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Logging After Wildfire: Salvaging Economic Value or Mugging a Burn Victim?

In recent years, the United States Department of Agriculture Forest Service ("Forest Service") has shifted more of its focus and resources to issues concerning wildfires on national forests. In the decades following World War II, the Forest Service focused on commercial timber sales and road construction. From 1960 through 1990, logging levels on national forests ranged from approximately nine to twelve billion board feet per year.[1] During this time period, the Forest Service constructed much of the 400,000 miles of logging roads remaining throughout the National Forest System.[2] While it was building roads and planning timber sales, the Forest Service was also suppressing nearly every wildfire that ignited on the national forests.[3]

By 1995, timber harvest levels on the national forests had decreased to under four billion board feet, and by 2000, the levels had fallen to approximately two billion board feet.[4] While commercial logging and harvest levels significantly declined, the Forest Service

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1 U.S. FOREST SERVICE, U.S.D.A., SOUTHERN FOREST RESOURCE ASSESSMENT TIMBR-1: TIMBER PRODUCTS SUPPLY AND DEMAND Fig. 2 (2001) [hereinafter SFRA], *available at* http://www.srs.fs.usda.gov/sustain/ draft/timbr1/timbr1-16.htm (last visited Oct. 29, 2004); *see also* ROSS W. GORTE, CONF. RESEARCH SERV., CRS REPORT FOR CONGRESS: TIMBER HARVESTING AND FOREST FIRES 1 (Aug. 22, 2000).

2 *See* National Forest System Road Management, 65 Fed. Reg. 11,676-01 (proposed March 3, 2000).

3 *See* RANDAL O'TOOLE, REFORMING THE FIRE SERVICE: AN ANALYSIS OF FEDERAL FIRE BUDGETS AND INCENTIVES 5 (2002).

4 SFRA, *supra* note 1; GORTE, *supra* note 1, at 1; FOREST AND RANGELAND MGMT., USFS, USDA, *at* http://www.fs.fed.us/forestmanagement/reports/sold-harvest/index.shtml (last modified Feb. 7, 2004).

was dramatically increasing its fire-related budget. Between the early 1990s and 2001, the Forest Service's fire budget increased from $415 million to $1.8 billion.[5]

Under the current Bush Administration, the Forest Service has combined its focus on both wildfire and commercial timber harvest. Instead of logging national forests to provide a steady supply of timber for local mills, much of the Forest Service's current emphasis is on logging trees in order to save forests from catastrophic wildfires. To achieve this goal, the Forest Service currently focuses on pre-fire "thinning" and post-fire logging projects. The agency does this, even though the current buildup of fuels on national forests is the result of past Forest Service fire suppression, and the fact that weather,[6] and not the buildup of fuels, may be the primary reason for recent severe wildfires. At the same time, the Forest Service continues its policy of suppressing nearly all wildfires, with aggressive fire[7] fighting tactics, including bulldozed fire-lines, chemical fire retardant, and back-fires set by the agency.[8]

The Forest Service's standard practice is to follow severe wildfires with proposed post-fire timber sales.[9] The recent increase in the number and size of wildfires has led to an increase in the number and size of proposed post-fire logging projects.[10] Not surprisingly, these increases have resulted in an increase in the amount of post-fire logging litigation. As much as the timber industry desires to immediately log the burned trees to salvage their economic value, conservationists view recently and severely burned areas as sensitive locations where significant commercial logging should not be permitted. This paper addresses some common themes and issues that have emerged in post-fire cases over the past few years.

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[5] O'TOOLE, *supra* note 3, at 10.

[6] *Id* at 5, 14.

[7] *Id.*

[8] *Id.* at 5.

[9] *See* Pac. Northwest Research Station, U.S. Dep't of Agric., *Postfire Logging: Is It Beneficial to a Forest?*, SCIENCE FINDINGS 1, 3 (Oct. 2002).

[10] Because the size and acreage of green timber sales on national forests has steadily declined, the overall percentage of salvage sales has increased. In 2003, post-fire timber sales proposals made up nearly half the total logging volume planned for the National Forest System. AMERICAN LANDS ALLIANCE, RESTORATION OR EXPLOITATION? POST-FIRE SALVAGE LOGGING IN AMERICA'S NATIONAL FORESTS 3 (2003).

I
COMMON THEMES IN POST-FIRE LOGGING CASES

In recent post-fire logging litigation, there have been at least four common themes. First, the Forest Service routinely attempts to expedite the logging process as soon as possible. However, these attempts have been largely unsuccessful, and as a result, the Forest Service recently changed rules to allow for more flexibility. Second, the Forest Service has been largely unwilling to disclose or address the available scientific evidence that cautions against logging after severe wildfires. Third, the Forest Service has failed, thus far, to account for the substantial environmental impacts of its previous firefighting activities within the proposed areas.

A fourth theme has emerged more recently and is likely to be involved in future post-fire logging cases. Increasingly, the Forest Service is promoting the creation and maintenance of permanent "fuel management zones" or "fuel breaks" as part of its purpose and need for post-fire logging projects. The issues arising from the use of fuel breaks include the Forest Service's obligation to demonstrate and maintain the effectiveness of fuel breaks and potential environmental impacts associated with the required maintenance.

A. Forest Service Attempts to Expedite and/or Sidestep the Regular Process

One constant in post-fire cases is the confrontation between economics and science. On one side, the timber industry would like to see the burned trees logged and removed as quickly as possible to recover or salvage their economic value. Burned trees lose economic value over time, and so from an industry perspective, delay means lost revenues. On the other side, conservationists view severely burned forests as one of the last places to which the Forest Service should be looking for commercial logging projects in national forests due to their already sensitive condition resulting from the fire.

