

**COMMENTS OF ATTORNEY GENERALS OF CALIFORNIA, COLORADO, ILLINOIS  
MAINE, MASSACHUSETTS, MINNESOTA, NEW MEXICO, OREGON, AND  
WASHINGTON**

March 9, 2026

VIA REGULATIONS.GOV

Joshua White  
Acting Director  
Ecosystem Management Coordination  
U.S. Department of Agriculture, Forest Service  
201 14th Street SW, Mailstop 1108  
Washington, DC 20250–1124

**Re: Proposed Rule – Project-Level Predecisional Administrative Review Process,  
91 Fed. Reg. 5387 (Feb. 6, 2026) (RIN 0596–AD69)**

Dear Acting Director White:

The Attorneys General of the States of California, Colorado, Illinois, Maine, Minnesota, New Mexico, Oregon, and Washington and the Commonwealth of Massachusetts (collectively, States) respectfully submit these comments on the United States Department of Agriculture’s proposed rule amending the regulations governing the predecisional administrative review of projects proposed by the United States Forest Service (Forest Service) (Proposed Rule).<sup>1</sup>

States have a vested interest in ensuring the responsible management of national forests and preserving their ability—and the ability of their citizens—to raise meaningful comment and objections to management decisions that would harm those interests. The regulations governing predecisional review provide an adequate opportunity to raise issues in comments and objections. However, provisions of the Proposed Rule would collectively eviscerate this opportunity, and the Proposed Rule fails to provide a reasoned explanation for such a stark departure from established policy and practice. The States propose modifications to the final rule, identified below, to avoid a potentially unlawful result and to ensure adequate public awareness and a meaningful opportunity to comment on Forest Service projects subject to the predecisional administrative review process.

**I. THE PROPOSED RULE THREATENS STATES’ IMPORTANT SOCIAL,  
ECONOMIC, AND SOVEREIGN INTERESTS IN RESPONSIBLE FOREST  
SERVICE MANAGEMENT.**

The Proposed Rule would threaten States’ interests by severely limiting the opportunity of States and their citizens—including local residents and experts with the most knowledge of on-the-ground conditions—to comment on and object to wide-ranging projects (such as permits for mining and timber sales, construction of interior roads, and hazardous fuels reduction projects) that have the potential to cause significant harm to social, economic, and sovereign

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<sup>1</sup> Project-Level Predecisional Administrative Review Process, 91 Fed. Reg. 5387 (Feb. 6, 2026) (RIN 0596–AD69).

interests. Summaries of the specific interests of some States, provided below, are representative of the interests that would be harmed by the Proposed Rule.

## **A. California**

Projects on national forests within California are of critical importance to the State's people and its economic and sovereign interests. California is home to more than 20 million acres of national forest land.<sup>2</sup> The Forest Service estimates that around 24 million people visit California's national forests every year and that recreation alone contributes \$1.4 billion to the State's economy and supports 26,000 local jobs.<sup>3</sup>

California's national forests are also key to the State's water supply and water quality. Approximately 60% of California's water supply originates in national forests. These forests filter water and promote infiltration of water into deep aquifers, thus regulating snowmelt that travels into California's rivers and reservoirs. This increases the dependability and cleanliness of the State's water supply, which provides drinking water and supports the State's agricultural industry.<sup>4</sup> Related to its interests in these important social and economic benefits, California has a sovereign interest in a clean and dependable water supply, asserting ownership of waters in the State for the public benefit.<sup>5</sup>

## **B. Colorado**

In Colorado, the Forest Service manages 11.3 million acres of national forest land, totaling 47% of Colorado's forests.<sup>6</sup> These forests are critical to the ecological and economic health of the State. As a result, at least two state agencies—the Colorado Department of Natural Resources (CDNR) and Colorado Division of Parks and Wildlife (CPW)—regularly participate in the Forest Service's administrative review process.

Colorado derives immense economic and biological value from its national forests. For example, these forests are home to state species of special concern, such as the river otter, which has been the subject of significant state investments and is not protected at the federal level. Forty-eight of Colorado's 53 14,000-foot peaks also stand on this land, boasting some of the most popular hiking in the United States and drawing visitors from around the world.<sup>7</sup> Additionally, almost three quarters of Colorado's high-elevation forests are on national forest land.<sup>8</sup> These forests are critical for the health of Colorado's watersheds, which provide water for

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<sup>2</sup> U.S. Dep't of Agric., Region 5, About the Area, <https://www.fs.usda.gov/r05/about-area> (last visited March 1, 2026).

