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***Via electronic submission to:*** https://eplanning.blm.gov/eplanning-ui/project/1504279/510

U.S. Department of the Interior
Bureau of Land Management
c/o Heather Bernier, Acting Division Chief
Attention: W0-210-SLVGCX
2850 Youngfield Street
Lakewood, CO 80215

**Re: BLM's Proposed New Categorical Exclusion for the Salvage Harvest of Dead or Dying Trees, 85 Fed. Reg. 33,697 (June 2, 2020); NEPA Number: DOI-BLM-WO-WO2100-2020-0001-OTHER_NEPA**

Dear Ms. Bernier:

On behalf the Attorney General of California, Xavier Becerra,[1] we respectfully submit these comments on the revisions proposed by the U.S. Department of the Interior, Bureau of Land Management ("BLM") to its regulations implementing the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. 85 Fed. Reg. 33,697 (June 2, 2020) (hereinafter, the "Proposed Rule"). In particular, the Proposed Rule would add a new categorical exclusion from NEPA's environmental review requirements for the salvage harvest of dead or dying trees in BLM-managed forests on harvest areas up to 5,000 acres in size.

The State recognizes the importance of taking an active role in managing public forest lands to address disturbances and to reduce wildfire risks, especially given the conditions created by past forest management practices and climate change, which has resulted in increased drought, insect outbreaks, and longer and more severe fire seasons. However, the Proposed Rule unnecessarily shortchanges public participation and informed decision-making for timber salvage projects in a way that has no rational relationship to protecting communities or wildlands from these dangers.

[1] The California Attorney General submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. *See* Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12612; *D'Amico. v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 1415.

In particular, BLM claims that this proposal will "help recover economic value" from public lands, and provide BLM with more flexibility to respond to disturbances across larger areas to provide for public and infrastructure safety. Yet BLM's own regulations already contain a categorical exclusion for timber salvage projects up to 250 acres, and nowhere does the agency provide an adequate justification for this massive increase in project size that will escape public input and environmental review. This is especially problematic given the potential for significant environmental impacts from salvage harvest projects of this size, including soil disturbance, erosion, and wildlife impacts, as well as cumulative impacts from the implementation of multiple projects.

Safeguarding adequate NEPA review and ensuring full public disclosure of environmental impacts for timber projects on our public lands is of paramount importance to the State's interests. In California, BLM administers 15.2 million acres of public lands, equal to nearly 15% of the State's land area. BLM-managed forest areas are spread throughout the state, but many of these lands are in the coastal ranges of Northern California, including in the California Coastal National Monument, the King Range National Conservation Area, and the Berryessa Snow Mountain National Monument. BLM also manages areas such as the Fort Ord National Monument near Monterey and the Sand to Snow National Monument outside of Palm Springs. BLM lands in California provide habitat for 34 animals and 68 plants listed as endangered or threatened under the federal Endangered Species Act, such as the bighorn sheep and Pacific fisher, as well as numerous other sensitive species that depend on forest habitat, such as the California spotted owl.

For these reasons, Attorney General Becerra urges BLM to withdraw the Proposed Rule and instead to focus on work that directly addresses the threats posed by climate change and provides a targeted, environmentally-sustainable approach to protect communities and wildlands.

## STATUTORY BACKGROUND

### I. National Environmental Policy Act.

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Congress enacted NEPA in 1969 to "establish a national policy for the environment ... and to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4321. NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations broadly define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures ... ." 40 C.F.R. § 1508.18.[2] In taking a "hard look," NEPA requires federal agencies to consider the direct, indirect, and cumulative impacts of their proposed actions. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 837 (10th Cir. 2019); 40 C.F.R. §§ 1508.7, 1508.8(a)–(b).

To determine whether a proposed project may significantly affect the environment, NEPA requires that both the context and the intensity of an action be considered. 40 C.F.R. § 1508.27. In evaluating the context, "[s]ignificance varies with the setting of the proposed action" and includes an examination of "the affected region, the affected interests, and the locality." *Id.* § 1508.27(a). Intensity "refers to the severity of impact," and NEPA's implementing regulations list ten factors to be considered in evaluating intensity, including "[u]nique characteristics of the geographic area such as proximity to ... ecologically critical areas," "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act," and "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." *Id.* § 1508.27(b). The presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

As a preliminary step, an agency may first prepare an environmental assessment ("EA") to determine whether the effects of an action may be significant. 40 C.F.R. § 1508.9. An EA must discuss the "environmental impacts of the proposed action" and "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *Id.* § 1508.9(a)–(b); *see id.* § 1500.1(b). If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons to explain why a project's impacts are insignificant." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). "The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008).