Thus far, it would appear that the industry voice has been loudest within the Forest Service, as the agency has routinely sought ways to expedite the regular process for post-fire timber sales. As seen below, the Forest Service has creatively relied on a number of special provisions for various post-fire projects but the agency has been largely unsuccessful in litigation on this issue. Therefore, the Forest Service has recently sought additional means, through both new

legislation and revised administrative rules and regulations, to speed up its regular planning process.

1. Breaking a Post-fire Logging Strategy into Smaller, Individual Projects

In 1996, the Tower Fire swept through the North Fork John Day watershed in Eastern Oregon and became the largest wildfire in the recorded history of the Umatilla National Forest.[11] Immediately, the Forest Service developed a post-fire logging strategy for several thousand acres of burned forest.[12] The National Environmental Policy Act ("NEPA") requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for any major federal action that may significantly impact the environment.[13] For the Tower Fire, however, the Forest Service did not prepare an EIS to assess the overall impacts of its post-fire logging strategy. The Forest Service instead developed a number of smaller logging projects, with each either assessed separately in an individual Environmental Assessment ("EA"),[14] or "categorically excluded"[15] from NEPA review.

The Forest Service's decision to divide its overall post-fire strategy into separate logging projects was intentionally designed to speed up the administrative process for these post-fire timber sales. As explained by the Forest Service, "its decision to 'conduct separate NEPA analysis on subsequent projects . . . not only simplifies the NEPA analysis, but . . . also allows some projects to move forward if other projects get snagged in appeals and/or litigation.'"[16] In a letter to timber companies, the Forest Service further explained that its

11 Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1210 (9th Cir. 1998).

12 *Id*.

13 *See* 42 U.S.C. § 4332(2)(C); *Blue Mountains*, 161 F.3d at 1211.

14 "As a preliminary step, an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS." *Blue Mountains*, 161 F.3d at 1212, *citing* 40 C.F.R. § 1508.9. "An EA is a 'concise public document that briefly provide[s] sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact.'" *Id*. (quoting 40 C.F.R. § 1508.9).

15 "Categorical exclusion" is defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4.

16 *Blue Mountains*, 161 F.3d at 1215 n.6.

post-fire strategy emphasized "multiple, smaller scale project NEPA preparation to achieve quick success."[17]

In *Blue Mountain Biodiversity Project v. Blackwood*, a number of environmental organizations filed suit to challenge the Big Tower project, the largest of the individual timber sales planned for the Tower Fire area.[18] The plaintiffs argued that NEPA required the Forest Service to assess the entire post-fire strategy in a single EIS. After losing at the district court level, the plaintiffs appealed and the Ninth Circuit Court of Appeals reversed. The NEPA regulations state that a significance determination and obligation to prepare an EIS "cannot be avoided by . . . breaking [an action] down into small component parts."[19] "If several actions have a cumulative environmental effect, 'this consequence must be considered in an EIS.'"[20]

For the Tower Fire area, the Forest Service had identified five post-fire logging projects within the same watershed, which together required the logging of forty to fifty-five million board feet of timber and the construction of approximately twenty miles of road.[21] All of the proposed timber sales were reasonably foreseeable, as they were developed as part of a comprehensive post-fire strategy.[22] The Ninth Circuit held that the proposed sales, at the very least, raised substantial questions whether significant impacts would occur which would require an EIS.[23] Therefore, the court "impose[d] the 'snag' that the Forest Service feared but the law requires."[24]

Even though the Forest Service's approach to the Tower Fire was ultimately rejected by the Ninth Circuit, in some regards, it was successful for the Forest Service and timber companies. Due to both the district court ruling in favor of the Forest Service and the Ninth Circuit initially declining the plaintiffs' request for a stay of the logging, over half of the trees in the Big Tower project area were

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17 *Id*.

18 *Id.* at 1208.

19 *Id.* at 1215 (citing 40 C.F.R. § 1508.27(b)(7)).

20 *Id.* at 1214 (quoting Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1378 (9th Cir. 1998)).

21 *Id*. at 1215.

22 *Id*.

23 *Id*.

24 *Id*.

logged and removed by the time the Ninth Circuit enjoined the sales.[25]

2. Eliminating the Administrative Appeal Process

In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act, to guarantee a person's right to file administrative appeals of Forest Service decisions.[26] Persons or organizations who have been involved in the public comment process for Forest Service projects are allowed to administratively appeal the final Forest Service decision within forty-five days.[27] If an administrative appeal is filed, the Forest Service is ordinarily not allowed to implement the challenged decision until fifteen days following the disposition of the appeal.[28]

For the Bitterroot post-fire logging project in Western Montana, the Forest Service attempted to forego the mandatory administrative appeal process.[29] Wildfires burned large portions of the Bitterroot National Forest in the summer of 2000. Subsequently, the Forest Service developed a post-fire logging proposal and prepared an EIS.[30] Instead of having the forest supervisor for the Bitterroot National Forest sign the record of decision for the Bitterroot project, the decision was signed by Undersecretary of Agriculture Mark Rey.[31] The Forest Service maintained that Mark Rey's signature eliminated the need for the Forest Service to allow administrative appeals and that Rey's approval "constituted the final administrative determination for the project."[32]

In *Wilderness Society v. Rey*, a number of environmental organizations filed suit to enjoin the Bitterroot project and to force the Forest Service to comply with the Appeals Reform Act.[33] The government's basic argument was that the Appeals Reform Act only requires an administrative appeal for decisions of the Forest Service. Since the Bitterroot decision was signed by the Undersecretary of

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25 *Id.*

26 *See* Wilderness Soc'y v. Rey, 180 F. Supp. 2d 1141, 1147 (D. Mont. 2002).

27 Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, § 322, 106 Stat. 1374 (1992).

28 36 C.F.R. § 215.17 (2003).

29 *See Wilderness Soc'y*, 180 F. Supp. 2d at 1141.

30 *Id*. at 1143-44.

31 *Id*.