<sup>3</sup> U.S. Dep't of Agric., Region 5, Nature's Benefits—Local Economies (Aug. 8, 2023), <https://www.fs.usda.gov/sites/nfs/files/r05/publication/NB%20Infographic%20-%20Local%20Economies.pdf>.

<sup>4</sup> U.S. Dep't of Agric., National Forests in California: Nature's Benefits—Water (Sept. 7, 2023), <https://www.fs.usda.gov/sites/nfs/files/r05/publication/NB%20Infographic%20-%20Water%20%281%29.pdf>.

<sup>5</sup> Cal. Water Code §§ 102, 105.

<sup>6</sup> Colo. State Forest Serv., Ownership of Colorado's Forests, <https://csfs.colostate.edu/forests-trees/colorado-land-ownership/> (last visited March 4, 2026).

<sup>7</sup> Nat'l Forest Found., Find Your Fourteener – Launching a Path Forward on Colorado's Iconic Peaks, <https://www.nationalforests.org/who-we-are/find-your-fourteener> (last visited March 4, 2026).

<sup>8</sup> Colo. State Forest Serv., Ownership of Colorado's Forests, <https://csfs.colostate.edu/forests-trees/colorado-land-ownership/> (last visited March 4, 2026).

Colorado and 18 other states.<sup>9</sup> In short, national forests fuel Colorado’s economy and preserve human and environmental health across the state.

Notably, the White River National Forest in northwest Colorado produces the greatest economic impact and attracts the most visitors of any national forest in the United States. In 2019, the forest generated over 12 million recreation visits and had an economic impact of \$1.59 billion.<sup>10</sup> The forest is home to world-renowned ski resorts, such as Breckenridge, Beaver Creek, Copper Mountain and Vail, all of which are major contributors to the State’s \$8 billion winter recreation economy.<sup>11</sup>

Given Colorado’s interest in its national forests, CDNR and CPW often participate in the Forest Service’s administrative review process. Recent examples include the Twin Peaks Project, Berlaimont Estates Project, Mad Rabbit Trails Project, Eagle and Aspen/Sopris Wildlife Habitat Improvement Projects, McCoy Park Beaver Creek Ski Area Expansion, Booth Hillside Bighorn Sheep Habitat Treatment Project, Powderhorn Ski Area West End Lift Replacement Project, and Arapahoe Basin Ski Area Expansion Project.

### C. Massachusetts

Although not host to any national forests, the Proposed Rule threatens the social, economic, and sovereign interests of Massachusetts, a Commonwealth touched in countless ways by the activities and decisions of the Forest Service. The Proposed Rule could impact neighboring states’ national forests, and therefore could result in harmful impacts to Massachusetts’ natural resources. For example, Vermont’s Green Mountain National Forest abuts Massachusetts and provides and protects habitat for essential flora and fauna, including fish, bear, moose, otter, and more.<sup>12</sup> These forested resource areas and habitats extend over the border into Massachusetts.<sup>13</sup>

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<sup>9</sup> Erika Reiter & Chuck Rhoades, U.S. Dep’t of Agric., Sprucing Up High-elevation Forests (Feb. 26, 2024), [https://www.fs.usda.gov/about-agency/features/sprucing-high-elevation-forests#:~:text=The%20Forest%20Service's%20restoration%20partners%20have%20started.Wildlife%20habitat%20\\*%20Timber%20production%20\\*%20Recreation; see also Colo. State Forest Serv., 2022 Report on the Health of Colorado’s Forests – Watershed Protection, https://csfs.colostate.edu/forest-management/forest-health-report-2022/watershed-protection/#:~:text=Colorado%20is%20a%20headwaters%20state.flows%20that%20harm%20water%20infrastructure](https://www.fs.usda.gov/about-agency/features/sprucing-high-elevation-forests#:~:text=The%20Forest%20Service's%20restoration%20partners%20have%20started.Wildlife%20habitat%20*%20Timber%20production%20*%20Recreation; see also Colo. State Forest Serv., 2022 Report on the Health of Colorado’s Forests – Watershed Protection, https://csfs.colostate.edu/forest-management/forest-health-report-2022/watershed-protection/#:~:text=Colorado%20is%20a%20headwaters%20state.flows%20that%20harm%20water%20infrastructure (last visited Feb. 26, 2024).) (last visited Feb. 26, 2024).

<sup>10</sup> U.S. Dep’t of Agric., FY19 Economic Contributions from National Forests and Grasslands, <https://newspack-coloradosun.s3.amazonaws.com/wp-content/uploads/2022/12/AAG-Methodology-and-Summary-Report.pdf> (last visited March 3, 2026).

