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August 25, 2019

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

RE: Comments on the U.S. Forest Service's Proposed Rule to revise its National Environmental Policy Act (NEPA) regulations. (Docket Number FS-2019-0010

Dear Ms. Barker,

Please accept the following comments from Trout Unlimited regarding the United States Forest Service's proposed rule to revise its National Environmental Policy Act (NEPA) procedures.

Trout Unlimited is a national conservation organization with more than 300,000 members and supporters who share in a mission to conserve, protect and restore North America's coldwater fisheries and their watersheds. Public lands are incredibly valuable to Trout Unlimited and our members. Not only do they offer world-class angling opportunities, but 70% of the remaining habitat for native trout in the West is found on public lands.

Trout Unlimited's conservation work involving public lands is multi-faceted. We are participants in the NEPA process as a member of the public, as well as a partner with the Forest Service on restoration projects that require NEPA review. In this way, we have a unique perspective having been on both sides of the NEPA coin.

NEPA is one of America's bedrock environmental laws, providing meaningful opportunities for the public to be involved in the management of their public lands and ensuring that agency decisions are fully informed and grounded in the best available scientific information. Trout Unlimited supports efforts to increase the efficiency of decision-making and environmental review. However, efficiency should not come at the expense of public participation, transparency, or rigorous scientific analysis that ensures fully-informed decisions. We strongly recommend that any revisions of the Forest Service's NEPA requirements adhere to these principles.

Creating efficient processes is about more than revising regulations. Without sufficient funding and qualified resource professionals, streamlining NEPA is just a band-aid on a bigger problem. Since 1995, the Forest Service has experienced nearly a 40% decline in non-fire personnel. That means fewer biologists, fewer engineers, fewer hydrologists, fewer trail crews, less community involvement and fewer professionals to conduct timely, thorough NEPA procedures. This is an issue that Congress and the Administration must address to not only ensure healthier forests, but a healthier Forest Service.

Trout Unlimited appreciates the Forest Service's desire to streamline decisions. But fast decisions are not always good ones. NEPA is the primary vehicle the agency uses to communicate with people about the management of *their* public lands. Unfortunately, the proposed rules undercut collaboration with

A mission to conserve, protect, & restore North America's coldwater fisheries and their watersheds.

National Office: 1777 N Kent St., Suite 100, Arlington, VA 22209
T: (703) 284-9406 F: (703) 284-9400 smoyer@tu.org www.tu.org

communities of place and interest, for example, by severely curtailing scoping. They threaten fish and wildlife species by eliminating consideration for existing “sensitive species” and give short shrift to core elements of the agency’s planning regulations, such as “species of conservation concern”.

The proposed rule dangerously blurs the distinction between timber harvest and ecological or watershed restoration. While at times hazardous fuels treatments can be a useful tool to help meet restoration objectives, timber harvest and restoration are not synonymous. Many timber sales occurring on national forests fall within the proposed restoration categorical exclusion (CE) allowance of 4,200 acres for timber harvest and the very act of removing timber can be construed as “wildfire risk reduction”, thereby qualifying for the CE. This proposal would allow all of that to proceed, thereby categorically excluding much of the agency’s timber program. While there are times that categorical exclusions for hazardous fuels treatment might be appropriate, certainly there must be times when it is not.

The Forest Service has made tremendous strides in fostering an ethos of collaborative stewardship across the agency. We believe the Forest Service to be among the most effective of the federal agencies in working with organizations such as Trout Unlimited and local communities to help restore our public lands and waters. We are concerned this proposal could jeopardize many years of progress by overly insulating the agency from the scrutiny of its citizen-owners. We offer the specific suggestions below to help avoid that catastrophic outcome.

Collaboration

Collaboration is one of the most important tools for fostering efficient land management. When projects are conceived, developed and implemented in a collaborative manner, the result is not only increased efficiency, but also more durable decisions less prone to legal challenges. Strengthening opportunities for collaboration should be a primary objective of the revised regulations.

