August 26, 2019

NEPA Services Group
c/o Amy Barker
USDA Forest Service
125 South State Street, Suite 1705
Salt Lake City, UT 84138

Re: Forest Service Proposed Rule: National Environmental Policy Act (FS-2019-0010); RIN 0596–AD31

Dear Ms. Barker:

The American Cultural Resources Association (ACRA) appreciates the opportunity to comment on the Forest Service proposed rule revising its National Environmental Policy Act ("NEPA") regulations. ACRA is concerned with the changes proposed by the Forest Service because they would: (1) increase the risk that other laws required to be considered when federal funds, approval, or permits are at issue will not be considered as required; (2) decrease the opportunities for public input on and scrutiny of the Forest Service's decisions under NEPA; and (3) reduce the level of environmental review of many proposed actions involving Forest Service land.

ACRA is the national trade association supporting and promoting the cultural resource management (CRM) industry. Our member firms undertake much of the legally-mandated CRM studies and investigations in the United States. Many of our members serve as consultants to project applicants and federal agencies subject to NEPA review (including the Forest Service) and advise their clients on how to achieve a responsible balance between development needs and preservation values.

This proposed rule is of interest to ACRA because part of the "human environment" that must be considered under NEPA includes cultural resources. 40 C.F.R. §§ 1508.8 (Council on Environmental Quality ("CEQ") definition of "effects"), 1508.14 (CEQ definition of "human environment"). The Forest Service asserts that its goal is to increase efficiency, which is needed due to the increasing amount of the Forest Service budget being spent on wildfire suppression and the backlog of special use permit applications. 84 Fed. Reg. 27544, 27544 (proposed June 13, 2019). ACRA supports efficiency, and in fact is committed to working with agencies to streamline and improve the permitting process. However, efficiency should not come at the price of approving proposed actions without adequate consideration of how those could affect the environment or exclude the public from commenting on important decisions.

I. There is a Risk and Likelihood that the Review Required by Section 106 of the National Historic Preservation Act Will Not Occur

There are some overlaps in the cultural resources that must be considered under NEPA and under the National Historic Preservation Act ("NHPA"). While actions categorically excluded under NEPA are not exempt from Section 106 of the NHPA and its implementing regulations (36 CFR

Part 800), or other required processes, ACRA is concerned that the practical effect of the proposed rule would be to allow certain proposed actions to escape review under Section 106 as well.

The proposed changes would not only decrease the number of environmental reviews, but also decrease the opportunities for public involvement in the process. The NHPA and NEPA specifically involve members of the public (which often includes non-federal tribes and other descendant communities) because they frequently have information or knowledge about cultural resources which may not have been identified, or the public may have knowledge about significant effects of the proposed actions on such resources.

II. Tribal Consultation

The Forest Service's determination that the proposed rule would not significantly affect Tribes is incorrect and without substantiation. The Forest Service states that it is "sending letters inviting federally recognized Tribes and Alaska Native Corporations to begin consultation on the proposed rule." 84 Fed. Reg. 27544, 27550. The Forest Service additionally states:

> Pursuant to Executive Order 13175, the Agency has assessed the impact of this proposed rule on Indian tribal governments and has determined that the proposed rule would not significantly or uniquely affect communities of Indian tribal governments. The proposed rule deals with administrative procedures for complying with the requirements of the National Environmental Policy Act and, as such, has no direct effect on the occupancy and use of NFS land.

Id. Executive Order 13175 requires early consultation when a federal policy has "tribal implications," defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." Exec. Order No. 13175 §§ 1(a), 5(b).

The Forest Service is incorrect that the proposed NEPA rule purely relates to "administrative" procedures – the NEPA process provides an opportunity for members of the public, including both recognized and unrecognized Tribes, to help project proponents ensure avoidance of detrimental impacts on tribal and other cultural resources. The Forest Service has previously acknowledged these close linkages between agency actions and Indian concerns. For example, in 2015 the Forest Service released "Tribal Connections," an interactive map "designed to illustrate the relationship between lands administered by the Forest Service, Indian lands, and lands ceded to the United States[.]"[1] Tribes' traditional and cultural relationships to Forest Service land were also recognized in the Food Conservation and Energy Act of 2008, one of the purposes of which was "to authorize the Secretary of Agriculture to ensure access to National Forest System land, to the maximum extent practicable, by Indians and Indian tribes for traditional and cultural purposes[.]" 25 U.S.C. § 3051(3). Executive Order 13007 similarly requires federal land managing agencies to "accommodate access to and

[1] The Tribal Connections map can be viewed here: https://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32

ceremonial use of Indian sacred sites by Indian religious practitioners" and to "avoid adversely affecting the physical integrity of such sacred sites." Exec. Order No. 13007 § 1(a).

