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EDITOR'S NOTE

Written by Jennifer L. Harder
Editor-in-Chief



Environmental Law News is pleased to publish the following articles in our spring issue:

- Keith Solar and Lauren Presser mark the 50th anniversary of the Marine Mammal Protection Act with a review of its accomplishments, and a look ahead to the future of marine protection under the Act
- Alec Tyra explores the legal landscape relevant to liability for PFAS contamination and the key question of insurance
- Jana Zimmer examines enforcement policies and procedures at the California Coastal Commission and proposes a slate of reforms
- Aaron Ferguson assesses the capacity for the National Environmental Policy Act to accommodate critical forest management projects
- Beth Kent describes the importance of joint development of urban parks and affordable housing, previewing a policy paper slated for publication by UCLA
- Gary Lucks provides his annual insightful review of recently enacted California environmental legislation

To foster a robust dialogue, *Environmental Law News* does not limit or seek to shape the views of authors; we welcome articles from all perspectives. To facilitate that dialogue, we have previously invited authors to submit articles articulating a different perspective on any of the issues addressed in our publications. In this issue, two new authors have accepted that invitation and provided responses to the article written by Phillip Williams in the Fall 2021 issue of *Environmental Law News*, addressing water rights and due process:

- Raquella Thaman assesses water rights, dignity, and personhood
- Sarah Spinuzzi offers a different view of the nature of property rights in water

Environmental Law News again extends an invitation for article submissions, whether you are a new or seasoned author. Feel free to pitch an idea for an article that you would like to write, or offer a response to a prior article. We want to hear from our readers! Please contact Editor-in-Chief Jennifer Harder at jharder@pacific.edu with proposals for articles or questions.

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TESTING NEPA'S FLEXIBILITY FOR FOREST MANAGEMENT PROJECTS IN CALIFORNIA

Written by Aaron Ferguson¹



INTRODUCTION

Over the past several years, a consensus has formed around the idea that decades of fire suppression have resulted in overly dense and less resilient forests throughout California.² Deterioration of California's forests has been exacerbated by wildfires, weather extremes, drought, invasive species, and human population pressure.³ Restoration of forests can provide opportunities for timber production and recreation, as well as improvements in water supplies, water quality, and wildlife habitat.⁴ However, without increasing the pace and scale of forest management activities, California risks the loss of these potential benefits.⁵

Given the federal government's vast holdings of forestland throughout California, it will continue to be a key player in forest management. For example, forests occupy nearly 40% of the 15 million acres "headwaters region" in California, or about 6 million acres.⁶ Federal agencies own about two-thirds of these forests, or about 4 million acres.⁷ Recognizing the integrated nature of forests, communities, watersheds, and wildlife, and the varied incentives for protecting and managing these resources, in August 2018, the United States Department of Agriculture, Forest Service (Forest Service), initiated the Shared Stewardship Investment

Strategy and committed to work closely with states to set landscape-scale priorities for fire risk treatments.⁸

With this commitment, in 2020, the Forest Service and the State of California executed an agreement that has established a joint framework to enhance forest stewardship in California, including a commitment to scale up vegetation treatment to one million acres of forest and wildlands annually by 2025, with each party committing to treat 500,000 acres per year (2020 MOU).⁹ During the previous ten-year period, from 2010-2020, treatments occurred on a total of 409,735 federally owned acres within the "headwaters region"—an average of less than 41,000 acres per year.¹⁰ Given that this headwaters area includes about 20% of the Forest Service's 20 million acres under management in the Pacific Southwest Region, the rate of treatments on federal land will need to increase to approximately 100,000 acres per year in this area alone to achieve the 500,000 acre per year treatment objective in the 2020 MOU. This would be a 150% increase relative to the recent past.

Forest management on federal lands triggers federal regulatory compliance obligations. The National Environmental Policy Act (NEPA) is a key variable in the pace and scale of forest management on federal lands. This article assesses the recent evolution of NEPA

compliance efforts within the Forest Service, evaluates other potential limiting factors on the Forest Service's fire protection activities, describes potential impediments to efficient implementation of environmental analyses, and suggests approaches to the implementation of NEPA that would help ensure the Forest Service can consistently treat 500,000 acres per year of forestland in California.

