The Healthy Forests Restoration Act

By Phillip M. Kannan, guest contributor

Introduction

The United States Forest Service (Forest Service)[1] manages 193 million acres as national forests, national grasslands, and other lands collectively called the national forest system;[2] 35 million acres of this total are designated as wilderness. In this effort the Forest Service is subject to the control of both Congress and the president; however, in implementing the broad policies set by laws and executive directives, the Forest Service has broad discretion. The public, including for example environmental groups, logging companies, local governments, ATV manufacturers and owners, hikers, and skiers, can attempt to influence the discretionary decisions made at every level of the Forest Service. Since at least 1969 when the National Environmental Policy Act (NEPA) became law there have been administrative and judicial procedures available to anyone, including the groups mentioned in the previous sentence, who has been injured by a Forest Service decision to have it reviewed by an independent adjudicator to determine whether it is in compliance with the requirements established by laws and regulations.

In 1960 Congress enacted the Multiple Use Sustained Yield Act (MUSYA)[3] which requires that the national forests be used for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[4] Congress was silent on the weights to be assigned to these uses; thus, the managers of national forests have broad discretion in doing so. Although this list of uses is alphabetical, presumably so as not to imply a ranking, the dominant use of national forests is for timber. The institutional culture of the Forest Service, established by its founder Gifford Pinchot, is reflected in Pinchot's famous characterization of the purpose of national forests as providing "the greatest good for the greatest number for the longest time." This effectively mandated that the dominant use of the forests would be growing trees as a crop.

It was taken as an axiom that forest fires are a threat to this crop. From this premise the Forest Service managers put in force what has been called the 10 a.m.. policy: all forest fires must be suppressed by 10 a.m.. of the day they were reported. The results of this policy were (1) fewer acres of national forest burned and (2) larger fuel loads in the forests. The Forest Service recognized the risk presented by these conditions; it ranked fire and fuel as the greatest threats to the health of national forests. In 1995 it adopted a policy that included mechanical thinning, prescribed fire, and selective fire suppression.[5]

The new policy did not prevent severe fire seasons in 2000 and 2002. President Bush decided to modify the policy with the goal of reducing the risk of severe forest fire even further. In August 2002 he adopted a policy called the Healthy Forests Initiative. This new policy has two components: (1) administrative and (2) legislative. Together, these mandates represent a dramatic change in the management of national forests, not merely a modified approach to fire protection.

The Administrative Component of the Healthy Forests Initiative

Because the administrative changes required no congressional approval, President Bush was able to initiate these changes almost immediately after announcing the new program. The administration put the following general policy in place: "HFI [Healthy Forests Initiative] focuses on reducing the risk of catastrophic fire by thinning dense undergrowth and brush in priority locations that are on a collaborative basis with selected federal, state, tribal, and local officials and communities. The initiative also provides for more timely responses to disease and insect infestations that threaten to devastate forests."[6] The emphasis was on mechanical removal rather than prescribed burning and the involvement of local officials. By December 12, 2003, 46 of these projects were underway by the Forest Service and 20 more were planned by the Bureau of Land Management.[7]

The most important element of the administrative component of the Healthy Forests Initiative is its effect on the National Environmental Policy Act (NEPA). This act requires every federal agency to prepare an environmental impact statement (EIS) for every proposed major federal action that will have a significant effect on the environment. Each agency has implemented this obligation through a triage system: actions are classified into one of three categories.[9] In the first category are those actions that normally require an EIS. In the second category are those agency actions that, because of their limited effect on the environment, the agency has determined do not require an EIS; these are called categorical exclusions.[10] The third category consists of those actions which do not clearly fit into either of the other two; for these actions the agency must prepare an environmental assessment (EA) to determine whether or not the action will have a significant impact on the environment.