Additionally, there is no requirement that the regulation "uniquely" affect Tribes, as the Forest Service States. Furthermore, the Forest Service has numerous gathering, consultation, and commenting protocols and programmatic agreements with Tribes that are in direct conflict with the proposed rule. Consultation with Tribes after the acceptance of the proposed rule change is not consultation but notification. The consultation process should have begun at an early phase of the proposed change. ACRA encourages the Forest Service to engage in meaningful consultation with Tribes to determine how this rule would affect tribal interests on Forest Service land before proceeding.

III. The Proposed Rule Would Eliminate Important Environmental Reviews

A. The Proposed Regulations Governing Categorical Exclusions Would Result in the Approval of Many Proposed Actions with Little or No Environmental Review

The proposed rule would revise or abandon several existing categorical exclusions and add several new categorical exclusions.[2] The regulations would also allow a proposed action to be categorically excluded by relying on multiple categorical exclusions "when a single category does not cover all aspects of the proposed action." 84 Fed. Reg. 27544, 27554. Although the Forest Service states that this approach "shall not be used to avoid any express constraints or limiting factors that apply to a particular CE[,]" the reality of this change is that it could lead to the approval of large-scale projects which exceed the scope and intent of the applicable categorical exclusion. 84 Fed. Reg. 27544, 27546. The projects' individual components may not "individually or cumulatively have a significant effect on the human environment" but, when considered together, could have significant effects. 40 C.F.R § 1508.4.

The proposed changes to the provisions governing categorical exclusions are troubling, especially when considered alongside the other changes discussed below – for example, those that would decrease the avenues for public input during the Forest Service's NEPA process.

B. The Backstop for Categorical Exclusions – Extraordinary Circumstances – Would Be Weakened

Under the current and proposed regulations, certain resource conditions should be considered in determining whether extraordinary circumstances "related to a proposed action warrant analysis and documentation in an EA or EIS" – if extraordinary circumstances exist, the proposed action should not be categorically excluded. 36 C.F.R. § 220.6(b). The analysis of extraordinary circumstances

[2] A categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency…and for which, therefore, neither an environmental assessment [("EA")] nor an environmental impact statement [("EIS")] is required." 40 C.F.R. § 1508.4.

provides a critical backstop by ensuring that actions that could have significant effects on the environment are not categorically excluded from further review.

The proposed rule would make several problematic changes to what Forest Service officials look to in deciding whether extraordinary circumstances exist. First, the rule would remove "sensitive species" as a resource condition. The Forest Service states in the Federal Register notice that its "2012 planning regulations marked a transition away from the term…and retention of the term in the NEPA procedures is therefore unnecessary." 84. Fed. Reg. 27544, 27546. The Forest Service also argues that because all projects must comply with applicable land management plans, it is not necessary to include "sensitive species" in the list of resource conditions. The Forest Service should explain whether all land management plans provide protections for these species. Even if this is the case, removing this category as a consideration in whether extraordinary circumstances are present would lead to actions being approved without additional review – therefore decreasing the public's awareness of actions that could affect these species. The explanation provided for this change does not adequately explain or ensure that sensitive species would be adequately considered.

Second, the proposed rule would change the degree of effect needed for certain resource conditions to constitute extraordinary circumstances, which would make the Forest Service's regulations inconsistent with CEQ's regulations. The current regulation provides: "[i]t is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist." 36 C.F.R. § 220.6(b)(2). The proposed change would require the official to determine that "there is a likelihood of *substantial adverse effects*." 84 Fed. Reg. 27544, 27554 (emphasis added). The Forest Service describes this change as "clarify[ing] the degree of effects threshold for determining whether extraordinary circumstances exist." 84 Fed. Reg. 27544, 27546. Similarly, in a webinar hosted by the Forest Service on these proposed changes, the agency explained that this change aimed to clearly state the standard.[3] But there is no need to include this language. The standard is clearly established by the regulations describing when the use of categorical exclusions is appropriate. 40 C.F.R. § 1508.4 ("*Categorical exclusion* means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency[.]"). Thus, if a resource condition listed in the regulations is present, and that condition would have a significant effect on the human environment, the Forest Service should determine that "extraordinary circumstances" exist. The introduction of a new standard – substantial adverse effects – at a minimum creates confusion and at most conflicts with and violates the CEQ's regulations.

