

Categorical Exclusions from NEPA for Fire Management Activities and Limited Timber Harvest

Federal Register June 5, 2003 Fire Management Activities

Categorical Exclusions FSH 1909.15 Environmental Policy and Procedures Handbook Chapter 30—Categorical Exclusion From Documentation for Fire Management Activities

The USDA Forest Service and the Department of the Interior have issued the categorical exclusions in their respective NEPA procedures. The categorical exclusions appear in Forest Service Handbook (FSH) 1909.15, Environmental Policy and Procedures, ID 1909.15–2003–1, and Department of the Interior Manual 516 DM, Chapter 2, Appendix 1, Departmental Categorical Exclusions. Reviewers who wish to view the entire chapter 30 of FSH 1909.15 may obtain a copy electronically from the USDA Forest Service directives page on the World Wide Web at <http://www.fs.fed.us/im/directives/>. Reviewers who wish to view the Department of the Interior Manual 516 DM may obtain a copy electronically from the Department of the Interior page at <http://elips.doi.gov/table.cfm>.

Following is the text of the two categorical exclusions:

Hazardous fuels reduction activities using prescribed fire not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. Such activities:

Shall be limited to areas (1) in wildland-urban interface and (2) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface;

Shall be identified through a collaborative framework as described in “A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy Implementation Plan;”

Shall be conducted consistent with agency and Departmental procedures and applicable land and resource management plans;

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[To provide context for understanding the new categorical exclusions that are established as paragraphs 12, 13, and 14 in section 31.2, the introductory text of section 31.2 (identified by italics) follows:]
31.2—Categories of Actions for Which a Project or Case File and Decision Memo Are Required. Routine, proposed actions within any of the following categories may be excluded from documentation in an EIS or an EA; however, a project or case file is required and the decision to proceed must be documented in a decision memo (sec. 32). As a minimum, the project or case file should include any records prepared, such as (1) the names of interested and affected people, groups, and agencies contacted; (2) the determination that no extraordinary circumstances exist; (3) a copy of the decision memo (sec. 30.5 (2)); (4) a list of the people notified of the decision; (5) a copy of the notice required by 36 CFR part 217, or any other notice used to inform interested and affected persons of the decision to proceed with or to implement an action that has been categorically excluded. Maintain a project or case file and prepare a decision memo for routine, proposed actions within any of the following categories.

* * * * *

12. *Harvest of live trees not to exceed 70 acres, requiring no more than 1/2 mile of temporary road construction.* Do not use this category for even-aged regeneration harvest or vegetation type conversion. The proposed action may include incidental removal of trees for landings, skid trails, and road clearing. Examples include but are not limited to:

- a. Removal of individual trees for sawlogs, specialty products, or fuelwood.
- b. Commercial thinning of overstocked stands to achieve the desired stocking level to increase health and vigor.

Shall not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness;

Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and may include the sale of vegetative material if the primary purpose of the activity is hazardous fuels reduction.

Post-fire rehabilitation activities not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds) to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or to repair or replace minor facilities damaged by fire.

Such activities:
Shall be conducted consistent with agency and Departmental procedures and applicable land and resource management plans;

Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and

Shall be completed within three years following a wildland fire.

13. *Salvage of dead and/or dying trees not to exceed 250 acres, requiring no more than 1/2 mile of temporary road construction.* The proposed action may include incidental removal of live or dead trees for landings, skid trails, and road clearing.

Examples include but are not limited to:

a. Harvest of a portion of a stand damaged by a wind or ice event and construction of a short temporary road to access the damaged trees.

b. Harvest of fire damaged trees.

14. *Commercial and non-commercial sanitation harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than 12 miles of temporary road construction, including removal of infested/infected trees and adjacent live uninfested/uninfected trees as determined necessary to control the spread of insects or disease.* The proposed action may include incidental removal of live or dead trees for landings, skid trails, and road clearing. Examples include but are not limited to:

a. Felling and harvest of trees infested with southern pine beetles and immediately adjacent uninfested trees to control expanding spot infestations.

b. Removal and/or destruction of infested trees affected by a new exotic insect or disease, such as emerald ash borer, Asian longhorned beetle, and sudden oak death pathogen.

I. The Origin of the Forest Service Rule Changes

The two new rule changes to the Forest Service Handbook (FSH 1909.15) Environmental Policy and Procedures were set in place by the Bush Administration based upon arbitrary and unsupported claims of over-regulation and failure to accomplish planned projects.

