on informed decision-making, and have mechanisms to assure accountability. NEPA may be an imperfect process, but it is a process that works and enjoys the public's trust.

In short, NEPA protects more than the environment, it protects our constituencies' opportunity for healthy recreation on public lands. By categorically excluding forest planning from NEPA analysis, that protection is lost.

Thank you for the opportunity to appear before the Subcommittee.

Mr. GRIJALVA. Thank you. Let me turn now to Dr. Barry Noon.

STATEMENT OF DR. BARRY NOON, PROFESSOR, COLORADO STATE UNIVERSITY

Mr. NOON. Mr. Chairman and members of the Subcommittee, I want to thank you for the opportunity to submit testimony for the record of this hearing. My name is Barry Noon. I am a Professor in the Department of Fish, Wildlife and Conservation Biology at Colorado State University. I have worked on land management and wildlife conservation issues for the past 33 years, 15 of those as a Federal research scientist.

I am not an expert on NEPA. However, I have contributed to land management planning under NEPA requirements on several occasions, including the Northwest Forest Plan Sierra Nevada framework, and I also served on a Forest Service commissioned committee of scientists tasked with evaluating the National Forest Management Act regulation. My comments today reflect in part my experiences on the committee of scientists. However, I do not speak for the committee. I speak only for myself.

The purpose of my testimony is to comment on the importance of retaining a transparent, thorough, deliberative and science-based process to evaluate ecological impacts of land management decision. I will address four issues that arise naturally in the NEPA process and are crucial to transparent and science-based planning on the national forest.

The first of these will be the need for management alternatives. The second would be cumulative effects analyses. The third, accountability as it is achieved by ecological monitoring, and fourth, the related issue of how the absence of the vertebrate species viability requirement from the current regulations increases the need to retain NEPA analyses.

When Congress enacted the NFMA of 1976, it adopted a provision to create a committee of scientists to advise the Forest Service on the drafting of regulations to implement the Act. The original committee of scientists convened in 1979 had a significant impact on biodiversity conservation on Forest Service lands. Their recommendations, which eventually appeared in the 1982 regulations to implement the Act, included a commitment to the viability of all vertebrate species in accordance with the NFMA requirement to provide for a diversity of plant and animals.

The charge to the second committee was to develop management principles and guidelines for the sustainable use and conservation of Forest Service lands. Similar to the first committee of scientists report, this committee implicitly supported the continuance of rigorous environmental assessments, including those under NEPA. Considering full NEPA disclosure is important for several reasons. One, consideration of land management alternatives.

Projects such as timber harvest, insulation of dams, exploitation of mineral deposits and the construction of roads are proposed to achieve specific management objectives. Because such activities always result in at least short-term environmental impacts, they are appropriately accompanied by EIS'. The NEPA process requires the Forest Service to propose and evaluate alternative ways of achieving these objectives to reduce or mitigate adverse consequences to the environment. In my experience, this structured process has

made explicit the tradeoffs between social, economic, and environmental objectives.

Second, the importance of cumulative effects. The impacts of land management activities accumulate across space and time, and in terms of meaningful human timeframes may lead to irreversible changes. The reality is that it is impossible to evaluate the ultimate effect of any proposed project without also considering the synergistic effects of past management actions and other proposed changes in land use.

Third, accountability through ecological monitoring. When NEPA was first enacted in 1970, it required each agency to identify and develop methods which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking. This purpose can be addressed by identifying objective, measurable criteria that can be used to judge the success of forest management plans in terms of environmental stewardship and other management objectives. In my experience, keeping track of environmental impacts has been addressed in part by the development of species based monitoring programs.

Fourth, loss of species viability requirement. The 2000 NMFA regulations increased the Federal government's commitment to the protection of biodiversity, specified specific criteria for assessment during the NEPA process, and gave the public a meaningful opportunity to offer comment and exert oversight on the implementations of the regulations. The year 2000 regs were short lived, however.

In January 2005, without convening a committee of scientists, the Forest Service issued a new set of regulations. The 2005 regulations eliminated as a goal the obligatory protection of biological diversity, the requirement to prepare environmental impact statements pursuant to NEPA, and reduce the role and influence of science in the development and implementation of forest plans. In my opinion, absent the viability requirement, NEPA assessments are the only place that fish and wildlife are evaluated at appropriate spacial and temporal scales.

In conclusion, the historic role of the Forest Service has been to sustain the health, diversity and productivity of the nation's forests and grasslands. This mandate is especially relevant today. However, because of accelerating rates of land transformation on private lands, invasion of exotic species, spread of animal and plant diseases and climate change, for example, fulfilling this mandate is more difficult than ever before.

What is needed now is not a reduction in our government's commitment to environmental stewardship, but rather a strengthening of our resolve to conserve species and ecosystems. This will require the use of the best available science and a full disclosure of the environmental tradeoffs that accompany multiple use and resource exploitation. Thank you.

[The prepared statement of Mr. Noon follows:]

Statement of Barry R. Noon, Professor, Department of Fish, Wildlife, and Conservation Biology, Colorado State University

Mister Chairman and members of the subcommittee, I want to thank you for the opportunity to submit testimony for the record of this hearing. My name is Barry Noon—I am a professor in the Department of Fish, Wildlife and Conservation Biol-

ogy at Colorado State University. I have worked on land management and wildlife conservation issues for the past 33 years, 15 of those years as federal research scientist. For 10 years, I directed a Forest Service Wildlife Research Program in the Pacific Northwest and in 1995, I served as Chief Scientist of the National Biological Service, Department of the Interior.

I am not an expert on the National Environmental Policy Act; however, I have contributed to the land management planning process under NEPA requirements on several occasions, including the Northwest Forest Plan, the Sierra Nevada Framework, and a Forest Service commissioned Committee of Scientists tasked with evaluating the National Forest Management Act (NFMA) regulations in 1997. My comments today reflect, in part, my experiences on the Committee of Scientists—but, I do not speak for the Committee—only for myself.

The purpose of my testimony is to comment on the importance of retaining a transparent, thorough, deliberate, and science-based process to evaluate the ecological impacts of land management activities on Forest Service lands. In addition to my relevant experience as a COS member, I will address 4 issues that arise naturally in the NEPA process and are crucial to transparent and science-based planning on the National Forests:

(1) A consideration of management alternatives which brings into focus the unavoidable tradeoffs among competing objectives;
(2) The cumulative effects of multiple land-use projects;
(3) Accountability achieved by means of science-based ecological monitoring programs;
(4) How the absence of the vertebrate species viability requirement from the current National Forest Management Act regulations increases the need to retain NEPA analyses.

Committee of Scientists and Ecological Sustainability

When Congress enacted the National Forest Management Act (NFMA) of 1976, it adopted a provision to create a Committee of Scientists to advise the Forest Service on the drafting of regulations to implement the Act. The original Committee of Scientists, convened in 1979, had a significant impact on biodiversity conservation on Forest Service lands. Their recommendations, which eventually appeared in the 1982 regulations to implement the Act, included a commitment to the viability of all vertebrate species in accordance with the NFMA requirement to provide for a diversity of plant and animal communities.

The charge to the second Committee of Scientists was to develop management principles and guidelines for the sustainable use and conservation of Forest Service lands. The committee produced a report, delivered to the executive and Congressional branches of government, entitled "Sustaining the People's Land: Recommendations for Stewardship of Our National Forest and Grasslands Into the Twenty-first Century." Similar to the first COS report, the second report lead to a new set of NFMA regulations, enacted in November 2000.

A defining characteristic of the second Committee of Scientists report was its assertion that the primary responsibility of Forest Service managers was to sustain the integrity of all ecological systems on Forest Service lands, and that ecological sustainability was an essential prerequisite to economic and social sustainability. As such, the report implicitly supported the continuation of rigorous environmental assessments, including NEPA. Continuing full NEPA disclosure is important for the following reasons.

1) Consideration of Land Management Alternatives in Forest Planning Decisions Is Important for Balancing Competing Demands on Natural Resources

Projects such as timber harvest, installation of dams, exploitation of mineral deposits, and the construction of roads are proposed to achieve specific land management objectives.. Because such activities always result in at least short-term environmental impacts, they are appropriately accompanied by environmental impact analyses. The NEPA process requires the Forest Service to propose and evaluate alternative ways of achieving these objectives to reduce or mitigate adverse consequences to the environment, including the alternative of no action. In my experience, this structured process makes explicit the inescapable tradeoffs between social, economic, and environmental objectives.

Constructing alternative scenarios requires planners to take a big picture perspective to land management. Alternatives are often portrayed as maps, which allow planners (and the public) to view fully the spatial location and extent of proposed actions. This process is particularly important because of the rapid land use change that is occurring on private lands adjacent to our national forests, which are often

the last place to conserve natural resources at meaningful scales. To the extent that essential environmental goods and services are diminished on private lands, the need for public lands to compensate for those losses becomes more pronounced.

2) Assessing Cumulative Effects of Land-Use Practices Is Critical To Reducing Impacts to the Environment

The impacts of land management activities accumulate across space and time, and, in terms of meaningful human time frames, may lead to irreversible changes. The reality is that it is impossible to evaluate the ultimate effect of any proposed project without also considering the synergistic effects of past management actions and other proposed changes in land use.

In 1978 the Council on Environmental Quality defined cumulative effects as

> *the impact on the environment resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions regardless of what person or agency undertakes such actions*

This definition is useful, but no longer sufficient, to guide relevant cumulative effects analyses. The reason is that it assumes that effects are simply additive and it fails to acknowledge the interaction between natural disturbance processes and land management. Additivity is no longer tenable because we now know that stresses to ecological systems are often multiplicative leading to non-linear relationships and steep threshold responses

We now also recognize that natural disturbance events commonly interact with management to produce unexpected outcomes. Examples provided in the Committee of Scientists report include, the decision not to thin an overstocked forest that has high fuel loads may result in significant watershed effects if a wildfire occurs; a poorly designed road may not be a problem until after a large storm when numerous road-related landslides occur; and overgrazing in riparian areas may not result in loss of woody plants until after a drought has occurred.

These and other cumulative effects are often only considered and evaluated in process of land management planning (e.g., the forest plans) and are triggered by NEPA requirements. Individual project assessments often fail to address cumulative effects and are not a substitute for the comprehensive evaluations that characterize environmental impact assessments.

3) Accountability Through Ecological Monitoring Is Needed To Address Broad Changes To The Environment

When NEPA was first enacted in 1970 it required each agency to "identify and develop methods and procedures—which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations". This purpose can be addressed in an environmental impact statement by identifying objective measurable criteria that can be used to judge the success of the forest plans in terms of environmental stewardship and other management objectives. In my experience, environmental impacts have been addressed in forest plans by the development of science-based monitoring programs to assess broad scale changes in environmental attributes (e.g., vegetation community types and their successional stages) and the direct monitoring of a small number of focal or management indicator species. Current NFMA regulations do not require the direct monitoring of any plant or animal species and it may now be that the only time when wildlife and fish are directly assessed is during NEPA analyses of land management plans. Excluding forest management from NEPA would eliminate a key process that could prevent the listing of still more species as threatened or in danger of extinction.

4) Loss of the Species Viability Requirement Compromises Environmental Stewardship

Based on recommendations of the most recent Committee of Scientists report, the 2000 NFMA regulations proposed a focal species approach to biodiversity assessment as a sensible compromise to the requirement to assess the viability of all vertebrate species as required in the 1982 regulations. In total, the 2000 regulations increased the federal government's commitment to the protection of biodiversity on U.S. National Forest lands, specified specific criteria for assessment during the NEPA process, and gave the public a meaningful opportunity to offer comment and exert oversight on the implementations of the regulations.

The year 2000 regulations were short-lived. In January 2005, without convening a committee of scientists, the Forest Service issued a new set of regulations (70 Fed. Reg.1022 (January 5, 2005:1022-1061). The 2005 regulations eliminated as a goal the obligatory protection of biological diversity, the requirement to prepare environmental impact statements pursuant to the National Environmental Policy Act

(NEPA), and reduced the role and influence of science in the development and implementation of forest plans.

The National Forest Management Act expressly requires that forest plans be developed in compliance with NEPA (16 USC 1604 (g) (1)). The new regulations, which "categorically exempt" future plan amendments and revisions from NEPA analysis, greatly increase the likelihood that significant, adverse environmental impacts will occur on Forest Service lands throughout the United States. As I noted previously, in the absence of NEPA requirements, there will be no mandatory consideration of cumulative impacts or alternative actions when plans are developed or revised. Furthermore, it is my understanding that the Forest Service has separately created a number of other "categorical exemptions" for individual actions, such as fuels reduction and disease control. The net result is that entire categories of actions will not undergo NEPA review, and thus could be implemented without due consideration of the best available science.

Concluding Remarks

The historic role of the Forest Service has been to sustain the health, diversity, and productivity of the nation's forest and grasslands in order to meet the needs of present and future generations. This mandate is especially relevant today. However, because of accelerating rates of land transformation on private lands, the invasion of exotic species, the spread of plant and animal diseases, and climate change, for example, fulfilling this mandate is more difficult than ever before. What is needed now is not a reduction in our government's commitment to environmental stewardship but rather a strengthening of our resolve to conserve species and ecosystems. This will require the use of the best available science and a full disclosure of the environmental tradeoffs that accompany multiple use and resource exploitation.

Unfortunately, in the last few years we have seen increasing priority given to activities that have a long history of compromising ecological sustainability on public lands. These include rollbacks to forest protections in the Northwest, lack of administrative support for the roadless rule, greatly increased levels of oil and gas development in ecologically sensitive areas, and increased access for motorized recreation in our few remaining back country areas. As a result, we have seen decreased consideration given to environmental protection on Forest Service lands at a time when the threats to species and ecosystems on these lands is at all time high. Exempting the forest planning process from the requirements of NEPA decreases the likelihood that environmental protection will be given the priority it deserves in the planning process.

Mr. GRIJALVA. Thank you. Mr. Nathaniel Lawrence. Counsel.

STATEMENT OF NATHANIEL LAWRENCE, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL (NRDC)

Mr. LAWRENCE. Chairman Grijalva and Mr. Bishop, thank you very much for hearing my testimony today. To come right to the point, what distinguishes the Forest Service today is not whether it uses categorical exclusions. Agencies for years have successfully used categorical exclusions as an efficiency device when projects they undertake are known not to have environmental impacts. What distinguishes the Forest Service is its across-the-board application of categorical exclusions that are so ill-defined they cannot possibly prevent environmental impacts on the ground.

Today under this Administration wherever you look in the Forest Service you find categorical exclusions instead of NEPA review, and it is this shell game that whatever decision you are looking at happens to be the wrong one for NEPA review that distinguishes this agency now and ought to concern the Committee.

Let us be clear about one thing. The use of a categorical exclusion is not NEPA review. NEPA provides for categorical exclusions but once a categorical exclusion is invoked, NEPA standards for environmental review fall away. NEPA requires, it has enforceable standards, for scientific accountability, for responsiveness to the

public, and for fresh thinking to combat tunnel vision and bureaucratic momentum.

These standards are missing. They fall away when a CE is invoked. By its wholesale reliance on CEs, the Forest Service is shortchanging itself as well as the environment and the public because NEPA is how you get the best information about how your actions will affect the environment over the long haul, and for an agency that is charged with managing the environment, that information is critical.

We hear a great deal about forest health problems today and it is used as a rationale for stripping away NEPA review. The hard truth is that the forest health problems we have on national forests have occurred on the Forest Service's watch over the last 100 years, mostly without the benefit of environmental review. This is the wrong time to be throwing away our best chance to get it right in our national forests.

The Forest Service is also wrong about NFMA plans. NFMA plans make a difference. Congress enacted NFMA to make a difference. The statute requires that plans make a difference. That they ensure against resource damage, damage to soils, to water courses, to lakes, to species diversity, and the plans that comply with NEPA, they will make a difference, and because they make a difference, they need full NEPA review.

To suggest that the Supreme Court cases you heard about today say anything about whether Congress can mandate plans that make a difference is a misstatement of such breadth that it really takes my breath away. The agency is also wrong that its categorical exclusions for fuels reduction thinning and for salvage can be counted on to avoid environmental impacts. Fuels reduction thinning, if it is done right, if it is small trees and brush, if it is done without roads, if it is done in places that have previously seen management, it has management problems and a road infrastructure in place, that kind of fuels reduction thinning can be counted on, I think, to be benign, but the reality is our scientific understanding of the long-range impact of how thinning affects long-range fire susceptibility is in its infancy.

The scientific literature is full of studies of how models predict what will happen when you thin but it is very, very spare on on-the-ground studies of how real-world thinning done by loggers actually impacts subsequent fire. The studies we have do have very mixed results and they show that sometimes commercial thinning can increase fire danger instead of reducing it.

That is what happened in the Hayman fire incidentally in Colorado where retrospective studies by the Forest Service and academics show that thinning did not affect subsequent fire intensity or sometimes made it worse. The same thing is true for salvage. A recent study, a very recent study, joint Federal government study with academic institutions of the Bisque fire in southern Oregon showed that where there had been salvage logging and replanting prior to the fire, when the fire came through, fire intensities were up to 60 percent more intense than in neighboring areas, adjacent similar areas that had not had salvage logging.

I do not want to close without saying a thing or two about the situation in Tahoe. I have two things to say. The first is, the last

time I went to the Tahoe basin, I saw some thinning work that the Forest Service had done that was really a thing of beauty. The agency can get it right. It can do small diameter thinning without roads, without leaving behind small flammable fuels, and it can really improve the situation.

The second this is it is a real mistake to confuse safety for homeowners with restoring ecological integrity in the backcountry. The thing that saves homes is intensive logging, intensive thinning right around the homes, and fireproof roofs. If they have those two things, thinning within a few hundred feet and fireproof roofs, they survive even intense fires.

Conversely, if they do not have those things they do not survive them. That is what happened in Los Alamos where an intense backcountry fire came into town, dropped down to the ground, and burnt through as a low intensity ground fire and still burnt home after home after home because they did not have that kind of home site preparation. Thank you very much.