<sup>11</sup> Nat’l Forest Found., White River National Forest, <https://www.nationalforests.org/our-forests/find-a-forest/white-river-national-forest> (last visited March 3, 2026); see also Colorado Parks & Wildlife, *The State of Colorado’s 2025-2029 Statewide Comprehensive Outdoor Recreation Plan* (Aug. 1, 2024) at 182 (Appendix G).

<sup>12</sup> See, e.g., Forest Service, Green Mountain and Finger Lakes National Forests (Mar. 26, 2025) <https://www.fs.usda.gov/r09/gmfl/recreation/george-d-aiken-wilderness> (describing wildlife protected by the inventoried roadless area-surrounded Aiken Wilderness).

<sup>13</sup> See Mass. Dep’t of Conservation & Recreation, Maps of State Forests in Northern Berkshire and Western Connecticut Valley, Forest Resource Management Plans, <https://www.mass.gov/lists/forest-resource-management-plans> (last visited Mar. 9, 2026).

Additionally, Vermont's Green Mountain National Forest and New Hampshire's White Mountain National Forest host the headwaters for the Connecticut River<sup>14</sup> and Merrimack River,<sup>15</sup> respectively, which flow through Massachusetts. The Connecticut River is a vital natural resource that supports Massachusetts' biodiversity.<sup>16</sup> It is particularly important for its richness of federal and state-listed endangered species, as well as the Commonwealth's economy, including industry, agriculture, and recreation.<sup>17</sup> The Merrimack River is an irreplaceable source of drinking water for over half a million Massachusetts residents and visitors.<sup>18</sup> The river and its tributaries also support countless fish, migratory birds, and approximately 75 federally or state-listed endangered species (e.g. Shortnose Sturgeon), as well as recreation, cultural identity, and the economy in Massachusetts cities like Lowell and Lawrence.<sup>19</sup>

#### D. New Mexico

New Mexico has a substantial interest in responsible Forest Service management as national forest lands are essential to New Mexico's growing economy, distinct cultural heritage, and vital water security. New Mexico is home to 9.1 million acres of national forest lands.<sup>20</sup> National forests spur investment throughout the State and drive key industries upon which the State relies for essential revenue, including tourism and outdoor recreation. In 2025, the Forest Service invested over \$26 million in New Mexico to reduce wildfire risk, including an investment of over \$3 million in the Pueblo of Cochiti.<sup>21</sup> Likewise, each national forest generates significant economic activity, with Carson National Forest alone generating \$70.7 million annually in total visitor spending.<sup>22</sup> Similar to the geography of other national forests in New Mexico, Carson National Forest overlaps four non-metro counties, underscoring the importance of national forests on New Mexico's local and rural economies.<sup>23</sup>

National forest lands are also home to significant cultural and heritage resources predating the establishment of the United States. Many Tribal Nations and land grant

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<sup>14</sup> *Id.*

<sup>15</sup> See U.S. Army Corps of Eng'rs, Merrimack River Navigation Project, [https://www.nae.usace.army.mil/Missions/Civil-Works/Navigation/Massachusetts/Merrimack/#:~:text=Merrimack%20River%20Navigation%20Project,in%20the%](https://www.nae.usace.army.mil/Missions/Civil-Works/Navigation/Massachusetts/Merrimack/#:~:text=Merrimack%20River%20Navigation%20Project,in%20the%20) (last visited Mar. 9, 2026).

<sup>16</sup> See Mass. Div. of Fisheries & Wildlife, The Nature Conservancy, <https://biomap-mass-coeea.hub.arcgis.com/> (last visited Mar. 9, 2026).

<sup>17</sup> See N.H. Dep't of Env'tl. Servs., Environmental Fact Sheet: The Connecticut River (2023), <https://www.des.nh.gov/sites/g/files/ehbemt341/files/documents/2020-01/rl-4.pdf>.

<sup>18</sup> See U.S. Env'tl. Prot. Agency, About the Merrimack, <https://www.epa.gov/merrimackriver/about-merrimack> (July 11, 2025).

<sup>19</sup> See Mass. Div. of Fisheries & Wildlife, Shortnosed Sturgeon, <https://www.mass.gov/info-details/shortnose-sturgeon> (found in both Connecticut and Merrimack rivers) (last visited Mar. 9, 2026).

<sup>20</sup> U.S. Dep't of Agric., Region 3, Forests and Grasslands, <https://www.fs.usda.gov/r03/forests-grasslands> (last visited March 4, 2026).

<sup>21</sup> U.S. Dep't of Agric., Forest Service Invests over \$26M in Arizona, New Mexico, Pueblo of Cochiti to Reduce Wildfire Risk (Sept. 25, 2025), <https://www.fs.usda.gov/r03/newsroom/releases/forest-service-invests-over-26m-arizona-new-mexico-pueblo-de-cochiti-reduce>.