EVOLUTION OF NEPA COMPLIANCE EFFORTS WITHIN THE FOREST SERVICE

AN OVERVIEW OF NEPA

NEPA (42 U.S.C. § 4321 et seq.) requires federal agencies to consider significant environmental effects of their proposed actions by assessing and publicly disclosing any such effects and alternatives prior to making decisions.¹¹ In essence, NEPA is a procedural requirement; it does not guarantee a particular course of action. The President's Council on Environmental Quality (CEQ) oversees NEPA implementation by issuing regulations and other guidance to federal agencies to ensure compliance with the environmental impact assessment process.¹²

In general, the NEPA assessment process starts with the identification of a need for action and the development of a project proposal. If the lead agency, or the agency with jurisdictional authority to carry out the project, anticipates that the action will have or potentially have significant environmental impacts, the agency will prepare an Environmental Impact Statement (EIS)—the most thorough level of NEPA review.¹³ An EIS results in a Record of Decision identifying the agency's decision regarding the design, construction, operation and/or implementation of the project; alternatives considered; and any mitigation and monitoring, if necessary.¹⁴ If it is unclear to the lead agency whether the impacts will be significant, the agency prepares an Environmental Assessment (EA)—a concise analysis establishing sufficient evidence, or lack thereof, of any significant environmental impacts.¹⁵ If the agency identifies significant impacts warranting review, it begins the process for a complete EIS.¹⁶ If the agency does not find any such impacts, it issues a Finding of No Significant Impact (FONSI).¹⁷ Alternatively, the agency may find that the proposed project falls within a statutorily defined categorical exclusion—a class of actions excused from the EIS and EA documentation requirements.¹⁸ These exclusions still require compliance with environmental regulations and a meaningful public engagement process, but the requirements are streamlined in correlation with the reduced impacts.¹⁹

A NEPA assessment may occur at a programmatic level (as opposed to a site- or project-specific level) when an agency undertakes review of a broad program decision as well as multiple projects under the program.²⁰ Under programmatic level review, repeated actions, which are likely to have similar direct, indirect, and cumulative impacts, may be evaluated at a broader scale.²¹ That programmatic review of general impacts, in either a Programmatic EIS or Programmatic EA, can be relied on, and impacts do not always need to be re-analyzed when the agency makes decisions on specific actions.²² The intention of programmatic review is not to avoid the public decision making process established under NEPA, but to provide a more expeditious process for comprehensive review of a larger-scope policy, program, or plan or at the early stages of a phased proposal.

FOREST SERVICE NEPA PROCEDURES

Many individual federal agencies, including the Forest Service, have developed their own, supplemental NEPA procedures.²³ The Forest Service's NEPA requirements apply when: (1) the Forest Service has a goal and is preparing to make a decision on the means to accomplish that goal; (2) the proposed action is subject to Forest Service control and responsibility; (3) the proposed action would cause effects on the natural and physical environment and the relationship of people and that environment; and (4) the proposed action is not statutorily exempt from NEPA.²⁴

Initially, NEPA requirements do not apply to Forest Service actions that are "necessary to control the immediate impacts of [an] emergency and [] urgently needed to mitigate harm to life, property, or important natural or cultural resources."²⁵ For example, fire suppression activities are not subject to environmental analysis under NEPA.

Under the Healthy Forests Restoration Act of 2003 (HFRA), "authorized hazardous fuel reduction projects" are subject to less stringent NEPA requirements.²⁶ Generally, these projects need only present and analyze the proposed agency action, the "no action" alternative, and one additional alternative.²⁷ For a hazardous fuel reduction project located within the wildland-urban interface, an EIS need only describe the proposed action and one alternative.²⁸ Projects near at-risk communities in the wildland-urban interface are generally not required to analyze any alternative to the proposed project.²⁹