[The prepared statement of Mr. Lawrence follows:]

Statement of Nathaniel Lawrence, Natural Resources Defense Council

Mr. Chairman and Members of the Subcommittee:

Thank you for your invitation to appear today and offer my views on the U.S. Forest Service's use of Categorical Exclusions from environmental review. The Natural Resources Defense Council (NRDC), whose Forestry Project I direct, represents more than 1.2 million members and activists. These people have an intense interest in the welfare of our national forest system lands. On their behalf, NRDC has worked for many years to improve agency decisionmaking affecting these lands, often through rulemakings and public processes involving our nation's environmental charter, the National Environmental Policy Act (NEPA). We have provided detailed analysis of and comments on multiple generations of national forest management plans across the country as well as proposals for the planning regulations to govern formulation of those plans. We have often participated in public environmental review processes for individual projects implementing or affecting management plans. When, in recent years, the Forest Service has proposed new exemptions from NEPA review, we have also carefully scrutinized its rationales for doing so and furnished the agency with our analysis of its proposals. And we have gone to court when needed, both to defend good processes and decisions the Forest Service has made, and to have poor ones corrected.

Overview: The Forest Service's Flight from NEPA Review.

In recent years, the U.S. Forest Service has developed a regrettable and deep-seated aversion to the public scrutiny, scientific accountability, and fresh thinking required by NEPA. The agency still does NEPA review, and sometimes does so admirably. Increasingly, though, it treats NEPA review as a burden to be shirked, across the board. Whatever decision the agency is considering, it appears always to be the wrong time to take a hard look at environmental impacts, consider whether a different approach would be better, or open up agency thinking and evidence to outside experts, sister agencies, and the affected public. The result is something approaching a shell game, with NEPA review never there, no matter where we look for it.

By ducking NEPA review, the Forest Service errs in several ways. As discussed in detail below, the agency is wrong as a legal matter that categories of decisions it exempts from NEPA review fall below the threshold for preparation of environmental documentation. Also elaborated below are factual reasons why decisions that meet its exemption criteria may affect the environment significantly. The agency's biggest error, though, may be in repudiating the benefits of NEPA review for so many of its management responsibilities.

NEPA's High Standards and Accountability Improve Agency Decisions.

For decisions with potential environmental consequences, which are much of the bread and butter work of the Forest Service, it is NEPA compliance that creates reliably high quality results, combats tunnel vision, and promotes public buy-in. At the same time that it empowers your constituents, Representatives, with the details

of agency proposals and a right to have their concerns responded to, it firmly guides bureaucrats toward good government. NEPA's well-established rules, detailed regulations, and court-enforceable standards work as nothing else does against sloppy and wishful thinking, the sweeping of problems under rugs, and the lack of responsiveness that are typically at the root of agency's decisions that we all later come to regret.

NEPA provides strong, reliable information about the likely real-world impacts of a decision through its information quality requirements. In run-of-the mill decision-making under the Administrative Procedure Act, agencies need only show that they were non-arbitrary. See, e.g., Massachusetts v. E.P.A., 127 S.Ct. 1438, 1459 (2007). Under NEPA, they are charged to "insure the professional integrity, including scientific integrity, of the[ir] discussions and analyses." 40 C.F.R. § 1502.24. They must not only lay out the reasoning behind their conclusions, but also disclose and respond to responsible scientific criticism. Navajo Nation v. U.S. Forest Service, 479 F.3d 1024, 1056 (9th Cir. 2007); Save Our Ecosystems v. Clark, 747 F.2d 1240, 1245, n.6 (9th Cir. 1984).

NEPA helps overcome the natural tendency of decisionmakers to do what they are most familiar with or think of first, without fully reflecting on whether that is really the best course. It requires that reasonable alternatives to the agency's first instinct be fleshed out and considered, in the search for a better way to do things. An environmental impact statement (EIS) must "[r]igorously explore and objectively evaluate all reasonable alternatives," to the agency's initial proposal. 40 C.F.R. § 1502.14(a). Even in an environmental assessment (EA), a short review of projects that are found not to have significant environmental impacts, NEPA directs agencies to develop "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. 102(2)(E).

This alternatives requirement, often described as the "heart of NEPA," see, e.g., Department of Transportation v. Public Citizen, 541 U.S. 752, 757, (2004), is also a key way for agencies to bring the public into their process, and achieve acceptance of the outcome. An agency's "duty under NEPA is to study—"significant alternatives" suggested by other agencies or the public during the comment period." Roosevelt Campobello International Park v. U.S. Environmental Protection Agency, 684 F.2d 1041, 1047 (1st Cir. 1982). This mandate to look at how the public would like to see a project undertaken, if a reasonable way of doing so is put forward, gives interested parties a horse in the race. With tangible evidence that their views have been taken seriously, they are far more likely to accept the outcome, then if they think they were excluded from the outset. Public buy-in is important not simply for whether a decision will go unchallenged. It also contributes to how favorably the entire agency is viewed, a factor in how well the agency may find its future projects received and funded.

Categorical Exclusions from NEPA Review are Important But Misused Tools.

The Forest Service's chosen mechanism for avoiding NEPA review is an important efficiency device known as a categorical exclusion (CE). Properly used, CEs allow agencies to dispense with formal NEPA review for classes of actions known not to have significant environmental impacts.[1] See 40 C.F.R. § 1508.4. Originally conceived of as applying to decisions not meaningfully affecting the physical environment at all, from picking uniforms to mowing lawns, they are now used as well for scaled down versions of management actions that could otherwise require an EIS. This latter use requires care. Such exclusions from NEPA review are not really categorical; they are a matter of degree. Unless they are kept truly de minimis, it takes field experience to determine whether a given class and scale of projects can legitimately be categorically excluded. Importantly, any CE must identify an escape hatch in the form of "extraordinary circumstances in which a normally excluded action may have a significant environmental effect" and therefore requires NEPA review. 40 C.F.R. § 1508.4.

CEs properly utilized are beneficial to all parties. They allow agencies and the public to focus their resources on projects that really do entail potential impacts on the environment. It is crucial, though, that they be well defined, limited to categories demonstrably free of impacts, and with a robust extraordinary circumstances

[1] An EIS is required if a project may affect the environment significantly. See, e.g., Arkansas Wildlife Federation v. U.S. Army Corps of Engineers, 431 F.3d 1096, 1100-1101 (8th Cir. 2005). An EA is the required environmental document if, among other reasons, an agency is unsure whether to prepare an EIS. Utah Environmental Congress v. Troyer, 479 F.3d 1269, 1274 (10th Cir. 2007).

mechanism in place. The fact that decisions to invoke CEs are made out of the public eye make these safeguards all the more important.

The Forest Service, unfortunately, has in recent years applied poorly defined and/or unjustified CEs at every stage in the process of regulating public land use. The result is an agency lurching toward a NEPA-free existence. Whole management plans for national forests have no impacts, if the Forest Service is to be believed, and can be adopted under a CE. Changing the regulations that govern management plans also has no impact. Implementing plans on the ground, for large and ill-defined categories of logging, also turns out not to have impacts, and again requires no NEPA review. And decisions that used to be made in EAs about whether a project might have significant impacts, likewise, are done behind closed doors.

The Forest Service is Mistakenly Trying to Exempt Forest Management Plans, Which Do and Must Affect the Environment, From NEPA Review.

In perhaps its most novel and disturbing form, the Forest Service's expansion of CEs now includes the doctrine that entire, long-range, forest management plans may not need public NEPA review. Late last year, the agency adopted a new CE that covers amendment or revision of forest management plans. 71 Fed. Reg. 75481 et seq. (Dec. 15, 2006); Forest Service Handbook 1909.15, chap. 30, sec. 31.2(16). These plans are, on their face, the kinds of actions that require NEPA review. The Council on Environmental Quality NEPA regulations define "major federal action," triggering EIS eligibility, to include "formal plans—which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based." 40 C.F.R. § 1508.18(b)(2). In promulgating a CE for forest management plans, the Forest Service argued that such plans would henceforth only guide future decisions, and not themselves have potential impacts. See, e.g., 70 Fed. Reg. 1023, 1024—1025 (Jan. 5, 2005). However, under the NEPA regulations quoted above, neither the fact that plans "guide" other actions, nor the future nature of those actions, makes a forest plan any the less the kind of "formal plan" which is a major federal action. Additionally, deferring NEPA review at the forest management plan stage is inconsistent with the directive that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time." 40 C.F.R. § 1401.2.

Moreover, numerous factors inherent in forest management plans make it plain that they may affect the environment significantly. These factors include the geographic scope of forest plans (up to 17 million acres), their duration (up to 15 years), and the potential that they will make possible or prohibit actions of great potential impact on the environment. These actions include large scale logging and road construction, widespread use of off-road vehicles, grazing, and determination of the allowable locations for and intensity of recreational use. Moreover, past forest management plans unquestionably affected the environment significantly. They determined where logging could take place, what resource protections would be used, whether grazing and motorized recreation would continue. And each of them was accompanied by an EIS that chronicled the ways in which it would affect the environment and compared them to the effects of alternative planning options. Thus, even if forest management plans could be adopted to avoid such provisions, the change from the previous, more meaningful plans, from binding protections to none, from resource use decisions to none, has environmental consequences. If the agency really leaves open all questions about resource allocations and protections in its next generation of plans, then it must at least be deciding at that time to create a risk that they will not be as well protected in later decisions as the plan could assure. And creating a substantial risk for those resources means potentially having a significant impact on the environment.

At all events, forest management plans cannot legally be so devoid of protective provisions and decisions about implementation. Under the National Forest Management Act (NFMA), forest plans must, among other things, make choices about forest management systems and harvesting levels. 16 U.S.C. § 1604(e). They must "provide for diversity of plant and animal communities." Id. at § 1604(g)(3)(B). Forest plan regulations must "insure that timber will be harvested—only where—watershed conditions will not be irreversibly damaged" and "protection is provided for streams, streambanks—and other bodies of water." Id. at § 1604(g)(3)(E). Plans must insure that clearcutting and other regeneration cuts are only used under certain environment-protecting conditions. Id. at § 1604(g)(3)(F). Because the assurance of these safeguards, or the failure to assure them, will have significant impacts on the environment—and manifestly Congress would not have specified them if it thought the safeguards were insignificant—the statute mandates that plans be the kind of instruments to which NEPA review attaches. Moreover, NFMA requires that forest plans include, in writing, "the planned timber sale program." 16 U.S.C. § 1604(f)(2). Thus, while the required timber sale program may change over time, each forest

management plan is required to propose actions which, by any standard, normally could significantly affect the environment, requiring an EIS.

Lack of Environmental Review for Management Plans is Aggravated By Also Exempting the Regulations Governing Them From NEPA Review.

Up a level from forest management plans, in adopting forest planning regulations, the Forest Service is also applying CEs to avoid NEPA review. Regulations the agency adopted in 2005 attempted to lay the groundwork for eliminating NEPA review of forest management plans by changing their content to make them non-decision documents. See 70 Fed. Reg. 1022 et seq. (Jan. 5, 2005). Despite itself describing this new approach as "a paradigm shift in land management planning," id. at 1024, the agency sought to adopt the new rules under a CE. In March of this year, a federal court, finding that the agency relied on a CE that had never previously been used for a regulation of such magnitude, had no record to support its invocation of the CE, and appeared to be engendering potentially significant environmental consequences, struck the rule down. Citizens for Better Forestry v. USDA, 481 F.Supp.2d 1059, 1087-90 (N.D. Cal. 2007).

The Forest Service, though, has not given up. It had already modified its CE rules explicitly to cover "[e]stablishing procedures for amending or revising Forest Land and Resource Management Plans." Forest Service Handbook 1909.15, chap. 30, sec. 31.12(2)(f); see also id. at sec. 31.2(16). It has also recently recommenced its revision of the planning regulations. Any effort, however, to drop planning regulations that do mandate effective protections will encounter the same problem as dropping protections from the plans themselves. The decision to stop protecting the environment is itself a decision with environmental consequences. Claiming otherwise is like arguing that eliminating speed limits has no impact because a non-limit does not mandate anything.[2]

Failure to Undertake Environmental Review At the Project Level Completes a Clean Sweep of NEPA Avoidance.

The Forest Service's flight from NEPA extends down to the individual management project level. In arguing against NEPA review at the forest management plan stage, the agency claimed that plan implementing projects would provide a superior forum for such analysis. See, e.g. 70 Fed Reg. at 1064 ("NEPA analysis and documentation will be timed to coincide with meaningful stages in agency planning and decisionmaking"); id. ("[a]ny proposed use in an area identified [in a forest management plan] as suitable for that use must be considered under agency NEPA procedures at the time of a project decision"). In fact, however, under the Forest Service's evolving approach, many plan implementing activities are themselves conducted under statutory or regulatory authority that eliminates or truncates NEPA review. This includes CEs for thinning and salvage operations, which collectively comprise the large majority of logging rationales currently used throughout the National Forest System. It also includes misuse of legislated CEs and the much curtailed NEPA process authorized under the Healthy Forest Restoration Act, Public Law 108-148, sec. 104. This elimination of NEPA review at the project level completes the shell game of avoidance, the failure ever to provide high quality, accountable, and responsive analysis of environmental analysis at any management stage at all.

1. Thinning CEs.

Central to, and emblematic of, this rejection of NEPA review even at the project level, is the agency's CE for forest thinning in the name of fuel reduction. Current Forest Service rules allow for such thinning on up to 1,000 acres, about one and a half square miles, under a CE. Forest Service Handbook 1909.15, chap. 30, sec. 31.2(10). Though there are some sidebars on the practice, the agency imposes no limits on the logging methods that can be used, or the size of trees removed. Heavy-duty, industrial logging systems, designed to keep costs low rather than avoid environmental damage, are perfectly allowable. And while public rhetoric about fuels reduction focuses on thick brush and small trees, the CE allows the Forest Service to remove huge trees without NEPA review. This is not a hypothetical concern, since the agency rationalizes removal of up to 30 inches in diameter five feet off the ground, in the name of reducing fire risk.[3]

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[2] In addition, of course, any version of planning regulations drafted to keep plans from having actual impacts will run afoul of the NFMA requirements discussed above, as well as the general NEPA regulatory admonition to incorporate environmental review as early planning processes as possible.

[3] This rationale was advanced, for example, even in the agency's planning for a national monument. The Giant Sequoia National Monument Management Plan Draft Environmental Impact

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In justifying adoption of its fuels reduction CE, the Forest Service erroneously looked to recent experience with projects that might or might not resemble those allowed by the CE. The agency relied heavily on a spreadsheet tally of some 3,000 projects as proof that new projects authorized to go forward without NEPA review under the CE could be counted on to avoid environmental impacts. 68 Fed. Reg. 33814, 33817 (June 5, 2003). NRDC carefully reviewed the database utilized for this spreadsheet. We found that the large majority of reviewed projects were small scale. Well under 10% involved mechanical thinning of over 250 acres.[4] This small size made the reviewed projects more likely to be suited to a CE. At the same time, however, it made them irrelevant in gauging the impacts of a CE that allowed much larger scale logging. The lack of adequate limitations on the size, intensity, or location of fuels reduction logging in the CE the agency ultimately adopted means that future projects need not be remotely like those included in the spreadsheet. Past performance is therefore no guide to future impacts or the need for NEPA review.

Equally seriously, the spreadsheet does not appear to reflect much actual on-the-ground monitoring of impacts to environmental factors, such as soil compaction, spread of exotics, usage by disturbance-averse and/or interior-adapted wildlife species, or in-stream turbidity. NRDC made spot inquires on some of the larger-acreage mechanical fuels treatment projects. Not surprisingly, given the recent vintage of most projects, many did not have monitoring completed. The Sequoia National Forest, for example, wrote us back that none of the three projects we inquired about—the Hotel A, McGee, and Dry Eshom—had completed monitoring. See Exhibits A and B. Similarly, the Gallatin National Forest told us that it had no reportable monitoring for the spreadsheet projects we inquired about. See Exhibit C. The Klamath National Forest referred us to forestwide monitoring on its website for some projects, but the forestwide reports had no information specific to the projects. See Exhibits D and E. Other forests, like the Plumas and Modoc National Forests, reported that the only monitoring documents that existed for projects about which we inquired were the "daily logs" filled out during contract operations by Forest Service staff, not records of the projects' actual impact on environmental factors.[5] Far from having long-term on-the-ground monitoring of the projects' actual environmental impacts, the agency did not even have near term results.

The need for environmental review for at least some of the logging allowed by the fuels reduction CE is obvious. The on-the-ground results of such thinning are highly uncertain. A recent study of seven thinning projects in the Sequoia National Forest showed that subsequent wildfire was more intense in all of the thinned plots than in similar adjacent areas that had not been thinned.[6] As an eminent panel of fire ecologists wrote to President Bush in 2003 about western forest fire threats: "neither the magnitude of the problem nor our understanding of treatment impacts would justify proceeding in panic or without thorough environmental reviews.[7]

The most fundamental reason for care and environmental review in using thinning for fuels reduction is the gaping lack of empirical studies concerning its effectiveness as applied in the field. The scientists quoted above noted that "[t]he most debated response to alleviating future fires—mechanically thinning trees—has had limited study." Researchers for the federal government's Joint Fire Science Program pointed out that "[t]he lack of empirical assessment of fuel treatment performance has become conspicuous."[8] The authors, after canvassing the existing scientific literature concluded that, other than theirs, only one lone study "included both statistical analysis and comparison of stand conditions in treated and untreated areas such that differential fire effects could be directly related to the intensity of fuels manipulation."[9]

Statement expressly proposed to log trees up to 30 inches diameter at breast height to reduce fire risks.

[4] Analysis available from NRDC upon request.

[5] Personal communication from Michael Condon.

[6] Hanson, C.T., Odion, D.C. 2006. Fire Severity in mechanically thinned versus unthinned forests of the Sierra Nevada, California. In: Proceedings of the 3rd International Fire Ecology and Management Congress, November 13-17, 2006, San Diego, CA. Attached as Exhibit F.

[7] Christensen, N., et al. 2003. Letter to President Bush of 9/24/02. Attached as Exhibit G. These preeminent scientists did not conclude that only passive management or non-mechanical treatments could be appropriate. Rather they warned of the importance of carefully analyzing site specific factors when fuels reduction through mechanical thinning is attempted: "responding to this fire situation requires thoughtfulness and care."

[8] Omi, P. & E Martinson. 2002. Effect of Fuels Treatment on Wildfire Severity. Submitted to the Joint Fire Science Program Governing Board, March 25, 2002, and online at: http://www.cnr.colostate.edu/FS/westfire/FinalReport.pdf.

