

Katy Riker

Associate
208.383.5102
Boise
KDRiker@hollandhart.com



Murray Feldman

Partner
208.383.3921
Boise
mfeldman@hollandhart.com

Conservation Plans for Old-Growth Forests May Affect National Forest Permitting

Insight — January 3, 2024

The United States Forest Service ("Forest Service") recently announced plans to amend all its land management plans for National Forest System units, affecting 128 plans in total.[1] The Forest Service did so in a scoping notice under the National Environmental Policy Act ("NEPA"), announcing its intent to amend the plans, prepare an environmental impact statement under NEPA, and evaluate the effects of the proposed amendments.

These plan amendments aim to protect and preserve mature and old-growth forests, characterized by diversity in tree height, size, and canopy layers, biomass accumulation, varying species composition, and more. If implemented, these amendments may affect many National Forest System permittees and project proponents, implicating recreational developments, timber sales, mineral development, pipeline rights-of-way, and more.

Executive Order 14072's Restoration and Conservation Goals

President Biden initially announced the Administration's goal of restoring and conserving the nation's forests, including mature and old-growth forests, in Executive Order 14072, "Strengthening the Nation's Forests, Communities, and Local Economies," issued on April 22, 2022. Executive Order 14072 instructs the Department of the Interior ("DOI") and United States Department of Agriculture ("USDA") (collectively "Agencies") to define and inventory old-growth and mature forests; coordinate conservation and wildfire risk reduction strategies; analyze threats to mature and old-growth forests; and develop policies for climate-smart management. The Agencies must also set goals to meet certain reforestation targets by 2030.

National Forest Land Management Plans

The National Forest Management Act ("NFMA") requires the Forest Service to develop land management plans ("plans") for each unit of the National Forest System.[2] These plans provide management direction and general planning guidelines for up to 15 years for all of the National Forest System units. The Forest Service has broad discretion in developing plans, subject to its overarching mandate to manage for multiple use and sustained yield. Once a plan has been developed and adopted for a National Forest System unit, it can be changed through a comprehensive overhaul process known as a "revision," or be subject to targeted "amendments" for site-specific or resource-specific changes.[3] The approved plans, as revised and amended, are a key management tool

because all activities authorized in that national forest unit must be consistent with the governing plan.[4]

Every plan must contain the Forest Service's desired conditions reflecting the "social, economic, or ecological characteristics" of a plan area; objectives providing a concise statement of the desired rate of progress for the area; guidelines providing constraints on agency project and activity approvals while also allowing flexibility for various situations; standards for decision making; and an overview of the "suitability of lands" describing the multiple uses or activities suitable for lands based on desired conditions. Plans do not have to include goals but often do.[5]

Proposed Amendments to 128 Land Management Plans

In spring 2023, the Agencies completed President Biden's Executive Order 14072 inventory and created a comprehensive definition of mature and old-growth forest in two forms: (1) a narrative framework, which provides general descriptions to be applied across geographical areas and forest types, and (2) working definitions, which provide qualitative criteria using measurable characteristics, applied to specific regions and forest types.[6] Now, equipped with the inventory and updated definitions of mature and old-growth forests, the Forest Service is prepared to amend 128 land management plans to further Executive Order 14072's conservation goals.

The Forest Service proposes to add to each plan new management approaches, standards, guidelines, and plan monitoring requirements, among other changes.[7] For example, the proposed standards curtail vegetation management (such as timber harvest) within old-growth forest areas that is for the "primary purpose of growing, tending, harvesting, or regeneration of trees for economic reasons."[8] If "ecologically appropriate" vegetation management is permitted, it must not "degrade or impair the composition, structure, or ecological processes in a manner that prevents the long-term persistence of old-growth forest conditions within the plan area."[9]

The proposed management approaches prioritize identifying threats and stressors to mature and old-growth forests, "climate-informed stewardship," and establishing milestones to obtain desired conditions, including "long-term abundance, distribution, and resiliency of old-growth conditions" contributing to the "overall ecological integrity of ecosystems and watersheds."[10] The changes highlight the Forest Service's desire to increase habitat connectivity to improve the movement of species.

In keeping with the Biden Administration's focus on Tribal Nation engagement, the proposed changes also emphasize that "interpretation and implementation" of the land management plan is "grounded in recognition and respect of tribal sovereignty, Indigenous Knowledge, and the ethic of reciprocity to future generations."[11] Underscoring this point in its scoping notice, the Forest Service acknowledges Indigenous Knowledge as a source of best-available scientific information.[12]

Overall, the proposed plan amendments reflect an ongoing transition—in the almost five decades since NFMA's 1976 passage—to emphasize

ecosystem services values in national forest planning and management. As recognized by the Forest Service itself and manifest in a series of national forest planning rules and implementation decisions such as the current proposal, the Forest Service has steadily moved away from a mid-20th century overarching emphasis on commodity production values toward the present framework where ecosystem conservation and protection values are becoming paramount.[13] The Biden Administration's climate change adaptation and biodiversity conservation goals, such as the 30-by-30 goal to conserve 30 percent of the nation's lands and waters by 2030,[14] add further policy emphases to the current Forest Service proposal.

Stakeholder Implications

Every project involving the use or occupancy of National Forest System land must be consistent with the applicable plan.[15] Thus, every Forest Service project approval document must describe how the proposed project is consistent with relevant plan components. At the individual project level, site-specific actions, such as grazing or right-of-way permits, can be denied if they are inconsistent with the governing plan. If the Forest Service's proposal is implemented, these amendments could require permittees to (1) engage in increased monitoring and reporting requirements; (2) be subject to access closures where the Forest Service identifies threats and stressors to mature and old-growth forests; and (3) increase tribal consultation obligations.

The Forest Service currently seeks scoping comments for the environmental impact statement drafting process. Stakeholder comments should focus on identifying modifications to the Forest Service's language, alternatives, or identifying any information relevant to impacts to the environment. Scoping comments are most valuable to the Forest Service if received by February 2, 2024.[16] Stakeholders can expect a proposed action and draft environmental impact statement in May 2024, followed by a final environmental impact statement in January 2025.[17]

[1] *See* 88 Fed. Reg. 88042, 88042-43 (Dec. 20, 2023).
[2] *See* 16 U.S.C. § 1604(a)-(i).
[3] 36 C.F.R. § 219.7.
[4] 36 C.F.R. § 219.15.
[5] 36 C.F.R. § 219.7(e)(1)-(2); *see also* USDA–Forest Service, *A Citizen's Guide to National Forest Planning* at 19-21 (2016), *available at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd520671.pdf.
[6] USDA–Forest Service & DOI–Bureau of Land Management, *Mature and Old-Growth Forests: Definition, Identification, and Initial Inventory on Lands Managed by the Forest Service and Bureau of Land Management* at 5-6 (2023), *available at* https://www.fs.usda.gov/sites/default/files/mature-and-old-growth-forests-tech.pdf.
[7] 88 Fed. Reg. at 88047-48.
[8] *Id*. at 88047.
[9] *Id*.
[10] *Id*.
[11] *Id*.

[12] *Id*. at 88044.
[13] *See, e.g.*, Murray Feldman & Hadassah Reimer, *Ecological Succession of National Forest Planning Regulations*, Natural Resources & Env't, Winter 2019, at 8-11.
[14] *See, e.g.*, Murray Feldman, Angela Franklin, & Kaitlyn Luck, *Conserving America the Beautiful: The 30-by-30 Goal and Its Historical Roots*, Natural Resources & Env't, Spring 2022, at 1-5.
[15] 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15.
[16] 88 Fed. Reg. at 88043.
[17] *Id*.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.