

To: Interested Persons
From: Mike Anderson, The Wilderness Society
Re: Westerman bill H.R. 2936 summary and analysis
Date: June 23, 2017

Following is a partial summary and analysis of H.R. 2936, the “Resilient Federal Forests Act of 2017,” sponsored by Representative Westerman. A discussion draft bill was released by the House Natural Resources Committee on June 7 and was the subject of a legislative hearing by the Federal Lands Subcommittee on June 15. The text of H.R. 2936 was released on June 20, and is scheduled to be marked up by the House Natural Resources Committee on June 27. A similar version of the legislation, H.R. 2647, passed the House during the last session of Congress in 2015.

The bill is divided into ten different titles, including a range of forest management “streamlining” and funding provisions aimed at increasing timber production in the national forests and other federal lands. This memo addresses portions of the bill that are of utmost importance to The Wilderness Society.

A. NEPA Rollbacks

Title I would create numerous new “categorical exclusions” (CE) from the public participation and environmental analysis requirements of the National Environmental Policy Act (NEPA). The CEs would apply to both Forest Service and BLM lands. *Note: the sizes of the new CEs proposed in the 2017 Westerman bill are twice as large as those in the 2015 bill.*

First, a CE would be available for six types of forest management activities whose “primary purpose” is either to (1) address an insect or disease infestation, (2) reduce hazardous fuels, (3) protect drinking water supply, (4) protect critical habitat from wildfire threat, (5) increase water yield, or (6) “produce timber.” Sec. 102(a), emphasis added. The CE activities could be up to 10,000 acres in size, but the size limit would triple to 30,000 acres for projects that are either developed through a “collaborative process,” proposed by a local resource advisory committee, or covered by a community wildfire protection plan. Sec. 102(b). *Notes:*

(1) The 10,000- to 30,000-acre CE for timber-producing projects (which was not in the discussion draft or in the 2015 Westerman bill) is vastly larger than the 70-acre CE currently allowed for national forest logging projects -- see 36 CFR 220.6(e)(12).
(2) The 2014 Farm Bill created a CE for collaboratively-developed insect and disease treatment projects up to 3,000 acres in size within the wildland urban interface or specified high-risk forest areas that preserve old-growth forests and focus on scientifically sound ecological restoration. H.R. 2936 would effectively repeal the Farm Bill CE by authorizing a ten-fold increase in the maximum size of projects and eliminating any requirement to protect old-growth forests or focus on scientifically sound ecological restoration.

Second, the bill would create a CE for salvage logging projects up to 10,000 acres in size. Sec. 112(b). *Note: this is 40 times larger than the current 250-acre size limitation for salvage logging CEs, which was adopted by the Bush Administration – see 36 CFR 220.6(e)(13).* The bill would allow a Regional Forester to waive the stream buffer requirements in forest plans for salvage CE projects. Sec. 112(d).

A third CE would be created for forest management projects up to 10,000 acres in size whose primary purpose is to create early successional habitat for wildlife “and other purposes.” Sec. 113. *Note: creation of early successional habitat is commonly accomplished by clearcutting. The breadth of this language suggests that CEs for up to 10,000-acre clearcutting projects would be permissible for any purpose. Current Forest Service NEPA policy does not allow the use of CEs for clearcutting, regardless of purpose. Conceivably, this CE could authorize 15-square-mile clearcuts with no consideration of environmental impacts on scenery, water quality, etc.*

Fourth, the bill would categorically exclude eight different types of forest management activities up to 10,000 acres when their “primary purpose ... is to improve or restore such lands or reduce the risk of wildfire...” Sec. 115(b). For example, the bill would exempt from NEPA analysis the “use of herbicides.” Sec. 115(b)(2)(H). *Note: This new CE apparently would override current Forest Service NEPA regulations that require the agency to prepare a full environmental impact statement prior to aerial spraying of herbicides -- see 36 CFR 220.5(a)(1). Potentially, the bill would allow herbicide spraying on over 15 square miles near communities in the wildland-urban interface, with minimal public notification and no analysis by the Forest Service of the effects on human health and safety. The other seven types of activities covered by this 10,000-acre CE would include removing invasive species, reducing hazardous fuels, and creating fuel breaks.*

H.R. 2936 swings another axe at NEPA by giving the Forest Service a four-month deadline to eliminate current environmental safeguards in the agency’s NEPA regulations for potential wilderness areas, imperiled wildlife and plant species, and other “extraordinary circumstances.” Sec. 903(a). The effect would be to allow categorical exclusions (including but not limited to the new CEs created by Title I) to be used even when potential wilderness areas and at-risk species are affected. This section also eliminates a requirement (adopted under the Bush Administration) to prepare an environmental impact statement whenever a project would substantially alter a potential wilderness area. Sec. 903(b). *Note: This section was not part of the 2015 Westerman bill.*

Title I would also eliminate the need to consider alternatives to a proposed forest management activity in an environmental assessment (EA) or environmental impact statement (EIS) if the activity was collaboratively developed, proposed by a Resource Advisory Committee, or covered by a Community Wildfire Protection Plan. Sec. 101. This provision would apply to both Forest Service and BLM lands. *Note: The 2014 Farm Bill provided similar NEPA streamlining authority for insect and disease treatment projects; however, compared to the Farm Bill, the Westerman bill would reduce the*

number of required action alternatives from two to one (the proposed action) and it would not include a requirement to protect old-growth forests.