32 *Id*.

33 *Id.* at 1142-43.

Agriculture, the decision was exempt from the law that requires administrative appeals.[34] As recognized by the district court, under the government's argument, the Forest Service could completely circumvent the administrative appeals process for any controversial project by simply having the Undersecretary sign the decision.[35]

The government's argument, although creative, was flatly rejected by the district court. As stated by Chief Judge Donald Molloy:

> The notion that a signature by the Undersecretary transforms the action from Forest Service business to the business of some other agency is mystical legal prestidigitation. The decision, not the signatory, is the operative fact for purposes of the Appeals Reform Act. The Secretary may not escape her statutory duty to provide an appeals process by completing the signature line of a Forest Service record of decision.[36]

Therefore, the Bitterroot logging project was enjoined and remanded back to the Forest Service, which was ordered to comply with the Appeals Reform Act.

The Forest Service had tried to forego the administrative appeal requirement to expedite the process.[37] As stated by the Forest Service's attorney, the advantage to cutting out the administrative appeal was to get the project underway and eliminate the 105 day delay that would otherwise ensue.[38] The court recognized, however, that the administrative appeal process serves legitimate functions in the deliberative process. Such functions include providing interested participants the opportunity to question the assumptions or science relied upon by the agency and assuring compliance with applicable standards, science, and sound analysis.[39] By attempting to avoid the mandatory appeals, the Forest Service contributed to the difficulty that it was trying to avoid for the controversial post-fire project. Judge Molloy stated that "[t]he action taken by the Forest Service here tends to cause the affected communities of interest to polarize, while the appeal process Congress requires is intended to harmonize to the extent possible the various interests in the decision-making process."[40]

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[34] *Id.* at 1147.

[35] *Id.*

[36] *Id.* at 1148.

[37] *Id.*

[38] *Id.* at 1149, n.4.

[39] *Id.* at 1148-49.

[40] *Id.* at 1143.

3. Eliminating the Mandatory Stay During the Administrative Appeal Process

In 1999, the Big Bar Complex wildfires burned through parts of the Six Rivers National Forest in Northern California and the Forest Service began preparing for post-fire logging.[41] Even though the area had just burned, the Forest Service's main concern was that the area would soon burn again. The Forest Service maintained that commercial logging was necessary to reduce the threat and intensity of a future fire. The agency, therefore, named its Big Bar logging project "Fuels Reduction for Community Protection, Phase 1." Unlike the Big Tower project, the Forest Service prepared an EIS. Additionally, unlike the Bitterroot project, the Forest Service allowed interested parties to administratively appeal the record of decision. For the Big Bar wildfires, however, the Forest Service decided that it would not stay the project while it considered the administrative appeals due to emergency conditions that required urgent action.[42] Therefore, as soon as the record of decision was signed, the Forest Service allowed logging to commence.[43]

The Forest Service's regulations generally do not allow a project to be implemented until fifteen days following the date that administrative appeals are resolved.[44] The regulations in effect at the time of the Big Bar project did provide a limited exception to the automatic stay provision, allowing the Chief of the Forest Service to determine if there is an emergency situation.[45] An emergency was defined as an "unexpected event, or a serious occurrence or a situation requiring urgent action." An example of such an emergency was "[h]azardous or unsafe situations as a result of wildfire."[46] In May 2001, the forest supervisor for the Six Rivers National Forest requested an emergency declaration for the majority of the Big Bar logging project, asserting that there were hazardous and unsafe conditions due to the high probability of future wildfires in the area.[47] Forest Service Chief Dale Bosworth granted the emergency request

41 *See* Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 977-78 (N.D. Cal. 2002).

42 *See generally* Court Transcript, Sierra Club v. Bosworth, No. C-01-2626-SC (N.D. Cal. July 12, 2001) (on file with author).

43 *Id.*

44 36 C.F.R. § 215.10(b) (1993).

45 *Id.*

46 36 C.F.R. § 215.10(d)(1)(ii) (1993).

47 *See* Letter from Six Rivers National Forest Supervisor, to Dale Bosworth, Forest Service Chief (May 14, 2001) (on file with author).

"to address the potential significant risk to human health and safety to the local communities in the affected area . . . if actions are not initiated this summer."[48]

Environmental groups immediately brought suit to challenge the emergency determination for the Big Bar project and moved for injunctive relief to stop the logging and to force the Forest Service to stay the project while considering the administrative appeals.[49] The plaintiffs in *Sierra Club v. Bosworth* relied extensively on Forest Service documents to argue that the agency had no scientific support for its emergency situation determination and had failed to address contradictory evidence. In fact, the EIS itself for the Big Bar project acknowledged that there was no immediate threat of future wildfire and that implementing the logging project would actually elevate the fire hazard in the short term.

In January 2000, the Forest Service's Pacific Northwest Research Station reviewed all available post-fire logging studies and "found no studies documenting a reduction in fire intensity in a stand that had previously burned and then been logged."[50] The Forest Service's post-fire review considered the 1995 Beschta Report, in which the authors were "aware of no evidence supporting the contention that leaving large dead woody material significantly increases the probability of reburn."[51] The review also considered the Forest Service's 1995 Everett Report which found that "[t]here is no support in the scientific literature that the probability for reburn is greater in post-fire tree retention areas than in salvage logged sites."[52] Conversely, according to the Everett Report, current research suggests that salvage logged areas may have elevated fire hazards compared to unlogged sites for the first twenty years.[53]

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[48] Letter from Dale Bosworth, Forest Service Chief to Six Rivers National Forest Supervisor (May 25, 2001) (on file with author).

[49] *See* Court Transcript, Sierra Club v. Bosworth, No. C-01-2626-SC (N.D. Cal. July 12, 2001) (on file with author).

