

TESTIMONY OF NATHANIEL LAWRENCE
NATURAL RESOURCES DEFENSE COUNCIL
ON THE U.S. FOREST SERVICE'S USE OF
CATEGORICAL EXCLUSIONS FROM NEPA

SUBMITTED TO THE SUBCOMMITTEE
ON NATIONAL PARKS, FORESTS & PUBLIC LANDS
OF THE COMMITTEE ON NATURAL RESOURCES
OF THE UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 28, 2007

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 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

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).

“[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

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

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 inquiries 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

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.”

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

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 above¹⁵, actually increase subsequent fire effects. In their letter to President Bush¹⁶, 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

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/noncommercial thinning projects, the intensity of subsequent fire was reduced. Nevertheless, they 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.

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

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

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/specprep/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 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>.

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 need not 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.

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

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.

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 categorical 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.

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.