This is the second of three posts on proposed legislation to address the fire crisis on federal lands (the first post is here). Last post, I talked about why this legislation is essential, and the strengths of the bill that the House passed last Congress. In this post, I'll talk about the parts of the legislation that were controversial and their potential problems. These were the parts of the legislation that sought to narrow the application of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and litigation to projects to reduce fire risk on federal lands.

The basic structure of the legislation was that it allowed agencies, in designated "fireshed management areas" with high fire risks, to identify forest management projects to address fire risk (and other forest management issues). The definition of a "hazardous fuel management activity" was quite broad, including controlled burns, grazing, and mechanical thinning or logging (Section 2(7) of the bill). And in Section 106(2), the bill identifies "fireshed management projects" as incorporating almost any activity one would want to do in a forest, including "hazardous fuel management activities." These fireshed management projects, if located in a designated fireshed management area, receive significant reductions in NEPA review, environmental regulation, and litigation. Of course, given the seriousness of the fire challenge, and the wide range of ecological circumstances across forests, a wide range of tools is necessary. But that very breadth of authority also creates a risk of abuse.

The first major change to environmental regulations in the bill is perhaps the most significant. Section 106(3)(A) of the bill applies to all fireshed management areas, in a uniform manner, the current emergency regulations for NEPA, ESA, and the National Historic Preservation Act (NHPA). The upshot of this provision is that it dramatically reduces (and in many cases might eliminates) NEPA, ESA, or NRPA review or protections for all forest activities in these areas. The provision does not even appear to be limited to fireshed management projects. Its breadth appears unnecessary – it is not clear why emergency provisions should apply to actions that are not related to fire risk. Moreover, by dramatically expanding the scope of emergency exemptions, it risks undermining their utility more broadly. Emergency provisions necessarily require discretion and speed to apply. But if the use of emergency provisions becomes politicized, deployed to advance other key policy goals besides emergencies, there is a real risk that their use will become politically contested, and they will become harder to use when they are truly needed.

The second major change in Section 106(a)(3)(B) allows for fireshed management projects to use a range of preexisting categorical exclusions from NEPA, including

several under the Healthy Forests Restoration Act (HFRA). Categorical exclusions allow for agencies to proceed under a general presumption that an action does not require review under NEPA – the HFRA, enacted in the early 2000s, created a number of categorical exclusions for forest management projects. The intent of this provision appears to allow agencies to pick and choose which of a number of potentially relevant categorical exclusions to use, presumably based on which ones would best advance the agency's goals. This flexibility means this is a powerful tool for agencies.

There are two guardrails on the use of these categorical exclusions. First, their use must be consistent with the underlying statute that created them. Second, they can only be used in locations where the underlying forest plan would allow timber harvesting. (In general, the Forest Service must create forest plans for its lands identifying how it will manage those lands, and the restrictions of those plans are binding on the agency when it does specific projects such as timber sales.)

The third major change in Section 106(b) is a large expansion in the scope of several of the categorical exclusions cross-referenced in 106(a)(3)(B). For instance, the bill would expand the acreage limits for HFRA categorical exclusions, which previously were limited to 3,000 to 4,500 acres per project (varying based on the categorical exclusion), to 10000 acres. It also would expand HFRA to cover all kinds of forests – the law is currently limited to certain types of forests that have higher fire risks.

These expansions to the scope of categorical exclusions were not called for in the most recent wildfire commission report. One can understand the impulse – addressing fire risk is extremely urgent, and requires large-scale action. But it is not clear that these particular expansions – which can produce projects as big as 15 square miles – are needed. And if you do not trust the Forest Service or other federal agencies to only use these exemptions where they are needed for fire risk, but instead to apply them to a much broader range of other projects, expanding these exemptions is a real problem.