Under the HFRA, hazardous fuel reduction projects that maximize retention of old-growth and large trees to

promote resilience to insects and wildfires are categorically excluded from NEPA.³⁰ These projects are limited to 3,000 acres and must occur in wildland-urban interface areas or outside these areas in high-fire risk areas. These projects are also exempt from the Forest Service's pre-decisional administrative review process.³¹

The Forest Service most recently revised its NEPA procedures in 2020.³² On the heels of a significant shift in Forest Service resources from non-fire to fire programs, the Forest Service sought to make more efficient use of its limited non-fire management resources by creating opportunities for more streamlined NEPA analyses.³³ The 2020 revisions included the addition of a Determination of NEPA Adequacy (DNA) process, which allows the Forest Service to determine whether a NEPA analysis prepared for a prior activity can satisfy NEPA requirements for a new proposed action that is substantially the same.³⁴ The process allows the agency to review and determine that an existing NEPA analysis covers the proposed action without preparing a supplemental EIS or EA.³⁵

The Forest Service also added new categorical exclusions specific to its jurisdictional duties. Categorical exclusions apply if there are no extraordinary circumstances related to the action and the action is within a category listed in 36 C.F.R. §§ 220.6(d) and (e).³⁶ Specifically, the Forest Service added exclusions related to construction and management of National Forest System (NFS) roads, and activities with a primary purpose of meeting restoration objectives or increasing forest resilience on no more than 2,800 acres.³⁷ Given the limited nature of these revisions as compared to the proposed rule, the Forest Service has stated that it will consider other changes in review of its NEPA procedures as required by 40 C.F.R. § 1507.3(b), including classes of actions that normally require an EIS, procedures associated with categorical exclusion determinations, and use of other agency categorical exclusions.³⁸

OTHER FACTORS GOVERNING FOREST SERVICE MANAGEMENT ACTIVITIES

MORE ACRONYMS: NFMA AND MUSYA

To put NEPA in the context of the Forest Service's fire protection activities, it is important to understand the statutory and regulatory framework that governs Forest Service planning and management actions. The National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1614, contains the statutory framework under which the Forest

Service manages NFS lands.³⁹ The Forest Service must develop a forest plan for each unit of the forest system.⁴⁰ All subsequent agency actions must be consistent with the forest plan.⁴¹ NFMA, in turn, references the Multiple-Use Sustained Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528-531, and requires that plans developed for units of the NFS "provide for multiple use and sustained yield of the products and services obtained therefrom . . . and [must] include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]"⁴² MUSYA states that "[i]t is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."⁴³ Under these authorities, the Forest Service generally has broad discretion to undertake activities intended to mitigate risks of wildfire, provided those activities are consistent with the overarching forest plan, which itself must be consistent with NFMA.

Pursuant to NFMA and MUSYA, the Forest Service adopted a new rule in 2012 that governs NFS planning (Planning Rule).⁴⁴ The Planning Rule contains provisions relevant to landscape-scale restoration and identifies planning levels and responsible officials.⁴⁵ Notably, the supervisor of the national forest is the responsible official for development and approval of a plan for a unit of the NFS, and the supervisor or district ranger is the responsible official for project and activity decisions.⁴⁶ The Planning Rule establishes a planning framework with iterative processes, including assessment, plan development or amendment, and monitoring.⁴⁷ The Planning Rule also notes that "the intent of the framework is to create a responsive planning process that informs integrated resource management and allows the Forest Service to adapt to changing conditions, including climate change, and improve management based on new information and monitoring."⁴⁸ Further, the Planning Rule directs the responsible official to establish an interdisciplinary team to assist in these processes.⁴⁹

The Planning Rule also specifies that a plan revision (i.e., a new plan for an entire plan area) or a new plan (i.e., plan developed for a new unit) requires preparation of an environmental impact statement.⁵⁰ In addition, the Planning Rule contains a specific directive that a plan provide for ecosystem services and multiple uses, including recreation, range, timber, watershed, wildlife, and fish.⁵¹ And the Planning Rule represents the first time that a planning rule promulgated by the Forest Service has provided specific criteria to assess consistency of a project with a forest plan.⁵² Plans and projects implemented under these plans are now subject to pre-decisional administrative review.⁵³

