

To: Interested Persons
From: Mike Anderson, The Wilderness Society
Re: “Wildfire Prevention and Mitigation Act” -- S. 2068, Title III
Date: November 3, 2017

Following is a partial summary and analysis of S. 2068, the “Wildfire Prevention and Mitigation Act of 2017,” sponsored by Senator Barrasso. The bill was introduced on November 2 and referred to the Senate Environment and Public Works (EPW) Committee, which held a hearing on the draft bill on October 25. S. 2068 is virtually identical to Barrasso’s draft bill. Senators Thune, Daines, and Hatch are original co-sponsors.

The proposed legislation would greatly increase the amount of logging of national forest lands that can occur without consideration of environmental impacts or opportunities for public involvement. The legislation removes essential checks on Forest Service compliance with the law and significantly undermines the National Environmental Policy Act, a bedrock environmental law. The bill poses a serious threat to environmental stewardship, public involvement, wildlife conservation, and the rule of law in the national forests.

This analysis focuses on Title III of S. 2068, called “Forest Habitat and Ecosystem Restoration Improvement.” Title III is essentially a combination of two bills that were introduced earlier this year by Senator Barrasso (S. 879, the “National Forest Ecosystem Improvement Act,”), and by Senator Thune (S. 1731, the “Forest Management Improvement Act”). This memo does not evaluate the two other titles of Barrasso’s EPW bill. Title I, called “Litigation Relief for Forest Management Projects,” is based on S. 605, sponsored by Senator Daines. Title II, called “Sage-Grouse and Mule Deer Habitat Conservation and Restoration,” is based on S. 1417, sponsored by Senator Hatch.

Title III consists of three subtitles: (A) General Provisions, (B) Ecosystem Restoration, and (C) Categorical Exclusions.

Subtitle A – “General Provisions”

NEPA Rollbacks. Section 311 requires the Forest Service to prepare an abbreviated environmental assessment (EA) for each “ecosystem restoration project,” which the bill broadly defines to include timber harvesting. The EA would only need to consider the proposed action and the no-action alternative, including the effects of taking no action on forest health, habitat diversity, wildfire potential, etc. The bill would limit the length of the EA to 100 pages, would require the EA to be completed within 180 days, and would require no supplemental analysis. This section comes from S. 879.

Section 311 would undermine a bedrock environmental law -- the National Environmental Policy Act (NEPA). It would eliminate NEPA’s requirement to consider a reasonable range of alternatives and would impose arbitrary limits on the size of NEPA documents and the time to complete the NEPA process. It would also eliminate environmental impact statements, even where required by NEPA. In combination with the bill’s NEPA categorical exclusions in

Subtitle C, these provisions would significantly reduce environmental safeguards and public involvement opportunities in national forest management.

Permanent Road Construction. Section 312 would amend the 2014 Farm Bill to allow permanent road construction to be included in projects implemented by state forestry agencies on national forest lands through “Good Neighbor Authority.” Current law limits the use of such authority to construction of temporary roads, which are typically less environmentally damaging than permanent roads. Permitting permanent road construction could lead to additional environmental damage. This section is part of S. 1731.

Stewardship Contracting. Section 313 would make three problematic changes to the stewardship contracting authority provided by the 2014 Farm Bill. First, it would allow use of stewardship contracts to perpetuate existing lumber mills, even where such mills are not economically feasible or environmentally sustainable. Second, it would allow stewardship contracts to be awarded to the lowest bidder rather than on a best-value basis, thereby favoring cost-savings over superior qualifications or other advantages. Third, it would require 25% of any timber sale receipts from stewardship projects to be paid to local counties, thus reducing the receipts that can be retained by the Forest Service to fund additional stewardship projects. All these changes would benefit timber companies and county governments at the expense of environmental protection and restoration of the national forests. This section is part of S. 1731.

Binding Arbitration. Section 314 requires the Forest Service to establish a binding arbitration/alternative dispute resolution process for forest management projects—including logging projects. For these projects, no judicial review would be allowed. Anyone who filed an administrative objection to such a project could file a “demand for arbitration” within 30 days after the Forest Service notified the objector that the project is subject to the arbitration process. The demand for arbitration must include an alternative proposal for the project. The arbitrator would select either the Forest Service’s project or the objector’s alternative proposal. The entire arbitration process would be completed within 90 days after the filing of a demand for arbitration. The arbitrator’s decision would not be subject to judicial review, except in instances of corruption, fraud, bias, or other misconduct by the arbitrator. This section comes from S. 879.

The proposed arbitration process is seriously flawed because it provides no means to ensure that the Forest Service is complying with environmental laws. This section undermines enforcement of existing law, reduces citizen access to courts, and limits public participation in public land management.

Subtitle B – “Ecosystem Restoration”

Mandatory Treatment Acreages. Section 323 requires the Forest Service to establish a 5-year schedule, starting in 2018, that results in doubling the acreage of restoration treatments that the Forest Service accomplished in FY 2017. The Chief of the Forest Service would assign to each Forest Service region a portion of the annual acreage treatments. This section is based on S. 879, which provided specific annual acreage targets for prescribed fire and mechanical treatments, including commercial thinning and even-aged management (i.e. clearcutting).