Trout Unlimited regularly participates in collaborative projects – large and small – with the Forest Service, other agency partners and public land stakeholders. For example, Trout Unlimited is a partner in many Collaborative Forest Landscape Restoration Program projects throughout the West, such as the Four Forest Restoration Initiative in Arizona, the Forest Service’s largest (2.4 million acre) collaborative restoration effort in the country. Additionally, we are participants in numerous forest plan revisions that incorporate all aspects of forest management, including forest health, watershed restoration, timber harvest, grazing issues, and minerals management.

Our experience is that plans and projects that are developed through strong collaborative relationships are efficient projects, and where there are delays it is not due to onerous NEPA process requirements, but rather institutional challenges such as staff turnover and limited resources – no amount of NEPA streamlining will address these problems. Maximizing collaborative processes with the Forest Service’s many partners and public land users will serve to empower local stakeholders and Trout Unlimited encourages the Forest Service to enhance the collaborative opportunities for the benefit of all.

220.4(d) – SOPA and Scoping:

Trout Unlimited recommends that the final rule retain language requiring scoping for all proposed actions.

The proposed rule would substantially curtail public scoping from being required “for all Forest Service proposed actions, including those that would appear to be categorically excluded”, to “scoping is required for all Forest Service environmental impact statements”, with scoping optional for other

actions, such as environmental assessments (EA) and categorical exclusions. We appreciate the need to provide deciding officials with flexibility and agree that it is important to right-size the public process. However, scoping is a fundamental component of any public process. Providing for early and often engagement with the public fosters transparency, builds trust and provides the agency with valuable input that will lead to better-informed decisions.

For instance, when considering a CE or an EA, public input provided by scoping can be used to help uncover the presence of sensitive resource conditions, as well as inform whether there is a cause and effect relationship between a resource condition and the proposed action. Scoping also represents a valuable opportunity for collaboration by soliciting insight and new ideas that perhaps were not raised or considered internally within the agency.

While we appreciate that SOPAs will continue to be used to help inform the public, SOPAs are not the equivalent of scoping notices and do not provide the level of detail necessary for the public to provide the agency with constructive input. Additionally, most SOPA actions are not publicly announced as are scoping actions (e.g., press releases, public notices). Depending entirely on SOPA as a means to inform NEPA activities places an undue burden on the public in having to seek out SOPA actions on their national forests. Furthermore, SOPA references are currently troublesome for the public since many links provided on SOPA are generally outdated and lack appropriate reference materials, most likely due to understaffed Forest Service offices. The proposed language for SOPA notices is not explicit in how the public will be made aware of proposed NEPA actions and it is vague in addressing timely notification. By continuing to require scoping for all proposed actions, the Forest Service will ensure that public involvement is consistent across the agency, is transparent in announcing scoping actions, and maintains a high level of coordination and collaboration with the public.

Lastly, we note that eliminating scoping requirements for certain actions that have no other public comment requirements, such as CEs and determinations of NEPA adequacy (if promulgated), would mean that these actions would likely not be subject to the project-level predecisional administrative review process pursuant to 36 CFR part 218. This is concerning and could very well lead to more litigation, not less.

220.4(i) -- Determination of NEPA Adequacy:

New tools like determination of NEPA adequacy (DNA) could help relieve the Forest Service of redundant NEPA reviews; however, DNA's should supplement the NEPA process, not serve as a substitute for NEPA.

To ensure the proper application of this tool, the decision to use a DNA must not be made in a vacuum. Public involvement – especially scoping – and consultation with stakeholders, applicable resource professionals, and partner agencies (e.g., U.S. Fish and Wildlife Service, State fish and game agencies) are necessary to ensure that this decision is fully informed. Additionally, the determination cannot be a simple “yes or no” checklist of applicable criteria. The deciding official should be required to not only answer if an existing analysis is sufficient, but more importantly *why* it is sufficient, with supporting documentation.

Any DNA must also provide the current best available scientific information in its content for making its determination decision. The DNA evaluation criteria must be based on timely documents, including any references to forest management plans and amendments. Referencing as supportive analysis aging forest plans and outdated project-level NEPA analysis should not be adequate for determining NEPA

adequacy. Accordingly, we recommend that the responsible official also consider if the existing analysis relies upon the most up to date, best available scientific information.