COORDINATED PLANNING

In August 2018, the Forest Service prepared a plan for coordinated forest management efforts with states, tribes, local communities, and collaborative groups.⁵⁴ As part of its Shared Stewardship Investment Strategy, the Forest Service recognized the urgent challenges facing the nation's forests, including wildfires, invasive species, and drought, and set forth an approach for identifying landscape-scale priorities for treatments in areas with a high return on investment.⁵⁵ The Forest Service articulated three elements of this strategy: (1) prioritize stewardship decisions with the States; (2) use new mapping and decision tools where they can do the most good; and (3) use all available authorities and tools, including timber sales, mechanical treatments, and carefully managed fire.⁵⁶ The Shared Stewardship Investment Strategy followed on the heels of federal legislation extending the authorized term of stewardship contracts with other public or private entities to 20 years (up from 10 years).⁵⁷ This extension has the potential to make these arrangements more attractive to contracting parties by reducing the time and expense involved in renewing contracts and increasing certainty for land and business planning purposes.

Importantly, the Shared Stewardship Investment Strategy acknowledges that the Planning Rule provides the Forest Service an opportunity to improve the efficiency of its NEPA processes, and by developing projects across large landscapes, the Forest Service can perform environmental analysis for larger planning areas.⁵⁸ At the time the Forest Service published the Shared Stewardship Investment Strategy, the agency was in the process of reviewing and updating its NEPA regulations, which ultimately led to the 2020 revisions described above, and as noted in 85 Fed. Reg. 73620, 73621, may lead to further revisions in the near future.⁵⁹

Consistent with the Shared Stewardship Investment Strategy, the Forest Service and the State of California executed the 2020 MOU. The 2020 MOU recognizes that the agencies must adopt efficiencies and streamlined regulatory procedures to quickly and effectively complete environmental review.⁶⁰ In addition to each party committing to treat 500,000 acres per year by 2025, the parties to the MOU agreed to develop a 20-year project plan for forest and vegetation management by 2021.⁶¹ The MOU further emphasizes that restoring forest health will not only provide public safety, recreation, job creation and economic opportunities, but will also improve watershed health, and protect and purify water supplies.⁶²

OPPORTUNITIES FOR EFFICIENCIES

EXAMPLES OF RECENT NEPA ANALYSES

Currently, three different approaches to NEPA compliance—categorical exclusions, preparation of an EA and FONSI, and preparation of an EIS—can be found in projects within the Tahoe National Forest. In addition to NEPA and the other statutory frameworks discussed above, forest management projects in the Tahoe National Forest are governed by the *Tahoe National Forest Land and Resource Management Plan* (USDA 1990) as amended by the *Sierra Nevada Forest Plan Record of Decision* (SNFPA ROD) (USDA 2004) (together, the Forest Plan).

CATEGORICAL EXCLUSIONS: CUCKOO VEGETATION MANAGEMENT PROJECT

The Cuckoo Vegetation Management Project (Cuckoo Project) encompasses approximately 4,535 acres of vegetation management to reduce fuels and hazards, improve wildlife habitat and improve forest health and resilience on a ridge between the North and Middle Forks of the American River.⁶³ The Cuckoo Project includes commercial thinning, pre-commercial thinning, fuels reduction (including the use of prescribed fire) to minimize and rearrange surface and ladder fuels, and protection of disease-resistant pine tree species.⁶⁴ The Cuckoo Project relies on six categories of categorical exclusions for NEPA compliance—16 U.S.C. § 6591a-b (insect and disease infestations); 16 U.S.C. § 6591d (hazardous fuels reduction projects on less than 3,000 acres [which applies to commercial thinning]); 36 C.F.R. § 220.6(e)(1) (construction and reconstruction of trails); 36 C.F.R. § 220.6(e)(5) (regeneration to native tree species without herbicides); 36 C.F.R. § 220.6(e)(6) (timber stand and/or wildlife habitat improvement without herbicides and less than 1 mile of road construction); and 36 C.F.R. § 220.6(e)(20) (activities that restore lands occupied by trails). The Forest Service analyzed the relationship between the proposed action and the resource conditions in agency procedures, 36 C.F.R. § 220.6(b), and concluded no extraordinary circumstances existed that would warrant further analysis and documentation in an EA or EIS.⁶⁵ This analysis considered effects on endangered and sensitive species, and relied on project-specific biological assessments. The Cuckoo Project demonstrates the value of unique resource analyses in supporting categorical exclusion determinations.