The Natural Resources Defense Council (NRDC) recently released an analysis of the hazardous fuels reduction projects Undersecretary Mark Rey used as a justification for changes to the judicial system proposed under the Healthy Forests Restoration ACT of 2003 (H.R. 1904). Mr. Rey's justification included the following points: (a) court-ordered delays in conducting needed forest restoration justify changes in judicial review; (b) current case law ignores the costs of inaction, and (c) H.R. 1904 would restore balance to litigation. He also appended a list of cases said to demonstrate how litigation imposes unwarranted delays on the Forest Service. NRDC analyzed the 23 litigated

projects reported by the General Accounting Office in an earlier report. NRDC spoke with litigants and their lawyers, reviewed pleadings, and compiled a chart describing interim and permanent injunctions in the cases, their outcomes, project size, and factual backgrounds, and contact information for each. In summary, NRDC found that:

1. Only 2% of all the acreage slated for fuels reduction in fiscal years 2001 and 2002 by the Forest Service was litigated, and only about 1% was subject to any interim injunction.
2. Courts regularly consider the factors that the Rey letter claims they cannot. On a case-by-case basis, they allow the agency to proceed with logging it says is beneficial, even when they have found that logging plans were developed illegally.
3. Mr. Rey's list of supposedly delayed projects falls apart on inspection: nothing he lists as an active fuels reduction project has been delayed at all by court order.

II. FSH 1909.15—Environmental Policy and Procedures Handbook—Extraordinary Circumstances

(Interim Directive August 23, 2002 Federal Register Vol. 67, No. 164)

Chapter 30—Categorical Exclusion From Documentation Policy 30.3

(Redefines Extraordinary Circumstances)

1. A proposed action may be categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA) **only if** there are no extraordinary circumstances related to the proposed action and if:
 - a. The proposed action is within one of the categories in the Department of Agriculture (USDA) NEPA policies and procedures in 7 CFR part 1b, or
 - b. The proposed action is within a category listed in section 31.1b or 31.2.
2. Resource conditions that should be considered in determining whether **extraordinary circumstances*** related to the proposed action warrant further analysis and documentation in an EA or an EIS are:
 - a. Federally listed threatened or endangered species or designated critical habitat, **species proposed for Federal listing or proposed critical habitat**, or **Forest Service sensitive species; (adds two categories)**
 - b. Flood plains, wetlands, or municipal watersheds.
 - c. Congressionally designated areas, such as wilderness, wilderness study

areas, or national recreation areas.

d. Inventoried roadless areas.

e. Research natural areas.

f. American Indian and Alaska Native religious or cultural sites.

g. Archaeological sites, or historic properties or areas.

Note: Steep slopes or highly erosive soils have been eliminated as a category in the new rule.

*Unlike the general interpretation of the previous categorical exemption rule, the mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion. The new rule grants discretion to the responsible official to determine the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

3. Scoping is required on all proposed actions, including those that would appear to be categorically excluded. If the Responsible Official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA (Ch. 40). If the Responsible Official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS (Ch. 20).

III. Categorical Exclusion rules and how these changes can be abused...plus what we can do about it.

Extraordinary Circumstances definition changes cited above increase the power of individual forest service officials to locally determine levels of significance related to proposed actions. The rule changes increase the possibility for abuse of discretion in making determinations regarding lack of significance, or whether there is “no impact” to categories listed under extraordinary circumstances. Since there is no appeal of categorically exempted projects, legal action, public protest, political pressure and media exposure are our only tools to stop abuse.

Categorical Exclusion for Fire Management (June 5, 2003 Fed. Register Notice)

- **Hazardous fuels reduction activities using prescribed fire not to exceed 4500 acres, and mechanical methods (including logging) not to exceed 1000 acres.**

Major concerns: Although the environmental community is generally supportive of the use of prescribed fire and the re-establishment of fire’s role in fire-dependent ecosystems, there still needs to be thoughtful application of this management tool.

The timing and intensity for burns, for vegetation and for wildlife is a key concern. Increased use of spring burns to lessen the risks of fire escaping into unintended areas may lead to increases in large tree mortality, for example. Another concern for the Sierra Nevada is the broad use of fire in lower elevation spotted owl habitat where the owls are largely dependant on ground nesting wood rat populations. Large burns could dramatically reduce the prey base across an owl's home range with one burn event. These concerns and mitigations should be openly discussed in the environmental analysis, and not brushed over in a watered-down decision memo.

Monitoring Action: The threshold for use of a Cat. Ex. is still high in that the decision-maker must assert, and defend with documentation, *that there is no impact*. Uncertainty or the possibility of impacts works against the use (or abuse) of the Cat. Ex. option. Knowing the key issues on the land proposed for the Cat. Ex. will be critical to challenging forest service abuse. Treatment intensity, spatial and temporal relationships to other actions, and species vulnerability are key points for activists to consider in commenting on these projects.