<sup>22</sup> U.S. Dep't of Agric., Benefits to People at a Glance Report: Carson National Forest, <https://www.fs.usda.gov/emc/economics/documents/at-a-glance/benefits-to-people/southwest/BTP-Carson.pdf> (last visited March 3, 2026).

<sup>23</sup> *Id.*

communities neighbor national forest lands, continuing to maintain strong historic ties to these lands. For example, over 30 Tribal Nations consider Santa Fe National Forest as part of their ancestral domain.<sup>24</sup> Likewise, many land grant communities, recognized political subdivisions of the State, utilize historic acequias to channel critical water, captured as snow by national forest mountains, into surrounding agricultural communities.<sup>25</sup>

Furthermore, given New Mexico's arid climate and urgent water scarcity, national forests act as a critical supply of water and help to protect water quality. The Rio Grande Basin, which provides drinking water to Albuquerque and Santa Fe, two of the state's most populous cities, receives 29% of its water from national forest lands.<sup>26</sup> Likewise, about 843,000 people, equivalent to nearly half the state's population, receive water from protected areas that overlap with the Cibola National Forest by at least 25%.<sup>27</sup>

New Mexico has a strong interest in continuing to foster economic growth, maintain its unique cultural heritage, and protect its critical water supply by ensuring responsible Forest Service management. The Proposed Rule threatens the meaningful participation of the State and its residents to comment on matters most important to communities throughout New Mexico. Limits to this participation are especially concerning as the largest wildfire in the state's history occurred on national forest lands during a prescribed burn by the Forest Service in 2022.<sup>28</sup> This wildfire alone burned nearly 342,000 acres and resulted in public health, environmental, and economic damages from which the state has not yet recovered.<sup>29</sup>

## **E. Washington**

Washington has a significant interest in the responsible management of national forests within its borders. Washington State contains 9.2 million acres of national forest land, comprising about one-fifth of the State's total land mass.<sup>30</sup> National forest lands are inextricably connected to the State's economic interests, water supply, wildlife, and the management of state-owned lands. The Proposed Rule will impede the ability of Washington State and its citizens to meaningfully participate in the public comment process for projects that impact the full slate of these interests.

Forest recreation activities provide billions of dollars' worth of economic benefit to the State of Washington. This includes the economic benefit the State enjoys from recreational and commercial fishing of anadromous fish, such as salmon, that spawn in forested lands. More

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<sup>24</sup> U.S. Dep't of Agric., Santa Fe National Forest Land Management Plan (July 2022), [https://www.fs.usda.gov/sites/nfs/files/legacy-media/santafe/Record\\_of\\_Decision.pdf](https://www.fs.usda.gov/sites/nfs/files/legacy-media/santafe/Record_of_Decision.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> State of N.M., 2020 New Mexico Forest Action Plan (Sept. 2020), at 157, [https://www.emnrd.nm.gov/sfd/wp-content/uploads/sites/4/NMFAP\\_2020\\_v1-1\\_2021\\_03\\_12b\\_web.pdf](https://www.emnrd.nm.gov/sfd/wp-content/uploads/sites/4/NMFAP_2020_v1-1_2021_03_12b_web.pdf).

<sup>27</sup> U.S. Dep't of Agric., Benefits to People at a Glance Report: Cibola National Forest, <https://www.fs.usda.gov/emc/economics/documents/at-a-glance/benefits-to-people/southwest/BTP-Cibola.pdf> (last visited March 3, 2026).

<sup>28</sup> See James R. Meldrum et al., U.S. Dep't of Agric., Note RNRS-RN-111 – Living with Wildfire in Santa Fe, New Mexico: 2024 Data Report (2026), <https://research.fs.usda.gov/treesearch/80111>.

<sup>29</sup> See *id.*

<sup>30</sup> See U.S. Dep't of Agric., Forest Serv., Forest Service Roadless Area Conservation, Final Environmental Impact Statement ("2000 FEIS"), Vol. 1 at A-4.

broadly, outdoor recreation in Washington supports \$26.5 billion in annual expenditures from residents and tourists on trips, fishing, boating, and outdoor recreation gear.<sup>31</sup> This amounts to over \$40 billion in total economic value, about \$400 million of which is tied directly to national forest lands.<sup>32</sup>

National forests in Washington are critical to the State's water supply. For example, over two million Washington citizens rely on watersheds that lie largely within and are fed by snowmelt from the Mount Baker-Snoqualmie National Forest.<sup>33</sup>