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Agencies are required to provide a safety valve for categorical exclusions. The applicable regulation states: "[Agencies] … shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."[11] Determining when extraordinary circumstances exist is almost completely within the discretion of the agency; challenges to an agency's decision that a particular action is not an extraordinary circumstance has almost no chance of success. The Court of Appeals for the Tenth Circuit summarized this legal principle as follows: "[Agencies] … are afforded a presumption of regularity … . This court grants "substantial deference" to the agency's interpretation of its own regulations. We may reject the agency's interpretation only when it is unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning." The challenger would have the burden of overcoming the presumption of regularity, and thus, have limited chances of forcing an agency to apply the extraordinary circumstances procedure.[13]

The Forest Service issued regulations adding new categorical exclusions. These include (1) harvest of live trees not to exceed 70 acres with no more than 1/2 mile of temporary road construction; (2) salvage of dead and/or dying trees not to exceed 250 acres with no more than 1/2 mile of temporary road construction; (3) commercial and non-commercial felling and removal of any trees necessary to control the spread of insects and disease on no more than 250 acres with no more than 1/2 mile of temporary road construction;[14] (4) hazardous fuels reduction activities; and (5) rehabilitation activities for lands and infrastructure impacted by fires or fire suppression.[15] These exemptions mean that neither the Forest Service decisionmaker nor the public will have the benefit of the scientific, economic, and other data that would be included in the environmental assessment or environmental impact statements for these categories.

The fuel reduction activities categorical exclusion applies to projects up to 4,500 acres for use of prescribed fire and 1,000 acres of mechanical control such as thinning. The rehabilitation categorical exclusion applies to projects of up to 4,200 acres.[16] Facts such as composition of the soil, the slope of the area to be logged, the proximity of the activity to surface water and to ground water, and other characteristics of the site are irrelevant to these exclusions.

The fact that the categorical exclusions set specific acreage limits and specific road length limits creates the opportunity for the Forest Service to apply mechanical control methods to large forests in 1,000-acre bites without either an environmental assessment or an EIS.[17] Moreover, even if none of the individual 1,000-acre projects has a significant impact on the environment, the combined or cumulative environmental effect of several of them can be significant. The fact that each is categorically excluded from the NEPA process, however, means that the cumulative impacts may never be analyzed. NEPA requires "all federal agencies to consider values of environmental preservation in their spheres of activities;"[18] that goal should be more explicit in the Healthy Forests Initiative.

In addition to these limits on NEPA, the administration adopted a process limiting the consultation requirements under section 7 of the Endangered Species Act (ESA). Under this provision of the ESA, agencies considering action that could affect an endangered or threatened species must prepare a biological assessment of the likely harm to the species and then consult with the Fish and Wildlife Service which can impose conditions on the proposed action, including prohibiting it, in order to protect the species. One commentator has characterized the new process as "allowing agencies carrying out fire management activities to avoid any consultations [under the ESA]."[19]

Other provisions in the Forest Service's regulations eliminate administrative appeals when a decision regarding a Healthy Forests Initiative project is made by the secretary or under secretary. Only a person or organization that submitted "substantive written or oral comments" can appeal decisions in such projects.[20]

The net result of these administrative policies is that fuel reduction activities, rehabilitation activities for lands and infrastructure impacted by fires or fire suppression, and the other categorical exclusions and other Healthy Forests Initiative projects will have little review by anyone outside the Forest Service. The public will have less data and less input regarding such activities that fall within a categorical exclusion. The Fish and Wildlife Service, designated by Congress as the protector of endangered and threatened species, will have less influence over the Forest Service in these activities. The Healthy Forests Initiative included one additional administrative policy which involves the Northwest Forest Plan of 1994 (NWFP). The NWFP established an ecosystems regime for managing 24.4 million acres of federal forests in the northwest that were the habitat of the northern spotted owl.[21] This plan set timber targets but required specific mitigation measures. The Forest Service and the Bureau of Land Management have failed to meet those measures; thus, the timber harvest has been below the targets. The Healthy Forests Initiative weakens the mitigation requirements of the NWFP and will thus make the harvest targets more likely.[22]

Picnic Rock Fire near Ft. Collins, Colorado - April, 2004

The Legislative Component of the Healthy Forests Initiative

The Healthy Forests Restoration Act of 2003 (HFRA) became law on December 3, 2003.[23] One of its primary purposes is to improve planning as a strategy to reduce personal injury and property damage from wildfires. This includes identifying at-risk communities and focusing programs at wildland-urban interfaces. Congress authorized $760 million annually for hazardous fuels reduction programs, 50 percent of which must be used on wildland-urban interface programs.

