Healthy Forests or Invitation to Log?
Forest Practices Under the Bush Administration

By Jan Chatten-Brown & Amy Minteer

Our national forests provide habitat for species, including many that are threatened or endangered; recreational opportunities for the public; watersheds critical for clean water; and a source of lumber and paper. Worldwide, the forests act as our planet's lungs, producing oxygen. Fire has always occurred in our national forests. However, the recent proliferation of catastrophic forest fires has caused many to call for a revamping of our forestry policies. The current Bush Administration has answered that call with a directive it calls the Healthy Forest Initiative. Indeed, the wildfires of 2002 through the Rocky Mountain states and through 2003 in Southern California have produced an overwhelming sense of urgency to change the way we manage our forests. Bush's approach is to make drastic changes to the regulatory scheme already in place, dramatically reducing the public's role in the forest management process. While some find the Initiative to be a necessary change, others question the motives behind and the effectiveness of the initiative.

This article describes the regulatory system that was in place until implementation of the Initiative began; the increased threat of intense fires due to years of fire suppression; and the Initiative itself, with its regulatory and legislative components. It also provides support for the conclusion that, at least in part, the purpose of the Initiative is to facilitate logging, and that it will not result in wise forest management.

The Regulatory Framework Prior to the Healthy Forests Initiative.

Though the amount of forested land in the United States has been dramatically reduced since our country's founding, according to the federal government, national forests and grasslands still encompass 191 million acres of land, an area equivalent to the size of Texas. (http://www.fs.fed.us.) These forests are managed by the Forest Service, an arm of the Department of Agriculture ("USDA"), and the Service has a mandate to achieve a balanced use of our forest.

a. The National Forest Management Act. In large measure, the National Forest Management Act of 1976 ("NFMA"; 16 U.S.C. 472a, 476, 500, 513-516, 521b; 576b, 1600-1602, 1604, 1606, 1608-1614) governs the administration of our national forests. NFMA requires the Secretary of Agriculture to assess forestlands; develop a management program based on allowing multiple uses, such as recreation, wildlife habitat and timber harvesting, that limits the harvest of timber to a quantity that could be removed annually while sustaining the forest in

perpetuity; and implement a resource management plan for each unit of the National Forest System.

NFMA was enacted in response to continuing debates about the practice of clear-cutting in national forests. The Act requires adoption of forest management plans to give regional foresters guidance for meeting the goal of multiple use and sustained timber yields. The Congressional findings for NFMA state that the forest management plans "must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests and rangelands, through analysis of environmental and economic impacts, coordination of multiple use and sustained yield opportunities as provided in the Multiple-Use Sustained-Yield Act . . ., and *public participation* in the development of the program." (16 U.S.C. 1600(3), emphasis added.) Further, the Act provides "new knowledge derived from coordinated public and private research programs will promote a sound technical and ecological base for effective management, use, and protection of the Nation's renewable resources." (16 U.S.C. 1600(4).)

NFMA also requires that procedures be established "including public hearings where appropriate, to *give* the Federal, State, and local governments and *the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs*." (16 U.S.C. 1612 (a), emphasis added.) If the timber sales are to be above the amount established by the forest management plan, which initially required public participation, the public must again be allowed to comment upon the increased harvest. (16 U.S.C. 1604(d); 16 U.S.C. 1611(a).)

b. <u>The Roadless Rule</u>. During the Clinton administration, the Forest Service adopted regulations to protect pristine and wild areas of national forests where special considerations should be taken into account in determining whether a timber harvest should be allowed. These areas contain millions of acres of critical watersheds, wildlife habitat and unique ecosystems. (Fed. Reg. Vol. 66, No. 9, p. 3245.) The regulations, referred to as the "Roadless Rule," were adopted on January 12, 2001, shortly before President George W. Bush took office. The Roadless Rule was designed "to establish prohibitions on road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System lands." (Id., p. 3244.) The Roadless Rule establishes a nationwide policy for protection of the unique characteristics of roadless areas because "if management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced." (*Id.* at 3246.) The qualities of the roadless areas to be protected are diversity of plant and animal communities, large undisturbed areas of land as habitat for endangered, threatened

or other sensitive species and undisturbed soil, water and air. (36 C.F.R. 294.11.) The Rule prohibits the removal of trees from inventoried roadless areas of the National Forest System, except for very limited circumstances. (36 C.F.R. 294.13.) The Bush administration is now proposing to modify the Roadless Rule by adding additional exceptions on the prohibition on logging. (June 9, 2003 USDA Press Release, http://www.fs.fed.us/r4/caribou-Targhee/news/2003/50RoadlessPressReleaseFinal.pdf#xml.)