- **Treatments limited to (1) wildland-urban interface and (2) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface.**

Major concerns: These categories encompass the vast majority of western forest landscapes, although the “Healthy Forest” Initiative has included many landscapes and fire regimes that burn with long intervals, in stand-replacing fires, naturally. An example would be rocky mountain Lodgepole pine forests.

Monitoring action: Know the fire history and fire regime for the forest where you monitor projects. Conservation groups should continue to argue that the bulk of the fuels reduction work be conducted in the areas nearest communities and not in the wildlands, based upon highest risk and limited funding. We should also insist that specific residual fuel standards be met (and not exceeded) for various stand conditions. Standards such as height-to-live-crown, flame length, and rate of spread focus on the reduction of surface and ladder fuels, the key components of fire spread. Request the fire and fuel analysis disclose the level of treatment necessary to successfully reduce unacceptable fire behavior.

- **Treatment areas are supposed to be identified through a “collaborative framework” in the Western Governor’s 10-Year Comprehensive Strategy. See website located at <http://www.westgov.org>**

Major concerns: The Forest Service won’t want to collaborate with conservation groups because it empowers them in the planning process. Dictionary definition of collaborate: to work together.

Monitoring action: Demand participation and publicly challenge the Forest Service when environmental concerns are ignored. Raise the lack of collaboration and the failure of the Forest Service to involve environmental groups in planning, analysis, and implementation and monitoring, when Cat. Ex. projects are challenged.

The three guiding principles of the Western Governor's 10-year Comprehensive Strategy are:

1. Priority setting that emphasizes the protection of communities and other high-priority watersheds at-risk.
2. Collaboration among governments and *broadly representative stakeholders*.
3. Accountability through performance measures and monitoring of results.

- **Must be consistent with agency procedures (regulations, manuals) and management plans (existing forest plan).**

Major concerns: The forest service will move quickly to approve projects that lack adequate cumulative effects analysis for at-risk plant and wildlife species, and they will ignore cumulative watershed effects analysis.

Monitoring actions: Request that a cumulative impacts analysis is completed for all past, current and reasonably foreseeable future actions on each project. NEPA 40 C.F.R. § 1508.7 requires this analysis for all resources, including sensitive plant and wildlife species, watershed impacts, fire and fuels, management indicator species, impacts to old forest vegetation, soils and other resources. If there is widespread abuse you must have standing on specific issues to challenge these projects in court.

- **Shall not be conducted in wilderness or impair suitability of wilderness study areas.**

Major concerns: WSA's are roadless by definition. Roadless Area logging via existing or temporary roads near roadless boundaries or helicopter logging that will increase fire danger, are possible under a misuse of the Cat. Ex. rule. The forest service decision-maker could "find" that this activity does not mar the roadless area values.

Monitoring action: The forest service has proposed several helicopter logging salvage sales in roadless and proposed wilderness areas before the Cat. Ex. rule change occurred. There is no guarantee that this type of action won't impact future wilderness designations or lead to unacceptable environmental outcomes as seen in current salvage logging proposals, with enormous residual fuel loads, in the Sierra Nevada. Track projects closely that cut up an analysis are in to <1000-acre treatment areas to avoid full NEPA analysis.

Categorical Exclusion for Timber Harvest (July 29, 2003 Fed. Register Notice)

- This exclusion for timber harvest allows the harvest of live trees not to exceed 70 acres with no more than a ½ mile of temporary road. This new NEPA exclusion rule also allows salvage harvest up to 250 acres, and the incidental removal of any size trees, alive or dead, for landings, skid trails and roads.

Major concern: This exclusion from NEPA allows for the removal of insect, disease, windthrow, or ice-damaged trees, commercial sanitation (the plucking out of large snags) and fire salvage anywhere on the landscape including old growth forests where such structures and processes are often a key part of normal (and beneficial) ecosystem function.

Monitoring action: The same applicable regulations apply to this categorical exclusion, including cumulative effects analysis, cumulative watershed effects analysis, the test for significance, extraordinary circumstances, and questions of uncertainty that override the forest service's ability to use this expedited NEPA pathway. Understanding snag levels and the importance of certain processes such as the use of snags by cavity nesting birds during insect outbreaks or the opportunistic use of fire-killed trees by wildlife, will help the forest monitors determine if the forest service proposal is appropriate or a short cut to logging ecologically important trees without proper analysis of potential impacts.