[50] PAC. NORTHWEST RESEARCH STATION, U.S. DEP'T OF AGRIC., ENVIRONMENTAL EFFECTS OF POST-FIRE LOGGING: LITERATURE REVIEW AND ANNOTATED BIBLIOGRAPHY 19 (2000).

[51] ROBERT L. BESCHTA, DR. ET AL., WILDFIRE AND SALVAGE LOGGING: RECOMMENDATIONS FOR ECOLOGICALLY SOUND POST-FIRE SALVAGE MANAGEMENT AND OTHER POST-FIRE TREATMENTS ON FEDERAL LANDS IN THE WEST (1995), *available at* http://www.saveamericasforests.org/congress/ Fire/Beschta-report.htm.

[52] Memorandum from Richard Everett, Science Team Leader, Wenatchee FSL, to the Regional Forester 4 (August 17, 1995) (regarding the Review of Recommendations for Post-Fire Management) (on file with author).

[53] *Id.* at 5.

The Everett Report recognized that the urgency to log after intense wildfire is primarily based on economics.[54] The Forest Service had earlier concluded, however, that economics is not a legitimate reason for a stay exemption under the administrative appeal regulations.[55] Chief Judge Marilyn Patel of the Northern District of California agreed with the plaintiffs. She concluded that there was no evidence of immediate danger or hazard, that the real issue was economics, and that, at least in the context of the motion for a temporary restraining order, the Forest Service was not justified in an exemption from the normal administrative appeal processes.[56] The ongoing logging for the Big Bar project was therefore enjoined and the Forest Service withdrew its emergency determination and stayed the project while it considered the administrative appeals.

4. New Tools to Potentially Expedite the Process for Post-Fire Timber Sales

Under the current Bush Administration, the Forest Service has frequently claimed that national forests are in a state of "analysis paralysis," in that the agency is subject to unnecessary planning and evaluating, when it should be focused more on action. In response, the agency has recently been granted new tools to expedite timber sales in a number of situations. Many of these new tools, however, have already been judicially challenged. The courts will no doubt be involved in helping to define the propriety and limits of the new regulatory and statutory provisions.

a. New "Categorical Exclusions"

As stated above, federal agencies are required to prepare a detailed EIS for proposed actions that may significantly impact the environment. Agencies often prepare less detailed EAs to determine whether an EIS is required. The Council of Environmental Quality's (CEQ) regulations implementing NEPA also direct federal agencies to

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[54] *Id.* at 6.

[55] In *Kentucky Heartwood, Inc. v. Worthington*, 125 F. Supp. 2d 839 (E.D. Ky. 2000), the court enjoined the Forest Service from proceeding with logging pursuant to an emergency situation determination. On reconsideration, Forest Service Chief Michael Dombeck emphasized that economics is not a normally accepted rationale for a stay exemption and that the record must instead demonstrate an imminent risk to public health and safety, private property, or the environment.

[56] *See* Court Transcript, Sierra Club v. Bosworth, C-01-2626-SC (N.D. Cal. July 12, 2001) (on file with author).

determine the actions that normally do not have any significant impact on the environment and, therefore, do not require either an EA or EIS.[57] These categories of actions are referred to as "categorical exclusions."[58]

The Forest Service Handbook lists the categories of "routine" actions that the Forest Service normally excludes from NEPA review.[59] These categories include such things as mowing lawns at a district office, resurfacing a road, reconstructing a trail, and girdling trees to create snags.[60] The Forest Service used to include a categorical exclusion for timber harvests removing up to 250,000 board feet and salvage timber harvests logging up to one million board feet of timber.[61] In *Heartwood v. United States Forest Service*, however, this category was determined to be invalid and the court entered "a nationwide injunction against the timber harvest [categorical exclusion]."[62] The court found that the Forest Service "did not provide any rationale for why this magnitude of timber sales would not have a significant effect on the environment."[63]

In 2003, as part of the Bush Administration's "Healthy Forests Initiative," the Forest Service created new categories of activities to be excluded from NEPA review and procedures. In June 2003, the agency published notice of a new categorical exclusion for mechanical hazardous fuels reduction projects (i.e., logging) up to one thousand acres in size.[64] Since the Forest Service often claims that post-fire timber sales are actually "fuels reduction" projects, it may attempt to rely on this new categorical exclusion for future post-fire logging projects. In addition, in July 2003, the Forest Service published notice of new categorical exclusions for "limited timber harvest" including the "salvage of dead and/or dying trees" on up to

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[57] 40 C.F.R. §§ 1501.4(a)(2), 1507.3; Heartwood v. U.S. Forest Serv., 73 F. Supp. 2d 962, 965 (S.D. Ill. 1999).

[58] 40 C.F.R. § 1508.4 ("Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.").

[59] USFS, FOREST SERVICE HANDBOOK: ENVIRONMENTAL POLICY AND PROCEDURES HANDBOOK, § 1909.15, 31.1(b) (1992).

[60] *Id.* §§ 1909, 31.1(b), 31.2.

[61] *Heartwood*, 73 F. Supp. 2d at 967, 974-75.

[62] *Id*. at 980.

[63] *Id*. at 975.

[64] National Environmental Policy Act Documentation Needed for Fire Management Activities: Categorical Exclusions, 68 Fed. Reg. 33,814, 33,815 (June 5, 2003).

250 acres.[65] As stated in the Federal Register, "[t]his categorical exclusion allows salvage harvest in areas where trees have been severely damaged by forces such as fire, wind, ice, insects, or disease and still have some economic value as a forest product."[66] Initial court decisions on the overall legality and the site-specific appropriateness of these new categorical exclusions will go a long way towards determining the frequency to which they are used and relied upon by the Forest Service for future post-fire logging projects.

b. The Revised Administrative Appeal Regulations

On June 4, 2003, the Forest Service published a final rule to substantially revise the procedures for administratively appealing Forest Service projects.[67] The new appeal regulations make important changes that the Forest Service will likely try to use to expedite post-fire projects. First, in response to *Wilderness Society v. Rey*, the new regulations provide that decisions of the Secretary of Agriculture or Undersecretary of Natural Resources and Environment are not subject to the administrative appeal procedures.[68] Therefore, the Forest Service has taken the argument that the courts rejected in *Wilderness Society* and inserted it into the revised regulations.