[9] Omi & Martinson's study showed that for a few prescribed fire and pre-commercial/non-commercial thinning projects, the intensity of subsequent fire was reduced. Nevertheless, they

Numerous other reviews and reports, many of them generated by the federal government, confirm the scientific uncertainty surrounding how thinning actually affects subsequent fire intensity. For example, a Department of Interior publication states that "[s]cant information exists, however, on the efficacy of fuel treatments for mitigating wildfire severity." [10] An Environmental Assessment published by Grand Canyon National Park reports that "methodologies appropriate for returning "natural" forest function and process are the subject of considerable debate." [11] As one U.S. Forest Service publication notes with understatement, "[s]ome uncertainty—surrounds management treatments." [12] It continues: "[a]t landscape scales, the effectiveness of treatments in improving watershed conditions has not been well documented." [13] And the Forest Service's retrospective examination of the relationship between fuel reduction activities and subsequent fire intensity in Colorado's Hayman Fire found no systematic benefit: "each of the different types of fuel modification encountered...had instances of success as well as failure in terms of altering fire spread or severity." [14]

The need for careful study of fuels reduction projects is heightened by the fact that they can, as shown by the Hanson & Odion on-the-ground study quoted above [15], actually increase subsequent fire effects. In their letter to President Bush [16], Christensen, et al. summarize the situation: "[a]lthough a few empirically based studies have shown a systematic reduction in fire intensity subsequent to some actual thinning, others have documented increases in fire intensity and severity." A Forest Service science publication reports: "Depending on the type, intensity, and extent of thinning, or other treatment applied, fire behavior can be improved (less severe and intense) or exacerbated." [17] A report of the Secretaries of Agriculture and Interior to the President warned that "the National Research Council found that logging and clearcutting can cause rapid regeneration of shrubs and trees that can create highly flammable fuel conditions within a few years of cutting. Without adequate treatment of small woody material, logging may exacerbate fire risk rather than lower it." [18] In fact, a whole series of studies from the scientific literature shows post-thinning increases in fire intensity and/or spread. [19]

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concluded, "[s]till unanswered are questions regarding necessary treatment intensities and duration of treatment effects."

[10] U.S. Department of Interior. People, Land & Water, vol. 8, no. 10 (May/June 2002), p. 17.

[11] National Park Service. 2002. "Environmental Assessment and Assessment of Effect: Research on Wildfire Hazard Reduction in Ponderosa Pine Ecosystems at Grand Canyon National Park," p. 1.

[12] U.S. Forest Service. 2002. Protecting People and Sustaining Resources in Fire-Adapted Ecosystems: A Cohesive Strategy. October 13, 2002, p. 32.

[13] Ibid, p.34.

[14] Finney, et al. 2002. "Report on Fire Behavior, Fuel Treatments, and Fire Suppression", in Interim Hayman Fire Case Study Analysis, R. Graham, tech ed. U.S. Forest Service, Rocky Mountain Research Station. Nov. 13, 2002. Page 82. Available online at: http://www.fs.fed.us/rm/hayman_fire/print/02finney_print.pdf.

[15] Supra note 6.

[16] Supra note 7

[17] Graham, R., et al. 1999. The Effects of Thinning and Similar Stand Treatments on Fire Behavior in Western Forests. U.S. Forest Service, Pacific Northwest Research Station. General Tech. Rpt PNW-GTR-463. Sept. 1999. Page 15.

[18] Babbitt, B. and D. Glickman. 2002. "Managing the Impact of Wildfires on Communities and the Environment: A Report to the President In Response to the Wildfires of 2000. September 8, 2000." Page 12. A second explanation for increases in fire intensity post-thinning is the increased drying effect of sun and wind in stands that have been opened up. See, e.g., Christensen, et al., 2002 (supra note 7); Rapp, 2002, "Fire risk in east-side forests" in Science Update. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. September (2): 1-12, at 8; U.S. Forest Service, 2000, Final Environmental Impact Statement for the Roadless Areas Conservation Rule, vol. 1, p. 3-110, available online at http://roadless.fs.fed.us/documents/feis/documents/vol1/chap3—health.pdf.

[19] Many of these studies were reviewed by the Forest Service in connection with the Final Environmental Impact Statement for the Roadless Areas Conservation Rule (FEIS); supra note 17. The fire specialist review of scientific literature for this FEIS summarizes their findings. See id., Fuel Management and Fire Suppression Specialist's Report, available online at: http://www.roadless.fs.fed.us/documents/feis/specrep/xfire_spec_rpt.pdf, at 22 ("The Congressional Research Service...noted: "timber harvesting does remove fuel, but it is unclear whether this fuel removal is significant;" "Covington (1996)...notes that, 'scientific data to support such management actions [either a hand's off approach or the use of timber harvesting] are inadequate'" (brackets in the source)); id. at 22-23 ("Kolb and others (1994)—conclude that—management activities to improve forest health [such as fuel management] are difficult to apply in the field" (brackets in the source)); id. at 21 ("Fahnstock's (1968) study of precommercial thinning found that timber stands thinned to a 12 feet by 12 feet spacing commonly produced fuels that 'rate high in rate of spread and resistance to control for at least 5 years after cutting, so that it would

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A real world illustration of this phenomenon comes from the Ninth Circuit Court of Appeal's review of the record for the Douglas Fire Bark Beetle Project of the Colville and Panhandle National Forests. There, the Court found that the evidence showed "risk of fire during the first few years of timber harvest under the Project will actually be greater than the risk of fire if no action is taken." [20]

2. Salvage CEs

A second growth area for NEPA-free logging is post-disturbance salvage. Along with the fuels CE discussed immediately above, the Forest Service adopted another poorly defined CE, this one for salvage logging. Forest Service Handbook 1909.15, chap. 30, sec. 31.2(13). Some of its potential to mask significant environmental impacts is reduced by the 250 acre size limit, though a companion CE for "post-fire rehabilitation" also by its terms applies to such logging and has a huge 4,200 acre limit. See id. sec. 31.2(11).

Use of a CE for any substantial salvage logging is unjustifiable because, as Forest Service researchers have concluded, salvage logging spreads exotic species, causes erosion, and reduces wildlife usage, among other harms. [21] These researchers found that "postfire logging is certain to have a wide variety of effects, from subtle to significant, depending on where the site lies in relation to other postfire sites of various ages, site characteristics, logging methods, and intensity of fire." Post-fire soils are particularly susceptible to logging damage and associated loss of productivity. [22]

Scientists both inside and outside the Forest Service agree there is little or no evidence that post-fire logging reduces the risk of later reburn, and warn that site-specific factors are critical in assessing the impacts of salvage logging. [23] Another Forest Service publication notes that "[t]raditional salvage harvests do little to reduce crown fire hazard" and "the potential for severe fire may actually be increased, if the fuels are not reduced." [24] Moreover, like thinning, salvage logging can actually exacerbate subsequent fire. A recent joint federal agency and university study of Oregon's Biscuit Fire showed that earlier salvage logging and tree planting increased fire severity by up to 61%, compared to similar non-logged but previously burned stands. [25]

One feature shared by the salvage and fuels CEs particularly increases the likelihood of environmental harm. Both allow road construction, the salvage CE of up to a half mile and the fuels CE without limit. Both restrict the construction to temporary roads. The Forest Service itself, however, has found that temporary roads can have the "same long-lasting and significant ecological effects as permanent roads." [26] The U.S. Department of Justice confirmed this finding, in its Memorandum in Support of Motion for Summary Judgment in Billings County v. Veneman, U.S. Dist. Ct., D. N.D., Civ. No. A1-01-087, dated Aug. 9, 2002, at page 49.

Despite this accumulating scientific evidence, the Forest Service remains enthusiastic about salvage logging without environmental review. Attached are photos of the ongoing Eightmile Meadow Salvage operation on the Mt Hood National Forest. Exhibit I shows a unit slated for logging. Exhibit J shows a logged unit. One not need pass judgment on whether such logging should proceed in order to understand from the photographic evidence that if it is done, it could have significant environmental impacts and deserves NEPA review prior to decisionmaking.

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burn with relatively high intensity;'" "When precommercial thinning was used in lodgepole pine stands, Alexander and Yancik (1977) reported that a fire's rate of spread increased 3.5 times and that the fire's intensity increased 3 times"); id. at 23 ("Countryman (1955) found that "opening up" a forest through logging changed the "fire climate so that fires start more easily, spread faster, and burn hotter").

[20] Land Council v. Vaught, No. 01-35088. Memorandum of August 14, 2001 at 4. (This is an unpublished opinion of the Ninth Circuit).

[21] McIver, J. D., and L. Starr, tech. eds. 2000. "Environmental Effects of Postfire Logging: Literature Review and Annotated Bibliography." U.S. Forest Service, Pacific Northwest Research Station PNW-GTR-486. Portland, OR. Available online at: http://www.fs.fed.us/pnw/pubs/gtr486.pdf.

[22] Beschta, R.L, et al. 1995. "Wildfire and Salvage Logging." Oregon State University. Corvallis, OR. Available online at: http://www.isu.edu/departments/bios/Minshall/Publications/Wildfire%20and%20Salvage%20Logging.pdf.

[23] See also Beschta et al., supra note 22; Everett, R. 1995. "Review of Beschta document." Letter dated August 16 to John Lowe. On file with: U.S. Forest Service, Pacific Northwest Research Station, Wenatchee, WA.

[24] Rapp, V. 2002. "Fire risk in east-side forests" in Science Update. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. September (2): 1-12.

[25] See attached Exhibit H.

[26] U.S. Forest Service. 2000. Final Environmental Impact Statement for the Roadless Area Conservation Rule, vol. 1, page 2-18.

3. CEs for Permit Renewals

The Forest Service has multiple CE categories that allow for renewal of permits and use authorizations without NEPA review. See Forest Service Handbook 1909.15, chap. 30, sections 31.12(9) & (10), 31.2(3) & (15) Many such renewals could sensibly be performed under a CE. The lax criteria the agency has adopted for such renewals, however, mean the CEs can be applied where environmental harm is a real possibility and NEPA review indicated. None of these CEs looks to whether prior uses ever had the benefit of NEPA review or whether new information or changed circumstances make such review needed at the time of renewal.

The Forest Service has similarly broad extraordinary authority to renew expiring grazing permits without conducting NEPA review, provided by Congress, as long as the decision to do so meets certain conditions. This provision, Section 339 of the FY 2005 Interior and Related Agencies Appropriations Act, P.L. 108-447, was the result of congressional concerns that the Forest Service had failed to process expiring grazing permits in a timely manner in compliance with NEPA. While Section 339 allowed the agency to exclude grazing permits from NEPA review, it did not give the Forest Service a blank check. The agency was required to comply with three distinct mandates as spelled out in the FY 2005 rider:

> (1) the decision continues current grazing management; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances.

The Forest Service has demonstrated a thorough-going inconsistency in providing the public with notice of these categorical exclusions. Often, the agency does not issue any public notice. When a National Forest does provide notice, it rarely makes clear whether public comment will actually be considered in the decision making process, or whether the public will retain the right of appeal after an agency decision is made to indeed categorically exclude an allotment. There are discrepancies within the same National Forest in implementing the Section 339 authority. Without public involvement, it is virtually impossible to hold the agency responsible if publicly owned resources are damaged or threatened by inappropriate or inadequate grazing management.

Rather than choosing categorical exclusions for allotments where there is a well-established record of sound grazing management, the agency has too frequently selected permits where there exists controversy surrounding the grazing practices. For instance, in Region Four (with forests in Southern Idaho, Nevada, Utah, and Western Wyoming), a region where inappropriate grazing decisions have well-demonstrated deleterious effects on public lands, the agency has categorically excluded, or is planning to, nearly two thirds of the permit renewals. Many of the permits that have been categorically excluded do not meet the requirements of the Section 339 program. In the Bridger-Teton National Forest, for example, home to a number of charismatic endangered species, some two million acres will have been categorically excluded from NEPA review by the time the program is finished.

Even designated wilderness is not considered a high enough bar to prevent the use of categorical exclusions. In NRDC's investigation of this program, we have found twenty-two allotments that operate within some part of a designated wilderness system which have received a categorical exclusion. An additional sixteen allotments that operate within wilderness are pending a categorical exclusion decision as well; including two allotments in the Sequoia National Forest whose 26,543 permitted acres operate entirely within a designated wilderness area. We have also has identified 58 categorically excluded allotments that operate primarily within a designated Inventoried Roadless Area, one additional allotment that was categorically excluded even though it operated primarily within a designated Wilderness Study Area, and nine allotments that currently operate within a designated Research Natural Area.

In the Gila National Forest of southwestern New Mexico, the agency has also been proposing categorically exclusions for permits on public lands that contain large swaths of wilderness. Moreover, along with portions of the Apache National Forest, the entire Gila National Forest has been designated as the sole recovery area for the critically endangered Mexican gray wolf. Despite the fact that wolf-livestock conflicts pose the greatest hurdle to successful Mexican gray wolf recovery, the Forest Service continues to propose categorical exclusions on its grazing management decisions for the area. And in the Pacific Northwest, where unmitigated cattle grazing can damage the spawning beds for migrating salmon and steelhead trout, the Umatilla National Forest elected to categorically exclude a number of grazing allotments that included this kind of essential salmonid habitat.

4. Expansion of CEs Through Misuse of Extraordinary Circumstances

The Forest Service's misuse of its "extraordinary circumstances" rule, which identifies the need for full NEPA review, adds to inappropriate application of CEs. The Forest Service interprets its CE rules so that the presence of an extraordinary factor does not trigger the protections of documentation under the National Environmental Policy Act (NEPA) and public review. Rather, an agency official makes an in-house determination of whether or not impacts related to the factor could be significant.[27] These, however, are exactly the sorts of decisions that NEPA contemplates will be made in a public Finding of No Significant Impact, after review of an EA and public comment. Made out of the light of day, they are prone to letting problems be "swept under the rug," a central reason that Congress understood NEPA was needed.

Conclusion.

The Forest Service's efforts to shirk NEPA make it stand alone in the federal family. Other agencies may sometimes wish to vault over environmental review and get right to work. None, however, has embarked on anything like so wholesale an effort to avoid it.

Increasingly, this disparity shows, among other places, in the litigation record. NEPA suits against the Forest Service accounted for 50 of a total of 118 cases filed in 2005, the last year for which statistics are available. See http://www.nepa.gov. Adverse orders or decisions against the Forest Service resulted in over 50% of those cases, compared to 25% for the remaining agencies.

In some sense, it is understandable that the Forest Service rankles at NEPA. It is staffed by professionals who trust their own professional judgment and want, often, to be left to exercise it without interference. The hard truth, however, is that the forest health problems the agency so often cites as the reason to plough ahead without NEPA, are almost all things that happened on the Forest Service's watch. Had NEPA been there over the years, with its high standards for information, responsiveness, and accountability, things might now be different.[28]

Thank you for the opportunity to testify today. I would be happy to answer any questions you might have.

Mr. GRIJALVA. Mr. Ray Vaughan. Sir.

STATEMENT OF RAY VAUGHAN, EXECUTIVE DIRECTOR, WILDLAW

Mr. VAUGHAN. Thank you very much, Mr. Chairman. As my written testimony outlines, what I and WildLaw have done over a number of years is to get very detailed project-by-project review of the use of CEs, particularly the HFI and CE6 CEs in the southern region, region 8. This type of in-depth review goes beyond just the raw numbers of use and acreage. I do not know of it being duplicated anywhere else in the nation, and so you cannot necessarily extrapolate to other parts of the agency. However, region 8 is probably the largest user of CEs and of projects as a whole particularly because of the very large prescribed burning program there.

The emphasis of what I did is back in 2003 I had the same fears that these would be massively abused, and looking at the raw language of the regulations that potential is clearly there. However, District Rangers do not read the regulations when they implement a CEs. They read guidance they get from the agency, and they talk to other people who have used the CEs, and they sometimes talk to people like me.

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[27] See U.S. Forest Service. 2002. Background for the Proposed Hazardous Fuels and Rehabilitation/Stabilization Categorical Exclusions, p. 5.

[28] Though much of the information bearing on forest health problems is of relatively recent vintage, the Forest Service has known for more than seventy years that fire suppression caused subsequent fires to burn more and more intensely. See Benedict, M.A. [Supervisor of the Sierra National Forest]. 1930. Twenty-one years of Fire Protection in the National Forests of California. Journal of Forestry 28: 707-710.

The actual guidance the agency issued on HFICs and on HFRA as well is excellent guidance and makes it real clear what you should do and what you should not do, and our experience in region 8 has been that overall final decisions on categorical exclusions are in complete compliance with the law, and make sense, and seem to be scientifically valid 92 percent of the time. I can show you the environmental assessments done by the national forest in Mississippi back in the 1990s. Every single one of them, more than 100, broke the law. Every one of them was in noncompliance.

The difference is the people and what the people try to do, and if the people in the agency have a context for these CEs, they are not just using them to use them, but a context of restoration, sustainability as they do in the national forest in Alabama and now in the national forest in Mississippi, invariably they do a really good job on it. They have lots of collaboration up front.

When EAs were used in Mississippi exclusively, they never had collaboration. They never listened to the public. Now District Rangers call me and everyone else who is concerned on every single CEs they do, the majority of which in Mississippi are two acres or less. Dealing with southern pine beetle outbreaks, we do not need to revisit the science and knowledge of controlling southern pine beetles every time you have a one-acre spot.

The reality is there can be very legitimate uses but the abuses can be very damaging, often perception and most of concern on the ground, and so they should not be tolerated even if they are a minority of the instances, and we believe we have been able to identify the vast majority of the areas the problems fall into, the mistakes, the errors, the abuses, and have detailed for the Committee what we think the agency could do to bring in the side boards a little bit and make sure that the CEs and those abuses do not occur again.

And just one point. The Earth Island case, by the way, does not extend the time it takes to do a CE if it is used properly because if there are not adversarial comments received on the CE, the appeal does not have to be given. The appeal time does not run, and so therefore when they do it right, that particular case did not add anything to the time it took to implement the CEs, but it was very useful in helping people like me reign in abuses. The worst abuses we see are segmentation, where they take a 3,000 acre project and divvy it up into 70-acre chunks and go, OK, we have 25, 30 CEs, and we do not have to do an environmental analysis or cumulative impacts review.

Because Earth Island made some of those in the one bad district in Mississippi a couple of years ago reviewable, I was able to appeal them. A new supervisor had just come in. He saw that that was an abuse. He stopped it, and that does not occur any more there.