EA/FONSI: FRENCH MEADOWS PROJECT

The French Meadows Project is an outgrowth of a collaborative effort between the Forest Service and local partners to improve ecological conditions and watershed health while reducing the potential for severe wildfire impacts in the Middle Fork American River watershed. The French Meadows Project proposes thinning, mastication (grinding/shredding), reforestation and prescribed fire treatments on approximately 12,183 acres to promote forest resilience to wildfire, insects and disease, and climate change; reduce the risk of high-severity wildfire; restore fish and wildlife habitat; and protect water supply and hydropower facilities.⁶⁶ The French Meadows Project relies on an EA and FONSI for NEPA compliance.⁶⁷

Following preparation of the EA and FONSI, the local partners authored a “lessons learned” report on the French Meadows Project.⁶⁸ The report notes that efficiencies were realized in NEPA processes by using consultants to prepare surveys and analyses, with the Forest Service retaining final authority to review and issue the final decision. By relying on consultants, the overall NEPA process took only 18 months to complete, as compared to four years or more for similar projects.⁶⁹ The partners’ report describes how application of NEPA to forest projects may be improved and explains that environmental review could have been streamlined by focusing on significant issues and limiting analysis of other issues, most of which were not identified by the Forest Service or public as significant or controversial.⁷⁰ The CEQ’s NEPA regulations provide for this type of approach.⁷¹ Moreover, the local partners suggested preparation of a regional or programmatic management plan for California spotted owl that site-specific documents could tier to or incorporate by reference, given the time spent evaluating the scope of the California spotted owl impacts analysis, and the fact that the California spotted owl is identified as a significant issue in almost all forest projects.⁷²

EIS (IN PROGRESS): NORTH YUBA LANDSCAPE RESILIENCE PROJECT

The North Yuba Landscape Resilience Project (North Yuba Project) has been developed through a collaborative process by the North Yuba Forest Partnership to improve forest health and resilience, reduce high-severity wildfire risk, and protect water supplies and communities. The planning area, which is approximately 275,000 acres total, with 210,000 acres on NFS lands, contains forest and other wildlife habitats and is an important water source for downstream

users.⁷³ The Forest Service plans to prepare an EIS for this project analyzing actions for the entire planning area with separate decision documents to follow for sub-project areas, including additional NEPA analysis if required.⁷⁴ Notably, this project anticipates Forest Plan amendments to allow activities that align with the project goals.⁷⁵

PROJECTS MOVING FORWARD

The Cuckoo Project demonstrates that it is possible to rely entirely on categorical exclusions for NEPA compliance, for projects that address one of the identified purposes such as fuels reduction, forest resilience, or timber stand and/or wildlife improvement. Additionally, the project must often be located in designated areas and fit within prescribed acreage limits. With landscape-scale projects, it becomes increasingly difficult to fit the entire project into one or more of these categories. There may be further opportunities to expand categorical exclusions when the Forest Service revisits its NEPA regulations, as it has suggested it plans to do in 85 Fed. Reg. 73620, 73621. One such example would be to increase the acreage limit specified in 36 C.F.R. § 220.6(e)(25) for activities with a primary purpose of meeting restoration objectives or increasing forest resilience. Additional evidence regarding local restoration projects intended to increase resilience may support such a modification.