The problem for the Forest Service, however, is that Judge Donald Molloy in *Wilderness Society* found the Forest Service's argument to be inconsistent with the Appeals Reform Act.[69] Adding the provision to the agency's regulations does not make it more consistent with the underlying statute. Therefore, the provision should be found illegal. In enacting the Appeals Reform Act, Congress sought to ensure that project-level decisions on national forests are subject to administrative appeals.[70] The Forest Service should not be allowed to circumvent the appeal process, and the intent of Congress, by simply having the Undersecretary sign a controversial decision.

Through the revised appeal regulations, the Forest Service has also attempted to address its unfavorable ruling in the Big Bar litigation.

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[65] National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598 (July 29, 2003).

[66] *Id*.

[67] Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33,582 (June 4, 2003) (to be codified at 36 C.F.R. § 215).

[68] Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 36 C.F.R. § 215.20(b) (2003).

[69] Wilderness Soc'y v. Rey, 180 F. Supp. 2d 1141, 1148 (D. Mont. 2002).

[70] *See id.* at 1147.

As before, when the Forest Service determines that an emergency situation exists with respect to a site-specific decision, it does not need to stay the decision during the administrative appeal process but may instead implement the decision as soon as it is signed.[71] The new regulations, however, broaden the definition of "emergency situation" to include situations "that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed."[72] Since burned trees typically lose economic value over time, the Forest Service will likely argue for some post-fire projects by stating that the federal government will lose substantial economic value if implementation of the project is delayed by the normal administrative stay provision.

By relying on the new economic value provision, the Forest Service will place the economics of a proposed post-fire timber sale directly at issue. This may lead to unintended results for the Forest Service, in both litigation and public opinion, as the economic costs of a post-fire timber sale may often exceed any economic benefits.[73] At the very least, increased attempts by the Forest Service to avoid the normal administrative stay provision will further increase litigation. Citizens will be forced to seek immediate judicial relief to enjoin imminent logging in order to ensure that their arguments and concerns are allowed to be heard while trees remain standing.

Most importantly, the new administrative appeal regulations exempt all projects that have been "categorically excluded" from NEPA.[74] As noted above, the Forest Service has significantly expanded the categories of actions where it claims no NEPA review is required. As a result, the number of Forest Service actions that the agency now claims exempt from administrative appeal will likely be significantly expanded. This again appears to contradict the intent and purpose of the Appeals Reform Act and will likely be challenged in court.

c. The Healthy Forests Restoration Act

In December 2003, President Bush signed the Healthy Forests Restoration Act of 2003. The stated purpose of the Act is to reduce

[71] 36 C.F.R. § 215.10(c) (2003).

[72] 36 C.F.R. § 215.2 (2003).

[73] *See generally*, ECONORTHWEST, ECONOMIC ISSUES UNDERLYING PROPOSALS TO CONDUCT SALVAGE LOGGING IN AREAS BURNED BY THE BISCUIT FIRE, *available at* http://www.salmonandeconomy.org/pdf/ BiscuitFireEcon.pdf (last visited Oct. 29, 2004).

[74] 36 C.F.R. §§ 215.11, 215.12(f) (2003).

wildfire risk through the implementation of hazardous fuels reduction projects.[75] Since the Forest Service has argued in the past that post-fire logging may decrease the risk of future fires, the agency may attempt to utilize this new statute for future post-fire logging projects.[76] First, the Forest Service would need to demonstrate that the proposed logging project is authorized under the Act. Hazardous fuel reduction projects may be authorized in: wildland-urban interface areas; certain municipal watersheds; lands that are at significant threat from windthrow, blowdown, ice storm damage, or insects and disease, and; threatened and endangered species habitat where the agency has identified wildfire as a threat to the species and where the proposed logging would "provide enhanced protection from catastrophic wildfire for the species."[77]

If the Forest Service is able to demonstrate that a proposed project fits within the hazardous fuel reduction projects authorized by the Act, special provisions would then apply that would expedite the process. For instance, NEPA would still apply, but the agency may be allowed to consider fewer alternatives to its proposal. The Forest Service would not need to follow its normal administrative appeal process but would instead only allow "predecisional" review.[78] Additionally, judicial review would likely be expedited, with preliminary injunctions limited to sixty days unless renewed by the court.[79]

B. The Failure to Address Conflicting Science

Along with the Forest Service's attempts to expedite the administrative process for post-fire logging projects, the most common theme in post-fire timber sale cases has been the Forest Service's unwillingness to disclose and address unfavorable science in EAs and EISs for the logging proposals. This issue was addressed in a 1995 scientific report entitled "Wildfire and Salvage Logging: Recommendations for Ecologically Sound Post-fire Salvage Management and Other Post-fire Treatments on Federal Lands in the West," commonly referred to as the Beschta Report. The Forest Service's failure to disclose and address the findings and

[75] Healthy Forest Restoration Act, H.R. 1904, 108th Cong. § 2(1) (2003).

[76] The Act applies to both the Forest Service and BLM. H.R. 1904, 108th Cong. § 3(1) (2003).

[77] H.R. 1904, 108th Cong. § 102(a) (2003).

[78] H.R. 1904, 108th Cong. § 105(a)(2) (2003).

[79] H.R. 1904, 108th Cong. § 106(c)(2) (2003).

recommendations of the Beschta Report in the public NEPA documents for post-fire logging proposals has substantially contributed to the Forest Service losing a number of post-fire cases.