In "certain narrow instances," an agency does not need to prepare an EA or EIS if the proposed action falls under a categorical exclusion. *See Coalition of Concerned Citizens to Make Art Smart v. Federal Transit Admin.*, 843 F.3d 886, 902 (10th Cir. 2016) (citing 40 C.F.R. § 1508.4). However, agencies may invoke a categorical exclusion only for "a category of actions

[2] The White House Council on Environmental Quality ("CEQ") was established to implement NEPA and has issued regulations at 40 C.F.R. Part 1500 that apply to all federal agencies.

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 [NEPA] regulations." 40 C.F.R. § 1508.4; *see also id.* § 1507.3(b)(2)(ii). When adopting such procedures, an agency "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," *id.* § 1508.4, in which case an EA or EIS would be required.

## II. Administrative Procedure Act.

Under the Administrative Procedure Act, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious where the agency: (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) offered an explanation so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). When promulgating a regulation, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

These core principles apply to an agency's decision to change existing policy. *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 513–15 (2009). While an agency need not show that a new rule is "better" than the rule it replaced, it still must demonstrate that "it is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Id.* at 515 (emphases omitted). Further, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.* Any "[u]nexplained inconsistency" between a new rule and its prior version is "a reason for holding an [agency's] interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) (finding that U.S. Forest Service promulgation of categorical exclusion for certain fuel reduction projects was arbitrary and capricious where agency failed to demonstrate that it made a "reasoned decision" based on relevant factors and information).

## THE PROPOSED RULE

The Proposed Rule would significantly expand an existing categorical exclusion for timber salvage projects on BLM-managed lands from the current limit of 250 acres to projects up to 5,000 acres (approximately 7.8 square miles). *See* 85 Fed. Reg. at 33,698. In particular, BLM's proposal would eliminate environmental review for projects involving the "[h]arvesting dead and dying trees resulting from fire, insects, disease, drought, or other disturbances not to exceed 1,000 acres for disturbances of 3,000 acres or less. For disturbances greater than 3,000

acres, harvesting shall not exceed 1/3 of a disturbance area but not to exceed 5,000 acres total harvest." *Id*. The exclusion allows the construction of up to one mile of permanent roads, temporary roads (with no mileage limit), and permits the logging of live trees deemed necessary for landings, skid trails, and road clearing. *Id*. at 33,698-99.

BLM asserts that this expansion is justified because "[s]alvage harvest can help to recover economic value from timber, contribute to rural economies, accelerate reestablishment of native resilient forest tree species, and reduce future wildfire fuel loads and hazards to wildland firefighters, the public, and infrastructure from dead and dying trees." *Id*. at 33,698. BLM also claims that over the past three decades, forests in the western United States have experienced bigger mortality events caused by wildfire, insect infestation and disease, drought, and other disturbances, and this new categorical exclusion would allow "BLM more flexibility to quickly respond to disturbances across larger areas." *Id*. at 33,698-99.

## COMMENTS ON THE PROPOSED RULE

BLM's Proposed Rule is arbitrary and capricious and in violation of the APA and NEPA for several reasons. It fails to offer any reasoned explanation for the massive increase in salvage harvest projects that would be exempt from NEPA's public participation and environmental review requirements. It fails to consider key aspects of the problem it is intended to remedy, *i.e.*, wildfire risks and public safety, by ignoring the role of climate change in fueling fires and failing to evaluate scientifically-based treatments that are close to communities and transportation corridors. And it cannot justify a categorical exclusion for projects of this size that are likely to have significant direct, indirect, and cumulative environmental effects.

### I. BLM Has Failed to Provide a Reasoned Explanation for a Twenty-Fold Increase in the Size of its Existing Categorical Exclusion.

