



November 2, 2020

The Honorable Sonny Perdue  
Secretary  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, D.C. 20250

The Honorable Vicki Christiansen  
Chief  
U.S. Department of Agriculture Forest Service  
201 14th Street, S.W.  
Washington, D.C. 20227

Re: Oil and Gas Resources Proposed Rule, RIN 0596-AD33, Docket FS-2020-0007

Dear Secretary Perdue and Chief Christiansen:

The Coalition for American Heritage appreciates the opportunity to comment on the Forest Service's update to its regulations governing Federal oil and gas resources on National Forest System lands.

The Coalition for American Heritage ("Coalition") is an advocacy coalition that protects and advances our nation's commitment to heritage preservation. Many of our members serve as consultants to project applicants engaged in federal projects and facilitate compliance with the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) on lands managed by the U.S. Forest Service.

Oil and gas leasing on Forest Service-managed land poses potential risks to some of the most sensitive cultural heritage sites in our nation. Coalition members recognize the importance of historical sites for education, historic research, heritage tourism, American Indian tribes, and local communities. Cultural resources such as cultural and historic landscapes, archaeological sites, and traditional cultural properties located on many Forest Service lands are non-renewable, and mistakes made in stewarding and protecting these resources result in permanent degradation of our national heritage.

The changes to Forest Service regulations proposed here (1) remove references to NEPA, the NHPA, and other laws, (2) remove certain public notice requirements, and (3) eliminate the requirement that the Forest Service review and consent to specific leases, instead placing the burden on the Forest Service to withdraw consent previously given in a more general review.

The Coalition is concerned with these changes because they would reduce the level of environmental review of many proposed actions involving Forest Service land, decrease the

opportunities for public input and scrutiny of the Forest Service's decisions under NEPA and the NHPA, and increase the risk that other laws required to be considered when federal funds, approval, or permits are at issue, will not be considered as required.

### **Removing References to NEPA and Other Environmental Laws Is Problematic**

The Proposed Rule removes numerous references to NEPA, the Endangered Species Act, and the NHPA. It would also delete mention of cultural resources. The rule states that the Forest Service and lessees must still comply with applicable federal laws and that removing these references is being done “in favor of letting those laws and regulations speak for themselves[.]”<sup>1</sup> These statutes are only as effective as the regulations implementing them, however, as the regulations create the processes for the statutes to be incorporated into agency review.

Some important sections which have been deleted include: (1) the NEPA compliance requirement in the Leasing analysis section (current 36 C.F.R. § 228.102(a); proposed 36 C.F.R. § 228.103), and (2) several sections in the current “Surface use requirements” section (§ 228.108), including a requirement that the operator report findings of cultural and historical resources to the authorized Forest Service officer. If the regulations no longer mention these environmental and cultural resources protections, there is no process through which the laws are required to be applied.

### **Proposed Changes to the Leasing Decision Process Diminish Forest Service Authority**

In the name of increasing efficiency and “align[ing] Forest Service regulations with those used by the Bureau of Land Management[.]”<sup>2</sup> the Proposed Rule takes away several critical decision points from the Forest Service, which has the expertise necessary to make informed and balanced decisions about its own lands.

Most significantly, the changes would establish a new process in which the Forest Service, according to the rule summary, “will make a single decision identifying lands on which the Agency would consent to the [BLM]'s offering oil and gas leases[.]”<sup>3</sup> The Forest Service claims this would remove a “duplicative” validation review, when in reality the change eliminates a key opportunity for the Forest Service—which has more specific knowledge about the lands at issue than the BLM—to ensure that the lease of *specific lands* would comply with NEPA and the applicable forest management plan. Instead, the burden would be on the Forest Service to withdraw the consent previously given in a “forest-wide or area-specific leasing analysis.”<sup>4</sup>

These proposed changes to 36 C.F.R. § 228.103 remove a key section which requires a second leasing decision by the Regional Forester before specific lands can be offered for lease by the BLM. The current regulations provide that, before leasing can occur, the Regional Forester must

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<sup>1</sup> 85 FR 54315.

<sup>2</sup> *Id.* at 54312.

<sup>3</sup> *Id.* at 54315.

<sup>4</sup> *Id.* at 54323.

verify that “oil and gas leasing of the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest land and resource management plan.”<sup>5</sup> The current process continues: “If NEPA has not been adequately addressed, or if there is significant new information or circumstances...requiring further environmental analysis, additional environmental analysis shall be done before a leasing decision for specific lands will be made.”<sup>6</sup> Removing this step is no small measure, as it eliminates the current process for how the Forest Service is able to fulfill its obligations under NEPA and other laws, such as the NHPA.

In its discussion of the NHPA, the Environmental Assessment for the rule claims that the changes “would not have on-the-ground effects” because “the rulemaking effort would establish the administrative, procedural processes by which the Forest Service manages oil and gas resources[.]”<sup>7</sup> The EA further asserts that the “Forest Service would consider these effects at the leasing or project-level stage.”<sup>8</sup> Where the proposed changes would eliminate much of the current process for considering effects on cultural resources and the environment, however, the assertion that the rule will not have on-the-ground effects because the effects are considered at the project-level is disingenuous. In fact, as discussed above, the Proposed Rule eliminates the process by which the Forest Service decides whether to lease specific lands, instead relying on a much more general decision made forest-wide or area-wide.