CEs are a wonderful tool for small projects, like a screwdriver for tightening screws and building things. However, screwdrivers cannot do everything. In the planning area, the 1982 regulations and the implementation of planning now is a mess and does need to be fixed, but planning can be made shorter not by going the CE route, but by making the plan a guide to a desired future instead of just

a broad predictor of all possible futures, and plans are not supposed to be just aspirational. That is not enough.

There needs to be a decision made on which aspirations we are going to choose to pursue during the planning period and in the management of the forest. I believe a broader guide of the agency for restoration, sustainability and protection will give that type of context that will make everything from CEs to EIS' to plans work much better. Thank you very much.

[The prepared statement of Mr. Vaughan follows:]

Statement of Ray Vaughan, Executive Director, WildLaw

I. Categorical Exclusions

As part of the processes under the National Environmental Policy Act (NEPA), Categorical Exclusions (CEs) are used to analyze projects and actions that an agency can demonstrate have no environmental impacts. Thus, projects that fall within the bounds of a CE do not need the lengthy environmental impact analysis process of an Environmental Impact Statement (EIS) or the shorter Environmental Analysis (EA). When used rationally and appropriately, CEs can be useful and proper tools for handling certain types of small projects and immediate but limited needs.

Like all tools for accomplishing work, CEs can be properly used, improperly used or abusively misused. There is nothing inherently wrong with CEs, any more so than there is anything wrong with EAs and EISs. While some decry CEs as ways to limit public participation and eliminate review of environmental impacts, others laud them as the prime solution to getting good work done on public lands. Both views miss. CEs are nothing but a NEPA tool. They are not the cause of abuse or the cause of solutions; they are merely the mechanism by which some abuses and some solutions can be accomplished.

Are CEs being abused by the Forest Service and sometimes used to limit or eliminate public participation in management of public lands? Absolutely. But so are the EA and EIS processes. I can show you full blown EISs that are garbage, nothing but ruses for doing things that the laws passed by Congress do not allow. I can show you EAs that got less environmental analysis, public participation and on-the-ground monitoring than some CEs.

Every agency this size has people in it that will abuse any authority they have to achieve goals that are not in the public interest. Like with all human endeavors, this abuse is done by a small minority of the people involved. Still, such abuses can loom large in physical consequences and in public perception. But just because a murder uses a hammer to kill someone, you do not condemn hammers.

Are there proper uses of CEs by the Forest Service? Absolutely. Indeed, in WildLaw's experience (which is mainly in Region 8, the Southern Region), we find that the vast majority of uses of CEs are proper. It cannot be assumed, however, that the experiences in Region 8 translate to the entire National Forest System. What few CEs we have reviewed outside Region 8 have mostly been improperly used. The detailed review and tracking WildLaw does of CEs in most of Region 8 does not appear to have been replicated by anyone else in any other Region, to our knowledge. I do know that the agency itself does not track the use of CEs in the detail that we do, and the Forest Service does not have a national data set to tell you or anyone the full extent of CE use and misuse. This lack of comprehensive information on the use of CEs is troublesome but solvable through the use of an independent ombudsman.

The main issue with CEs is whether they are being properly used in a context that will produce good results on the land and for the people who care about and depend on National Forests. When used by a line officer in the context of a good management plan that emphasizes restoration of the natural forests and that encourages sustainability, CEs are almost always a useful tool for developing and implementing small projects which fit within that larger restoration and sustainability framework. See attachment.

II. Healthy Forest Initiative CEs

In 2003 the Forest Service adopted new CEs. See 68 Fed. Reg. 33813 (June 5, 2003).

> The types of projects being conducted by these agencies under the NFP include prescribed fire (including naturally occurring wildland fires managed to benefit resources), mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area reha-

bilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions.

Id. at 33807.

WildLaw currently tracks and monitors almost every HFI CE project in the Southern Region (except for Arkansas and Texas). Out of those approximately 350 projects that we know of, we found 58 that, when proposed, did not comply with the law, which includes the applicable HFI regulations themselves and the applicable sections of the Appeals Reform Act (ARA), the Administrative Procedures Act (APA) and the parts of the National Environmental Policy Act (NEPA) that apply to the HFI. Out of those 58, 27 were corrected after we brought the problem to the attention of the agency. Thus, in Region 8, you could give the agency a preliminary grade of "83," a "B." Then, upon further work and correction of problems, the grade rises to "92," an "A-." We have also reviewed certain specific HFI projects in many states throughout the country. Over all, our analysis is based on our review and work on more than 400 HFI projects, a level of review that exceeds the level of review done by the agency itself when it adopted some of these very regulations. (For example, when the Forest Service developed the Fire CE, the number of thinning projects it reviewed in that process was only 81. The Forest Service supported adoption of the Small Timer Sale CE with a review of only 154 projects.)

This high compliance rate in Region 8 is impressive for a set of CEs that had been predicted by many (including by me) to be a potential source of massive abuse. However, the media and many environmental advocates usually do not focus on the compliance but on the ugliness of some of the few projects that are noncompliant. Here is why: while an "A-" compliance rate seems pretty good, the impacts of one bad project can far outweigh the positive effects of many, many good projects. A really destructive noncompliant project, such as one that logs old growth unnecessarily, can do orders of magnitude more damage than the good that comes from most compliant projects. The few bad projects can taint the work and image of the many good ones. And the media has a natural tendency to focus on the bad, the controversial, rather than on the good and the acceptable.

Of those projects that do not comply with the applicable authorities, the vast majority of problems involved break down into just four areas. Therefore, fixing the problems and making the programs successful should not be that difficult. This monitoring by WildLaw does not show systemic abuses or widespread problems with HFI CEs but shows localized and sporadic abuses of these new authorities, more often through ignorance rather than actual intent. There is a real potential for the success of these programs as they were set forth to Congress and the public, if the problem areas are addressed and monitored closely and if some changes are made to Forest Service CEs in general to make them more adaptable and less prone to erroneous uses and abuse.

These four main problems areas of the HFI CEs are:

1. Failure to provide adequate scoping notice of an HFI project. While most ranger districts monitored provide good scoping notices that adequately describe the proposed project and the potential impacts (and thus the areas of concern for public participation), there are some districts that produce insufficient notices, such as two-paragraph scoping notices that do not even tell the public where the project will occur and what the project will entail. This clearly defeats the main purpose of the HFI of making public participation be more cooperative and occur earlier in the process.
2. Failure to have an open, collaborative public participation process in the development of projects that will be decided with a CE. Invariably, the National Forests with the most success with, and least abuse of, CEs are those that bring the public into a conversation about the proposals long before they become locked into stone. Such collaborative work includes field trips to review proposed project sites, the seeking of input from the public on the need and scope of the projects and much more. Really good examples of public participation can currently be found in the Bankhead National Forest in Alabama, the De Soto National Forest in Mississippi and the Ocala National Forest in Florida.
3. Segmentation of a larger project into smaller chunks so as to make the smaller "projects" qualify for the CEs of the HFI. While not common, when this abuse occurs, it is often quite blatant and obviously intentional. Commentary with the HFI regulations plainly states that the new CEs provided under the HFI are NOT to be used to segment larger projects into smaller ones that could use the CEs, but the regulations themselves do not specifically prohibit segmentation. Segmentation is a major NEPA violation.
4. Failure to protect larger trees and old growth as impliedly required by the HFI. Cutting larger, older, fire-resistant trees is clearly not in the best inter-

ests of healthy forests and of protecting communities from catastrophic wild fires. Where this abuse occurs, needed work to thin young trees in the wildland urban interface (WUI) is often sacrificed in order to cut the bigger trees further from communities. This violates the spirit of the HFI as it was presented to the public and Congress.

Easy actions to limit these problem areas (such as strong guidance documents from the Chief and interpretive regulations on these areas) and constant tracking and monitoring could solve the vast majority of problems with the implementation of the HFI CEs and would go most of the way to solving public relation problems with the programs.

More fundamentally, though, the long-term solution to problems with CEs is the same solution to most problems with the National Forest System. CEs will work best (and thus be less abused) when they are used in a framework of restoration and sustainability for the National Forest involved. The best examples of good use of HFI CEs are found in Alabama and Mississippi, where the National Forests there have adopted restoration programs for their forests overall. Therefore, adoption of a national policy of restoration and sustainability as the guiding theme for the National Forests would provide a context for better and consistent use of CEs, as well as all other authorities and tools the agency uses. See attachment.

Possible Solutions

- Require that all scoping notices for CEs provide adequate information on what actions are being proposed, where they are being proposed, and why they are being proposed. Adequate maps should be required. Guidance should encourage explanations in the scoping notice of the current conditions needing to be addressed, including good explanatory photographs of the current conditions and the desired conditions after the project is complete. We have seen excellent examples of all this being done in five pages and can provide Congress and the agency with those examples.
- Encourage more up-front public participation, train line officers and support the use of more cooperative conservation collaboration techniques and efforts in the development, shaping and implementation of project proposals.
- Explicitly place segmentation prohibitions in all CEs. Conduct a public rulemaking process to amend the CEs to include specific language instructing line officers not to segment larger projects into smaller segments that can each fit within the acreage limits of the CEs. Guidance should also be issued to flesh out the perimeters of what is and is not improper segmentation.
- Amend the small timber sale CE (CE 12, FSH 1909.15—31.2(12)), the salvage CE (CE 13, FSH 1909.15—31.2(13)), and the hazardous fuels reduction CE (CE 10, FSH 1909.15—31.2(10)) to include protection and retention of large trees as much as possible. I suggest incorporating the old growth and large tree protection and retention sections of the Healthy Forest Restoration Act (HFRA) as a good example. The HFRA contains two large tree sections that would be good additions to the HFI regulations:
  - 1. "In carrying out a covered project, the Secretary shall fully maintain, or contribute toward the restoration of, the structure and composition of old growth stands according to the pre-fire suppression old growth conditions characteristic of the forest type, taking into account the contribution of the stand to landscape fire adaptation and watershed health, and retaining the large trees contributing to old growth structure." HFRA § 102(e)(2).
  - 2. In areas outside of delineated old growth stands (which have to meet the requirements in § 102(e)(2)), the HFRA also provides requirements for the keeping of large trees in project areas. § 102(f) mandates that projects be carried out so that they (1) focus largely on small diameter trees, thinning, strategic fuel breaks, and prescribed fire to modify fire behavior and (2) maximize the retention of large trees, as appropriate for the forest type, to the extent that the trees promote fire-resilient stands.
- Initiate more in-depth training for line officers to teach them the proper use of the HFI CEs and how they should and should not be used. This training needs to include instruction on how to build a good collaborative process for public participation in development of CE projects. This should be a cooperative effort that includes non-agency personnel who can provide a perspective agency staff needs in order to make these regulations succeed. Many line officers (more than 75) have sought assistance in the proper use of CEs from WildLaw, because they could not get that from the agency.
- Establish, fund and contract for an independent Healthy Forests Ombudsman to provide independent, comprehensive and unbiased review of HFI (and HFRA) projects and training and assistance for line officers.

- Long-term, the Forest Service needs to adopt as a guiding mission the restoration of the National Forests and the sustainable protection and use of those lands. See attachment.

While not necessary to fix current problems with HFI CEs, we feel that some additional changes to the CEs are needed to make them more flexible and make their proper uses clearer to line officers who often have difficulty knowing when and how to use these tools. Also, like all "top down" regulations that attempt a "one size fits all" rule, these CEs do not fit equally everywhere. A 70-acre logging thinning project in young Longleaf Pine may be fine, while a 10-acre project in a cove hardwood forest could be devastating. The CEs need better guidelines for their proper use and to prevent abuses. Our suggested changes/additions to the CEs are:

- Revisit the data and information used to establish these CEs. Because these CEs have been used hundreds of times since their adoption, there is now a much better data set on their impacts, uses and effectiveness than existed when they were adopted. Examples:
  - Data used to adopt the small timber sale CE did not support 70 acres as the limit; the administrative record had good information to support a 10-acre CE. Now, though, the CE has been used on projects up to 70 acres. Revisiting that information may support use of 70 acres or may show that a different limit or set of limits is required. Some forest types may handle 70 acres of logging without any adverse impacts while other types may have suffered adverse impacts at smaller acreages.
  - The acreage limits in the hazardous fuels reduction CE need to be refined to general forest type. Fire-dependent forest types (such as Longleaf Pine) clearly can handle a 4,500 prescribed burn, and use of a CE on that level is appropriate. Fire-intolerant forest types, though (such as Southern Appalachian cove hardwoods), do not need prescribed fire at all, and a burn of any size there can have devastating impacts. Fire-adapted or tolerant forest types (such as Oak-Hickory in the Piedmont or Cumberland Plateau) can handle infrequent fires but do not need them regularly for their health. For those types of forests, more analysis may be needed to justify fires of more than 1,000 acres or so.
- Based upon that review, refine the acreages and proper uses of these CEs and give better guidance on their proper usage. Adding requirements about taking forest type and the ecosystems involved in a proposed CE project into account in determining whether or not the CE is applicable would be helpful.
- Prohibit use of the hazardous fuels reduction CE for fire in fire-intolerant forest types.
- Consider adoption of a specific wildland urban interface (WUI) CE, to be used in conjunction with Community Wildfire Protection Plans. Many of the HFI CEs have been used to conduct projects in the WUI, and the HFRA has WUI-specific authorizations in it. With this new experience and information, it may be appropriate at this time to explore the adoption of a CE specifically designed for use in the WUI for small community protection projects; this would be a CE tailored to fit the needs of WUI projects. That may work better than trying to fit a WUI project into the current HFI CEs, which are more generalized and not specifically designed for WUI needs and work.

III. CE for National Forest Plans

WildLaw does not support the development and use of a CE for the adoption or major revision of National Forest management plans, as required by NFMA. Certainly, planning as it exists under the 1982 NFMA regulations has become too complex and cumbersome and needs a major overhaul. But to throw the baby out with the bath water is not the solution. CEs are screwdrivers, tools to get small, routine jobs done. Plans are the framework of the entire "house" that is a National Forest's long-term management; you cannot build the frame of a house with just a screwdriver.

Forest plans are critically important documents that embody the overarching goals and objectives for our National Forests and establish guidelines for how to achieve them. It is imperative that these forest plans are drafted with extensive input from scientific experts and the interested public so that wilderness, old-growth, drinking water, recreation, and wildlife habitat are adequately provided for and protected. Plans determine what types of projects can occur and where they can occur, even if they do not determine exactly which projects will occur or when. Since all projects, permits, contracts, etc. must be consistent with the forest plan (16 U.S.C. § 1604(i)), it is clear that plans are important in determining what activities can occur. Forest plans also make final decisions, such as designation of special areas, opening of lands to mineral exploration and development, and recommenda-

tions for wilderness areas. Thus, their development should be subject to detailed and thorough NEPA analysis and public participation.

Instead of avoiding the problems with planning by attempting to get around it with a CE, the Forest Service should finally attempt to solve the problems with NFMA's implementation. The Forest Service should take the time to do a good job and really figure out new regulations (1) that really comply with NFMA and give the agency a strong scientific basis for management and (2) that resolve most of the conflict around management of the public's forests. Using cooperative conservation approaches, new NFMA regulations and directives should be developed through a facilitated group problem-solving process involving all the diverse interests involved in management of the National Forests. Instead of an agency-driven and developed set of NFMA regulations, we propose a collaborative development of solutions to National Forest problems that then lead to new regulations to implement those solutions.

In February 2003, as part of the adoption of the 2005 regulations, the Forest Service brought together approximately 100 interested people to discuss options for protecting biological diversity on the National Forests under the new National Forest Management Act regulations. I was one of the participants in that workshop and the only environmentalist/conservationist who gave a presentation at it. While the agency ultimately ignored what this group suggested, the people and the balance of types of people (agency, industry, scientists, environmentalists, etc.) at that workshop were excellent. No party of interest could claim not to be adequately represented there. Given a few more days and a real mandate to find common ground solutions to problems on the National Forests, I guarantee that that group would have found at least a handful of common sense solutions 90% of everyone would have agreed with. The agency could have then moved forward on those consensus items and left more contentious issues aside for the time being, thus accomplishing much needed work in the public forests and reducing litigation significantly.

Despite the legal limbo of the various Roadless Rules, the creation of the Roadless Area Conservation National Advisory Committee (RACNAC, of which I am a member) has proven to be a unique success. For the first time ever, the agency has successfully brought together diverse interests, got them talking without conflict baggage and seen them produce proposed solutions, some of which go beyond the boundaries of just roadless areas. Other agencies have had success with standing FACA committees and other advisory groups that work to resolve long-standing issues. It is time the Forest Service tried this conflict resolution approach on a larger scale, on the scale of planning for all the National Forests.

IV. CE 6

In our experience, the worst problem area with CEs appears to be with an old CE, CE 6, which was adopted long before this Administration. WildLaw has already submitted an APA petition to the Secretary to fix the problems with CE 6. Having this Subcommittee advise the Secretary on that CE may also be useful. WildLaw has reviewed, commented on and challenged numerous improper uses of CE 6; we have also reviewed, commented on and supported numerous proper uses of CE 6.

Summary of the CE 6 Problem

A. Southeast Situation

Categorical Exclusion 6 was adopted some time ago, well before this present Administration. Agency records on the adoption of CE 6 are scant to nonexistent, and the original intent behind it is not readily apparent. In the Southeast, in particular, CE 6 has been abused frequently. While Tennessee is notable for its frequent reliance on CE 6 in large projects, South Carolina is notorious for applying it to very large projects, some more than 66,000 acres in size. Florida is similar to South Carolina, except worse, with some CE 6 prescribed fire projects there being more than 100,000 acres in size. We got most of those abuses stopped.

B. Nationwide Situation

The Forest Service does not know the extent of its use of CE 6. WildLaw has tracked Forest Service CE 6 projects in the Cherokee, Pisgah, Nantahala, Sumter, Francis Marion, Apalachicola, Ocala, Osceola, Alabama and other National Forests in Region 8. The materials we received in response to a Freedom of Information Act request on the use of CE 6 shows clearly that the Forest Service is not tracking its own use of CE 6—it took months to get a full response and then it came from each region, not a centralized location.

Basically, CE 6 is often used to get around the acreage limitations in the HFI CEs. This CE needs to be revisited and overhauled.