We also recommend the language be strengthened under 220.4(i)(1)(i). The section uses “essentially similar” [to a previously proposed project] as a determining factor for issuing a DNA. This vague and subjective reference can be interpreted in a variety of ways, potentially lessening the analysis and allowing proposed actions to proceed that have not been properly vetted. Trout Unlimited recommends that this language be modified to “substantially similar” and identify the aspects of the proposed project that shall be evaluated for similarity (e.g., size, location, affected environment, scope, intensity of activities).

Lastly, including all relevant supportive data in making the DNA decision must be part of the decision record.

220.4(k) – Condition-based Management:

The Agency proposes to codify the practice of condition-based management, stating that it is “based on existing practice to provide clear, consistent direction on its use, and to encourage more widespread use”. However, the proposed rule provides little direction to ensure consistent use. Misapplication of the tool would erode public trust as projects are implemented unbeknownst to stakeholders.

It remains unclear if the Forest Service proposes to create a new process. If this is an existing practice, then codifying it is unnecessary and by simply providing administrative guidance, it would better serve both agency personnel and the public. Additionally, adopting a sound DNA policy would provide the flexibility sought to implement projects over longer time spans and if implemented correctly (e.g., scoping and public involvement), would not undermine the core tenets of NEPA.

220.5(a) – Categorical Exclusions:

Trout Unlimited recognizes that CEs are an integral part of NEPA, and the proper use of this tool can allow the agency to better focus staff time and resources on proposed actions that warrant more rigorous analysis. Additionally, the proper application of the tool can help to increase the pace and scale of forest and watershed restoration activities. However, we caution the Forest Service in relying upon multiple CE categories for a single proposed action to allow a proposed action to move forward as the selected NEPA action. We recommend there be caveat language that this process can only be applied in situations where all of the proposed activities must qualify for at least one of the CEs. Cobbling a proposed action together using multiple CEs when the proposed action as a whole should warrant a more rigorous NEPA review makes the Forest Service vulnerable to litigation.

Additionally, we recommend that 220.5(a) include language stating that all CEs must be consistent with all Forest Service directives, applicable land management plans, travel management plans, oil and gas leasing decisions, and other relevant planning documents.

220.5(b) and 220.5(c) – Extraordinary Circumstances Determination:

Trout Unlimited recommends keeping the existing regulation language stating, “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. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS.”

An important check to ensure that CE's are properly used and do not unwittingly result in significant impacts to important resources is the extraordinary circumstances review. The proposed rule rightly notes that it is not just the presence of a resource condition that creates an extraordinary circumstance (thereby preventing the use of a CE), it is the cause-and-effect relationship.

However, the proposed rule would greatly increase the threshold in which a cause-and-effect relationship triggers an extraordinary circumstance. Under the 2008 regulations, a CE may not be used if there is uncertainty whether the proposed action may have a significant effect on the environment.

Under the proposed rule, an extraordinary circumstance only exists when the responsible official determines that there is "a likelihood of substantial adverse effects", meaning that uncertainty or "potential" effects will no longer require an environmental analysis. The resulting quandary is that an environmental analysis would clear up uncertainty as to the adverse effects of a proposed action, but this analysis would not be required. This would set the stage for CEs to be used even when substantial questions remain, leading to decisions that are not fully informed, impacts to sensitive resources that would otherwise be avoidable, and more vulnerable to litigation.

220.5(b)(1) – Extraordinary Circumstances Resource Conditions:

Trout Unlimited also has concerns with the proposed rule removing the term "sensitive species" from the list of resource conditions, providing the justification that "the Agency's 2012 planning regulations marked a transition away from the term "sensitive species," and retention of the term in the NEPA procedures is unnecessary." We believe that this rationale is flawed.

While the planning rule did move away with the term "sensitive species", the rule did not move away with the concept and, if anything, established a greater commitment to conserving these species. In this way, the 2012 Planning Rule essentially replaced the term with "species of conservation concern", with the Planning Rule's preamble stating that sensitive species "are thus similar to species of conservation concern."