U.S. Forest Service lands also play an important role for Washington's wildlife, including threatened and endangered species under the Endangered Species Act that the State is heavily invested in recovering. Multiple threatened or endangered fish species native to Washington have habitat in national forests, including sockeye, chum, and chinook salmon, steelhead trout, and bull trout.<sup>34</sup> National-forest lands also include habitat for endangered species like the Canada lynx, the grizzly bear, the gray wolf, the woodland caribou, the marbled murrelet and the northern spotted owl.<sup>35</sup> Under Washington law, wildlife, fish, and shellfish are property of the State.<sup>36</sup>

Projects on national forests in Washington also pose impacts for state-owned forests, which border many of the U.S. Forest Service properties in the State. This includes the Washington State Department of Natural Resources' timberlands adjacent to the Olympic National Forest, the Gifford Pinchot National Forest, the Mount Baker-Snoqualmie National Forest, the Okanogan National Forest, and the Colville National Forest.

## **II. THE PROPOSED RULE PRIORITIZES EFFICIENCY AND COST SAVINGS AT THE EXPENSE OF PUBLIC PARTICIPATION IN FOREST SERVICE DECISION-MAKING.**

The Proposed Rule asserts that it is changing the administrative review regulations to "align with applicable National Environmental Policy (NEPA) regulations and simplify and streamline processes to ensure the Forest Service conducts administrative review in a timely and efficient manner."<sup>37</sup> In particular, the Proposed Rule cites to the Council on Environmental Quality's rescission of its NEPA implementing regulations and the Department of Agriculture's subsequent rescission of its agency NEPA regulations. The Proposed Rule also asserts that the current review process causes significant costs and delays in the approval and implementation of Forest Service projects.<sup>38</sup>

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<sup>31</sup> Earth Economics, Economic Analysis of Outdoor Recreation in Washington State, 2020 Update, at 13, <https://rco.wa.gov/wp-content/uploads/2020/07/EconomicReportOutdoorRecreation2020.pdf>.

<sup>32</sup> *Id.* at 15.

<sup>33</sup> U.S. Dept. Of Transp. Volpe Ctr., Roadmap for Increased Investment in Western Washington's National Forest Road Network (July 2025).

<sup>34</sup> 2000 FEIS, *supra*, C-3 to C-18.

<sup>35</sup> *Id.*

<sup>36</sup> Wash. Rev. Code § 77.04.012.

<sup>37</sup> 91 Fed. Reg. at 5387.

<sup>38</sup> *Id.* at 5389-90.

While States support the concept of an efficient review process, it cannot be at the expense of public awareness and participation in Forest Service projects. Principles of administrative review (reflected in requirements set forth in the Administrative Procedure Act), the Healthy Forests Restoration Act (HFRA),<sup>39</sup> and the regulations implementing the HFRA that have been in place since 2013 **require** that the public has a fair and meaningful opportunity to participate in Forest Service decisions and that the Forest Service addresses valid issues raised by the public before making a final decision, to avoid judicial review that would significantly delay the implementation of decisions. Efficient review is only one aspect of this process.

#### **A. Principles of Administrative Review Require Fair and Meaningful Opportunity for the Public to Comment and Raise Issues Prior to Litigation.**

The HFRA provides for notice and opportunity to comment on projects proposed by the Forest Service before a final decision is made.<sup>40</sup> “The requirement of notice and a fair opportunity to be heard is basic to administrative law.”<sup>41</sup> Notice and comment ensures that an agency’s decisions are informed by a variety of viewpoints, including those it may not have considered; ensures fairness to parties affected by an agency action, and enables parties to develop a record to support administrative and judicial review. Consequently, the public must be given a meaningful opportunity—including adequate time—to comment. “The opportunity for comment must be a *meaningful opportunity*. That means enough time with enough information to comment and for the agency to consider and respond to the comments.”<sup>42</sup> For example, “instances actually warranting a 10–day comment period will be rare. Such instances are generally characterized by the presence of exigent circumstances in which agency action was required in a mere matter of days.”<sup>43</sup>

The HFRA also provides for a predecisional administrative review process.<sup>44</sup> Exhaustion, like notice and comment, enables affected parties to alert an agency to defects in proposed actions and bring their expertise to bear in resolving them without the need for judicial review.<sup>45</sup> Consequently, objections raised in administrative review must put the agency on reasonable notice of alleged defects to a proposed action in order for the agency to cure them. However, this does not require a high degree of specificity. “[T]he issue exhaustion requirement should be interpreted broadly. Plaintiffs satisfy the issue exhaustion requirement if their appeal

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<sup>39</sup> 16 U.S.C. §§ 6501 *et seq.*

<sup>40</sup> *Id.* § 6515(a)(3).