Description of CE 6

The language of CE 6 is exceptionally broad:

31.2—Categories of Actions for Which a Project or Case File and Decision Memo Are Required

6. Timber stand and/or wildlife habitat improvement activities which do not include the use of herbicides or do not require more than one mile of low standard road construction (Service level D, FSH 7709.56). Examples include but are not limited to:
   a. Girdling trees to create snags.
   b. Thinning or brush control to improve growth or to reduce fire hazard including the opening of an existing road to a dense timber stand.
   c. Prescribed burning to control understory hardwoods in stands of southern pine.
   d. Prescribed burning to reduce natural fuel build-up and improve plant vigor.

FSH 1909.15, chapter 31.2(6)(emphasis added).

CE 6 evolved from two CEs no longer in existence:

1. "Low-impact silvicultural activities that are limited in size and duration and that primarily use existing roads and facilities, such as firewood sales; salvage, thinning, and small harvest cuts; site preparation; and planting and seeding," ("Low-impact Silvicultural CE"). FSH 1952.2 (4), and
2. "Fish and wildlife management activities, such as improving habitat, installing fish ladders, and stocking native or established species." ("fish and wildlife CE") FSH 1952.2 (9).

50 Fed. Reg. 26078 (June 24, 1985).

The CEs scoped and issued at the same time as the Low-impact Silvicultural CE and the Fish and Wildlife CE included exemptions from NEPA's requirements when the Forest Service controlled poisonous plants in campgrounds, removed small mineral samples, and constructed picnic facilities—all mundane tasks with little chance of causing significant impacts either individually or cumulatively. See 50 Fed. Reg. 26078 (June 24, 1985).

At the time the Low-impact Silvicultural CE was adopted, the Forest Service provided assurance to commenters concerned about abuse of the broadly-worded authority, saying that "[t]he guiding principal is that the depth and breadth of the environmental analysis, the extent of public involvement, and the type of documentation for a proposed action must be commensurate with the scale and intensity of the anticipated effects." 50 Fed. Reg. 26,078 (June 24, 1985)(emphasis added). Only where "both past experience and environmental analysis demonstrate that no significant effects on the human environment will result, individually or cumulatively (FSM 1952.2)" were actions to be excluded from documentation. 50 Fed. Reg. 26,078 (June 24, 1985).

The final language of CE 6 was adopted in 1992. See 57 Fed. Reg. 43180. Once again, the Forest Service made clear that "[t]he intent of the agency is that only routine actions that have no extraordinary circumstances should be within categories for exclusion." 57 Fed. Reg. 43180 (Sept. 18, 1992). During scoping for the language change, the Forest Service defined a routine action as one which "will have little potential for soil movement, loss of soil productivity, water and air degradation or impact on sensitive resource values and is consistent with Forest land and resource management plans." 56 Fed. Reg. 19718 (April 29, 1991).

The historical justification for CE 6 is important because "CEQ must review all CEs before the FS adopts them to assure the CE's compliance with CEQ and NEPA regulations." Heartwood, Inc. v. United States Forest Serv., 73 F. Supp. 2d 962, 966 (D. Ill., 1999); see also 48 FR 34263 (July 28, 1983) ("Categorical exclusions promulgated by an agency should be reviewed by the Council at the draft stage."). "Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act." 40 C.F.R. § 1507.3. Since the CEQ must approve CEs and revisions are to be made in consultation with CEQ, only those actions contemplated at the time of approval as falling under a CE can be validly excluded from normal NEPA procedural requirements without further consultation. Any other reading renders the CEQ review meaningless.

In our FOIA request, WildLaw formally requested, among other things, "[a]ny documents describing the scope, purpose, and/or the intended use of CE 6's predecessors in application," and "[d]ocuments which the Forest Service has in its possession regarding the Forest Service's present understanding of the scope and application of CE 6." See WildLaw FOIA request of April 6, 2005. The Forest Service was unable to provide any documents justifying either CE 6 or its predecessors.

CEs should be used for "only routine actions that have no extraordinary circumstances." 57 Fed. Reg. 43180 (September 18, 1992). The Forest Service defined routine as: "the activity will have little potential for soil movement, loss of soil productivity, water and air degradation or impact on sensitive resource values and is consistent with Forest land and resource management plans." 56 Fed. Reg. 19718 (April 29, 1991). Both good and bad effects can be significant—it is the degree of impact, not the quality of impact that matters.

The Forest Service is misusing Categorical Exclusion 6 ("CE 6"), also called the timber stand improvement CE ("TSI CE"). The Forest Service is often using CE 6 to effect sweeping management objectives, not the small routine actions for which the CE was originally written and approved by the CEQ. While it is clear that some in the agency are using CE 6 to avoid NEPA as it makes management decisions for hundreds of thousands of acres of land in the Southeast, it is equally clear that the Washington Office of the Forest Service has no idea how many acres of land are being treated under this authority.

As part of the Healthy Forests Initiative, the Forest Service adopted a new set of CEs for thinning and prescribed fire use. The administrative records for those new CEs demonstrate clearly that the use of a CE for such projects cannot be justified for more than 4,500 acres for prescribed fire and 1,000 acres for thinning. Yet, the agency is using CE 6 for projects in the tens and even hundreds of thousands of acres that are precisely the same as the ones in CEs 10, 11, 12 and 13 that said projects larger than of such size cannot be justified through the use of a CE.

The Forest Service is performing large prescribed burns and thinnings using CE 6 precisely for the purpose of having a significant impact on the environment: to reduce fuel loadings, improve habitat, or to restore a former fire regime. "A categorical exclusion, however, is appropriate only when the agency determines that the proposed action will have "no effect" on the environment." Riverhawks v. Zepeda, 228 F. Supp. 2d 1173, 1189-1190 (D. Or., 2002)(citing 40 C.F.R. § 1508.4)(holding that the potential for impacts on turtles and salmon, as well as conflicts between various user groups precluded the use of a CE), Heartwood, Inc. v. United States Forest Serv., 230 F.3d 947, 954 (7th Cir., 2000) ("categorical exclusions, by definition, do not have a significant effect on the quality of the human environment"). The only way for the Forest Service to avoid the conclusion that its actions are having an effect on the environment is to claim that many of its management activities are not accomplishing the goals and objectives that the Service uses to justify funding these same projects. This is not a novel position by an agency, but it is not one that courts appreciate either. The West v. Secretary of the DOT court did not appreciate a similar approach by the Federal Highway Administration:

> The FHWA regulations forbid the use of a categorical exclusion for projects that will have "significant impacts on travel patterns." 23 C.F.R. § 771.117(a). The new South DuPont interchange was designed with the intent that it have significant impacts on travel patterns. It was designed and constructed because the agencies predicted that the existing interchanges were inadequate to handle the traffic from the anticipated growth. It is axiomatic that a new, fully-directional interchange cannot simultaneously relieve traffic congestion and yet have no significant impact on travel patterns.

206 F.3d 920, 929 (9th Cir. 2000).

CE 6's vague, broad language has allowed projects having significant environmental effects to be carried out without normal NEPA environmental review. That these projects apparently fit within the language of CE 6 proves that the categorical exclusion may be illegal on its face. The hope of WildLaw is that CE 6 can be modified in order to save it for proper use.

While we have much more information on CE 6, a brief summary of it is that there is evidence suggesting that the Forest Service did not originally intend the present misuse of CE 6, and therefore did not establish that it could be categorically excluded from NEPA.

First, the Forest Service has not been able to produce documentation of an evaluation of similar projects to support its conclusion that the type of projects it is proposing and carrying out outside of NEPA do not have a significant effect on the environment.

Second, as with the Low-impact Silvicultural CE, CE 6 was introduced in the context of other CEs of a much more mundane nature than the projects the Forest Service is presently claiming fall within the scope of CE 6.

Third, anecdotally (and since the Forest Service does not know how often it uses CE 6, anecdotes are all we have) the Forest Service in Region 8 (and apparently elsewhere) has only recently begun to exploit the nearly unbounded authority it provided itself in CE 6.

Fourth, the Forest Service recently introduced the Healthy Forest Initiative CEs which would be completely redundant with CE 6 if CE 6 were given the expansive reading some in the Forest Service now claim.

Lastly, one clue exists in CE 6 itself; the CE clearly states that it is for "Timber stand—improvement." Note the use of the SINGULAR version of the word "stand." CE 6 is for improvement to a "stand" of timber, not multiple "stands" of timber. Use of the word "stands" would make CE 6 unbounded, as it is being used too many times now. Use of the singular word "stand" does indeed limit the CE to a discrete area that can arguably fall with the proper use of categorical exclusions, as most stands are only a few tens of acres in size.

The Forest Service has not recently examined the use of CE 6 as it is required to do. Because of changes in use over time, a CE that was valid at adoption may be applied illegally now. "CEQ suggested...that agencies conduct periodic reviews of how existing categorical exclusions are used, how frequently EAs for repetitive actions result in FONSIs, and then establish comprehensive databases, preferably electronic." The NEPA Task Force Report To The Council on Environmental Quality: Modernizing NEPA Implementation, 5.2.2, Importance of the Administrative Record (Sept. 2003). There is no evidence that the Forest Service has taken this precaution. Indeed, it took months for the Forest Service to fully answer WildLaw's FOIA request for documentation of CE 6 projects and ultimately each region sent its own answer, all formatted differently.

Proposed Changes to CE 6

The administrative records for the new HFI CEs show that use of a CE on this scale for thinning and prescribed fire cannot be justified in any way. Therefore, by definition, a CE is not appropriate, and the Forest Service should prepare at least an environmental assessment ("EA") for projects beyond the 1,000 acres of thinning or 4,500 acres of prescribed fire. Our suggested solutions include:

- Initiating a full investigation of the uses of CE 6 to get a clear picture of how it has been used properly and how it has been used improperly. WildLaw is aware of a number of projects that are good examples of the proper uses of CE 6.
- During this review of CE 6, guidance and instructions should be issued to all line officers ordering them not to use CE 6 on projects larger than the acreage limits in the HFI CEs.
- Conducting a public rulemaking process to amend the CE to include specific language limiting the acres it may be used on or making it clear that it can be used only on a singular stand, not multiple ones.
- Amending the CE to change the stated uses for CE 6, to make it clear that it is not a substitute for the other thinning and burning CEs. Make it clear that CE 6 is for other uses in stand improvement.
- Issuing clear and unequivocal guidance to all forests and districts on the proper use of CE 6 and how it is for use in a singular stand and how it cannot be used as a way to get around the limitations in the HFI CEs.
- Initiating multi-party training for line officers to teach them the proper use of CE 6, how it should interact with the HFI CEs, and how CE 6 should and should not be used.

CONCLUSION

I deeply appreciate this opportunity to address the Subcommittee and present this testimony before it.

CEs have their place and can be useful tools for implementing small projects under NEPA. Like all tools, the CEs used by the Forest Service have the potential for abuse. The massive and widespread abuses predicted at the adoption of the HFI CEs have not materialized, at least in Region 8; only occasional abuses have occurred there. Perhaps Region 8 is an exemplary region, the best of the agency. Without better monitoring and information, we cannot know exactly how abused CEs are in the other regions; although, anecdotal information indicates that abuses are worse outside Region 8. Abuses of CEs can have serious impacts and jeopardize the proper use of CEs. However, the ways for the agency to fix the main problem areas exist.

I think that improvements and additions to the HFI CEs and a major overhaul of CE 6 will go far in making these tools into what they need to be. With targeted changes and additions, these CEs can be more useful for the agency and communities while also being less susceptible to abuse and misuse. The Forest Service should also attempt a more innovative and collaborative approach to reform NFMA planning instead of using a CE for plans.

Thank you.

Attachment

A Modest Proposal for the U.S. Forest Service (Short Version)

A White Paper by Ray Vaughan, WildLaw

"Harmony with land is like harmony with a friend; you cannot cherish his right hand and chop off his left." "A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise." Aldo Leopold.

"Conservation is the foresighted utilization, preservation and/or renewal of forests, waters, lands and minerals, for the greatest good of the greatest number for the longest time." Gifford Pinchot, first Chief of the U.S. Forest Service.

After decades of conflict over a handful of issues involving our National Forests, perhaps it is time to ask whether common ground can be found and progress made on areas of agreement. Can those parties and interests who have fought so long over the public lands put aside those conflicts and work together on other issues that make the public's forests healthier? Can an agency so long captured by a political mindset of short-term extraction move toward the goals of stewardship and sustainability it was originally formed to achieve? Can a way of resolving issues be found instead of people being stuck in a backward-looking paradigm of endless conflict?

We think that the answer to all those questions is "Yes." Here are our suggestions for moving forward. What does WildLaw want?

First, what we do not want. WildLaw does not want an agency that is a slavish and harried servant of the irreconcilable self-interested and shortsighted demands of "multiple use," as if anyone really knows what that term means. We do not want an agency wrapped in controversy and endless conflict. We do not want a land management agency that hides in a bunker of "agency expertise," afraid of really engaging in conversation with the people who own the forests, who pay the salaries of their managers and who often know those forests better than the agency experts.

We want a USFS that is a model agency the public can be proud of, an agency taxpayers want their money spent on, and an agency that Congress sees as a problem-solver it wants to support. We want a Forest Service that embraces genuine ecological restoration, protection and sustainability such that the many uses of and desires for the National Forests can finally be reconciled by a guiding principle that puts the good of the forest first, in the long-term, over the good of any one interest in the short-term. We want an agency driven by science, not politics. We want an agency that accepts the various public interests involved in our National Forests as indispensable partners in land management decision-making. We want a new USFS.

And a new USFS is coming; internal agency demographics and external realities make that inevitable. The issue is what type of new Forest Service we will have. This is our proposal.

From Conflict to Cooperative Conservation

From our many conversations with USFS personnel at all levels, industry folks, and other interested people, it is clear that a critical mass of people involved in our National Forests are ready to change how business as usual is done. The seemingly endless days of conflict and trench warfare among competing concerns wear down parties while the needs of the forests are sidelined.

Instead of frustration and anger, we propose a new course for positive change in the USFS and on our National Forests. Instead of focusing on the issues and principles we each hold that have divided us over the past decades, we need to begin talking with each other with respect and open minds. Let us focus on the areas of common ground where we can agree on the problems facing our forests, on the issues involved and on the solutions. We can always come back to the contentious issues later, and when we do, we may well find that after a few years of cooperation on common ground issues, we are not so far apart on those problem issues either.

We all now have an opportunity to figure out how to fix real problems and encourage the real innovations and successes the agency can achieve. Such an effort can be exciting while producing a better agency, better public relations, more certainty in forest management, and much less litigation. While there will be issues and areas where we do not agree, we can put those aside for the time being and work on the issues and areas upon which we can agree. In our experience, we find that 20% of the issues on the National Forests divide us, and the conflict around those issues prevents conversations and solutions on the other 80%. In every instance where we have been open to exploring the neglected 80%, we have found common ground with all reasonable people who care for our public lands.

As one of the top litigators against the Forest Service, WildLaw knows where the agency cuts corners and where the agency shines. We know many good people in

this agency, good people who are true public servants. We also know the few bad people in the Forest Service, bad people who will do anything they can to make short-term money for their buddies in industry at the expense of the public at large. The few bad folks spoil things for the many good agency employees. Every agency or collection of people is subject to this dynamic of a few dragging down the work of the whole; this is not unique to the Forest Service. But, at this time, we believe that we all really have the chance to reverse this dynamic for the Forest Service, to seize this opportunity to end the days of the few holding back the rest.

It is clear that collaborative efforts and cooperative conservation plans have been notably successful in many areas throughout the nation; WildLaw and our Executive Director Ray Vaughan have participated in several such efforts and know some of those successes. But as admirable as those success stories are, they are still the exception, not the rule, of how conservation work is done in America or on our National Forests. Clearly, more efforts are needed so that they become more of the rule.

Cooperative conservation efforts on our National Forests can produce results as good as the rhetoric. One example of success is the largest timber sale in agency history: the Hurricane Katrina salvage project in Mississippi (490,000,000 board feet) was conducted by a collaborative, cooperative process, and it was a success at every level.

If cooperative conservation succeeds on a broader, national scale, all of us can celebrate. If it does not, our forests will continue to degrade and command-and-control regulatory warfare will return. Trusts will be betrayed if cooperation does not lead to better forest management, but the possibilities cannot be known without trying.

Details of the WildLaw Proposal for National Forests

Since WildLaw's founding a decade ago, litigation and other legal actions have been our key methods for stopping egregious and illegal projects on public lands. During these ten years, we have developed critical links between regional efforts to facilitate restoration-based management on both public and private lands. Building upon and branching out from litigation, we have learned to use a broad array of tools in a proactive approach to both public and private resource management issues in our region: legal defense, economic reform, community empowerment, capacity building, and technical support.

WildLaw's concept of ecological restoration and sustainability for National Forests can help serve as a national policy statement to guide sound forest management. By including social and economic criteria, ecological restoration also bridges the gap between what is good for the land and what is good for communities and workers. Our concept would increase the amount of good work being done in our forests and reverse centuries of unwise resource extraction and development that have fundamentally altered most of America's forests. This history of unguided management has directly contributed to a dramatic loss of habitat, decline in water quality, and disappearing old-growth forests, as well as economic and social harm to communities and workers. Such good restoration efforts only work, however, if they are based on science and recognize that ecosystems are complex and our understanding of them is still limited.

Through a process of truly doing what is best for the land through restoration and management based on sustainability, the Forest Service needs to fully examine the role it could play in restoring community-based forestry economies and cultures in the regions surrounding our National Forests. During a period of significant change in forest policies at the federal, state and local level, WildLaw's vision of ecological forest restoration and sustainability establishes a viable vision for restoring natural ecosystems and a sustainable human relationship with the land.

Simply being an oppositional organization seeking to stop bad projects, while a worthwhile strategy and an integral part of our history, cannot be the only focus for WildLaw. We have an obligation to find ways to make the National Forests more vital and functioning ecosystems that meet the needs of a diverse set of people who use and love these lands. Through our initial experiences with pushing science-based ecological restoration and sustainability, WildLaw has begun a new and proactive/positive avenue of affecting forest management for the better.

We are faced with a synergistic combination of crisis and opportunity, and WildLaw is proposing three strategies:

1. Facilitating ecosystem-based forest management that restores and enhances the ecological health and sustainability of forests while producing services and goods for human communities, whether those economic opportunities are recreational or physical byproducts of ecosystem restoration.
2. Developing local, regional, and national markets, value-added enterprises, and business networks that maximize the economic benefits of sustainable forest

management for the Forest Service, local private landowners, workers, and communities.