The Proposed Rule fails to justify the need for a twenty-fold increase in the size of salvage harvest projects that are excluded from any environmental review or public process under NEPA. According to the rationale provided in the Proposed Rule, this new categorical exclusion "would allow the BLM more flexibility to quickly respond to disturbances across larger areas to provide for public and infrastructure safety, reduce hazardous fuel loads that impact firefighter and public safety, and contribute to … the Nation's need for domestic sources of timber and fiber." 85 Fed. Reg. at 33,698. Yet BLM provides little evidence that the Proposed Rule will actually support these purposes.

First, BLM does not justify the need for "more flexibility" and additional exemptions from the NEPA process. While BLM cites to landscape-scale mortality events that have occurred over the past three decades, *see* 85 Fed. Reg. at 33,699, it already has a categorical exclusion, promulgated in 2007, that allows certain salvage logging projects to proceed without NEPA review. *See* 72 Fed. Reg. 45,504 (Aug. 14, 2007). This exclusion was limited to projects "[s]alvaging dead or dying trees not to exceed 250 acres, [and] requiring no more than 0.5 mile of temporary road construction." *Id*. BLM found such limits to be "appropriate" based on Forest

Service data, and asserted that it "would need to gather new data to support using a [categorical exclusion] for larger treatment areas." *Id*. at 45,515.

BLM now estimates that it has used the current 250-acre categorical exclusion approximately 10 times a year for the past 5 years, but fails to identify any basis for a twenty-fold increase in the size of this exclusion to 5,000 acres. For example, BLM identifies no timber salvage projects that were unreasonably delayed due to NEPA review or that may have benefitted from the proposed categorical exclusion. In fact, of the 779 total salvage-related sales that BLM was able to locate in its database of previous actions, only 10 projects were 1,000 acres or greater, and only one was greater than 5,000 acres. *See* BLM Timber Salvage Categorical Exclusion Verification Report (June 2, 2020) ("Verification Report") at 9-10. Moreover, only one project involved the construction of a permanent road. *Id*. at 11-12. Clearly, the actions that BLM now proposes to categorically exclude from NEPA under this Proposed Rule are not "routine," as BLM claims. *See* Verification Report at 11. Moreover, the new categorical exclusion places few limits on BLM's use, allowing salvage harvest for unspecified "other disturbances," permitting the harvest of "dying trees" as determined by "someone technically trained for the work," and providing no limit on the number of projects that might be subject to this exclusion. *See* 85 Fed. Reg. at 33,698-99.

Implicit in BLM's reasoning is the fact that climate change has created serious challenges for the management of our nation's public lands. Yet nowhere does BLM actually acknowledge this reality or consider its own contribution to this serious problem. *See, e.g.*, 83 Fed. Reg. 49,184 (Sept. 28, 2018) ("Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements"). BLM fails to incorporate into its analysis the vital role of forests in sequestering carbon and mitigating greenhouse gas emissions from other sectors of the economy, and does not consider how the Proposed Rule would impact the carbon sequestration capability of lands managed by BLM.[3] Instead, BLM's proposed strategy is to achieve more "flexibility" by sacrificing full and complete environmental disclosure and public involvement required by NEPA. There is no reasoned basis for this position.

Second, BLM cites public and infrastructure safety as a rationale, but nowhere is the Proposed Rule associated with projects that are near communities or transportation corridors. By contrast, in the Verification Report, BLM cites to an Emergency Proclamation issued by California Governor Gavin Newsom on March 22, 2019 that suspended the requirements of the California Environmental Quality Act for 35 "priority fuel reduction projects" identified by the California Department of Forestry and Fire Prevention following historically destructive

[3] *See, e.g.*, Zald, Harold S.J., *et al*., "Severe fire weather and intensive forest management increase fire severity in a multi-ownership landscape," Ecological Applications 28:4, 1068-80 (June 2018), *available at*: https://esajournals.onlinelibrary.wiley.com/doi/abs/10.1002/eap.1710.

wildfires in 2017 and 2018.[4] Unlike the Proposed Rule, those projects contained a variety of fuel reduction activities that were focused on reducing fire risk for over 200 communities in the State and were to be conducted in "wildland urban interface" areas where human development meets wildlands.[5] BLM's proposed categorical exclusion contains no such limitations on the location or purposes of salvage harvest projects excluded from NEPA. There is also significant scientific controversy regarding the use of salvage logging to reduce wildfire risks.[6] *See Bark v. U.S. Forest Serv.*, 958 F.3d 865, 870 (9th Cir. 2020) (finding "considerable scientific evidence showing that" forest thinning project will not achieve fire risk reduction purposes and requiring preparation of EIS).