c. The National Environmental Policy Act. In its regulation of all national forests, the Forest Service *must* comply with the National Environmental Policy Act ("NEPA;" 42 USC §4321 et seq.) NEPA requires environmental review on most discretionary federal projects that significantly affect the environment. (42 USC § 4332(2)(C).) Under NEPA, the public is allowed time to comment upon projects that may affect the environment, and under NMFA, they are allowed to appeal Forest Services decisions they find to be imprudent. Under existing law, the Forest Service must provide a response to appeals, either changing the objectionable portions of the project, or give adequate reasoning for why the project is not required to be revised.

The Increased Threat of Intense Fires.

In pre-settlement days, fires started by lightning or by Native Americans periodically burned forestlands, maintaining natural plant succession, preventing the spread of invasive plants, and eliminating scrub and underbrush. Though some trees were lost, and many charred, these natural fires produced forests resistant to disease, drought, and severe fires. However, early in the 20th Century, national policy changed. The Forest Service was founded in 1905, and soon began a policy of fire suppression. Eventually the Forest Service adopted their "10 o'clock" policy: when a fire started, it was to be extinguished by the next day at 10:00 a.m.

The result of the fire suppression policy was that dense understories grew, with brush and small trees, including fire-prone non-native invasive species, under large, fire resistant trees. At the same time, roads built for logging increased public access to forested lands, and residential development of the urban-wildland interface increased. Human carelessness vastly increased the number of fires, and the intensity of the fires increased because of the brush and small trees that were no longer eliminated during natural fires. Today it is believed by many scientists that the dryness associated with global warming makes some of our forests tinderboxes, ready to erupt in fires with an intensity unknown one hundred years ago. Forest ecologists agree something must be done. The question is what. Environmentalists believe that controlled burns and selective thinning of forests, removing only brush and small trees, will make the forests healthy once again. The Bush administration has a very different approach.

President Bush's Healthy Forest Initiative.

On August 22, 2002, the President summarized the problems caused by disrupted forest ecosytsems and gave the Forest Service a clear direction. The White House issued a document called *Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities*. (http://www.whitehourse.gov/infocus/healthyforests**, "**Initiative.") The Initiative reported that over 5.9 million acres were burned in the first part of 2002, more than double the acreage of the 10-year average. Hundreds of millions of trees were destroyed by fires in the western states, and the fires burned with great speed and intensity, destroying thousands of homes and structures, as well as the trees. (Id., p. 4-5.) In addition to economic damage, these wildfires cause tremendous environmental damage, threatening species and eliminating their habitat, generating air pollution, destroying recreational opportunities, and degrading water quality after the soil is left exposed.

The President's Initiative calls for dramatic regulatory and legislative reform to expedite what it calls "hazardous fuels reduction." The Initiative touts a May 23, 2002, 10-year Comprehensive Strategy Implementation Plan that "calls for active forest and rangeland management, including thinning of forests and rangelands that produce forest by-products, biomass removal and utilization. . ." (Id., p. 9.) The Initiative proposed both regulatory changes and new legislation.

a. Regulatory Changes. Already, the Department of Interior ("DOI") and USDA have adopted regulations dramatically eliminating environmental review and administrative appeals for certain "hazardous fuels" reduction programs. The agencies established "Categorical Exclusions" to exempt hazardous fuels reduction on lands of less than 1,000 acres from review under NEPA, if the agencies conclude the areas are altered from pre-settlement fire regimes or are in an undefined "urban-wildland interface." (Fed. Reg. Vol. 68, No. 107, p. 33814, et seq.) Projects defined as "Categorical Exclusions" would also no longer be subject the administrative appeal process set forth in 36 CFR, Part 215. (Id. at 33582, et seq.)

These new policies were not adopted as regulations. Rather, USDA and DOI have, like other federal agencies, adopted their own detailed guidelines for implementation of NEPA. However, these guidelines must be consistent both the NEPA Regulations adopted by the President's Council on Environmental Quality (40 CRF, Part 1500) and NEPA itself. NEPA review includes impacts from small projects where "cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." (40 CRF § 1508.7.) There is no limitation on the number of 1,000 acre projects that may be

undertaken without environmental review under the USDA and DOI guidelines. Therefore it would be easy to impermissibly segment logging plans into discrete 1,000 acre projects. For that reason, the Guidelines are under attack under NEPA. Also, the elimination of administrative appeals is being challenged as contrary to a statutory mandate. Numerous legal challenges brought by environmental groups are currently pending.