The report prepared by the local partners in the French Meadows Project provides valuable lessons that may be applied to future NEPA analyses involving preparation of an EA. By involving local partners with an incentive to implement projects on federal lands for various purposes, including water supply and quality, community safety, and wildlife habitat, projects are likely to advance more swiftly while still satisfying NEPA’s requirements. Further, by involving local consulting experts, focusing on significant issues, and constraining the analyses to the project’s impacts on important resources, it is possible to streamline the NEPA process. For example, to facilitate the increase in treatments anticipated in the 2020 MOU, it may be helpful to start preparing programmatic analyses for key species by region now.

Over time, additional efficiencies may be gained by implementation of landscape-scale projects such as the North Yuba Project as a result of the extensive environmental analyses that will be involved in both the initial EIS and (likely) subsequent environmental analyses. In the future, there may be additional opportunities to

incorporate analyses by reference (40 C.F.R. § 1502.21) or use the Forest Service's relatively new DNA authority (36 C.F.R. § 220.4(j)).

The flip side of trying to streamline the NEPA process is the potential risk of litigation. Challenges to Forest Service fire management decisions usually fall into two categories: (1) challenges that the Forest Service's fire management activity conflicts with the overlying forest plan for the particular forest; and (2) challenges that the fire management activity conflicts with NEPA or the Endangered Species Act.⁷⁶

However, the bar for challenging agency action under NFMA or NEPA is a high one, as any challenge must be made under the Administrative Procedure Act (APA) (5 U.S.C § 500 et seq.), which requires the challenger to establish that an agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because of an agency's failure to meet NEPA's requirements.⁷⁷

Importantly, the challenging party must have standing to pursue the action under the APA, must bring suit within six years of a "final" agency action, must prove they were adversely affected or aggrieved by agency action, and must exhaust administrative remedies before pursuing an action under the APA.⁷⁸ As a practical matter, this high bar to legal challenge provides the Forest Service with some latitude in its decision making.⁷⁹

Finally, by engaging local partners in project implementation using stewardship agreements, as authorized in 16 U.S.C. § 6591c, there is a strong local incentive to keep projects on track and ensure success. While local action is critical, the varied ownership of land and resources throughout California's forested landscapes requires engagement by the state and federal governments. By applying the practices discussed in this article, state and federal governments have the opportunity to scale up treatments and avoid common procedural roadblocks that can hinder project completion under the current regulatory scheme.

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1. Aaron A. Ferguson practices natural resources law at Somach Simmons & Dunn. Michelle E. Chester and Daniel F. McCarl also contributed to this article.
 2. Van Butsic, Henry McCann, Jodi Axelson, Brian Gray, Yufang Jin, Jeffrey Mount, Scott Stephens & William Stewart, Public Policy Institute of California (PPIC), Improving the Health of California's Headwater Forests 3 (2017); Agreement for Shared Stewardship of California's Forest and Rangelands Between the State of California and the USDA, Forest Service Pacific Southwest Region 1 (2020).

3. *Id.*
4. *Id.*
5. Henry McCann & Mingfei Xiong, PPIC, Accounting for a Decade of Headwater Forest Management 2 (2021); Henry McCann, Van Butsic, John Battles, Ricardo Cisneros, Yufang Jin, Susie Kocher, Matthew Potts & Scott Stephens, PPIC, The Benefits of Headwater Forest Management 4 (2020); Agreement for Shared Stewardship of California's Forest and Rangelands Between the State of California and the USDA, Forest Service Pacific Southwest Region 2 (2020).
6. Henry McCann & Mingfei Xiong, PPIC, Accounting for a Decade of Headwater Forest Management 2 (2021). As described by PPIC, the "headwaters region" comprises millions of acres in the foothills and Sierra Nevada mountains east of California's Central Valley.
7. *Id.*
8. United States Forest Service, Shared Stewardship Across Landscapes: An Outcome Based Investment Strategy 2-3 (2018).
9. Agreement for Shared Stewardship of California's Forest and Rangelands Between the State of California and the USDA, Forest Service Pacific Southwest Region 3 (2020).
10. Henry McCann & Mingfei Xiong, PPIC, Accounting for a Decade of Headwater Forest Management 5 (2021).
11. *See* 42 U.S.C. § 4332(C).
12. *See* 40 C.F.R. §§ 1500-1508.
13. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500.1, 1502.2.
14. *Id.*
15. 40 C.F.R. § 1508.9.
16. 42 U.S.C. § 4332(2)(C).
17. 42 U.S.C. § 4370m(9)(A); 40 C.F.R. § 1508.13.
18. 40 C.F.R. § 1508.4.
19. *Id.*
20. *See id.* §§ 1502.4(b)-(c).
21. 40 C.F.R. § 1508.28.
22. *See id.*; *see also id.* §§ 1502.20 and 1508.28.
23. 36 C.F.R. Part 220.
24. 36 C.F.R. § 220.4(a).