The Beschta Report, prepared by a team of university and agency scientists, proposed guidelines for salvage logging and other post-fire treatments.[80] The Report determined that "[t]here is no ecological need for immediate intervention on the post-fire landscape" and that given the "high degree of variability and high uncertainty about the impacts of post-fire responses, a conservative approach is warranted."[81] The Report found that where post-fire logging does occur, "persistent and significant adverse environmental impacts are likely to result," including "soil compaction and erosion, loss of habitat for cavity nesting species, [and] the loss of structurally and fundamentally important large woody debris."[82] Because of this, the Report recommended that post-fire logging be prohibited on sensitive sites, including severely burned areas, erosive sites, steep slopes, roadless areas, and riparian areas.[83] The Report further recommends that tractor logging and road building be generally prohibited when logging does occur.[84]

The Forest Service has been uneven and arbitrary in its treatment of the Beschta Report, which has no doubt contributed to the agency's problems in court on this issue. The agency initially viewed the Beschta Report as important new information for post-fire timber sales, as the Pacific Northwest Regional Office immediately directed forest supervisors to consider the Beschta Report within NEPA documents for post-fire logging proposals.[85] This 1995 regional directive stated that the Report clearly needed to be considered, and that, in instances where the Forest Service chooses a contrary approach and prepares only an EA, the agency must explain why the different scientific conclusions did not trigger the need for a more detailed EIS.[86]

Just one year after the Beschta Report and the subsequent regional directive, the Tower fire burned through the North Fork John Day

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[80] BESCHTA ET AL., *supra* note 51, at 2.

[81] *Id.* at 5.

[82] *Id.* at 6.

[83] *Id.* at 9.

[84] *Id.* at 9-10.

[85] *See* Memorandum from John Lowe, Regional Forester, to Forest Supervisors and Directors (June 28, 1995) (Analysis of Fire Recovery Projects) (on file with author).

[86] *Id.*

watershed on the Umatilla National Forest. With the fire, the Forest Service had its first opportunity to follow the findings and recommendations of the Beschta Report, or at least to consider and address the Report in the EA and "Finding of No Significant Impact" that it prepared for the Big Tower logging project. The Forest Service, however, did neither. Instead, the agency proposed to log thirty million board feet in the high intensity burn areas, including 2,720 acres of logging on sensitive soils, one thousand acres of tractor logging, and eleven miles of new road construction.[87] The EA for the project entirely failed to mention the Beschta Report or the regional directive.[88]

Environmental groups filed suit against the Forest Service. In the suit, the groups relied heavily on the regional directive to argue that the Forest Service's failure to address the Beschta Report indicated that the impacts of the project were controversial and uncertain, thus requiring an EIS. The plaintiffs lost in the district court. On appeal, the project was enjoined by the Ninth Circuit.[89] The Ninth Circuit offered "no opinion on whether the Forest Service's omission of any discussion of the Beschta Report, alone, would discredit the Forest Service's decision not to prepare an EIS."[90] The Ninth Circuit did note, however, that the Forest Service's "failure to discuss and consider the Beschta Report's recommendations lends weight to [plaintiffs'] claim that the Forest Service did not take the requisite 'hard look' at the environmental consequences of post-fire logging instead of letting nature do the healing."[91]

After the 1999 Big Bar Complex fires on the Six Rivers National Forest, the Forest Service chose to prepare an EIS for its post-fire logging proposal but again it did not disclose or address the Beschta Report. Because an EIS was prepared, however, the legal issue involving the Beschta Report was not whether the Report triggered the need for an EIS due to controversy and uncertainty. Rather, the issue involved the EIS's failure to address the scientific evidence that directly contradicted the agency's post-fire proposal.[92] The plaintiffs cited to a number of cases concerning the Northern spotted owl to

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87 *See* Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1210 (9th Cir. 1998).

88 *Id.* at 1213.

89 *Id.*

90 *Id.*

91 *Id*.

92 *See* Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 977 (N.D. Cal. 2002).

argue that NEPA plainly requires an agency to disclose and respond to adverse scientific opinion within an EIS.[93] The district court agreed and held that the Big Bar EIS violated NEPA "by failing to disclose scientific opinion that opposes post-fire logging."[94] The court rejected the Forest Service's contention that it was sufficient to simply include the Beschta Report within the overall administrative record for the Big Bar project rather than addressing the Report within the EIS that the agency sends out to the public for comment and review.[95]

In 2000, the Hash Rock wildfire burned on the Ochoco National Forest in Central Oregon.[96] The Forest Service prepared an EA for a post-fire logging proposal. Again, the EA contained no discussion of the Beschta Report.[97] Plaintiffs again challenged the post-fire proposal arguing that the failure to address the Beschta Report and regional directive indicated that an EIS was required.[98] Similar to Big Bar, the Forest Service argued that its scientists read the Beschta Report, were familiar with it, and included a copy in the administrative record for the project.[99] The court, however, agreed with the plaintiffs that the EA itself should discuss the opposing viewpoints. As stated by Judge Ancer Haggerty: "The *Blackwood* decision, as well as the Regional Forester's post-Beschta report directive, both make clear that some reasoned evaluation of the Beschta Report is essential to any salvaging proposal on a forest damaged by wildfire."[100]

The Bureau of Land Management (BLM) has also had difficulty with the Beschta Report. After fires in 2001 in the Central Oregon Resource Area, the BLM prepared an EA to assess the impacts of its

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93 *See* 40 C.F.R. § 1502.9(b) (2003) (the agency must discuss any "responsible opposing view"); Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994) ("[the EIS] must also disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it." (quoting Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992))); *Moseley*, 798 F. Supp. at 1482 ("[t]he agency's explanation is insufficient under NEPA—not because experts disagree, but because the FEIS lacks reasoned discussion of major scientific objections."); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

94 *Bosworth*, 199 F. Supp. 2d at 981.