Third, BLM cannot prioritize economics and efficiency at the expense of statutory factors that agencies are required to consider under NEPA. Throughout the Proposed Rule, BLM states that the categorical exclusion will "contribute to rural economies" and "maximize economic returns." *See, e.g.*, 85 Fed. Reg. at 33,698, 33,700; Verification Report at 1, 6 ("A common purpose across the salvage sales evaluated is to provide opportunity to salvage timber as soon after the disturbance as possible before it loses merchantable value"), 21 ("salvage means that there is an intent to recover economic value"). Yet such economic considerations cannot excuse an agency from conducting NEPA review when the appropriate standards have been triggered. *See Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1086 (E.D. Cal. 2004) ("Neither the net long term benefits of the program, not the risk associated with not implementing the project, relieve [an agency] of its duty to conduct an EIS when the project will have significant environmental impacts"). Moreover, while BLM cites the need to quickly recover value from damaged timber, it admits that timber deterioration following a disturbance "generally begins to affect logs in two to three years," which should provide ample time to comply with NEPA. *See* Verification Report at 6. This is particularly true given the infrequency of large timber salvage projects on BLM-managed lands. *See id*. at 9 (finding only 10 salvage sales of 1,000 acres or greater since 1986).

Furthermore, BLM's comparison of its Proposed Rule to the Forest Service's NEPA procedures, or categorical exclusions previously established by Congress, is unavailing. *See* Verification Report at 23-24. While BLM discusses a recent proposal by the Forest Service to

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[4] Gov. Gavin Newsom, "Proclamation of a State of Emergency" (Mar. 22, 2019), *available at*: https://www.gov.ca.gov/wp-content/uploads/2019/03/03.22.19-State-of-Emergency-Attested.pdf.

[5] California Department of Forestry and Fire Prevention, "Community Wildfire Prevention & Mitigation Report" (Feb. 22, 2019), *available at*: https://www.fire.ca.gov/media/5584/45-day-report-final.pdf.

[6] Leverkus, Alexandro B., *et al.*, "Salvage logging effects on regulating ecosystem services and fuel loads," Frontiers in Ecology and the Environment (June 8, 2020), *available at*: https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/fee.2219; Dunn, Christopher J., *et al.*, "Modeling the direct effects of salvage logging on long-term temporal fuel dynamics in dry-mixed conifer forests," Forest Ecology and Management 341, 93-109 (Apr. 1, 2015), *available at*: https://www.sciencedirect.com/science/article/abs/pii/S0378112715000043.

establish a categorical exclusion for "ecosystem restoration or resilience activities," it ignores that fact that the Forest Service has a categorical exclusion for salvage harvest similar to BLM's existing exclusion, which the Forest Service has not proposed to change. *See* 36 C.F.R. § 220.6(e)(13) (allowing "salvage of dead and/or dying trees not to exceed 250 acres, requiring no more than ½ mile of temporary road construction").

In addition, the categorical exclusions established by Congress in the Agricultural Act of 2014, P.L. 113-79, and the Consolidated Appropriations Act of 2018, P.L. 115-141, do not support the Proposed Rule. These exclusions (1) limit project size to 3,000 acres, (2) do not allow for permanent roads, (3) focus on protecting communities by locating projects in the wildland urban interface, and (4) require a process for input by interested persons representing diverse interests. BLM's proposal goes well beyond every one of these limitations. And, as BLM recognizes, Congress did not authorize BLM to use these exclusions. *See* Verification Report at 24 and Appendix C.

Finally, BLM fails to offer any reasoned explanation for significantly reducing opportunities for public participation by local communities and other interested parties in the management of our public lands. Facilitating public involvement in an agency's decision-making process is a core tenet of NEPA. *See* 40 C.F.R. §§ 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."); 1500.2(d) (agencies shall "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment"); 1501.7 ("There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."); *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (NEPA's purpose is "to foster informed decision-making and informed public participation."). Agency actions that are categorically excluded from NEPA review are not subject to these robust public participation requirements.