The new regulation would also provide that "[t]he responsible official may consider whether long-term beneficial effects outweigh short-term adverse effects in making this determination." 84 Fed. Reg. 27544, 27554. As stated above with respect to the timber harvest categorical exclusion, this balancing is directly contrary to CEQ regulations, which provide that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27. These proposed changes to what constitute extraordinary circumstances would remove important

[3] The Forest Service's informational webinar is available here: https://www.fs.fed.us/emc/nepa/revisions/index.shtml

limitations on the Forest Service's determinations to categorically exclude certain proposed actions from further NEPA review.

C. Determinations of NEPA Adequacy Could Eliminate Important Environmental Reviews

The proposed revisions would adopt determinations of NEPA adequacy, which would allow the Forest Service to rely on a previous NEPA analysis to satisfy a new NEPA process. 84 Fed. Reg. 27544, 27553. Although there are restrictions on when determinations of NEPA adequacy could be used, the failure to conduct new, independent NEPA review of an action could result in the approval of actions without sufficient study or public input. At a minimum, there should be some sort of time constraint on this action. A NEPA analysis conducted in 1990 will likely be inadequate to address an environmental issue in 2020. Additionally, there may be cultural resources that were not evaluated previously that are now in need of documentation and evaluation (*e.g.*, buildings and structures now over 50 years of age, or sensitive ethnobotanical species now listed but formerly a species of no concern).

D. Condition-Based Management Could Similarly Allow the Forest Service to Act Without Environmental Review

The adoption of condition-based management would allow Forest Service to conduct certain actions when they encounter a particular condition without conducting site-specific analysis. Under this provision, the Forest Service would not be required to consider alternatives or provide an opportunity for public input or comment. 84 Fed. Reg. 27544, 27553.

E. Proposed Changes to Actions Normally Requiring EISs Are Problematic

A change to the list of proposed actions normally requiring the preparation of an Environmental Impact Statement ("EIS") includes mining operations "that involve surface disturbance on greater than 640 acres over the life of the proposed action." 84 Fed. Reg. 27544, 27558. This is a change from the current regulation, which provides that an EIS would ordinarily be required if "[a]pproving a plan of operations for a mine that would cause a considerable surface disturbance in a potential wilderness area." 36 C.F.R. 220.5(a)(2)(iii). Not only does the proposed change mean that mining on less than 640 acres of land would not normally require an EIS; the change also removes potential wilderness areas and harvesting timber in inventoried roadless areas from the list. 84 Fed. Reg. 27544, 27558. The Forest Service has not provided sufficient reasoning to support this change which has the potential to affect cultural landscapes, traditional landscapes, archaeological and other cultural resources. The size of the project is irrelevant to the surficial effects as well as long-term reclamation and remediation efforts.

IV. The Rule Removes Many Opportunities for Public Input

One of the more concerning aspects of the proposed rule is that it would eliminate public scoping for all proposed actions except those that require EISs. 84 Fed. Reg. 27544, 27553. The proposal would allow Forest Service personnel to decide in each particular case whether there should be additional public involvement. 84 Fed. Reg. 27544, 27553. The Forest Service argues that allowing

decisionmakers to exercise discretion in this manner "will allow the Agency to concentrate resources on projects that are potentially more complex or have greater public interest." 84 Fed. Reg. 27544, 27551.

The result of this change is that the only way the public will be aware of actions subject to categorical exclusions is in the Forest Service's Schedule of Proposed Actions ("SOPA") that is published four times each year. Actions that might warrant an EA or EIS might not be identified if the public is not involved in the process, and the SOPA does not provide a formal process through which the public has the right to comment. Additionally, in removing a large number of decisions from the formal process, even if many of those proposed actions are correctly being categorically excluded from additional NEPA review, the Forest Service is likewise removing an avenue for the public to participate and ensure the Forest Service is proceeding in accordance with applicable laws and regulations.[4]

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Many of the changes proposed in this rule could lead to the approval of proposed actions through categorical exclusions when such projects should have had further review. Absent public input – which the rule similarly limits – the public will be at a loss to provide suggestions for less harmful alternatives and denied the "no action" alternative. ACRA supports the Forest Service's encouragement of "early and ongoing engagement with the public and other external partners (such as other Federal agencies, Tribes, States, and local governments) that is not limited to a single NEPA process." 84 Fed. Reg. 27544, 27545-46. This rule runs counter to that goal.

Thank you for the opportunity to comment. Please do not hesitate to contact us with any questions on these comments.

Sincerely,

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[4] The fact that certain proposed actions are governed by other statutes, such as the Healthy Forests Restoration Act of 2003, does not alter the conclusion that the proposed rule would remove the public's ability to comment on many proposed actions.