95 *Id*. at 980-81.

96 League of Wilderness Defenders v. Forsgren, 184 F. Supp. 2d 1058, 1064-65 (D. Or. 2002).

97 *Id*. at 1065-66.

98 *Id*.

99 *Id*. at 1067.

100 *Id*. at 1068.

proposed Timber Basin logging project.[101] Plaintiffs challenged the project, arguing in part that the EA failed to disclose and consider opposing scientific evidence, including the Beschta Report. The court enjoined the project, again finding fault with the agency for failing to address contrary scientific evidence in the EA, and again rejecting the agency's argument that the science could instead be included in the administrative record for the post-fire project.[102]

In a recent unpublished decision from the Ninth Circuit, the court upheld an EIS for a post-fire logging project on the Helena National Forest in Montana.[103] The opinion is short and the facts are unclear, but the EIS apparently indicated that the Beschta Report was considered, and the Report was listed in the EIS bibliography.[104] Under these facts, the court held that an explicit discussion of the Beschta Report in the EIS was not required.[105] In any event, because the decision was not selected by the Ninth Circuit for publication, it is not binding precedent and generally cannot be cited in future cases.[106]

Overall, the Forest Service's failure to disclose or address the Beschta Report in the EAs and EISs for post-fire logging projects is inexplicable and inexcusable. The Forest Service currently blames long-standing NEPA procedures for its failure to proceed with its post-fire logging proposals and it specifically cites to the Beschta Report to complain about an "analysis paralysis."[107] Clearly, the Forest Service shares much of the blame when it repeatedly fails to address the relevant report, even after providing itself with specific directions to consider the report and after court decisions have directed it to do so.

C. The Past Effects of Fire Fighting Activities

Naturally, each post-fire logging project follows a recent wildfire. The Forest Service likely fought that wildfire with aggressive tactics, such as dropping large amounts of chemical fire retardant, bulldozing

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[101] League of Wilderness Defenders v. Zielinski, 187 F. Supp. 2d 1263, 1266 (D. Or. 2002).

[102] *Id*. at 1270.

[103] Native Ecosystems Council v. U.S. Forest Serv., 54 Fed. Appx. 901 (9th Cir. 2003).

[104] *Id*. at 904.

[105] *Id*.

[106] *See* 9TH CIR. R. 36-3.

[107] *Gridlock in National Forest: Hearing Before the House Committee on House Resources*, 107th Cong. (2002) (statement of Dale Bosworth, Chief, USFS).

fire-lines, and igniting backburns. In preparing an EA or EIS, agencies are required to consider cumulative impacts, which are defined to include past, present, and reasonably foreseeable future actions.[108] This leads to another issue that has arisen in recent post-fire logging cases: the Forest Service's obligation to consider and disclose the past environmental impacts of its firefighting activities within the cumulative effects analysis for the subsequent post-fire logging proposals.

One problem that plaintiffs have faced in making the argument is that much of the firefighting information is often undisclosed and difficult to obtain.[109] For the Big Bar wildfires on the Six Rivers National Forest, the plaintiffs discovered that the Forest Service had bulldozed fifty miles of fire-lines and constructed another hundred miles of hand-lines.[110] The Forest Service acknowledged that the dozer-lines consisted of areas where all material was removed down to the bare mineral soil. Furthermore, the agency admitted that it had removed some spotted owl habitat, and at times, had crossed streams and riparian reserves.[111] In addition, the Forest Service dropped 280 tons of chemical fire retardant on the Big Bar fires.[112] The Forest Service also logged trees to construct safety zones and helicopter landings in the analysis area during the fire fighting operations.[113] The Forest Service's EIS for the subsequent logging project, however, did not disclose or consider any of the environmental impacts of these previous fire fighting activities.

In considering plaintiffs' administrative appeal of the Big Bar project, the Forest Service's Appeal Reviewing Officer found it "inexcusable" for the EIS not to address the impacts of the fire-lines. The officer recommended that the decision approving the post-fire logging project be reversed "with added instructions to do the correct baseline analysis."[114] The Forest Service's Appeal Deciding Officer, however, rejected this recommendation and affirmed the decision to

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108 40 C.F.R. § 1508.7 (2002).

109 *See* O'TOOLE, *supra* note 3, at 13.

110 *See* Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 985 n.9 (N.D. Cal. 2002).

111 As noted by plaintiffs' expert in the Big Bar case, "[f]irelines cause significant and persistent reductions in soil productivity via elevated erosion, compaction and the removal of all organic matter, which is critical to soil productivity." *Id.* at 985-86 (internal quotation marks omitted).

112 *Id.* at 985 n.9.

113 *Id.*

114 *Id.* at 985 n.10 (internal quotation marks omitted).

proceed with the timber sale.[115] At the district court, the Forest Service argued that the fire-lines had been rehabilitated and that the omission of the fire fighting activities from the EIS was merely a "technical deficiency."[116] The district court, however, agreed with the plaintiffs that the EIS violated NEPA in its failure to disclose the environmental impacts of the fire fighting tactics.[117]

Two recent cases in Oregon dealt with similar fire fighting impacts. In fighting the Hash Rock fire on the Ochoco National Forest, the Forest Service bulldozed thirty-five miles of fire-lines and dumped over 70,000 gallons of chemical fire retardant. This information was again not analyzed or properly disclosed in the subsequent EA for the post-fire logging proposal.[118] The court agreed with plaintiffs that these undisclosed impacts contributed to the uncertainty of the proposed logging project's environmental effects, thus requiring an EIS.[119] Similarly, in the plaintiff's challenge to the BLM's Timber Basin post-fire logging project, the court found that the EA's consideration of fire fighting impacts was insufficient and contributed to serious questions as to whether the EA was adequate.[120]

Fire fighting has historically been a Forest Service activity that is not widely questioned by the general public or conservationists. However, as the agency's fire fighting budget continues to increase, and a much higher percentage of the agency's logging program involves post-fire timber sales, fire fighting strategies and tactics are gaining more attention. For instance, Forest Service Employees for Environmental Ethics recently filed suit to challenge the Forest Service's failure to prepare an EA or EIS for its nationwide use of chemical fire retardant in fighting wildfires.[121] NEPA should be allowed to play its part in the Forest Service's fire fighting actions and decisions. This would ensure that the public is involved, that reasonable alternatives are considered, and that environmental impacts are analyzed and disclosed.