In forests that are not old growth stands the programs are to be implemented by focusing "largely on small diameter trees, thinning, strategic fuel breaks, and prescribed fire to modify fire behavior." In old growth stands the Forest Service is "to fully maintain, or contribute toward the restoration of, the structure and composition of old growth stands according to the pre-fire suppression old growth conditions … ."[25]

Challenges to hazardous fuels reduction programs are limited by HFRA. First, only a person that has exhausted the administrative review process established by the secretary of agriculture can seek judicial review.[26] Second, only issues that were raised in the administrative procedure can be reviewed in court.[27] Third, all judicial challenges must be in U.S. District courts for the district in which the project is to be carried out.[28] Fourth, if a court issues an injunction halting the project, it can last at most 60 days; however, it can be renewed.[29]

Like the administrative component discussed above, the HFRA weakens NEPA and the NEPA process. In the 35-year history of NEPA, the courts and federal agencies have developed an interpretation of this law to require that the EIS analyze a broad range of alternatives to the proposed action; the alternatives have been called the heart of the EIS. The breadth of this set of alternatives is controlled by what is called the rule of reason under which the agency must consider the reasonable and feasible alternatives.[30] HFRA changes this basic tool of environmental protection and reduces the understanding of both the public and the Forest Service managers of how the ends might be accomplished with less environmental harm. If the Forest Service decides a hazardous fuel reduction project is not in the categorical exclusion class and that an EIS must be prepared, the EIS will contain at most three alternatives: (1) the proposed project; (2) no action; and (3) an alternative proposed during the scoping process if it meets the purpose of the project.[31] If the project is within 1.5 miles of an at-risk community, no alternative need be analyzed.[32]

Conclusion

The objective of the Healthy Forests Initiative is to reduce the risk from wildfires to humans, private property, and national forests. These goals should be pursued; however, the means of achieving them should comply with NEPA and the Endangered Species Act. Some fuel reduction activities and rehabilitation projects may be emergencies; however, not all will be. For those that are, NEPA and the implementing regulations provide an exemption: "Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review."[33] This exemption has been used by other agencies and upheld by courts.[34] The Healthy Forests Initiative should reflect the fact that not all projects under it will be emergencies.

Policies should be developed that reduce new development of at-risk communities. A model for doing this is provided by Coastal Barrier Resources Act.[35] The purpose of this act is

> *"… to minimize the loss of human life, wasteful expenditure of federal revenues, and the damage to fish, wildlife, and other natural resources associated with the coastal barriers along the Atlantic and Gulf coasts and along the shore areas of the Great Lakes by restricting future federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers … ."*[36]

To accomplish this purpose, except in very limited cases involving water-related projects, there can be no new expenditures or new financial assistance within the system of coastal areas defined by this law.[37]

A similar approach was taken by Congress regarding the risks of building in floodplains: "Congress prohibited post-disaster federal support to those who could purchase flood insurance but who fail to do so, and it incorporated protection of the natural functions of floodplains into the program's rating system, reducing insurance premiums in communities with good floodplain management programs."[38]

By limiting federal expenditures and financial assistance that would encourage or support the development or expansion of at-risk communities, the risk from wildfires will be reduced. Such a program should be made a part of the Healthy Forests Initiative. This together with withdrawal of (1) the categorical exclusions, (2) the restrictions on appeals, (3) the restrictions on alternatives to be considered under NEPA, and (4) the limitations on the requirement that the Forest Service consult with the Fish and Wildlife Service under the Endangered Species Act would make the Healthy Forests Initiative a more balanced program.