### **The Proposed Rule Removes Important Public Notice Provisions**

The Forest Service proposes to remove certain public notice requirements. For example, the proposed rule proposes to remove the public notice provision that requires the Forest Service Officer to give public notice of the decision regarding a surface use plan of operations.<sup>9</sup>

In the proposed changes to the Leasing analysis section, the Forest Service proposes to change the current requirement that the scheduling analysis be developed “with public input”<sup>10</sup>, to requiring the Forest Service to “consider the level of leasing interest expressed by the public.”<sup>11</sup> The proposed new language is ambiguous, raising questions regarding whether public input would be solicited. The Proposed Rule also removes a provision that requires a list of operators found to be in material noncompliance to be compiled, made available to Regional Foresters, Forest Supervisors, and upon request, to members of the public.

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<sup>5</sup> 36 C.F.R. § 228.103(e).

<sup>6</sup> *Id.*

<sup>7</sup> FS-2020-0007-0006, “Environmental Assessment for Proposed Rule to Revise Code of Federal Regulations 36 CFR Part 228, Subpart E: Oil and Gas Resources,” at 12.

<sup>8</sup> *Id.*

<sup>9</sup> Compare 36 C.F.R. § 228.107(c) (“(c) *Public notice*. The authorized Forest Service officer will give public notice of the decision regarding a surface use plan of operations and include in that notice whether the decision is appealable under the applicable Forest Service appeal procedures.”), with proposed 36 C.F.R. § 228.107 (containing no public notice requirement).

<sup>10</sup> 36 C.F.R. § 228.102(b).

<sup>11</sup> 85 FR 54323.

These changes are particularly concerning when viewed in context of the changes already discussed. Given that authority would be taken away from the Forest Service and references to key environmental and historic preservation laws would be removed, public notice of the agency's actions would be of even greater importance. Yet the Forest Service proposes to remove several of these notice requirements.

### **Tribal Consultation for the Proposed Rule Has Been Insufficient**

The description of the Forest Service's tribal consultation efforts in the Proposed Rule and the Environmental Assessment leave much to be desired. The consultation process has included two in-person regional tribal consultation meetings in late 2018. While the Forest Service contends that it will "continue to conduct government-to-government consultation on the rule until the final rule is published[,]" the Coalition questions to what extent this has occurred given the ongoing COVID-19 pandemic. Many Native American Tribes have important ties to Forest Service lands, underscoring the importance of meaningful consultation with them on this Proposed Rule.

### **The Claim That the Changes Would Not Lead to An Increase of Oil and Gas Leases on Forest System Lands Is Misleading**

In claiming the changes will not lead to an increase of oil and gas development, the Forest Service seems to be obscuring the Proposed Rule's true intention, which is plainly to increase oil and gas development on Forest System lands. The Environmental Assessment asserts that "[t]he Forest Service does not expect that the regulatory revisions will drive a notable increase or decrease in the number of leases or in the rate at which lands are nominated for lease by the oil and gas industry."<sup>12</sup> This is not credible when the Proposed Rule's development is viewed in context.

The Proposed Rule was promulgated following a Forest Service report prepared under Executive Order 13873. In that report, the U.S. Department of Agriculture (USDA) identified the current revisions "as appropriate to meet the intent of the E.O." — which, in the Forest Service's own words, asked agencies to submit reports to recommend actions that "could alleviate or eliminate aspects of agency policy that burden the domestic energy production."<sup>13</sup> Moreover, the Proposed Rule is one effort "in support of Secretary of Agriculture Sonny Perdue's direction to boost productively on national forests and grasslands," according to the Forest Service's news release about the Proposed Rule.<sup>14</sup>

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<sup>12</sup> FS-2020-0007-0006, "Environmental Assessment for Proposed Rule to Revise Code of Federal Regulations 36 CFR Part 228, Subpart E: Oil and Gas Resources," at 35.

<sup>13</sup> 85 FR 54313.

<sup>14</sup> Forest Service Proposes Improvements to Oil and Gas Development Regulations (Sept. 1, 2020), <https://www.fs.usda.gov/news/releases/forest-service-proposes-improvements-oil-and-gas-development-regulations>

Backlogs in reviews for oil and gas lease requests cannot justify revisions to regulations which eliminate important environmental reviews. The Forest Service's Civil Rights Impact Analysis submitted in support of the Proposed Rule states that the USDA is evaluating:

Streamlining the current process used to identify National Forest System (NFS) lands open for oil and gas leasing. There is a backlog of nearly 1,600 pending Expressions of Interest in leasing parcels for oil and gas development on about 1.3 million acres of NFS lands. To streamline the decision-making process, the leasing availability decision (36 CFR 228.102(d)), and the decision to authorize the Bureau of Land Management (BLM) to lease NFS lands (36 CFR 228.102(e)), would be combined into one decision point. This could save the Forest Service both time and analysis cost, improving response to industry requests for leasing.<sup>15</sup>

This context reveals that the Proposed Rule seeks to reduce the backlog of expressions of interest and increase oil and gas leases, not by improving its review process, but by eliminating certain environmental requirements altogether. Coalition members often see environmental and cultural resources regulations blamed for delays, when in reality, staffing has been reduced or agency processes are otherwise insufficient for reviewing the number of oil and gas projects under their purview. The Forest Service should address the backlog described above by improving its processes, rather than eliminating requirements to comply with NEPA and other laws.

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Thank you for the opportunity to comment on the proposed regulations. Please do not hesitate to contact us with any questions on these comments.

Best regards,



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<sup>15</sup> FS-2020-0007-0003, "36 CFR Part 228 Subpart E Revisions, Civil Rights Impact Analysis," at 6.