25. *Id.* § 220.4(b)(1).
26. Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887. “Authorized hazardous fuel reduction projects” are defined in 16 U.S.C. § 6511(2).
27. 16 U.S.C. § 6514(c).
28. *Id.* § 6514(d)(1). The “wildland -urban interface” is an area within one-half or one-and-one-half miles of an at-risk community, depending on topography. 16 U.S.C. § 6511(16). At-risk communities are listed in the Federal Register under the National Fire Plan. Urban Wildland Interface Communities Within the Vicinity of Federal Lands That Are at High Risk From Wildfire, 66 Fed. Reg. 43384 (Aug. 17, 2001).
29. 16 U.S.C. § 6514(d)(2).
30. *Id.* § 6591d(a)-(c). This exclusion is subject to the extraordinary circumstances procedures described in 36 C.F.R. § 220.6. See note 36, *infra*.
31. *Id.* § 6591d(a)(3).
32. National Environmental Policy Act Compliance, 85 Fed. Reg. 73620 (Nov. 19, 2020).
33. *Id.*
34. 36 C.F.R. § 220.4(j).
35. *Id.*
36. *Id.* § 220.6(a). Resources that should be evaluated when considering whether extraordinary circumstances exist include federally listed threatened or endangered species and their habitat. The existence of one or more of these conditions does not preclude use of a categorical exclusion, it is the potential impact of the proposed action on the conditions. 36 C.F.R. § 220.6(b)-(c).
37. 36 C.F.R. §§ 220.6(e)(23)-(25). Notably, the proposed restoration categorical exclusion originally contained an acreage limit of 7,300 acres, and if timber harvest activities were proposed those activities could not exceed 4,200 of the 7,300 acres. National Environmental Policy Act Compliance, 84 Fed. Reg. 27544, 27557 (June 13, 2019).
38. National Environmental Policy Act Compliance, 85 Fed. Reg. 73620, 73621 (Nov. 19, 2020).
39. The “National Forest System” includes “all national forest lands . . . , and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system.” 16 U.S.C. § 1609(a).
40. 16 U.S.C. § 1604(a).
41. *Id.* § 1604(i); see *Lands Council v. McNair*, 537 F.3d 981, 988-90 (9th Cir. 2008) (“The NFMA sets forth the statutory framework and specifies the procedural and substantive requirements under which the Forest Service is to manage the National Forest System lands. Procedurally, the NFMA requires the Forest Service to develop a forest plan for each unit of the National Forest System. 16 U.S.C. § 1604(a). In developing and maintaining each plan, the Forest Service is required to use “a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.” *Id.* § 1604(b). After a forest plan is developed, all subsequent agency action, including site-specific plans. . . , must comply with the NFMA and be consistent with the governing forest plan. *Id.* § 1604(i); see *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002) («[A] ll management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the Forest Act.» (citing *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 757 (9th Cir. 1996)).”).
42. 16 U.S.C. § 1604(e)(1). See *Lands Council v. McNair*, 537 F.3d 981, 988-90 (9th Cir. 2008) (“Congress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress’ early regulation of the national forests, it has never been the case that “the national forests were . . . to be ‘set aside for non-use.’” *United States v. New Mexico*, 438 U.S. 696, 716 n.23 (1978) (citing 30 Cong. Rec. 966 (1897) (statement of Rep. McRae)). For example, in the Organic Administration Act of June 4, 1897, passed less than a decade after Congress began regulating the national forests, Congress identified two purposes for which it would reserve a national forest at that time: “[to] secur[e] favorable conditions of water flows, and to furnish a continuous supply of timber.” *Id.* at 707-08 (quoting 16 U.S.C. § 475 (1976)). Congress’ current vision of national forest uses, a broader view than Congress articulated in 1897, is expressed in the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-31, which states that “[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” *Id.* § 528. The NFMA references 16 U.S.C. §§ 528-531 and requires that plans developed for units of the National Forest System «provide for multiple use and sustained yield of the products and services obtained therefrom . . . and [must] include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]» *Id.* § 1604(e)(1). Thus, the NFMA is explicit that wildlife viability is not the Forest Service’s only consideration when developing site-specific plans for National Forest System lands.”).