Title II of the bill seeks to expedite the NEPA process for salvage logging and reforestation activities after large-scale wildfires or other natural disturbances by requiring the Forest Service to complete any environmental assessment within two months after the wildfire, “notwithstanding any other provision of law.” Sec. 201(a). Expedited salvage logging could occur in inventoried roadless areas so long as the local forest plan allows reforestation of the area. Sec. 204 (2). Furthermore, by barring the use of preliminary injunctions or temporary restraining orders, the bill severely limits a court’s ability to halt a salvage logging project. Sec. 203. *Note: This NEPA streamlining title for salvage logging and reforestation is in addition to the salvage logging CE provided in Section 103 for salvage projects up to 10,000 acres. Under either authority, rushing the NEPA process for post-fire salvage logging could have disastrous environmental impacts on the fragile burned landscape. Even reforestation can have long-term adverse results, such as creating highly flammable tree plantations, if potential environmental effects are not well considered.*

Topping off H.R. 2936’s evisceration of NEPA on national forest lands, the bill entirely exempts Forest Service planning from NEPA compliance by providing that forest planning “shall not be considered a major federal action” for the purposes of NEPA’s public involvement and environmental review requirements. Sec. 801. *This provision directly contradicts the National Forest Management Act of 1976, which requires the Forest Service to comply with NEPA when it develops or revises forest plans – see 16 USC 1604(g)(1).*

B. Limitations on Judicial Review

H.R. 2936 runs roughshod over judicial review in several ways by eliminating or constraining the ability of citizens to challenge federal forest management decisions in court.

First, it replaces judicial review of many forest management activities on both national forest and BLM lands with a binding arbitration process. The bill would authorize the Forest Service to designate up to 90 projects per year (10 projects in each of the 9 Forest Service regions) for a “discretionary arbitration pilot program.” Sec. 321(a)(3). The bill would require the agency-appointed arbitrator to choose between the Forest Service’s proposed action and another party’s proposal. Sec. 321(d). The chosen project would not be subject to judicial review, even if it clearly violated the law.

Second, for all other forest management activities, the bill would prevent plaintiffs from recovering attorneys’ fees, even if they are successful in court. Sec. 311.

Third, the bill would alter the judicial review process regarding the balance of harms in considering injunctive relief by requiring a court to balance the short- and long-term impacts of undertaking the forest management activity with the impacts of not

undertaking the activity. Sec. 312. *Note: The Healthy Forest Restoration Act has essentially the same requirement for HFRA's authorized hazardous fuels reduction projects.*

Fourth, as discussed above, Title II of the bill prohibits a court from stopping a salvage logging project through a preliminary injunction or temporary restraining order. Sec. 203.

Taken together, the bill's restrictions on judicial review amount to a serious affront to the rule of law and our nation's system of checks and balances. Not since the days of the 1995 "Logging without Laws" Salvage Rider has Congress considered such a controversial infringement of citizens' ability to hold public land management decisions legally accountable.

C. Weakening the Endangered Species Act

H.R. 2936 significantly weakens the interagency consultation requirements of the Endangered Species Act (ESA).

First, the bill exempts the Forest Service or BLM from consulting with the U.S. Fish and Wildlife Service regarding a forest management activity if the Forest Service or BLM determines that its action is not likely to adversely affect an endangered or threatened species or their designated critical habitat. Sec. 123(a). For any forest management activity that is subject to consultation, the bill imposes a 90-day deadline to conclude the consultation, after which the activity is legislatively deemed to be in compliance with the ESA. Sec. 123(b).

Second, the bill broadens the "self-consultation" process provided in Section 123(a) to apply potentially to all federal agencies. The bill gives the U.S. Wildlife Service a 90-day deadline to revise its ESA consultation regulations to allow federal agencies to enter into "alternative consultation agreements" whereby agencies like the Forest Service could avoid any interagency consultation by determining that their actions are not likely to adversely affect listed species or critical habitat. Sec. 902.

Furthermore, the bill broadly exempts forest management activities from compliance with the ESA by stipulating that any such activity "shall be considered a non-discretionary action." Sec. 124; see also subsection (3) at end of Sec. 811(a) and Sec. 812. The purpose and full implications of this provision – which was not in the discussion draft bill – are not entirely clear, but suggest that forest plans would also be exempted from compliance with the ESA under the bill.