## II. The Proposed Rule Includes Actions that May Individually and Cumulatively Have a Significant Impact on the Environment.

NEPA sets a high bar to establish new categorical exclusions: the category of actions must "not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. Actions included in categorical exclusions, therefore, must be able to be undertaken repeatedly with no significant effect on the environment. CEQ lists as examples of such actions "payroll processing, data collection, conducting surveys, or installing an electronic security system in a facility."[7] BLM does not offer any justification for including 5,000-acre salvage harvest projects in this category of actions.

[7] Nancy H. Sutley, Chair, Council on Envtl. Quality, "Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act" (Nov. 23, 2010) at 4, *available at*: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.

In fact, the Proposed Rule is highly problematic given the potential for direct, indirect, and cumulative impacts related to soil disturbance, erosion, wildlife impacts, and the spread of non-native and invasive species from salvage harvest activities on such large areas of forest land. For example, salvage logging can remove the most fire-resistant snags and tree trunks,[8] which provide nesting and feeding habitat for wildlife,[9] and can hinder forest regeneration and restoration by compacting soils and degrading water quality.[10] As stated by the U.S. Forest Service in a synthesis report published in 2014:

> Salvage logging is controversial because few short-term positive ecological effects and many potential negative effects have been associated with postfire logging (Peterson et al. 2009), while the potential economic returns from salvaging timber in a timely manner can be very large (Sessions et al. 2004). …
>
> [G]eneral ecological concerns associated with salvage logging include impacts to soils; impacts to understory vegetation and recruitment; potential increases in surface fuel loads; reductions in key structural elements, such as snags and burned logs and their associated habitat values; and other influences on forest development. Reviews of the effects of salvage logging on aquatic systems reflect more general concerns about timber harvest (e.g., increased sedimentation and runoff from roads and logging disturbance, and loss of large trees and coarse woody debris inputs), although effects could be more significant because the timing of salvage logging imposes a stress following the disturbance of severe wildfire (Beschta et al. 2004, Karr et al. 2004, McCormick et al. 2010, Peterson et al. 2009).[11]

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[8] *See supra* note 6.

[9] *See, e.g.*, Thorn, Simon, *et al*., "Impacts of salvage logging on biodiversity: a meta-analysis," Journal of Applied Ecology 55:1, 279–289 (Jan. 2018), *available at*: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5736105/; Orczewska, Anna, *et al*., "The impact of salvage logging on herb layer species composition and plant community recovery in Białowieża Forest," Biodiversity and Conservation 28, 3407-3428 (2019), *available at*: https://link.springer.com/article/10.1007/s10531-019-01795-8; Lindenmayer, David B., *et al*., "From unburnt to salvage logged: quantifying bird responses to different levels of disturbance severity," Journal of Applied Ecology 55:4, 1626-1636 (July 2018), *available at*: https://besjournals.onlinelibrary.wiley.com/doi/epdf/10.1111/1365-2664.13137.

[10] *See, e.g.*, Wagenbrenner, Joseph W., *et al.*, "Effects of post-fire salvage logging and a skid trail treatment on ground cover, soils, and sediment production in the interior western United States," Forest Ecology and Management. 335, 176-193 (Jan. 2015), *available at*: https://www.sciencedirect.com/science/article/abs/pii/S037811271400557X?via%3Dihub.

[11] USDA Forest Service, Pacific Southwest Research Station, "Science Synthesis to Support Socioecological Resilience in the Sierra Nevada and Southern Cascade Range" (Sept. 2014) at

In addition, the Proposed Rule allows the construction of up to one mile of permanent roads, and an unlimited number of temporary roads, for each project, which itself creates the potential for significant environmental impacts. Numerous studies demonstrate that roads have the potential to significantly impact the environment.[12] As stated by the Forest Service, "[I]mproperly constructed roads and poor road maintenance can increase the risk of erosion, landslides, and slope failure–endangering the health of watersheds that provide drinking water to millions of Americans and critical habitat for fish and wildlife."[13] It is unreasonable for BLM to assume that repeatedly allowing new road construction could not, cumulatively, result in significant impacts on the human environment. *See* 40 C.F.R. § 1508.4 (defining categorical exclusions as "a category of actions which do not individually or cumulatively have a significant effect on the human environment").