b. New Legislation. While a successful challenge to the DOI/USDA guidelines may be likely, a Congressional act may dramatically change the administration of our national forests. HR 1904 (McInnis) has passed the House and is anticipated to pass the Senate, and be signed by the President, by late November, 2003. HR 1904 applies to "hazardous fuels", which is defined as "vegetation (dead or alive) in forest or rangeland ecosystem that (A) is in excess of historic conditions *or management* goals; and (B) can cause wildfires." (HR 1904, Section 101 (6), emphasis added.) Hazardous fuels reduction programs could be conducted on federal land located in, or in proximity to "an interface community or intermix community"; federal land located in proximity to a municipal watershed that could affect water quality ; "Federal land on which windthrow or blowdown, ice storm damage, or the existence *or threat of* disease or insect infestation, poses a significant threat to an ecosystem component, or forest or rangeland resource, on the Federal land or adjacent private land; and essentially any federal land containing threatened or endangered species." (*Id.*, Section 102 (a), emphasis added.) Clearly, the scope of authorized programs is extremely broad. The only practical limitations are that no more than 20 million acres of federal land may be included in such hazardous fuels reduction projects (*Id.*, Section 102 (c)), and lands proclaimed or designated wilderness by Congress or the President, are exempt (*Id.*, Section 102 (d)).

How would HR 1904 change existing law for hazardous fuels reduction projects? It would:

- Eliminate NEPA's current requirement for a study of alternatives with no-action, other reasonable actions, and mitigation measures for fuels reduction projects (*Id.*, Section 104 (b)), even though the alternatives analysis is considered the "heart of NEPA" (40 CFR 1502.14).
- Eliminate current appeal procedures and substitute a new administrative process, to be adopted within 90 days of enactment of the legislation (*Id.*, Section 105). Currently, if a project is appealed it could be stayed up to 105 days (36 CFR 215.15);
- Establish a 15 day statute of limitations for challenge to any fuels reduction project (*Id.*, Section 106 (a)(1)) while currently there is no statute of limitations, although the doctrine of laches bars lawsuits

where it is determined plaintiffs have unreasonably delayed bringing an action (*NEPA Law and Litigation*, Mandelker, 1991, § 4.26.)

- Limit preliminary injunctions to 45 days; require a report to Congress for any renewal of a preliminary injunction; and establish a goal that any litigation be completed within 100 days of a filing of a complaint (*Id.*, Section 106 (b) and (c)). Under existing law there is no time limit on preliminary injunctions and courts are not required to report to congress if they decide an injunction should be extended;
- Require courts to "give weight to a finding by the Secretary in the administrative record of the agency action concerning the short- and long-term effects of undertaking the agency action of not undertaking the agency action, unless the court finds that the finding was arbitrary and capricious." (*Id.*, Section 107.)

There is no protection in the bill for roadless areas, and there is strong concern in the environmental community that old growth forests may be logged under this provision, since there is no limitation on the size of trees to be taken, even though the Roadless Rule requires the Forest Service to maintain or contribute to the restoration of old growth stands, and retain large trees. (36 CFR 294.14.)

Is the Initiative the Right Response to the Problem Posed by More Intense Fires?

Is this draconian revision of existing law warranted by the threat of wildfires? The data does not support that there have been inordinate delays due to administrative appeals or litigation. The United States General Accounting Office found that more than 99 percent of fuel reduction projects proposed by the Forest Service in 2000 and 2001 were approved without appeal, and none were litigated. (GAO Report, Forest Service: Appeals and Litigation of Fuel Reduction Projects, August 31, 2001.) A database assembled by the Forest Service and the Bureau of Land Management shows 7% of 3480 fuels reduction projects over several years were appealed, and 3/10ths of a percent were litigated. (http://www.fs.fed.us.emc.hfi/data/xls; NRDC, "Analysis of Litigated Hazardous Fuel Reduction Projects: The GAO Report and the Mark Rey Letter of August 29, 2003," dated September 9, 2003.) Thus, many believe that it is not the need for expeditious action to reduce intense burns, but rather the desire to facilitate logging, that drives the President's Initiative. Indeed, Speaker of the House Dennis Haster has called the HR 1904 "an important bill for the forest industry" and it is "a common sense approach to make sure we can build the roads we have to build so this industry [logging] can start to come back."