<sup>41</sup> *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1102 (4th Cir. 1985) (emphasis added); *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) (“The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process.”).

<sup>42</sup> *California ex rel. Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1172 (N.D. Cal. 2019) (citing *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (3d Cir. 2011)) (emphasis added).

<sup>43</sup> *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012).

<sup>44</sup> 16 U.S.C. § 6515(c).

<sup>45</sup> *Native Ecosystems Council v. Marten*, 612 F. Supp. 3d 1146, 1162 (D. Mont. 2020) (“Before bringing a claim in federal court, a plaintiff must first exhaust its available administrative remedies. . . . The purpose of this requirement is to allow the ‘agencies to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention[.]’”) (quoting *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 846 (9th Cir. 2013)).

provided sufficient notice to the agency to afford it the opportunity to rectify the violations that the plaintiffs alleged.”<sup>46</sup>

**B. The Current Administrative Review Process Balances the Need for Efficient Decision Making with Requirements for Fair and Meaningful Opportunity for the Public to Comment and Raise Issues Prior to Litigation.**

Principles of administrative law, applicable to the HFRA’s comment and exhaustion requirements, are reflected in the current regulations, adopted in 2013, governing the Forest Service’s predecisional administrative review process. The final rule adopting the current regulations.<sup>47</sup> recognized the benefit of allowing for adequate opportunity to comment and raise administrative objections (Final Rule). For example, the Final Rule explained that “considering public concerns early on, before a decision is made, aligns with the Forest Service’s collaborative approach to forest management and increases the likelihood of resolving those concerns resulting in better, more informed decisions.”<sup>48</sup> Regarding comments that the 45-day period for filing objections to non-HFRA projects reviewed under an EIS should be shortened, the Forest Service responded that “this amount of time has worked reasonably well and provides an appropriate balance between the need to move forward efficiently toward a project decision while offering a reasonable opportunity for review of environmental documents and documenting unresolved issues.”<sup>49</sup>

The need to provide reasonable opportunity for public participation in environmental review is reflected throughout the current regulations. The current regulations require the Forest Service to publish legal notice of opportunity to comment, the objection process, and availability of final environmental review documents triggering the objection period and require the Forest Service to provide commenters with final environmental documents.<sup>50</sup> Furthermore, the regulations provide an adequate opportunity for public comment and objections. The regulations require that comments be accepted for 30 days for projects reviewed under an environmental assessment (EA) and 45 days for projects reviewed under an environmental impact statement (EIS).<sup>51</sup> The regulations require the Forest Service to accept objections to proposals for certain fuel reduction projects submitted within 30 days of publication of a final environmental review document, and objections to other Forest Service projects submitted within 45 days.<sup>52</sup> Notably, the regulations require that objections identify “specific issues related to the proposed project”; provide a statement, if applicable, of how the “draft decision specifically violates law, regulation, or policy”; and offer “suggested remedies.”<sup>53</sup>

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<sup>46</sup> *Or. Nat. Desert Ass’n v. McDaniel*, 751 F. Supp. 2d 1151, 1158 (D. Or. 2011) (quoting *Nat’l Parks & Conservation Ass’n v. BLM*, 606 F.3d 1058, 1065 (9th Cir.2010)).

<sup>47</sup> Project-Level Predecisional Administrative Review Process; Final Rule, 78 Fed. Reg. 18,481 (March 27, 2013).

<sup>48</sup> *Id.* at 18,483.

<sup>49</sup> *Id.* at 18,492.

<sup>50</sup> 36 C.F.R. §§ 218.7, 218.24(c).

<sup>51</sup> *Id.* § 218.25.

<sup>52</sup> *Id.* §§ 218.26(a), 218.32(a).

<sup>53</sup> *Id.* § 218.8.

Finally—and importantly—the regulations require that review be conducted not by the “responsible official” proposing the project, but by a higher-level official in the Forest Service.<sup>54</sup> This comports with basic principles of fairness. Responsibility for reviewing objections should lie not with the person proposing a project, who likely has a professional stake in its approval and is likely to have prejudged issues, but rather should be reviewed by a neutral party.

### **C. The Proposed Rule Would Deprive Fair and Meaningful Opportunity for the Public to Comment and Raise Issues Prior to Litigation.**

The Proposed Rule would cut back the provisions described above to such an extent that it would deprive the public of fair and meaningful opportunity to participate in Forest Service decision making subject to the administrative review process. While the Forest Service explains some amendments to these provisions, such as elimination of publishing notice in regional newspapers,<sup>55</sup> those explanations do not adequately account for the impact on public participation. Together, these amendments would foreclose meaningful participation.