3. Developing a skilled workforce of forestry professionals with access to the technical expertise, equipment, and financial resources required to carry out restoration and low-impact management activities on the ground.

Facilitating ecosystem-based forest management restores and enhances the ecological health of forests while producing services and goods for human communities.

Ecological Restoration Projects

In the late 1990s, WildLaw pioneered the model of ecosystem restoration on the National Forests in the South. Starting in Alabama, WildLaw worked with the USFS to develop the first forest-wide, science-based restoration programs in the nation. These restoration programs in the National Forests in Alabama have been extremely successful and have become national models. Our goal is to spread this model throughout the entire National Forest System nationwide.

Obviously, what is restoration of functioning forest ecosystems and what is sustainable management of those ecosystems will vary from forest to forest. There clearly can be no "one size fits all" approach to what is required on the ground. Some areas will need a hands-off approach, letting nature heal itself. Some areas will need road maintenance, road obliteration, stream restoration and other site-specific actions. Some areas will need thoughtful, long-term manipulation of the vegetation, sometimes through mechanical treatments, sometimes through prescribe fire. Some areas will need aggressive invasives treatment. Some areas will need planning for eliminating uncontrolled harmful recreation while still providing fun and safe areas for all forms of recreation. There is much genuine restoration work to be done.

While the work required on the ground might be different for each Forest, the process for arriving at a consensus of what the restoration and sustainable management needs of a particular Forest are can be universal. It is not a matter so much of using once set of laws and regulations over another. It is more about common sense, openness, humility and a willingness to listen and learn from others whom you may not agree with right now.

To make cooperative restoration programs work on our National Forests, folks like us at WildLaw must maintain vigilance in reviewing, commenting on and, when necessary, challenging projects on our public lands. Cooperative conservation only works when those who would abuse the land and the public for short-term gain cannot do so and when those whom they would adversely influence know they have the room to do the right thing, despite the politics of exploitation. So, we are not going away if cooperative conservation works; if anything, we will be more involved. We hope that the Forest Service and industry will get more involved also; that will be the only way for solutions to work.

For the USFS, to make a change in direction that solves most of the current problems in management of the National Forests, it needs to do these things:

Follow the law, use good science, be honest and open with the public.

For folks in the industry who are frustrated by the unpredictable and intermittent flow of materials from the National Forests and for agency personnel frustrated by the inability to get work done and the inability to do needed management, I want you to image something. Imagine a place where the flow of timber off the National Forests is at a known level and stable and predictable for at least 50 years, a place where the harvesting of that timber is not controversial and projects to approve that harvesting are not appealed or litigated, a place where industry, forest practitioners, environmentalists, scientists and agency personnel have all agreed on the management needed. Well, you do not have to imagine such a place. That place is the National Forests in Alabama.

The solution to analysis paralysis lies not so much in changing the rules of analysis but in changing how you do your analysis. For too long, the agency has compartmentalized (literally) its forests and its work. Trying to make each project look small and insignificant seemed like a good way to avoid doing population data collection, cumulative impacts analysis and a host of other things required by law for "big" projects. This scheme has not served either the forests or the Forest Service.

The Forest Service must stop managing merely by compartment and individual project. Instead, step back and assess at a landscape or watershed level what it is that the forests need and what can be done to meet those needs over a longer term, at least five years. Fifty years would be better. This is not planning but how to implement plans with a broad vision instead of a microscope. The Forest Service also must not focus on "product" being produced for sale; having timber quotas has never helped the forests or the agency. It would be far better to focus on acres restored,

watersheds healed, rivers and streams restored, wild places protected, visitor experiences enhanced, conflicts resolved, new workforces created, and the like. Do what the land needs, use the right tools to do the right job, and there will be products and services provided in their own due course. Focus on the work, the land and the people; the rest will take care of itself and be much better than artificial targets.

Take a year or two to develop a full and quality EIS on what restoration really means for your district or forest. Think big. Look at all forest needs, road repair and road obliteration, stream rehabilitation, indeed entire watershed rehabilitation, invasives removal, native forest restoration, etc. Involve all stakeholders at every step, especially at the start of the process. Instead of proposing actions, share each Forest's problems with all the collaborative stakeholders and seek their input on what the solutions (and thus the management actions) should be to solve those problems. Seek out ideas and assistance. Think big. Instead of a series of "small" projects that cumulatively are big (but which you claim are not), admit that what you are doing is one big project and analyze and act accordingly.

In woodworking, the saying goes "measure twice, cut once." It means to take the time to make sure the planned action is correct and then you get to take that action without making major mistakes and without having to do the work over. For NEPA, NFMA and ESA analysis, the same is true. Take the time to make sure what you are doing is right and done well, then you can do it without having a judge tell you to go do it over again. And over again....

To see how to do this right, look at the Conecuh National Forest in Alabama which prepared an EIS on a five-year program to restore Longleaf Pine over some 4,222 acres. It would give Forest Service restoration work better direction and improved validity if it abandoned all the piecemeal projects and instead looked at the forest as a whole to prepare and implement a full EIS on a comprehensive restoration program for each forest that could guide the timber management and other actions for a five-year period. One comprehensive and more-thorough analysis gives a better picture of the work that needs to be done (and where it really needs to be done) and can be done without the problems that arise from piecemeal implementation.

Now, all the forests in Alabama have prepared restoration programs. The Talladega National Forest released their five-year Longleaf Pine restoration EIS in early 2004. It covers 19,000 acres. They had MIS data for the entire area over several years, as well as complete PETS surveys for every acre of that 19,000 acres. That created a baseline and a need which no one could challenge.

Benefits of a Restoration/Sustainability Paradigm for the Forest Service

There are many benefits for all interested parties from a shift to this paradigm for the Forest Service:

- The USFS reduces conflict and litigation, most likely a significant amount.
- An end to "analysis paralysis," "process predicament," or whatever you call the excessive paperwork the agency engages in to justify plans and projects.
- Legal requirements for the development and implementation of projects and programs become clearer and better defined.
- Resources needed to plan and propose programs and projects are reduced while resources for actual implementation of work and monitoring on the ground increase.
- The timber industry and local communities gain a predictable and sustainable supply of economic and ecologic services and products from the National Forests. This paradigm will never recreate the unsustainable heyday of 12,000,000,000 board feet of lumber coming off the National Forests, but the intended sustainable reality of a more diverse economic engine from the National Forests will emerge.
- The public and conservation organizations gain the comfort that special areas in the National Forests are not the target of exploitation and management resources are expended on restoration of areas that really need that better management.
- Conflicts over hot-button issues are reduced, and "judgment day" on dealing with those issues is postponed, if not eliminated.
- Communications, dialogue and cooperation among previously adversarial parties increases and could lead to a new level of understanding that will solve many of the problems and conflicts on these public lands.
- Restoration and sustainable management improve habitat conditions for all native wildlife on the National Forests.
- The number of species headed toward extinction will be reduced, and those listed under the Endangered Species Act will head more toward recovery.
- Habitat for game species will be enhanced and improved.

- Protection of watershed values and clean water coming off the National Forests will increase.
- Clean air provided by natural forests will increase.
- Forests will become more resilient. Long-term restoration and sustainable management will reduce the National Forests' susceptibility to major damage from fire, insects, drought, hurricanes and other events.
- Restoration of natural ecosystems and sustainable management of those ecosystems will make the forests better able to handle changes due to climate change.
- Restoration and sustainable management make the National Forests a partial solution in reducing the severity of climate change.
- Conflicts between recreational users will be reduced as careful planning of where and how to accommodate the various uses sustainably will help resolve these conflicts.
- Training and new opportunities for forest practitioners and local communities will increase and provide long-term, predictable opportunities.
- A unified and agency-wide program for solving problems through this new paradigm with the widespread support of diverse interests could convince Congress to be more supportive of the agency and its funding needs.
- The National Forests and their management paradigm of restoration and sustainability would be a powerful and true model for the management of private forest lands.
- Work on the National Forests would be a jumpstart for the development of sustainable local economies based around the forests. There has been a lot of difficulty of developing new markets for private forest landowners and practitioners. The National Forests could provide the genesis for this and give it the ability to grow into the broader realm of forestry on all lands.

U.S. Forest Service and Its Opportunities with Communities

WildLaw feels that the U.S. Forest Service has both a relationship to the communities in the areas surrounding its forests as well as an opportunity to help better those same communities. First, many areas near National Forests tend to be rural, with little or no real industry to provide employment. Second, the artificially high and unsustainable harvests of the 1970s and 1980s created a reliance on those forests for jobs that were not sustainable for the long-term. Third, by harvesting most of the resource "capital" from these forests without any accompanying reinvestment, the Forest Service in effect stole from residents in communities surrounding these forests, and they have an obligation to right those wrongs from past mismanagement.

After years of dis-investment from rural, forest dependent communities, it is time for a major change. Elsewhere, especially in the West, communities and the Forest Service have recognized this need and have been working towards the creation of a restoration economy. The trick is how to get dollars for the work. The Forest Service and Congress seem intent on trying to make the forests pay for this out of dwindling forest reserves. To accomplish this, the Forest Service all too often puts out timber sales that involve harvesting the limited old growth or mature, functioning forests in order to pay for restoration. This is like borrowing money at 8% to reinvest it at 4%. It is taking the last capital out of the bank which will continue to bankrupt the forests and surrounding communities.

A sounder approach is to recognize the depleted accounts and to make a reinvestment that could be used to rebuild the capital so that once again we could live off the interest of a sustainable endowment in our forests and communities. This approach allows for the development of local workforces due to the sustainable nature of forest investments and activities, each Forest having its unique set of restoration needs and unique situation for sustainability.

WildLaw feels strongly that the Forest Service is in a position to do this. Science-based ecological restoration could provide the dual benefits of improving and restoring areas of the forests to more natural state and at the same time providing sustainable, well-paying jobs in the process.

As an agency guiding principle, the U.S. Forest Service needs to recognize and embrace the need for ecological restoration and sustainable management on the National Forests. True restoration and sustainability implemented on National Forests can be accomplished by engaging in the following strategies:

1. Every National Forest should engage in an open, cooperative public process to develop a vision for what that Forest needs and should move toward, like all the National Forests in Alabama did. All the restoration needs of that Forest need to be examined and prioritized in a collaborative process that gives all interests the assurance that they are heard and that their needs are met to

at least a reasonable level. All available scientific knowledge and expertise on the particular Forest's ecosystems must be fully integrated into the entire collaborative process. The agency should let proposed management actions come out of that process instead of proposing actions prior to the process. If additional authority and funding for this collaborative process are needed, the agency should go to Congress to seek that, showing them the successes the agency has thus far and how this approach can solve many of the problems facing the National Forests.

2. At the project level and the Forest planning level, the USFS should advocate for ecological restoration whenever appropriate, including having restoration-only alternatives developed for proposed projects. As an example, the 2004 revised plan for the National Forests in Alabama emphasizes restoration as the main management goal for the next 15 years in all the Forests in the state.
3. At every level, starting at the Washington Office, Forest Service decision-makers need to make it a priority to move the National Forests toward this model of ecological restoration. protection and long-term sustainability. Needed changes to regulations, additions to the Handbook and the Manual, and any needed guidance on this type of work should be developed and adopted with full public participation.
4. More work by the Research Stations should be focused on restoration and sustainability, both in general and in what particular Forests need. For some ecosystems, Longleaf Pine as the primary example, the actions needed to restore the ecosystem are well known. For most forest ecosystems, though, what is needed to restore the forest to a healthy state and keep it in a sustainable management regime is not yet known, or not well known. For such forests, restoration plans should start with well-monitored pilot and experimental projects before moving to a large scale, forest-wide program. For a well designed and monitored project to test restoration techniques for such forests, all parties involved must be willing to accept risk and be willing to allow the agency to fail occasionally without punishment.
5. To make all of the above possible and attractive for Line Officers in the agency, the Forest Service should engage in a thorough and comprehensive training program for its personnel to show them how to engage in the collaborative process to produce good restoration and sustainable management for their individual Forests. There are personnel in the agency who know how to do this; folks in groups like WildLaw and in industry also know how to do this. The agency should sponsor a program of training and education that brings together these people who have experience in this new paradigm so that they can educate others in this process and help them find the cooperative solutions that work for their individual Forests. WildLaw is fully prepared and ready to assist in this educational effort wherever it is needed.

Litigation risk and adversarial relationships would diminish drastically with this approach.

One of the greatest obstacles to accomplishing good forest management on the ground is the lack of skilled professionals practicing low-impact forestry. Our forest industry has mainly evolved to rely on large-scale logging operations that maximize short-term timber production, often at the cost of forest health. As a result, the vast majority of our logging workforce is deeply invested in expensive harvesting systems that require very high "production efficiency" to achieve profitability. While timber harvests have increased, the size of our workforce has actually declined. Loggers have had little choice but to follow the lead of industrial forestland owners and timber buyers to remain competitive.

With increasing interest in, as well as demand for, ecosystem-based forest management, the time is right to begin facilitating skill development for logging crews and other forestry and restoration practitioners. Pursuing this goal will require a significant investment in education, equipment financing, business development assistance, and technical assistance, and will require that we engage a new array of partners.

The U.S. Forest Service needs to work with partners such as community colleges, universities, established local logging crews, local mills, and nonprofits such as WildLaw and the Southern Forests Network (SFN) to explore opportunities for workforce development using such strategies as:

1. Meet with potential partners to introduce them to new ideas and gauge their interest in working together (our SFN program recently net with a local university forestry program and community college forestry & logging program).
2. Facilitate collaborative development of pilot projects on National Forests where there is the need to learn how to restore the forest ecosystems there.

3. Examine new markets and new products that can come from restoration activities, including small diameter wood products and products from thinning and clearing of undergrowth (including biomass energy, mulch, specialty crafts, carbon sequestration market credits, and other products).

EVALUATION

While a new paradigm in forest protection and management will take time to take hold and grow, there are ways to recognize and know that it is doing just that:

- Increasing number of valid restoration programs and projects on more National Forests.
- Open recognition by the USFS at all decision-making levels that restoration and sustainability are the goals of management.
- Increased involvement and interest by private forest land interests in the restoration work on National Forests and use of that restoration work as models for their private land work.
- New and increased market and economic opportunities for local communities and forest practitioners in sustainable forestry work, both on public and private lands.
- More National Forest management plans that directly and openly embrace restoration as the primary management goal, such has been done in Alabama, and to a lesser extent, Florida.
- More individual National Forest projects that are restoration based and fewer projects that fail to comply with the law.
- Where legal actions are necessary, they lead to the litigants and the Forest Service using the cases as opportunities to reevaluate management, instead of blindly defending past mistakes or blindly attacking the agency. And for those who challenge the agency, those groups must be open to finding a new direction for management, instead of just saying "no" to any management. Industry must be willing not to demonize environmentalists who challenge real violations of the law and bad management decisions; industry should not defend bad agency actions in a mentality of "defend it all, right or wrong." Industry must be willing to admit that certain activities should not be conducted on the public lands (or not conducted in certain ways or for certain reasons) in order to get better and truly sustainable management on the National Forests. Basically, trench warfare amongst all parties must end, and litigation must be reserved for truly illegal and unwise management decisions.
- Increased reporting of the ideas and implementation of restoration and sustainable management, both in the mainstream press and in forestry and academic publications.
- New and increased participation by traditional forestry industry in sustainable forestry efforts to help communities and workers make their work truly sustainable for the land and themselves.

Mr. GRIJALVA. Thank you, sir. Let me turn now to Mr. John Stavros. Thank you, sir.

STATEMENT OF JOHN STAVROS, NEW HARMONY, UTAH

Mr. STAVROS. As you said, my name is John Stavros. I come from a part of the country where you hear people say it's hot, but it is a dry heat. So a little different than here. I grew up in Salt Lake City and moved to New Harmony 11 years ago. I live on four acres of Forest Service boundary land, and I share a fence with the Dixie National Forest. I am an application developer for a large Boston-based financial services firm. My manager is in Boston, and I am lucky enough to work from my home office in the middle of nowhere.

You have heard testimony regarding categorical exclusions and their use and misuse, and you have heard it from experts on all sides of the issue. So why am I here? I am here to make it personal. This is my house. We see pictures like these coming out of Lake Tahoe this week, and it is easy to become numb to them. Let me tell you, when it is your house, it is a different set of emotions.

As you look at the pictures in my written testimony, you can see that this was a very close call. The Blue Springs fire roared into the community on the evening of June 27, 2005, just two years ago yesterday. There are many reasons why my house still stands. As Mr. Lawrence mentioned in his closing comments, it has a great deal to do with the conditions of the home itself, and we planned and built for the conditions in which we live.

I created a green space around my home and built it with fire-safe materials. Also my roof was thoroughly wet. Three built-in rooftop Rain Birds were soaking my house during all of this, and the heroics of the brave pilots and firefighters cannot be overstated.

In 2003 through 2005, two efforts were going on concurrently. First, the Forest Service informed the community in writing that they planned to cut a fuel break through the area just behind the community on Forest Service land. This thorough four-page document which began, "Your input is being sought", demonstrated how well thought out the plan was, and it offered a variety of contact methods if people had concerns. My only concern was, would the work happen quickly enough to do any good?

Did the fuel break stop the fire in its tracks? No. Did it help? I am certain that it did, as I observed the fire from as close as you would ever want to be. I believe that the fuel break bought precious minutes, allowing the helicopter to make one or two additional drops. It gave the community a few extra minutes to evacuate when the fire abruptly blew up in the early evening.

Second, the Utah State Department of Forestry, in cooperation with the local fire department and the U.S. Forest Service, organized my neighborhood to engage in work parties to reduce the fuel load, mitigate ladder fuels, and make the community as fire safe as it could be. We contributed dozens of hours over many weekends using chainsaws and hand tools while the state provided a chipper to shred the piles of useless slash.

My neighbors and I know that we have chosen to live in a higher risk area, and we do not expect the government to make us safe while we sit on the deck and sip lemonade. We grabbed onto the opportunity presented to us, got organized, and accomplished much, and as you might guess, following the fire we redoubled our efforts and worked even harder, but becoming fire-safe did not require that we clear-cut our beautiful properties. The Federal and state forestry officials taught us the concept of ladder fuels and helped us retain the wild beauty while reducing the hazard.