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115 *Id.*

116 *Id.* at 985-86 (internal quotation marks omitted).

117 *Id.* at 987.

118 League of Wilderness Defenders v. Forsgren, 184 F. Supp. 2d 1058, 1066 (D. Or. 2002).

119 *Id.* at 1069.

120 League of Wilderness Defenders v. Zielinski, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002).

121 Forest Serv. Employees for Envtl. Ethics v. USFS, No. CV 03-165-M-DWM (D. Mont. filed Oct. 14, 2003) (on file with author).

D. Fuel Management Zones/Fuelbreaks

Another recent issue that will likely continue to emerge in post-fire logging cases concerns the construction of "fuel management zones" ("FMZs") or fuel breaks. The Forest Service defines a fuel break as "a strategically located wide block, or strip, on which a cover of dense, heavy, or flammable vegetation has been permanently changed to one of lower fuel volume or reduced flammability."[122] The Forest Service appears to have an increased interest in creating permanent networks of fuel breaks on national forests which the agency believes will help in the suppression of future wildfires. For the recent Big Bar project in Northern California and for the forthcoming Biscuit project in Southwest Oregon, the construction of many miles of "strategic" fuel breaks is a significant component of the projects' overall purpose and need.

The issue raised by plaintiffs with respect to fuel breaks in the Big Bar case concerned the maintenance necessary to ensure the effectiveness of the proposed permanent fuel break network.[123] To be effective, the Forest Service must maintain fuel breaks in order to prevent vegetative in-growth. Such maintenance of many miles of fuel breaks may be expensive and may involve the use of potentially harmful herbicides.[124] For Big Bar, the Forest Service acknowledged that the proposed fuel breaks would need to be maintained every two to ten years, depending on how quickly brush returned. The Forest Service further stated that "[i]ndefinite maintenance of the fuel breaks to ensure low fuel conditions is essential."[125] The EIS, however, did not disclose how the fuel breaks would be maintained and did not analyze the environmental impacts of the required maintenance.[126]

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122 Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 978 n.1 (N.D. Cal. 2002).

123 *Id*. at 984.

124 *See* Order at 1, Californians for Alternatives to Toxics v. Dombeck, No. Civ. S-00-605 LKK/PAN (E.D. Cal. June 4, 2001) (on file with author). Based on the Forest Service's estimated costs, the plaintiff in *Californians for Alternatives to Toxics* (*CATs*) asserted that the only effective method of maintenance would be herbicides, "which, according to the Forest Service, is the most cost-effective method." *Id*. at 7. The court noted that "[h]erbicide use can cause adverse impacts to the environment, microorganisms, threatened and endangered species, soils, humans, other mammalian species and aquatic populations, and after use two of the most commonly used herbicides, glyphosate and triclopyr, have been found in both the surface and ground water." *Id*. at 8.

125 *Bosworth*, 199 F. Supp. 2d at 984.

126 *Id*.

The Forest Service argued in Big Bar that the issues concerning the maintenance of fuel breaks was "premature and speculative."[127] The court concluded that the maintenance was reasonably foreseeable and therefore had to be addressed within the EIS because the Forest Service had acknowledged that fuel break maintenance was necessary and essential.[128] The court held that "the EIS's failure to adequately disclose and analyze the environmental impacts of fuel break maintenance violates NEPA."[129]

The preferred alternative for the upcoming Biscuit post-fire logging project in Southwest Oregon proposes over 300 miles of 400 foot wide FMZs.[130] To create this permanent network of FMZs, fourteen million board feet of timber would be removed from close to 15,000 acres.[131] According to the Biscuit Draft EIS, these FMZs would not be designed to stop a future fire but instead would be a defensible space where fire managers could anchor fire-lines and initiate back-burns to fight future fires.[132] Due to the large network of proposed FMZs, including those within designated old growth reserves, Biscuit may become the next high profile case to address fuel break related issues.

CONCLUSION

Despite recent setbacks in court, the Forest Service shows no signs of insulating itself from the controversies surrounding post-fire logging of national forests. To the contrary, the Forest Service has significantly increased the number and size of post-fire logging proposals. The most extreme example is the proposed Biscuit project on the Siskiyou and Rogue River National Forests, where the Forest Service proposes to log an unprecedented 500 million board-feet from 29,000 acres, within the Siskiyou region of Southwest Oregon. In addition to being the largest timber sale in the recent history of the Forest Service, Biscuit would further increase the confrontation of post-fire projects by logging over 12,000 acres of inventoried roadless areas, with more logging proposed in designated old growth reserves.

127 *Id*.

128 *Id*. at 985.

129 *Id*.

130 USFS, Draft Environmental Impact Statement, Biscuit Fire Recovery Project ES-7 (2003), *available at* http://www.biscuitfire.com/deis/Executive_Summary.pdf (last visited Mar. 10, 2004).

131 *Id.* at II-23, II-29, *available at* http://www.biscuitfire.com/deis/chapter2.pdf (last visited Mar. 10, 2004).

132 *Id.* at I-7.

The massive Biscuit proposal, along with the large number of other post-fire proposals across the West, indicates that the Forest Service still does not seek a fair and balanced compromise or solution to the post-fire logging controversy. Therefore, additional litigation is likely in 2004.