Specifically, the Proposed Rule would reduce the time to file comments on environmental documents from 30 days to 10 days for projects reviewed under an EA and from 45 days to 20 days for projects reviewed under an EIS.<sup>56</sup> The Proposed Rule would also reduce the time to file objections to 10 days for a project reviewed under an EA and 20 days for projects reviewed under an EIS.<sup>57</sup> These provisions do not provide the public with an adequate opportunity to formulate comments and objections.

For example, Colorado’s CPW recently commented on a draft environmental assessment for the Twin Peaks Project in the White River National Forest. The Project proposed timber and vegetation treatment (including for the sale of timber), covers over 2,600 acres of land, and has a 90-page draft environmental assessment. To provide meaningful comments, CPW consulted with local staff and subject matter experts before drafting comments, completing necessary internal reviews, and submitting comments to the Service. Under the Proposed Rule, CPW would have only 10 days to complete this process. Where CPW can accommodate this expedited timeline, their comments will be rushed and necessarily limited in scope.

The Proposed Rule seeks to justify shortened comment and objection periods by reference to page limits of 75 pages for EAs and 300 pages for EISs established by the Fiscal Responsibility Act of 2023.<sup>58</sup> This is beyond implausible. The length of environmental documents does not necessarily reflect their complexity. Furthermore, it does not account for the fact that environmental documents often rely on and refer to other lengthy documents that the public would have to review to submit an informed comment or objection.<sup>59</sup> A 10- or 20-day comment and objection period, depending on the level of NEPA review, would be insufficient for

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<sup>54</sup> *Id.* §§ 218.2, 218.3.

<sup>55</sup> Proposed 36 C.F.R. § 218.3(b)–(c).

<sup>56</sup> *Id.* § 218.7.

<sup>57</sup> *Id.*

<sup>58</sup> Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(b), 137 Stat. 10; 42 U.S.C. § 4336a(e). Regarding shortened comment periods, the Proposed Rule implausibly asserts, “With shorter environmental documents commenters will require less time to review, comment, or object.” 91 Fed. Reg. at 5389.

<sup>59</sup> 7 C.F.R. § 1b.5(d) (excluding appendices from page limits).

the public to review and provide informed comments and objections on even the most straightforward environmental documents.

Furthermore, the Proposed Rule would also require that objections include “[c]learly articulated recommendations” and “clearly stated specific mitigations” and authorizes the reviewing official to set aside objections that do not include such statements.<sup>60</sup> This provision is far stricter than requirements under the current regulations, which only require objections to identify “specific issues” and “suggested remedies.”<sup>61</sup> It is the agency’s responsibility to undertake a good-faith, objectively reasonable effort to understand the public’s comments, even if they do not include a “clearly articulated recommendation.” This provision of the Proposed Rule gives the Forest Service unfettered discretion to unilaterally determine what is clearly articulated and what falls short. Furthermore, it unfairly shifts the burden for developing and analyzing project proposals from the agency, which has the needed expertise and should bear this responsibility, onto the public. And finally, it is not realistic to expect the public to formulate project proposals within the shorter comment and objection periods prescribed by the Proposed Rule.

Other provisions, particularly eliminating the requirement that the person reviewing objections not be the same person responsible for proposing a project, are indefensible.<sup>62</sup> Dispensing with the requirement of having a neutral “reviewing official” role allows a line officer who was involved in the underlying Forest Service decision to serve as the reviewer of that exact decision. This creates risk—and certainly the perception—that such official is likely both personally and professionally invested in the outcome may have already prejudged the issues. It also raises procedural due process concerns.<sup>63</sup>

### **III. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS BECAUSE IT DOES NOT EXPLAIN HOW REDUCED OPPORTUNITY FOR NOTICE AND COMMENT AND OBJECTION PERIODS WOULD PROVIDE THE PUBLIC A FAIR AND MEANINGFUL OPPORTUNITY TO COMMENT AND RAISE ISSUES PRIOR TO LITIGATION.**

A proposed agency action is arbitrary and capricious under the Administrative Procedure Act if it “entirely fail[s] to consider an important aspect of the problem.”<sup>64</sup> Furthermore, a proposed agency action that amends regulations must “provide a reasoned explanation for the change.”<sup>65</sup> The Forest Service purports to justify the Proposed Rule on the basis that it would

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<sup>60</sup> *Id.* §§ 218.9(d), 218.11(b)(4).

<sup>61</sup> Compare 36 C.F.R. § 218.8(d)(5), with Proposed C.F.R. § 218.9(d).