Section 324 requires the Forest Service to evaluate its implementation of ecosystem restoration projects, based on specific performance measures, and to produce an annual report. The required performance measures include acreages of timber sales, stewardship contracts, and prescribed burns.

Sections 323 and 324 are problematic because they would impose unrealistic management targets on the Forest Service that are not based on sound science or ecologically justifiable. The legislation provides no additional funding for the agency to achieve the statutory mandate to double the acreage of restoration treatments. Consequently, the Forest Service would have to divert resources away from all other multiple-use activities in order to accomplish the legally mandated amount of logging and other restoration treatments.

Subtitle C – Categorical Exclusions

Subtitle C would create five new types of categorical exclusions (CEs) that exempt national forest logging activities from complying with the requirements of the National Environmental Policy Act. Most of these CE provisions – Sections 333, 334, 335, and 336 -- come from S. 1731, while Section 332 comes from S. 879.

“Critical Response” CE. Section 332 gives the Forest Service a one-year deadline to create a CE for forest management projects whose “primary purpose” is to address at least two of the following objectives:

- address insect and disease infestations or risks,
- reduce hazardous fuels,
- protect a municipal water source,
- protect critical habitat from catastrophic disturbance,
- increase water yield, or
- “address salvage timber objectives.”

This section would require the Forest Service to create a CE for many conditions that either Congress or the Forest Service has already addressed. Congress has already created a CE for insect and disease infestation treatments up to 3,000 acres in the 2014 Farm Bill (see 16 USC 6591b). Reduction of hazardous fuels and protection of municipal water sources were explicit purposes of the expedited NEPA provisions of the Healthy Forests Restoration Act of 2004 (see 16 USC 6512(a)). Similarly, the Forest Service already has an administrative CE for salvage logging up to 250 acres (see 36 CFR 220.6)(e)(13)). Categorical exclusions undermine the National Environmental Policy Act and should be developed by the Forest Service in accordance with agency policy, not mandated by Congress.

Early Successional Forests CE. Section 333 provides CE authority for logging projects up to 6,000 acres (9 square miles) in size whose primary purpose is to create early successional forests. Projects must be carried out “in accordance with the applicable forest plan.” Creation of early successional forests is commonly accomplished by clearcutting. The breadth of this language suggests that CEs for up to 6,000-acre clearcutting projects would be permissible. Current Forest Service NEPA policy does not allow the use of CEs for clearcutting, regardless of purpose. Unless specifically disallowed by the local forest plan, this CE could authorize nine square miles

of clearcutting with no consideration of environmental impacts on scenery, water quality, recreational activities including hunting and fishing, or adjacent landowners.

Wildlife Habitat Improvement. Section 334 creates a statutory CE for logging projects up to 6,000 acres in size whose purpose is to improve wildlife habitat. This provision is unnecessary because the Forest Service already has an administrative CE for wildlife habitat improvement projects (see 36 CFR 220.6(e)(6)). Unlike the current administrative CE, the legislative CE in Section 334 could allow the Forest Service to spray herbicides and build an unlimited amount of road as part of habitat improvement projects, with scant public notice or environmental analysis.

Commercial Thinning. Section 335 creates a statutory CE for commercial thinning projects up to 6,000 acres, along with construction of up to one mile of temporary road. Current Forest Service regulations limit the size of commercial thinning projects that can be categorically excluded to 70 acres (see 36 CFR 220.6(e)(12)). Section 334 would vastly increase the size of such logging projects by 85 times!

No Consideration of Cumulative Effects. For each of the three CEs created by Sections 333, 334, and 335, the legislation would exempt the Forest Service from analyzing the cumulative effects of logging projects that are categorically excluded from NEPA. This means that the agency could undertake multiple 6,000-acre logging projects in the same vicinity without considering their combined impacts on the area's water quality, wildlife, and recreational resources.

Insect and Disease Infestation. Section 336 would create a fifth CE for logging projects up to 6,000 acres that are designed to reduce the risk of insect and disease infestations. This would effectively replace a CE authorized by the 2014 Farm Bill for collaboratively developed insect and disease treatment projects up to 3,000 acres. Besides increasing the maximum size of the CE by 3,000 acres (5 square miles), Section 336 would eliminate several of the 2014 Farm Bill's limitations on the use of the insect and disease CE. Specifically, under Section 336, projects using the insect and disease CE –

- would not have to retain old-growth and large trees that are resilient to insects and disease,
- would not have to consider the best available science to maintain or restore ecological integrity, and
- would not have to be developed collaboratively.

Conclusion

S. 2068 would greatly increase logging of national forest lands, while reducing environmental safeguards and opportunities for public involvement in national forest management. Annual acreage mandates would pressure the Forest Service to prioritize logging over all other uses and resources. Large expanses of forest up to 6,000 acres (9 square miles) in size could be logged with no consideration of the direct or cumulative impacts to water quality, wildlife habitat, or recreational opportunities. The legality of Forest Service management activities would be essentially unchallengeable in court, removing an essential check on federal agency compliance with the law. A bedrock environmental law – the National Environmental Policy Act – would be

seriously undermined. In sum, the bill poses a serious threat to environmental stewardship, public involvement, wildlife conservation, and the rule of law in the national forests.