

The House Natural Resources Committee passed H.R. 2936, the “Resilient Federal Forests Act of 2017,” out of committee on June 27th and the bill is now waiting in the House for debate. The bill would expedite National Environment Policy Act (NEPA) review for U.S. Forest Service projects in order to improve forest management on federal and Tribal lands and reduce fire risks. It may also exempt a wide range of logging activities on the National Forests from the Endangered Species Act.

NEPA requires agencies to consider the environmental impacts of proposed “major federal actions”. If the agency believes that the proposal is a major federal action, then the agency will produce an environmental impact statement (EIS), an in-depth analysis of the environmental consequences and alternatives the proposal. If the agency is unsure whether an action is “major” then it will produce a more concise and less rigorous analysis, an environmental assessment (EA), to determine whether the agency will then produce an EIS or if the activity has no significant impact and further review is not necessary. The agency must provide opportunity for public comment on an environmental impact statement and for many environmental assessments. Finally, certain actions are categorically excluded from environmental analysis.

H.R. 2936 would limit the NEPA process by (1) expanding the categories of Forest Service activities that are excluded from the NEPA analysis, (2) requiring expedited environmental assessments for other Forest Service activities which would limit the depth of the agency’s NEPA analysis (3) limiting the consideration of alternatives for some Forest Service activities to only the proposed action and taking no action at all, and (4) designating forest management plans as a categorical exclusion, therefore not requiring NEPA analysis. The rest of the blog post will unpack and analyze each of these four proposed changes to NEPA review of forest management

(1) Consideration of only two alternatives in EAs and EISs

Title I, Subtitle A of H.R. 2936 weakens the requirement that the Department of Agriculture consider alternatives for forest management activities if the activity falls within one of the following categories:

- Is developed through a collaborative process,
- Is proposed by a resource advisory committee,
- Will occur on lands identified as suitable for timber production, or
- Will occur on lands designated as treatment areas under section 602(b) of the Healthy

Forest Restoration Act of 2003, or covered by a community wildfire protection plan.

A resource advisory committee is a body appointed by the local Regional Forester or Bureau of Land Management state director that includes representatives from the timber industry, recreation industry, and environmental groups (16 U.S.C. 7125). This committee reviews and proposes projects and provides an opportunity for public participation in project development. Under the bill, an EA or EIS analyzing an action that the resource advisory committee had proposed would only require the analysis of one alternative from the proposed action: taking no action.

Forest lands are identified as suitable for timber production if timber production has not already been prohibited on the land (for example, by statute, regulation or order) and if timber production is compatible with the desired conditions for the land, timber harvest can occur without irreversible damage to soil, slope, or watershed conditions, and there is reasonable assurance that the lands can be adequately restocked within five years after final regeneration harvest (36 C.F.R. 219.11). Again, assessments of proposed actions on lands that meet these criteria would only need to consider the proposed action and a no-action alternative.

Treatment areas under the Healthy Forest Restoration Act (16 U.S.C. 6591a) are areas where trees are dying due to insect or disease infestation. In addition, the treatment areas must be at risk for increased mortality within the next 15 years due to insect or disease infestation. And, the forest must be in an area where hazard trees would pose a risk to public health, infrastructure or safety.

A community wildfire protection plan is created for an at-risk community. An at-risk community, as defined under the Healthy Forest Restoration Act (16 U.S.C. 6511), is one that is located within or adjacent to federal lands that are at risk for a wildfire. The protection plan is created through a collaborative process between the federal agency and the local community and the purpose of the plan is to reduce the risk of wildfire and harm to the community.

For management activities that would occur on lands that fall within either of these two categories, the agency only needs to consider the proposed action and a no-action alternative.

(2) Expanded categorical exclusions

Title I, Subtitle B of H.R. 2936 designates a long list of activities as categorical

exclusions—thereby not requiring an environmental assessment or environmental impact statement under NEPA. H.R. 2936 would exclude a forest management activity where the primary purpose is to address insect or disease infestation; reduce hazardous fuel loads; protect municipal water source; maintain, enhance or modify critical habitat for an endangered species to protect it from catastrophic disturbance; increase water yield; or produce timber where the acreage is less than 10,000. The bill allows these categorical exclusions to apply to an area up to 30,000 acres if it is developed through a collaborative process, proposed by a resource advisory committee, or is part of a community wildfire protection plan.

Subtitle B also extends categorical exclusions to salvage operations in response to catastrophic events; forest plan goals for managing and creating early successional forests (the young forest development stage after a disturbance such as fire or clear cutting); roadside projects such as removing hazard trees or salvaging timber for purposes of public health or safety; activities such as removal of trees and vegetation and livestock grazing for the purposes of restoration or prevention of wildfire. These exclusions are all limited to a unit size of 10,000 acres.

The 10,000 acre limit is again a significant increase in the permissible size of a unit that receives a categorical exclusion. Salvage logging projects are currently limited to 250 acres for a categorical exclusion. See 36 CFR 220.6(e)(13). Successional growth is often achieved by clearcutting, which is not currently eligible as a categorical exclusion under any purpose. Under this broad language, clearcutting would be permitted in an area of 15-square-miles (10,000 acres) without requiring consideration of the environmental consequences under a NEPA review, however H.R. 2936 does still require that all activities under the Act must comply with requirements in existing forest plans.

(3) Expedited environmental assessments for salvage logging and reforestation activities

Title II of the bill requires that the Forest Service complete an environmental assessment within 60 days for a salvage logging operation or a reforestation operation after large-scale wildfires and other natural disturbances. This expedited NEPA process for salvage logging builds upon the categorical exclusion allowed for salvage logging operations on 10,000-acre units provided under Title I. In both cases, the NEPA process is weakened to limit the consideration of the environmental impacts of salvage logging.

(4) Forest Management Plans are not Major Federal Action

Title VIII of H.R. 2936 provides that forest management plans are not a major federal action

for the purposes of NEPA. Forest management plans are planning documents created by the Forest Service that set objectives and strategies for managing resources in a specific area. The forest management plan guides future actions taken in the forest unit. The H.R. 2936 provision that forest management plans would not be major federal actions would change the Forest Service's current practice of creating an environmental impact statement when producing or amending a forest management plan. (See FSH 1909.12 Land Management Planning Handbook Chapter 20 - Land Management Plan 21.13 Opportunities for Coordinating Planning and NEPA Activities.)

(5) Changes to litigation

In addition to the significant amendments made to the NEPA review of federal forest lands, H.R. 2936 places several limits on the ability of litigation to challenge the NEPA process. The bill creates an arbitration program which would permit the Secretary to arbitrate certain objections to forest management activities instead of subjecting them to judicial review. Second, the bill would prevent the award of attorneys fees in challenges of forest management activities, Third, H.R. 2936 would prohibit a court from stopping a salvage logging project through a preliminary injunction or a restraining order. Finally, the bill also limits injunctive relief to 60 days, although it allows a renewal of the injunction.

(6) Endangered Species Act exemptions

Finally, the bill also imposes expedited review procedures for consultation for actions covered by the bill pursuant to the National Historic Preservation Act and the Endangered Species Act (ESA). Consultations that are not completed within a ninety-day window are deemed to conclude that the proposed actions are in compliance with those Acts. In addition, a provision of the Act states that all actions covered by the bill are deemed to be "non-discretionary actions" for purposes of the ESA, which may effectively exempt all actions covered by the bill from the ESA. This could be a very serious issue for endangered species whose habitat is on Forest Service lands.

Alexandria Sadler helped draft this blog post.