In addition, the bill amends the NFMA in order to exempt the Forest Service from regulations implementing the ESA that require re-initiation of consultation on land and resource management plans in response to a number of changed circumstances that occur after the plan is adopted. Such changed circumstances include new species listings or critical habitat designations, or cases where the amount of "take" (i.e. harm to listed species) specified under the forest plan is exceeded. Sec. 811(a). A similar ESA

exemption would also apply to the Bureau of Land Management's land use plans. Sec. 812. *These exemptions would apply to any aspect of a Forest Service or BLM plan, not just those pertaining to forest management activities.*

D. Undermining Protection of Roadless Areas

The bill includes convoluted language about roadless area management that could be interpreted to eliminate current regulatory protection of Inventoried Roadless Areas under the national Roadless Area Conservation Rule and the Idaho and Colorado roadless rules. The bill states that the bill's authorities do not apply to lands "that are located within a national or State-specific inventoried roadless area ... unless (A) the forest management activity to be carried out under such authority is consistent with the forest plan applicable to the area; or (B) the Secretary concerned determines the activity is allowed under the applicable roadless rule governing such lands." Sec. 3(2), emphasis added. *The use of the word "or" instead of "and" indicates that any forest management activities that are consistent with local forest plans would be allowed, even if those activities are prohibited by the national or state-specific roadless rules.*

At the time the Roadless Rule was adopted in 2001, forest plans allowed commercial logging on approximately 9 million acres of roadless areas and road construction on more than 34 million acres. Since very few forest plans have been updated since then to incorporate the Roadless Rule's prohibitions on road construction and commercial logging, one could argue that logging and road building would be allowed in millions of acres of roadless areas because those activities are "consistent with the forest plan applicable to the area."

E. Re-directing Funds from Environmental Restoration to Logging

Title IV would make several changes in the Secure Rural Schools Title II program that aim to shift the program's emphasis and funding from environmental restoration to timber production. For example, the bill would repeal the existing requirement to dedicate at least 50 percent of the Title II funding to stream and watershed restoration or road maintenance or removal. Sec. 401(b). Instead, the bill would require that at least 50 percent of the Title II funds in each county be used exclusively for stewardship projects that "include the sale of timber or other forest products." *Id.* The bill would also establish a "self-sustaining RAC program," in which the purposes of the Title II projects would be changed from the "protection, restoration, and enhancement of fish and wildlife habitat" under the current law to "accomplish forest management objectives" and "generate receipts." Sec. 403(a).

The bill would also shrink the size of the RACs from 15 members to just 9 members, change the approval process from super-majority to simple majority rule, and limit RAC membership to local residents. Sec. 402(b), (c) and (d). *The combination of requiring Title II funds to be used for timber projects, reducing the size and geographic diversity of the RACs that make recommendations on use of Title II funds, and stripping existing*

protections that ensure decisions reflect the diversity of stakeholders within a RAC would be problematic and would undermine the collaborative nature of RACs.

F. Adding Procedural Hoops to Road Decommissioning

The bill would require Forest Service land managers to consult with local county commissioners and solicit possible alternatives prior to decommissioning any closed or primitive road that is located in a “designated high fire prone area” of the national forests. Sec. 904(a). Local managers would also be required to obtain the advance approval of the Regional Forester in order to decommission a road. Sec. 904(b).

G. Removing Protection of Pacific Northwest Old-Growth Forests

The bill would prohibit the Forest Service from continuing to apply the “Eastside Screens” to timber sales. Sec. 905. The agency adopted the Eastside Screens in the early 1990s to protect old-growth forests east of the Cascade Mountains in Oregon and Washington. The Eastside Screens include a general prohibition on cutting trees that are at least 21 inches in diameter. *The effect of this provision would be to make many eastside old-growth ponderosa pine forests immediately vulnerable to logging.*

Furthermore, the bill would repeal the “Survey and Manage” requirements of the Northwest Forest Plan, which provide protection for rare species that inhabit mature and old-growth forests in western Washington, western Oregon, and northern California. Sec. 908.

H. Threat to Cascade-Siskiyou National Monument

H.R. 2936 would threaten the Cascade-Siskiyou National Monument and other protected BLM lands in western Oregon. Newly-added Section 913 declares, “All of the public land managed by the BLM in [western Oregon] shall hereafter be managed” pursuant to Title I of the Oregon and California Lands Act of 1937, which directs the BLM to manage the western Oregon O&C lands for “permanent forest production.” This language could be interpreted as a statutory repeal of the Cascade-Siskiyou National Monument, which was designated by Presidents Clinton and Obama through the Antiquities Act.