<sup>62</sup> Compare 36 C.F.R. § 218.3(a), with Proposed C.F.R. § 218.3.

<sup>63</sup> See, e.g., *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997) (“The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer. The Supreme Court has consistently enforced this basic procedural right and held that decision makers are constitutionally unacceptable . . . when a judicial or quasi-judicial decision maker has the dual role of investigating and adjudicating disputes and complaints.”).

<sup>64</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>65</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005)); see also *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

save the Forest Service time and money in reviewing and implementing projects. But it fails to consider the effect on fair and meaningful public participation as a key element of the administrative review process, let alone provide a reasoned explanation for its change in position. Furthermore, it fails to provide a reasoned explanation for curtailing the public participation safeguards under the current regulations. Participation in government decisions affecting public rights should not take a backseat to efficiency. For the reasons described above, the Proposed Rule is arbitrary and capricious and may result in due process violations as applied.

#### **IV. THE FOREST SERVICE SHOULD MODIFY THE PROPOSED RULE TO AVOID AN ARBITRARY AND CAPRICIOUS RESULT.**

The States urge the Forest Service to modify the final rule to incorporate the following recommendations so as to avoid the arbitrary and capricious reduction in public participation that would result from adoption of the Proposed Rule.

##### **A. The Final Rule Should Provide a Transition to Online Notice and Provide Newspaper Notice of the Transition.**

While we do not disagree that reliance on newspapers for news and information is steadily decreasing, the agency must consider that a disproportionate number of those who continue to rely on printed news sources likely reside in rural and remote communities that are more likely to be impacted by the Forest Service's land-management decisions and actions. For that reason, the Forest Service should consider a phased transition from publishing its notices in newspapers to the internet. Specifically, we urge the Forest Service to consider publishing notices in both places for at least one year (or longer in areas where such notices are infrequently published), and in any newspaper, include the following language: "This notice is also available at [www.governmentwebsite.gov](http://www.governmentwebsite.gov). Starting on [DATE], notices such as these will only be published online." This will give the public time to adjust to a format that might presently be inaccessible to them.

##### **B. The Final Rule Should Provide Longer Comment and Objection Periods to Provide Meaningful Opportunity for Public Participation.**

We urge that the Final Rule provide at least 20 days for an objection to EA (rather than 10 days) and 30 days for an EIS (rather than 20 days) to provide the public additional time to formulate detailed and useful objections. We also urge that the Final Rule provide the same timeframes for the comment period so that the public has adequate time to identify issues that may be raised in an objection.

##### **C. The Final Rule Should Eliminate the Provision Allowing the Official Responsible for Proposing a Project to Also Serve as the Reviewing Official.**

We strenuously oppose the provision of the Proposed Rule allowing the official responsibility for proposing a project to also review objections to a proposal. As described above, this runs counter to basic principles of fairness and due process. We strongly urge that this provision of the Proposed Rule be eliminated from the final rule.

#### **D. The Final Rule Should Eliminate the Strict Requirement That Objections Raise Specific Recommendations and Mitigation.**

We oppose the provision of the Proposed Rule allowing the reviewing official set aside objections that do not include a “clearly articulated recommendation” or “clearly stated mitigation for the responsible official to consider.” This proposal, too, should be withdrawn. Again, we believe it is incumbent on the agency to make an objectively reasonable effort to understand the public’s comments, even if they do not include a “clearly articulated recommendation.” So long as an issue is colorably raised, the reviewing official should infer or deduce—and consider—a logical solution.

Furthermore, while an objection that is informed by a degree of expertise or knowledge in resolving issues that arise in the context of land management would certainly be welcome, the public cannot be expected to have all the answers. It is not their job. Particularly where submission timeframes are shortened, the burden should not be on the public to “clearly articulate recommendations” or set forth “clearly stated mitigation” to avoid having their objections “set aside” and disregarded. The burden should instead be on the reviewing official to make a good faith effort to deduce the substantive concern from a comment and from that to consider possible recommendations or mitigation measures. This is consistent with ample caselaw holding that the exhaustion requirement is satisfied so long as officials had “sufficient notice” of an issue.<sup>66</sup> “Plaintiffs need not state their claims in precise legal terms, and need only raise an issue with sufficient clarity to allow the decision maker to understand and rule on the issue raised . . . .”<sup>67</sup>

#### **CONCLUSION**

For the reasons stated above, States urge the Forest Service to modify the Proposed Rule to protect the public’s right to fair and meaningful participation in decisions that will have significant impacts on their interests.

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<sup>66</sup> *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1065.

<sup>67</sup> *Id.* (internal quotations and citations omitted.)

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