Citing to the Verification Report, BLM claims that the new categorical exclusion "is appropriate because of the evidence of no significant effects from salvage harvest at the parameters proposed." 85 Fed. Reg. at 33,698. Yet the Verification Report focused on projects that were evaluated with an EA and FONSI, which by definition did not result in a finding of significant impacts. BLM further claims that it has records of only two EISs that evaluate salvage harvest projects, but acknowledges that those projects differ "by the complexity of the issues identified and the scope of the proposed activities." Verification Report at 22-23. At the same time, one of the projects evaluated with an EIS (Timbered Rocks) contained "6,780 acres total of salvage and green tree harvest," calling into question BLM's proposal to exclude comparably sized projects from any NEPA review. *See id*. at 23.

While BLM asserts that none of the evaluated projects "included mitigation measures as features of the proposed action or alternatives in order to preclude the need to prepare an EIS," Verification Report at 1, it repeatedly acknowledges that these projects included "design features … that assisted in determining that the proposed actions evaluated in the EAs had no significant

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195-96, *available at*:
https://www.fs.fed.us/psw/publications/documents/psw_gtr247/psw_gtr247.pdf.

[12] *See, e.g.*, Benítez-López, Ana, *et al*., "The Impacts of Roads and Other Infrastructure on Mammal and Bird Populations: A Meta-Analysis," Biological Conservation 143:6, 1307-1316 (June 2010), *available at*:
https://www.sciencedirect.com/science/article/abs/pii/S0006320710000480; Alisa W. Coffin, "From Roadkill to Road Ecology: A Review of the Ecological Effects of Roads," J. Transport Geography 15:5, 396-406 (Sept. 2007), *available at*:
https://www.sciencedirect.com/science/article/abs/pii/S0966692306001177; Trombulak, Stephen C., *et al*., "Review of Ecological Effects of Roads on Terrestrial and Aquatic Communities," Conservation Biology 14:1, 18-30 (2001), *available at*:
https://conbio.onlinelibrary.wiley.com/doi/pdf/10.1046/j.1523-1739.2000.99084.x.

[13] U.S. Forest Serv., Road Management Website, Background Question #8,
https://www.fs.fed.us/eng/road_mgt/qanda.shtml.

impacts." *Id*. at 4; *see id*. at 17 (listing project design features "to minimize environmental consequences"). BLM's need to include an extensive list of project design features in the text of the categorical exclusion itself further demonstrates the inappropriateness of its proposal. *See* 85 Fed. Reg. at 33,699. Categorically excluding these projects from NEPA review will preclude the development of site-specific mitigation measures that may only be developed during the public review and comment process.

For these reasons, the Proposed Rule is unlikely to withstand judicial scrutiny. The Ninth Circuit in *Bosworth* enjoined a categorical exclusion proposed by the Forest Service for fuels reduction projects because the agency failed to evaluate the potential cumulative effects of its proposal on a programmatic level. *Bosworth*, 510 F.3d at 1030. As with the Proposed Rule here, the Forest Service in *Bosworth* hoped to use this categorical exclusion to treat a significant number of acres. But as the Court noted, if the area to be treated is so extensive that "assessing the cumulative impacts of the ... [categorical exclusion] as a whole is impractical, then the use of the categorical exclusion mechanism was improper." *Id.* at 1028. Here, nowhere in the Proposed Rule or supporting documentation does BLM consider or analyze the cumulative impacts of exempting salvage harvest project up to 5,000 acres in size from NEPA, which the *Bosworth* court noted "is of critical importance in a situation ... where the categorical exclusion is nationwide in scope and has the potential to impact a large number of acres." 510 F.3d at 1028.

## CONCLUSION

As discussed above, BLM has failed to offer any reasoned explanation for exempting salvage harvest projects up to 5,000 acres from the requirements of NEPA. BLM should abandon this proposal and instead focus on work that addresses the threats posed by climate change and provides a targeted, scientifically-based approach to protect our communities and public lands.

Sincerely,

GEORGE TORGUN
Deputy Attorney General
DAVID A. ZONANA
Supervising Deputy Attorney General

For XAVIER BECERRA
Attorney General