I understand that some people believe that the public was excluded from the planning of the fuel break and that the motivation to move so quickly was based in part on greed. Somehow the Forest Service was going to make a buck on the trees they pulled from the fuel break while everyone was caught napping. In this situation, this is absurd. Junipers and scrub oak are brushy, gnarled trees with really little value beyond perhaps firewood.

The fuel break work began on schedule in the summer of 2003. It was going on just 1 or 200 feet behind my home so we could see and hear the daily progress of the work crews. Each evening my wife and I walked back into the cut zone to observe the results of the day's efforts. While we embraced the importance of the work, we expected to have our hearts broken by the site of the denuded

land and a chaotic job site. Instead, we saw that the crews took care to preserve the beauty and habitat of the zone, and that they stacked the useless slash neatly into piles exactly as the decision memo said they would. When winter lowered the fire danger to zero, crews returned and burned the slash.

Did I speak up or did I sit by passively? I am not a person who sits back and lets the government do as it wishes. When I moved out of the city, I quickly learned that in a sparsely populated region a few engaged people can make a difference. I am president of the local cycling club, and I serve on the national mountain patrol, a trained volunteer organization similar to a ski patrol.

I participated in numerous planning meetings with local and Federal land managers where the recreational interests of mountain bikers needed representation. I have proactively organized groups to support the mutual goals of land managers and cyclists. In turn, the land managers call on me when they need at the table a rational thinking representative of mountain biking. It is a relationship borne of trust and respect over the years. I believe that this history demonstrates that I am not passive when it comes to issues about which I am passionate.

If I felt that the Forest Service had planned anything not in the public's and my best interest, I would have spoken up. I know how to speak up, and I like to engage in the process. That is why I came 2,000 miles to spend five minutes with you today, and I see that my time is up so I do thank you for your attention.

[The prepared statement of Mr. Stavros follows:]

Statement of John Stavros, Resident of New Harmony, Utah, Application Developer in the private sector, Testifying at the request of the U.S. Forest Service

CONTENTS

1. Summary of witness credentials
2. Photographs from the Blue Springs Fire of June 27, 2005
3. Letter to residents regarding fuel break plans
4. Decision memo
5. Summary of oral testimony

I. Summary of witness credentials

The following establishes my credibility as a witness. I bring the following experiences and circumstances to this hearing:

- I am not affiliated with any government agency. I am employed in the private sector as an application developer in a large financial services firm.
- I've lived in the West all my life. I grew up in Salt Lake City and moved to southern Utah 11 years ago.
- I share a border with the Dixie National Forest. The back fence of my 4-acre home is the Forest boundary.
- I was informed about a planned fuel break well in advance of the commencement of work and had reasonable opportunity to oppose it had I wanted to. (I did not oppose it and opted not to make contact.)
- I observed the crews as they completed the fuel break and had no problems with the way they conducted their work. It proceeded efficiently in a workmanlike way.
- On June 27, 2005 a large forest fire came within 60 feet of my home giving me a frighteningly close view of the fire fighters' remarkable suppression efforts. I also witnessed the effects of the fuel break and the role it played in saving my home.
- I am president of the local cycling club and serve on the National Mountain Bike Patrol, a trained volunteer organization that functions much like the ski patrol does in ski resorts. These roles put me in frequent contact with local land managers.

- I have a running history of advocacy with local, state, and national land managers regarding recreation issues important to mountain bikers. I am proactive about being at the table during planning sessions and can rally local mountain bikers to volunteer in support of the mutual goals of land managers and cyclists.
- In 2004 and 2005, a dozen of my neighbors and I worked with the State Forestry people to reduce the fuel load on our properties. We cleared deadfall and cut the lower limbs from trees in an effort to hinder the progress of a fire. The neighbors provided the tools and labor and the State provided a big chipper to turn our huge slash piles into mulch.

II. Photographs from the Blue Springs Fire of June 27, 2005

[NOTE: Photographs have been retained in the Committee's official files.]

III. Letter to residents from the USFS regarding fuel break plans

June 12, 2003

Dear Interested Party:

Your input is being sought on an analysis for the New Harmony Fuels Treatment on the Dixie National Forest. This letter and the attached maps will provide you with information on the background of the project, the Purpose & Need, the Proposed Action, the decision to be made, as well as a request for your comments.

If the analysis demonstrates there are no issues, the responsible official will document this in a Decision Memo. The responsible official for this project is the Pine Valley District Ranger of the Dixie National Forest.

Background. The rapidly growing community of New Harmony has expanded along the National Forest boundary where structures have been built in the existing dense vegetation. Recently, large wildland fires like the Sequoia (8,100 acres) in 2002 and the Harmon Creek (493 acres) in 2000, and numerous small wildland fires, have burned around New Harmony. New Harmony is listed in the Federal Register as a "Community at Risk" to wildland fire. It is also an Interagency Urban Interface Focus Area. As such, the BLM and Utah Forestry, Fire, & State Lands Department are currently planning and executing different fuel treatments to make wildland fires easier to contain and extinguish.

Purpose. The purpose for this project is to modify fire behavior around New Harmony by reducing fire rate of spread and intensity, and by creating conditions that support desirable fire behavior. This project strives to have residences and community infrastructure adjacent to Forest Service land less susceptible to impacts from wildland fires. Fire behavior conditions associated with thick, continuous stands of brush and trees can fuel intense wildland fires in many areas along the National Forest/private land boundary. These conditions limit suppression effectiveness, and compromise the safety of initial response firefighting resources that are called on to protect these structures.

Need. To help protect New Harmony from future wildland fires, fuel modification is needed along the National Forest boundary. The modification should result in fire behavior (specifically, flame lengths) that is low enough so firefighters can be effective if suppression action is necessary.

Proposed Action. Construct a shaded Fuelbreak 4.9 miles long and 240 ft. wide by mechanical treatment and pile burning. The proposed action treats 145 acres to a fuel loading that produces flame lengths less than 4 ft. on all but the worst 10 percent of the weather days.

The shaded fuelbreaks (see attached map) will consist of new construction (240 ft wide) and widening of existing fuelbreaks that are 50 ft. wide to 240 ft. The fuelbreak will reduce dead and down fuel loading to less than 5 tons an acre. The brush and shrubs would be cut to approximately 6 inches or less in height. Pinyon and Juniper trees less than 8 feet tall would be cut, piled and burned. Pinyon and Juniper trees over 8 feet tall would be retained at a minimum crown spacing of 15 feet to a maximum crown spacing of 60 feet. A minimum of 1 snag per acre would be retained. Fuel wood gathering would not be possible because of limited vehicle access.

Comparison of Existing condition and Proposed Action Fuels Profile

	Fuel Heights	Fuel Spacing	Fuel Loads
Existing Fuel Condition	> 6 feet	0-2 feet	11-13 tons/acre
Proposed Action Fuel Condition	0-3 feet	> 15 feet	< 5 tons/acre

Existing Fuel Condition

Desired Fuel Condition

Proposed action for new fuelbreak construction.

- A total of 2.6 miles of new fuel break will be constructed to a width of 240 ft (92 acres). Of this, 2.1 miles 240 ft wide (76 acres) will be accomplished by chainsaw cutting and subsequent pile burning. Pile burning will occur during winter months. The remaining 0.5 mile, 240 ft. wide (15 acres) of new line construction will be accomplished using a mechanical brush mower in a previously treated area that contains a lower level of Pinyon and Juniper fuels that may be accomplished with this type of equipment.

Proposed action for widening existing fuelbreak.

- The existing fuelbreak was constructed under a wildland fire emergency action in 2002. The existing fuelbreak is 2.3 miles long and 50 ft. wide, the proposed action will widened it to 240 ft. (53 acres). This widening will be accomplished by chainsaw cutting and subsequent pile burning. Pile burning will occur during winter months.

Proposed Action Maintenance and Implementation Design

- The fuelbreak will be maintained by using goats to reduce encroaching grass and shrub vegetation at regular intervals (1-3 years) based on vegetation height (≧ to 3 ft in height). The goats will be utilized only within the fuelbreak area (145 acres), and be controlled with movable electric fence and consistently monitored by a herder. If goats are unavailable, maintenance will be accomplished by the use of chain saws and/or brush cutters with subsequent pile burning in fuels are in excess of prescription parameters. The area that is initially treated by mowing may be maintained by mowing when vegetation parameters are met (≧ 3 ft in height).
- Seeding of the constructed fuelbreaks would occur to reduce the relative amount of fine fuel produced by cheatgrass. This seed would be a mixture of non-native seed.
- The proposed action has been designed to limit access by ATVs. This would be accomplished by not removing existing vegetation barriers where there is potential for ATV access. Other areas of potential access will employ physical barriers (i.e. large rocks) to prevent access.

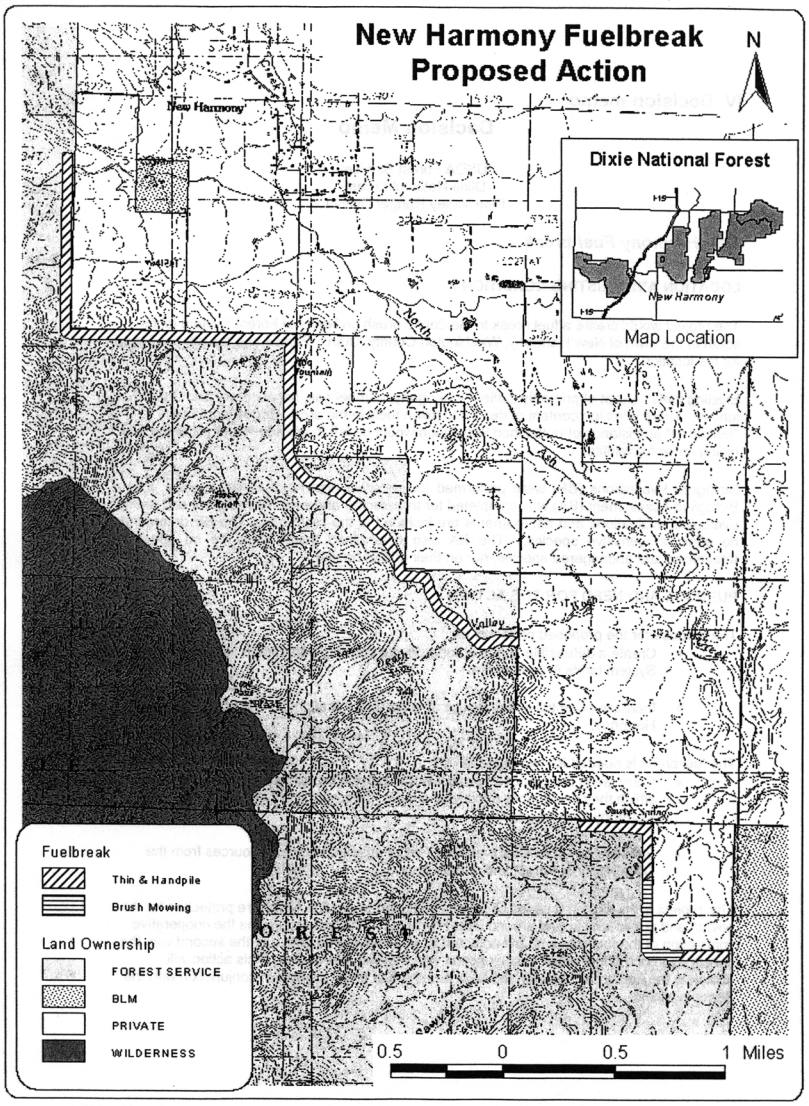
Location. The proposed action would be constructed south and west of the town of New Harmony (see map). The proposed action would be constructed in Sections 20, 27, 28 and 34 of Township 38S Range 13W and Section 2 of Township 39S Range 13W.

Timeline. Please respond to this letter with comments by June 25, 2003 to

Bevan Killpack
U.S. Forest Service
Pine Valley Ranger District
196 E. Tabernacle, Room 40
St. George, UT 84770
(435) 652-3100
ATTN: New Harmony Fuelbreak

Thank you for your time and interest in your National Forest.

BEVAN KILLPACK
District Ranger



IV. Decision memo

DECISION MEMO
USDA FOREST SERVICE
DIXIE NATIONAL FOREST
PINE VALLEY RANGER DISTRICT

New Harmony Fuel break

LOCATION AND EXISTING CONDITION

The project would create a fuel break in the dense brush on National Forest System lands south of the town of New Harmony, Washington County, Utah. Please see the attached map for the location.

Existing fuels consist of primarily curlleaf mahogany, gambel oak, serviceberry and Utah juniper. There is a high content of dead and down fuels in the area. Edges would be "feathered" and islands of untouched vegetation would be left to provide visual softening and hiding cover for wildlife.

Biological Evaluations (BE) were performed for sensitive plant and animal species, and a Biological Assessment (BA) was completed for threatened, and endangered plant and animal (biological evaluations and assessments are included in the project file) The BE determined no effect to sensitive species. The BA also determined there would be no effect on threatened and endangered species, nor on their critical habitat.

PURPOSE AND NEED FOR THE ACTION

The purpose for the proposed project is to:

- Create a defensible space around private property adjacent to National Forest System lands in case of fire.
- Increase potential effectiveness of initial attack firefighter resources within New Harmony.

The fuel break is needed for two reasons:

- Completing the proposed project would provide firefighters a defensible space in which they could more effectively suppress fires approaching the town of New Harmony from the south.
- Increase potential effectiveness of initial attack firefighter resources from the Dixie National Forest and cooperators.

This project is the third in a series of actions designed to provide better fire protection for the private and public land in and around New Harmony. The first action was the cooperative completion of the fuel break on the adjacent BLM administered land and the second was the construction of the fuel break in conjunction with the Sequoia wildfire. This action will complete the fuel break between the BLM and the fuel break created in conjunction with the Sequoia wildfire.

PROPOSED ACTION

Construct a shaded Fuelbreak 4.9 miles long and 240 ft. wide by mechanical treatment and pile burning. The proposed action treats 145 acres to a fuel loading that produces flame lengths less than 4 ft. on all but the worst 10 percent of the weather days.

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by mowing may be maintained by mowing when vegetation parameters are met (≧ 3 ft in height).

- Seeding of the constructed fuelbreaks would occur to reduce the relative amount of fine fuel produced by cheatgrass. This seed would be a mixture of non-native seed.

The proposed action has been designed to limit access by ATVs. This would be accomplished by not removing existing vegetation barriers where there is potential for ATV access. Other areas of potential access will employ physical barriers (i.e. large rocks) to prevent access.

DECISION

It is my decision to construct and maintain the project as described above.

CATEGORY

The Proposed Action is categorically excluded from documentation in an environmental impact statement or an environmental assessment (Forest Service Handbook 1909.15 (31.2). A project file has been prepared and is located on the Pine Valley Ranger District. The Proposed Action is a routine activity as defined in FSH 1909.15 Section 31.2. It will not individually or cumulatively affect the human environment and will not have effects on procedures adopted by the Agency.

The Proposed Action falls within category 10, of Section 31.2:

> "Hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres"

FINDING THAT NO EXTRAORDINARY CIRCUMSTANCES EXIST

This analysis considered the extraordinary circumstances defined in FSH 1909.15, Section 30.3. It has been determined that no conditions exist which might cause the action to have significant effects on the human environment. The analysis also revealed that no extraordinary circumstances exist which may cause the Proposed Action to have significant effects. A summary evaluation is described below.

a. Steep slopes or highly erosive soils: The proposed action occurs on slopes and soils suitable for the project.
b. Threatened and endangered species or their critical habitat: A finding of "no effect" has been determined for all threatened and endangered plant and animal species.
c. Flood plains, wetland and municipal watersheds: The proposed action will not affect any flood plains or municipal watersheds.
d. Congressional designated areas, such as wilderness, wilderness study areas, national recreation areas: These designations do not occur within the project area.
e. Inventoried roadless areas: The treatment units do not occur within any inventoried roadless area.
f. Native American religious or cultural sites, archeological sites, or historic properties or areas: No known sites will be affected.
g. Public health: Public health will not be affected.
h. Federal, State or local laws or requirements imposed for environmental protection: This proposal will comply with any laws or requirements imposed for the protection of the environment including the Endangered Species Act, Clean Air Act, and the National Historic Preservation Act.

PUBLIC INVOLVEMENT AND SCOPING PROCESS

Public input for this proposal was obtained by sending a scoping letter to members of the public who could be affected by, or have requested to be notified of similar proposals. Comments received were utilized in developing the proposed action. Scoping information is located in the project file.

FINDINGS REQUIRED BY OTHER LAWS

The National Forest Management Act and accompanying regulations (FSH 1909.15.30) require that several findings be documented at the project level. These findings are as follows:

Forest Plan Consistency

This analysis is tiered to the Dixie National Forest Land and Resource Management Plan (DNF-LRMP). The Proposed Action addressed under this decision is consistent with management direction identified in the DNF-LRMP for the Management Area; 5A Big Game Winter Range (non-forest) and 4C Wildlife Habitat (Shrub Areas).

Agency Road Rule

This action does not fall within any suspension category as described in the Interim Road Rule; 36 CFR 212.

IMPLEMENTATION

Implementation may take place immediately.

ADMINISTRATIVE REVIEW AND APPEAL OPPORTUNITIES

Pursuant to 36 CFR 215.8 (a) (4), this decision is not subject to a higher level of review.

CONTACT PERSON

For additional information on this decision, please contact Brett Fay, Interdisciplinary Team Leader, Dixie National Forest Supervisors Office, 1789 N. Wedgewood Ln., Cedar City, UT; phone: (435) 865-3700.

V. Oral Testimony Summary

My name is John Stavros. I grew up in Salt Lake City and moved to New Harmony 11 years ago. I live on 4 acres of national forest boundary land and share a fence with the Dixie National Forest. I'm an application developer for a large Boston-based financial services firm. My manager and work group are in Boston, and I am lucky enough to perform my big-city job from my home office in the middle of nowhere.

You've heard testimony regarding the planning and creation a fuel break near the town of New Harmony. You've seen the documents and given thought to the rules, regulations, and processes involved. Why am I here? I'm here to make it personal.

This is my house. We all see pictures like these on the news every summer as fires inevitably burn thousands of acres and destroy countless homes, and it's easy to become numb to the images. Let me tell you that when it's your house, it's a different set of emotions. As you look at the pictures in my written testimony, you can see that this was a very close call. The Blue Springs Fire roared into the community on the evening of June 27, 2005 (2 years ago yesterday). I included an image that shows the Forest boundary and the fire containment boundary relative to my home.