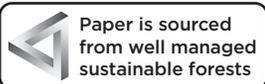
43. 16 U.S.C. § 528.
44. 77 Fed. Reg. 21162.
45. 36 C.F.R. § 219.2.
46. *Id.* §§ 219.2(b)(3), (c). A “plan or land management plan” is “[a] document or set of documents that provide management direction for an administrative unit of the NFS developed under the requirements of [Part 219] or a prior planning rule.” 36 C.F.R. § 219.19.
47. 36 C.F.R. § 219.5(a).
48. *Id.*
49. *Id.* § 219.5(b).
50. *Id.* §§ 219.7(a)-(c).
51. *Id.* § 219.10.
52. National Forest System Land Management Planning, 77 Fed. Reg. 21162, 21240 (April 9, 2012).
53. 36 C.F.R. Parts 218, 219.
54. This collaborative approach is consistent with the directive in 16 U.S.C. § 1604, which requires the Secretary of Agriculture (acting through the Forest Service) to develop land management plans for the NFS in coordination with the land management planning processes of State and local governments.
55. Shared Steward Investment Strategy 2.
56. Shared Stewardship Investment Strategy 3.
57. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 1065 (March 23, 2018); see 16 U.S.C. § 6591c.
58. Shared Stewardship Investment Strategy 20.
59. *Id.*
60. Agreement for Shared Stewardship of California’s Forest and Rangelands Between the State of California and the USDA, Forest Service Pacific Southwest Region 3 (2020).
61. *Id.* at 3-4.
62. *Id.* at 5-6.
63. USDA Forest Service, Decision Memo, Cuckoo Vegetation Management Project 1 (2022).
64. *Id.* at 3-8.
65. *Id.* at 9-12.
66. USDA Forest Service, Decision Notice and Finding of No Significant Impact for the French Meadows Project 1-5 (2018).
67. *Id.* at 6-9.
68. David Edelson & Angel Hertslet, Restoring Forests through Partnership: Lessons Learned from the French Meadows Project (2019).
69. *Id.* at 4.
70. *Id.* at pp. 8-9.
71. See 40 C.F.R. §§ 1500.1, 1500.2, 1502.2.
72. David Edelson & Angel Hertslet, Restoring Forests through Partnership: Lessons Learned from the French Meadows Project 9 (2019); See 40 C.F.R. §§ 1502.20, 1502.21, 1508.28.
73. USDA Forest Service North Yuba Landscape Resilience Project, Purpose and Need and Proposed Action 1 (2021).
74. USDA Forest Service, North Yuba Landscape Resilience Project Scoping Letter 1-2 (2021); USDA Forest Service North Yuba Landscape Resilience Project, Purpose and Need and Proposed Action 3-4 (2021).
75. *Id.*
76. See, e.g., *Blue Mts. Biodiversity Project*, 615 F.3d 1122, 1128-29 (9th Cir. 2010); See, e.g., *Lands Council v. US Forest Service*, 2014 U.S. Dist. LEXIS 1644, at *10-11.
77. 5 U.S.C. § 706.
78. 5 U.S.C. §§ 500 et seq., 702; 28 U.S.C. § 2401(a).
79. See *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011); see also *Lands Council v. US Forest Service*, 2014 U.S. Dist. LEXIS 1644, at *6 (E.D. Wash. Jan. 6, 2014).

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