It is puzzling that the proposed rule would not include the term "species of conservation concern" as a resource condition as doing so would ensure greater alignment between the agency's NEPA regulations and the 2012 Planning Rule. We note that proposed rule retains other non-Congressionally designated resource conditions, including Research Natural Areas, another type of Forest Service administrative designation.

Along with species of conservation concern, it is important to retain sensitive species as a resource condition. Species of conservation concern will have only been identified for forests that have revised their plans using the 2012 Planning Rule. All other forests plans will still be using the term sensitive species, so for these forests retaining sensitive species in the list of resources conditions is important to prevent, for example, species like Bonneville cutthroat trout and Westslope cutthroat trout from slipping through the cracks when a CE is being considered for a proposed action.

Accordingly, we recommend that the final rule include both "sensitive species" and "species of conservation concern" as resource conditions that must be considered in determining whether extraordinary circumstances exists. We also recommend that any species that State agencies have identified as a high priority for conservation be included as a resources condition, such as "species of greatest conservation need" that are identified in state wildlife action plans. Doing so will ensure consistency with State fish and wildlife management priorities.

Lastly, Trout Unlimited supports the inclusion of Wild and Scenic Rivers as a resource condition, as well as clarify roadless areas as "those designated under 36 CFR part 294".

Categorical Exclusions:

Trout Unlimited supported the agency's efforts in 2012 to establish a new CE soil and water restoration activities and we believe that there may be opportunity to build on this success with new CEs. That said, we do have concerns with some of the CEs being proposed and Trout Unlimited offers the following comments to specific to the proposed rule:

- **220.5(e)(8) – Short Term Minerals Investigations CE:**

Trout Unlimited notes that there are instances in which the Forest Service has applied this CE to suction dredge mining projects in sensitive coldwater fisheries, including threatened and endangered salmon and steelhead habitat in the Snake River Basin in Idaho. The impacts of suction dredge mining are unique from land-based mining investigations and scientific studies show suction dredging degrades water quality through erosion and sedimentation and mobilization of mercury and other heavy metals, impacting fish and the aquatic food web by destroying aquatic habitat. The practice was banned in California in 2009 and in 2017 the Oregon Legislative Assembly passed legislation that prohibited the activity in essential anadromous salmonid habitat.

Suction dredge mining is not associated with an "investigation", but rather a type of placer mining that removes mineral commodities. Further, the controversy surrounding the practice coupled with the impacts to sensitive aquatic resources makes suction dredge mining ill-suited for categorical exclusions. While the proposed rule does not propose changes to this CE, we strongly recommend that a limitation clause be added to 220.5(e)(8) that specifically excludes suction dredge mining as an activity to which this CE may be applied. Doing so will ensure that the effects of this practice on sensitive aquatic ecosystems are fully evaluated when proposals are considered while still allowing the use of this CE for bona fide investigations.

- **220.5(e)(20) – Soil and Water Restoration CE:**

As previously noted, Trout Unlimited supported the three CEs developed in 2012 for soil and water restoration. These are narrowly targeted CEs with clear purpose and sideboards to prevent misapplication. While the 2012 CEs were only for actions related to unauthorized roads and trails, expanding the use of the CE to cover similar projects for system roads makes sense.

- **220.5(e)(23) and 220.5 (e)(25) – Trail Conversion CE and Road Conversion CE:**

Trout Unlimited questions the need to allow illegal, user-created roads and trails to become part of the National Forest Service System without an adequate analysis and public process. Doing so would incentivize the pioneering of new user-created routes, resulting in numerous resource impacts that deserve a more robust analysis, including aquatic impacts from sedimentation, displacing wildlife, interrupting migration routes, fragmenting habitat, and forest user conflicts.

If a travel management plan has already considered bringing a user-created road or trail onto the system, then implementing this decision should not require new NEPA and would be the kind of decision that is well-suited for the proposed DNA tool. However, if this is a new and separate action, caution should be applied to avoid the addition of increased roads and trails to maintain and which will add to the current maintenance backlog.