Endnotes

[1]This brief article will consider only the role of the Forest Service, an agency within the Department of Agriculture, in the Healthy Forests Initiative. The Bureau of Land Management, an agency in the Department of Interior, has an analogous role to be carried out under laws and regulations pertaining to it.
[2]68 Fed. Reg. 33,582 (June 4, 2003).
[3]16 U.S.C. §§ 528-531 (2006).
[4]16 U.S.C. § 528 (2006).
[5]Jesse B. Davis, T*he Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 Environmental Law 1209, 1210 (2004).
[6]http://www.whitehouse.gov/infocus/healthyforests/restor-act-pg2.html (visited August 6, 2006).
[7]http://www.whitehouse.gov/infocus/healthyforests/restor-act-pg2.html (visited August 6, 2006).
[8]42 U.S.C. §§ 4321-4370f (2006).
[9]40 C.F.R. § 1501.4(a).
[10]Categorical exclusions are defined by the Council on Environmental Quality as "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 in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. This regulation is binding on the Forest Service and all other federal agencies.
[11]40 C.F.R. § 1508.4.
[12]Utah Environmental Congress v. Bosworth, 443 F.3d 732, 740 (10th Cir. 2006).
[13]*See Id.* in which the challenger failed to force the Forest Service to apply its extraordinary circumstances procedure.
[14]68 Fed. Reg. 44598 (July 29, 2003) (for exemptions (1), (2), and (3)).
[15]68 Fed. Reg. 33814 (June 5, 2003) (for exemptions (4) and (5)).
[16]*Id.* (stating, "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. … 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").

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 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.
[17]A Healthy Forests Initiative project in the Fishlake National Forest in Utah called for timber thinning to treat beetle-infested trees of 123 acres and the construction of .75 mile of road reconstruction. However, the categorical exclusion that might be applied to this project would not fit because it was limited to .5 mile of temporary road construction. The Forest Service decided that "the .75 mile of road reconstruction will not be implemented as part of this decision." Utah Environmental Congress v. Bosworth, 443 F.3d 732, 738 n.4 (10th Cir. 2006).
[18]Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1111 (D.C. Cir. 1971).
[19]Jesse B. Davis, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 Environmental Law 1209, 1212-1213 (2004).
[20]*See Id.* at 1220-1221 for detailed discussion of these limitations.
[21]*See* Bruce Babbitt, *Science: Opening the Next Chapter of Conservation History*, 267 Science 1954 (1995) for a discussion of NWFP.
[22]For a more detailed discussion see Jesse B. Davis, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management,* 34 Environmental Law *1209*, 1233-1234 (2004).
[23]Public Law 108-148, codified at 16 U.S.C. §§ 6501-6591.
[24]16 U.S.C. § 6512(f).
[25]16 U.S.C. § 6512(e).
[26]16 U.S.C. § 6515(c).
[27]*Id.*
[28]16 U.S.C. § 6516.
[29]I*d.*
[30]City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) (stating, "The EIS, however, need not consider an infinite range of alternatives, only reasonable or feasible ones.") and 40 C.F.R. § 1502.14(a)-(c).
[31]16 U.S.C. § 6514(c)(1) (2006).
[32]16 U.S.C. § 6514(d)(2) (2006).
[33]40 C.F.R. § 1506.11.
[34]*See, e.g.*, South Carolina v. O'Leary, 64 F.3d 892 (4th Cir. 1995).
[35]16 U.S.C. §§ 3501-3507 (2006).
[36]16 U.S.C. § 3501 (2006).
[37]*Id.* at § 3504.
[38]Robert V. Percival, Christopher H. Schroeder, Alan S. Miller and James P. Leape, Environmental regulation: Law, Science, and Policy (3rd ed. 2000). p. 764