The fourth major change is in Section 120, which restricts lawsuits to fireshed management projects in a variety of ways. Some provisions seem to restate current law: Courts may not grant injunctive relief unless the plaintiff demonstrates they are likely to succeed on the merits of their lawsuit. Section 120(a). Other provisions put greater limits on the relief that plaintiffs can obtain. Under Section 120(b), courts are to consider the short-term and long-term effects of granting (or

denying) injunctive relief, which might lead courts to consider the fire risk impacts of enjoining proposed projects. Courts can only enjoin agency decisions if they find that the agency action poses a "risk of proximate and substantial environmental harm" and no other remedy will be effective. Section 120(c)(1)(A). Courts cannot vacate an agency decision they find unlawful (which means completely sending back the agency to start over), but must instead only remand back to the agency for a limited period to fix the relevant legal error. Section 120(c)(1)(B). And agencies can continue to implement portions of their decision that are not affected by the relevant legal error. Section 120(c)(1)(C).

Together, these provisions do significantly limit the availability of injunctive relief to plaintiffs challenging fire management projects. How significantly will likely matter substantially on the judge hearing the case. A judge who wants to rule for environmental plaintiffs likely can make all the relevant findings if they wish; a judge who wishes to rule against them can do so using almost any of these provisions. It probably places some weight on the scale in favor of agencies, but its impacts will be uncertain and variable.

Other litigation changes include a requirement that plaintiffs must have participated in any administrative process and raised their issues with the agency before filing suit (what is called exhaustion), and a very short (120 days after a project is approved) statute of limitations period for challenging agency decisions. The first is not novel – similar exhaustion requirements apply in other contexts as well. Its impact may not be substantial either. Sophisticated plaintiffs will quickly adapt to raise their claims early. Indeed by requiring plaintiffs to exhaust their administrative remedies, the provision might in fact encourage plaintiffs to dump a wide range of claims on agencies in the administrative process, just to keep their options open for a later lawsuit, slowing down administrative processes. Ironically, by dramatically expanding the use of categorical exclusions from NEPA, the legislation would also dramatically reduce the scope of administrative proceedings for projects. And if there are no administrative proceedings, then no exhaustion requirement can apply for plaintiffs, who can proceed straight to litigation.

The statute of limitations requirement is a major change. By shortening the window in which litigation is possible, it will mean agencies get closure much more quickly in terms of knowing whether a lawsuit will be filed. Whether the short statute of limitations also reduces the total volume of litigation is fairly unclear. Again, sophisticated and well-resourced plaintiffs likely can meet the deadlines and will plan ahead. The short statute of limitations does create some complications in its

interaction with other statutes. For instance, the ESA has a sixty-day notice requirement before a plaintiff can file suit, which might make the timeframes tight for plaintiffs to litigate. And a range of NEPA and ESA claims (for instance, reconsultation under NEPA given a change in circumstances) won't arise until after a project has been approved – it is unclear if they are covered by the statute of limitations. If they were, they would largely be foreclosed.

My takeaway on the litigation changes is that their impacts are uncertain but on the whole likely marginal. Again, I understand the motivations. There are plaintiffs who are serial litigators against the Forest Service, challenging any kind of forest management project on ideological grounds. But those groups are well-resourced and sophisticated. They will seek to find favorable judges, and will probably be prepared to meet exhaustion requirements and short statutes of limitations. Perhaps the provision I am most supportive of here is the concept of taking the long- and short-term risks of action and inaction into account – something that has not occurred often enough in this area of law. The risks of inaction when it comes to fire are high, though the risks of action are sometimes high as well. More thoughtful consideration of all of those risks are worthwhile.

Overall, some of the provisions here really some problematic – most importantly the emergency provisions. It's not clear to me what the need is for the dramatic expansion in size of the HFRA and other categorical exclusions. Allowing fire management projects to go through any one of six different categorical exclusions seems like it could lead to unpredictable results, greatly expanding agency authority in potentially problematic ways. The litigation provisions, which have received a lot of attention, may be the least significant of the proposals.

Next post I'll explore whether there is an alternative path we could take on these issues.