There are many reasons why my house still stands. We planned and built for these conditions. I created a green space around my home and built it of fire-safe materials. Also, my roof was thoroughly wet. Three built-in rooftop rain birds were soaking my house during all of this. And the heroics of the brave pilots and firefighters cannot be overstated.

In 2003 through 2005, two efforts were going on concurrently.

- First, the Forest Service informed the community in writing that they planned to cut a fuel break through the area just behind the community on Forest Service land. The thorough, 4-page document demonstrated how well thought-out the plan was and it offered a variety of contact methods if people had concerns. The first line of the letter is, "Your input is being sought." My only concern was, would the work happen quickly enough to do any good.

  Did the fuel break stop the fire in its tracks? No. Did it help? I believe it did. As I observed the fire from as close as you'd ever want to be, I believe that the fuel break bought precious minutes allowing the helicopter to make 1 or 2 additional drops. It gave the community a few extra minutes to evacuate when the fire abruptly blew up in the early evening.
- Second, the Utah State department of forestry in cooperation with the local fire department and the U.S. Forest Service organized the neighbors in Harmony Heights to engage in work parties to reduce the fuel load, mitigate ladder fuels, and make the community as fire-safe as it could be. The neighbors contributed dozens of hours over many weekends using chain saws and hand tools while the State provided a chipper to shred the piles of useless slash.

My neighbors and I know that we have chosen to live in a higher-risk area. We do not expect the government to make us safe while we sit on the deck and sip lemonade. We grabbed on to the opportunity presented to us, got organized, and accomplished much. As you might guess, following the fire, we redoubled our efforts and worked even harder. This effort did not require that we clear-cut our beautiful properties. The federal and state forestry officials taught us the concept of ladder fuels, explained how to estimate flame wall height for different kinds of vegetation, and helped us retain the wild beauty while reducing the hazard. Pictures included in my written testimony show a typical area of the neighborhood before and after our work.

I understand that some people believe that the public was excluded from the planning of the fuel break and that the motivation to move so quickly was based, in part, on greed. Somehow the Forest Service was going to make a buck on the trees

they pulled from the fuel break while everyone was caught napping. This is absurd. Junipers and scrub oak, the predominant foliage in the zone, are brushy, gnarled trees with little value beyond perhaps firewood.

The fuel break work was going on just one or two hundred feet behind my house, so we could see and hear the daily progress of the work crews. Each evening, my wife and I walked back into the cut zone to observe the results of the day's efforts. While we embraced the importance of the work, we expected to have our hearts broken by the site of denuded land and a chaotic job site. Instead, we saw that the crews took care to preserve the beauty of the zone and that they stacked the useless slash neatly into piles. When winter lowered the fire danger to zero, crews returned and burned the slash. What we saw matched exactly with the treatment prescribed in the decision memo that I included in my written testimony.

I am not a person who sits back and lets the government do as it wishes. When I moved out of the city, I quickly learned that in a sparsely populated region, a few engaged people can make a difference.

I am president of the local cycling club and serve on the National Mountain Bike Patrol, a trained volunteer organization similar to a ski patrol. I've participated in numerous planning meetings with local and federal land managers where the recreational interests of mountain bikers needed representation. I proactively organize volunteer groups to support the mutual goals of land managers and cyclists. In turn, the land managers call on me when they need at the table a rational, thinking representative of mountain biking.

It's a relationship born of trust and respect over the years. I believe that this history demonstrates that I am not passive when it comes to issues about which I am passionate. If I felt that the Forest Service had planned anything not in the public's and my best interest, I would have spoken up. I know how. I like to engage the process. That's why I came 2,000 miles to spend 5 minutes with you today. I see that those 5 minutes are about up. Thanks for your attention.

Mr. GRIJALVA. Thank you, sir. Let me begin some questions and hopefully we will go as quickly as possible so that we can get in as many questions as possible during the timeframe. A couple of questions for Mr. Jensen, if you do not mind, sir. What other Federal agencies beyond the Forest Service have categorically excluded their land management plans from NEPA do you know of?

Mr. JENSEN. Well Interior has coordinated its approach with the Forest Service. I think the most important—let me back up just a bit. There is a lot of governmental action undertaken everyday that affects Forest Service lands, public lands, private lands and is done so in a way that works in relative harmony with NEPA as it has conventionally been used.

I look at the programs administered by the Federal Energy Regulatory Commission, by FERC, the hydropower licensing program, the natural gas pipeline permitting program. Big, controversial. All sorts of issues attached to them. They use NEPA. They use it up front. They have a very strong commitment to public involvement early rather than late in the process and that works.

Mr. GRIJALVA. On that point, you said healthy forests depend on a healthy——

Mr. JENSEN. Governance.

Mr. GRIJALVA.—governance and public governance. Elaborate just on that point.

Mr. JENSEN. On that point. Well I think the core——

Mr. GRIJALVA. Because we have heard that it can be an intrusion. It can delay. It can extend. Yes.

Mr. JENSEN. I think I start from the premise that the Forest Service's job is never going to be easy because Congress and the public are many different minds about what ought to happen on

forest land. There is not a perfect outcome. There is not a perfect decision for any acre, any forest, any district.

The best we can do in our democracy is show respect for the diversity of opinion and make the best informed judgment within the timeframe available to decide, and I think there is a real confusion within the Forest Service. I think they are disoriented. I think they have been beaten up for so many years from so many different directions, whipsawed between extremes, that they are still reacting rather than planning for how to bring the public into a partnership, an effective partnership with the Forest Service.

My comments today are really aimed at a deep concern that an agency that Congress has entrusted with these lands is losing the ability to lead. Whether you are on the timber side of the equation or the non commercial side of the equation, that is a problem.

Mr. GRIJALVA. Thank you. Let me turn to Dr. Noon. You mentioned that you served on the committee of scientists under a previous administration that reviewed forest planning regulation. You indicated there was no committee convened to look at the 2005 planning rule. Has there been a review, a comment since that point to review the 2005 review and comment by a panel of scientists or a committee of scientists, particularly with regards to one of the issues we talked about and that is the cumulative effect issue, and if you could comment on both of those.

Mr. NOON. Yes. To the best of my knowledge, there has not been an external committee of scientists, let us say from academia, that do not have connections with agencies that have reviewed the 2005 regulations. There have been some publications, one of which I coauthored in scientific literature talking about some of the potential consequences to biodiversity conservation in the 2005 regs.

Mr. GRIJALVA. Thank you. Mr. Lawrence, what are appropriate uses of a categorical exclusion? If you can give an example or a comment on that.

Mr. LAWRENCE. Categorical exclusions are appropriate when they limit the scope and the nature of an activity so we can count on it not to have environmental impacts. So in the case, for example, of a fuels reduction CE which I think we could legitimately use, it would need to limit the activity to small diameter trees and brush, the kinds of things that we hear need to be cleaned out, and it would avoid the use of roads which are associated with increased fire danger and all kinds of ecological effects.

The Forest Service's CE by contrast has no limit on the diameter of the trees that can be logged, and this is a serious thing because the agency is on record saying that trees as large as 30 inches can be logged. Thirty inches in diameter at breast height. This is a huge tree. Can be logged for fuels reduction purposes.

The CE allows that kind of logging to go over one and a half square miles, and that is going to produce bad results. You need limits on the type of work that can be done, as well as the size of the area.

Mr. GRIJALVA. Mr. Vaughan, I appreciated your testimony about working with the reality of CEs and having to deal with those. For my clarification, do you support the 2005 forest planning rule that categorically excludes forest land from NEPA?

Mr. VAUGHAN. No, sir, we do not.

Mr. GRIJALVA. OK. Last question and then I will turn it over to the Ranking Member. I mentioned in my opening statement that I was concerned that the Forest Service is systematically weakening NEPA by finalizing categorical exclusions, not just in the project and planning phase and that that begins to weaken it. Mr. Lawrence, in that big picture view of NEPA and the Forest Service, what is your impression under this administration?

Mr. LAWRENCE. Under this administration, the Forest Service is in full flight from NEPA. It is doing everything it can to apply CEs wherever it can to avoid NEPA compliance. Sometimes the results are good, as I mentioned. I have seen great work done in the Lake Tahoe basin, as Mr. Vaughan mentioned. He has had great experiences. This depends on the individual people on the ground and how they implement the CE, and there are lots of good people in the Forest Service who do good work.

What is missing is enforceable standards that create real accountability and give us some real confidence that across the board the use of CEs is going to be good, not bad, for the environment.

Mr. GRIJALVA. Thank you. Mr. Bishop.

Mr. BISHOP. Thank you. Let me ask just a couple of questions to different members of the panel if I could. Mr. Jensen, if I could simply ask you in your personal experience have you personally compared levels of public involvement required under the 2005 planning rule with prior planning rules?

Mr. JENSEN. I have not.

Mr. BISHOP. OK. I appreciate that. Mr. Vaughan, I appreciate your what I would say at least balanced testimony at this hearing as you are talking about how it can be used for both good and evil at the same time. A lot of people were saying when the healthy forest initiatives were passed that there would be massive and widespread abuse, and I am assuming that you are saying that at least in the region 8 that you are aware that has not been the case.

Mr. VAUGHAN. That is correct. I was one of those people who were predicting that type of abuse, and at least in my region, my neck of the woods, it has not materialized.

Mr. BISHOP. Well shame on you then. You have heard of abuse in other areas. Is it anything that is more than anecdotal stages?

Mr. VAUGHAN. We have reviewed specific projects in other regions, particularly in region 9, that were abuses and illegal uses of the CEs but again we did no thorough review of all the uses of the CEs. We had people come to us and go, we have this project. It looks bad, and so I mean that is one of the nature of things. You know the bad things pop up and you see them. Unless you go look at everything, you do not have a context for them. So I have no context but so in a way it is anecdotal but we did do specific reviews of those specific projects.

Mr. BISHOP. All right. That is good. You mentioned much of that in your written testimony. I appreciate that. It was extremely good written testimony I might add.

Mr. VAUGHAN. Thank you.

Mr. BISHOP. Could you just take a moment talking about your perception of what levels should or could be helpfully used with having a healthy forest ombudsman?

Mr. VAUGHAN. Yes, sir. This is an idea I discussed with Under Secretary Rey, and he expressed a great deal of interest in it in that it would be a way to one, independently monitor the use of the healthy forest authorities, both from HFI and HFRA itself, and two, collect that sort of data and give that broad perspective to where you know in our experience reviewing one region's CEs and use of the authorities we do not think it is a huge stretch that you could have an office of a few people dedicated, two or three people dedicated to that job that would be able to give individual review of every single use of the CEs and HFRA authorities that would then be able to give you broader context than just raw numbers.

Where are they being abused? How? Why? Are they being misused? If so, how? And help the agency and everyone else get the type of picture we have in region 8 for the entire country.

Mr. BISHOP. Thank you. I appreciate that. I appreciate your testimony. Mr. Stavros, I appreciate you coming up here.

Mr. STAVROS. Thank you.

Mr. BISHOP. I even forgot to ask you, did I assume you flew out of Cedar City or St. George first?

Mr. STAVROS. Out of St. George.

Mr. BISHOP. OK. Then I cannot ask you how Mesa Airline is doing.

Mr. STAVROS. Well you know why I flew out of St. George.

Mr. BISHOP. All right. I think you answered my question. Thank you. The picture behind you, I do not think anyone cannot understand the kind of horrific attitude or consequences that were going through your mind as you were seeing that coming up there. I am under the assumption that the firebreak that was done was done as a categorical exclusion?

Mr. STAVROS. I believe that is true.

Mr. BISHOP. Was there anything in your experience with that that you think diminished your ability of having some kind of input? Was there anything with that process with which you have a problem either now or at the time?

Mr. STAVROS. I do not, not then and not now. In my written testimony I submitted the exact four-page document that was mailed to me and all my neighbors. As I said, the opening line was, "Your input is being sought." So from the very first paragraph they were trying to include the neighbors, and they laid out the plan very clearly.

This is how wide it is going to be. This is how long it is going to be. This is where we are going to do it. They included a map that showed exactly where it was going to be. If you have any issues, please contact this number. Here is a phone number. Here is an address. We would love to hear you know.

So at the time I spoke with some of my neighbors. My first thought was, great. When do we start? And of course no one can predict the future, and in hindsight had this particular little project required two or three or four years of study, this fire may have had a much different outcome for my neighbors and I.

Mr. BISHOP. I appreciate you being here, and that you are still involved in the process there in New Harmony. Just so it is very clear, New Harmony is not in my district, although when they re-

district I would be more than happy to have New Harmony and all the way to St. George in my district.

Mr. STAVROS. It is a tiny little place in the southwest corner, and I just want to say my lack of contact when I got that letter was not because I am passive. I enjoy speaking out and working with land managers, and I feel certain that had it been a concern that we would have in this case as well.

Mr. BISHOP. OK. My last set of questions are for Mr. Lawrence, and then I will be done, Mr. Chairman. Mr. Lawrence, I am assuming that your organization has testified before Congress before.

Mr. LAWRENCE. Yes, that is correct.

Mr. BISHOP. Do you have attorneys on your staff there? I mean you sued EPA 35 times. I am assuming you have some attorneys there.

Mr. LAWRENCE. We have a number of attorneys on the staff. I myself am an attorney just to clarify.

Mr. BISHOP. Thank you. The rules of this committee are that testimony should be received 48 hours before the Committee starts. Your particular testimony was given to us 40 minutes before this committee started. My question is: Why was your testimony so tardy, and was it a conscious and contemptuous act on your part in giving us the testimony when we had absolutely no time to review it before this committee began?

Mr. LAWRENCE. No, it certainly was not, and I apologize for the tardiness.

Mr. BISHOP. Why was it tardy?

Mr. LAWRENCE. I got it done as soon as I could. In fact, I wound up trying to email it from the airport yesterday before I took my transcontinental flight here, and simply could not get it to transmit.

Mr. BISHOP. When did you actually send your testimony to this committee?

Mr. LAWRENCE. Last night when I got to my hotel.

Mr. BISHOP. Not this morning?

Mr. LAWRENCE. You know it was well after midnight when I got to my hotel. I sent the exhibits yesterday, and for some reason sitting there in the airport I could not get the local Wi-Fi connection to send my testimony. I even had a fellow traveler try to send it from her laptop. I really apologize.

Mr. BISHOP. Were you aware——

Mr. LAWRENCE. I think this puts you in an awkward position, and I think it is regrettable.

Mr. BISHOP. It is a little bit more than regrettable, and it is unacceptable. Were you aware of the 48-hour rule?

Mr. LAWRENCE. I was not notified of it.

Mr. BISHOP. You were not aware of the——

Mr. LAWRENCE. But it is a matter of common sense that you need an opportunity to review the testimony.

Mr. BISHOP. Were you aware of the 48-hour rules in the other times? You know you are part of the usual suspects. It looks like reading Casablanca again. Was your committee aware of that rule in the past?

Mr. LAWRENCE. It has been some time since I myself testified here, and I do not remember being informed of a specific rule. I remember being asked for my testimony at a specific time.

Mr. BISHOP. Part of the process that the rules require not only the 48 hours but also a disclosure requirement. Your organization did not submit a disclosure requirement as well. So let me ask you some of the questions that would be on there. What, for example, is the business phone number?

Mr. LAWRENCE. I can certainly use the Committee's time answering these questions to the best of my ability. I would also be happy to submit the disclosure requirement if that would be a more efficient use of your time.

Mr. BISHOP. Well maybe you can just give them to me right now. Let us go to one. Are there any Federal grants or contracts from the Department of the Interior which you have received since October of 2000?

Mr. LAWRENCE. The phone number is (212) 727-2700 for the organization's headquarters in New York City.

Mr. BISHOP. Thank you.

Mr. LAWRENCE. I am unaware of any grants from the Interior Department. I do know that there are staff scientists at NRDC who administer grants from EPA, and I think also from the Energy Department.

Mr. BISHOP. Do you have any grants or contracts that would include subgrants or subcontracts with the Department of the Interior since the year 2000?

Mr. LAWRENCE. Again, I think the best answer to that would come from an organizational officer who oversees those grants but I am certainly unaware of any.

Mr. BISHOP. You are actually right in your testimony, and it would be best if it came from them. Any other information you wish to convey which might aid the members of this committee to better understand the context of your testimony?

Mr. LAWRENCE. I would be happy to talk about the issue in front of the Committee at length and at your convenience, sir.

Mr. BISHOP. Well take the next 57 seconds and try it.

Mr. LAWRENCE. I want to correct a misstatement about the time that it took to prepare the Tongas land management plan and the challenges that it faced. The Forest Service prepared the Tongas land management plan first in 1979, completed a plan and it went without challenge. When the Forest Service came back to the replanning process to revise that process in the early 1990s, its schedule was upset by the passage of Congressional legislation.

Mr. BISHOP. The disclosure rule is the disclosure of anything that you have going on there with programs that you are doing that may have an impact on the testimony, not necessarily the restatement of your testimony.

Mr. LAWRENCE. I am unaware of any such programs.

Mr. BISHOP. Are there any officers, elected positions, representative capacities held in the organization on whose behalf you are testifying?

Mr. LAWRENCE. I am testifying on behalf of the organization and its more than 1.2 million members and activists. Beyond that, there are no officers within NRDC who I represent here.

Mr. BISHOP. All right. I appreciate that. Let me just say once again that receiving this kind of testimony 40 minutes before this starts from your organization, an organization that knows what timelines are because you are attorneys, and an organization that has been here before is something I do find unacceptable, and my assumption is that we got it late simply because your organization got it late to this particular committee, and I am hoping that is the truth but it should never, never happen again, and it puts us at a disadvantage for this entire committee.

The Chairman has the ability in such situations of removing the testimony from the record or barring your testimony here given orally. He can do whatever he wants to, and I have actually no intentions of giving him advice on that but I simply want to note that you put this committee at an unfair disadvantage, and it is simply unacceptable especially with the experience that you had in testifying before Congress before. With that I yield back.

Mr. GRIJALVA. Thank you very much, Mr. Bishop, and let me thank the panelists, and indicate to all that all the testimony, oral and written and extraneous information, will be part of the record of this particular hearing and, with that, we are adjourned.

[Whereupon, at 12:08 p.m., the Subcommittee was adjourned.]

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