The fall 2003 California experience with devastating wildfires may shed additional light on the efficacy of HR 1904. The vast majority of fires that ravaged

hundreds of thousands of acres in Southern California occurred on lands covered by commercially valueless chaparral and insect-killed trees. The fuel's reduction programs for these areas have not been the subject of administrative or legal challenges that could have been prevented by HR 1904. The delay in actions to reduce fuels in these areas has been caused by a lack of funding. While the risk of high intensity fires caused by insect-killed trees had been widely publicized, Congress took several years to approve funding requests to remove these trees in Southern California. When some funding came, it was too late. The removal of fuels that would not lead to revenue production has been much slower and has received significantly less funding than in areas with large, commercially valuable trees, a problem Bush's Healthy Forest Initiative would do nothing to remedy and in fact does not even address.

Litigation experience since early in the Bush administration also supports the conclusion that "forest management" is being used as a guise for increasing logging. For example, in one case still pending before the United States District Court in the Eastern District of California, the Forest Service claimed a project of salvage logging after a fire would in part "reduce the amount of predicted surface fuel accumulations resulting from fire-killed trees and vegetation." (FEIS Red Star Restoration Project ROD p.2.)

The Red Star project arose after a fire burned nearly 17,500 acres of national forest land in the Sierra Nevada Mountains in the summer of 2001. The Forest Services' Red Star Project proposed to log 96 million board feet of timber on over 5,000 acres of the Tahoe National Forest that the wildfire had burned. A "restoration" project would be funded in part by profits from the sale of the logs that would be removed. (FEIS Red Star Restoration Project ROD, p. 6.)

The Red Star Project would require removal of fire killed trees, which includes trees the Service has determined will die due to the fire in the near future, with a diameter at breast height of 15 inches or greater, with no upper limit. The Project also would allow for the removal of fire killed trees with smaller diameters, but only if the funding would support it. Only if there was adequate funding would the Forest Service also remove the slash material associated with the removal of the trees of the larger trees. (The slash material is the smaller limbs, leaves, pine needles and bark from the larger trees.) This gives the timber companies nominal incentive to remove the smaller trees and slash material as those have very little if any economic value, especially when compared with the trees the Project requires be removed.

The lack of incentive or requirement to remove smaller trees and slash material is contrary to the presumed purpose of fire protection for several reasons. First, the Forest Service itself admits that "Excessive small woody debris, from small trees and limbs of larger trees, increases a fire's rate of spread and fire line

intensity, affecting the ability to suppress the fire and the ultimate fire size." (FEIS Red Star Restoration Project ROD p.4.) At the same time, the larger trees that are required to be removed are the most resistant to wildfires and provide a seeds as a source of natural reforestation after a fire. These larger trees, even when killed by fire, are still an important part of the forest ecosystem, providing shelter for numerous endangered and threatened species, and over time, enriching the soil with their organic material.

Under the current regulatory regime, environmental organizations were able to improve the Red Star Project through administrative appeal. Further, when the Service failed to address all the concerns raised in the administrative process, environmental groups obtained an injunction against implementation of the Red Star Project. The order was issued due to the judge's finding that "as trees will be cut, extreme levels of flammable slash will be generated, wildlife habitat for species dependent upon burned forests will be removed, wildlife habitat for sensitive species such as the California spotted owl will be threatened by future severe fire, recreational and scientific values of the inventoried roadless area effect, and the roadless characteristics and the ecological integrity of the inventoried roadless area would be impacted." (U.S. District Court Eastern District of California, Case No. CIV.S-03-1238, Earth Island Institute v. U.S. Dept. of Agriculture, June 25, 2003 Temporary Restraining Order.)

The actions of the Forest Service that led to this litigation demonstrate how the lure of short-term profits can override long-term forest management goals. The sale of valuable timber is required by the Project, while the removal of hazardous fuels materials is incidental. Under the proposed new legislation, environmental groups would not have been able to appeal the project administratively, and likely would not have been able to secure an injunction under the heightened requirements for balancing of harms.

Conclusion

Our forests are a precious national resource that must be carefully managed. More intense forest fires are the product of decades of fire suppression—a misguided policy adopted by the Forest Service. While the Forest Service has many fine forestry professionals, the pressure for revenue generation through logging is intense, and their relationship with the timber industry close. The President's Initiative, and the proposed amendments to the Roadless Rule, will facilitate logging while simultaneously reducing the public's ability to use both the administrative process and the courts to challenge what it believes are destructive forest practices. The role of the public in reviewing the actions of the Forest Service has, and should continue, to provide a check and balance, to assure that

our forests ecosytems are restored, based upon sound science, and a commitment to the preservation of an extraordinary resource.