For existing roads and trails that are part of acquired lands, there may be a need to bring these into the trail system more expeditiously, but as it is presented here, we do not support this CE and urge the agency to not adopt it as part of the final rule.

- **220.5(e)(24) – Roads and Bridges CE:**

Trout Unlimited shares concerns about the impacts from improperly constructed roads and associated infrastructure, as well as deferred maintenance and deteriorating road systems. These existing impairments must be addressed, and we have long sought funding through the appropriations process to help provide the resources necessary to tackle this mounting problem. While a CE may be warranted for certain activities proposed (such as rerouting a system road to minimize resource impacts) constructing new roads when the agency is not able to maintain the existing road system is not justified, either from a conservation perspective or an economic one. New roads undoubtedly will result in new impacts, both in terms of agency resources and also associated environmental impacts, such as erosion and sedimentation. We urge the Forest Service to not adopt any CEs that would allow for new permanent road construction without more robust environmental analysis and the participation of the public who recreate, hunt, fish and use national forests in a variety of ways.

- **220.5(e)(26) – Ecosystem Restoration and resilience CE:**

Any CE for restoration should be solely for restoration purposes to address a clearly identified restoration need, include a clear purpose, and provide meaningful sideboards to ensure that the CE is applied properly. Trout Unlimited suggests that there should be a requirement that all activities must directly address environmental impairments, resulting in a net conservation gain; restoration activities should not be merely an add-on to timber harvest plans.

This is a very broad CE with a wide range of eligible project types. We note that the examples of projects provided in the proposed rule are primarily outcomes, not actual activities that might qualify for the CE. While providing the agency with flexibility, this conflicts with CEQ guidance to provide “representative examples of the types of activities” that might be eligible. We feel that the proposed rule falls short of this guidance.

For instance, the proposed CE includes “hazardous fuels reduction and/or wildfire risk reduction” as an example of the types of activities that may be eligible for the CE. However, hazardous fuel reduction is an outcome, not a type of activity per se. There are numerous activities that could fall under this broad term (e.g., maintenance of existing treatments, mechanical thinning, pruning, mowing, etc.), but the proposed CE does not specify these kinds of hazardous fuel reduction activities as examples.

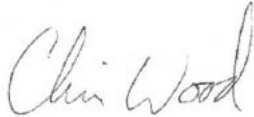
Similarly, the proposed CE includes as examples “Stream restoration, aquatic organism passage, or erosion control”. Again, these are objective and outcome statements. While laudable objectives, specific activities to achieve these outcomes should be identified in the CE. For instance, fish passage activities could include replacing undersized culverts and screening irrigation diversions, while stream restoration could include placement of large woody debris, revegetating stream banks or fencing livestock out of riparian areas.

To address this issue, Trout Unlimited recommends that the agency consider breaking the CE up into separate CEs for each restoration outcome. For instance, the agency might establish separate CEs for terrestrial habitat improvement; stream restoration, aquatic organism passage, or erosion control; road and/or trail decommissioning; controlling invasive species/reestablishing native species; hazardous fuels reduction and/or wildfire risk reduction; reforestation; restoration-focused timber harvest and thinning. Using this approach and identifying specific activities as examples for each outcome-specific CE would help to ensure that the both the public and agency staff clearly understand the proper application of the CE.

Additionally, we recommend that the agency consider whether existing CEs are already available that either meet these outcomes or which could be modified to do so. Lastly, TU does not believe that allowances for new permanent roads are appropriate and questions how creating new permanent roads could be viewed as a restoration activity.

Thank you for your commitment to America's public lands heritage. We hope that these comments and recommendations help the Forest Service to craft a final rule that allows the agency and its partners to increase the pace and scale of restoration without compromising the core principles of NEPA.

Sincerely,

A handwritten signature in cursive script that reads "Chris Wood".

Chris Wood
President and CEO
Trout Unlimited
1777 N. Kent Street, Suite 100
Arlington, VA 22209

Cc:

Vicki Christiansen, Chief, USDA Forest Service
Jim Hubbard, Under Secretary for Natural Resources and Environment, USDA