



**Public Comment on the Executive Order on Tackling
the Climate Crisis at Home and Abroad
Docket No. USDA-2021-0003**

**Property and Environment Research Center (PERC)
Bozeman, Montana**

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Summary of Recommendations:

It is time to enact market and partnership approaches that will reduce wildfire risk and promote forest ecosystem health.

Suggested reforms on how to fix America's forests:

- Improve and expand the Forest Service's categorical exclusions under the National Environmental Policy Act (NEPA) and work with Congress to improve and expand others
- Work with the Fish and Wildlife Service to finalize reforms that streamline consultation under the Endangered Species Act for forest restoration projects
- Work with Congress to reduce the effects of litigation on the Forest Service's capacity to restore forests
- Work with EPA to make it easier to exclude prescribed burns from state emissions calculations under the Clean Air Act
- Maximize cooperative agreements with private partners to perform more restoration and work with Congress to expand flexibility for the Forest Service to enter longer-term contracts
- Maximize the Forest Service's existing Good Neighbor Authority and work with Congress to expand it
- Work with Congress to establish a Forest Service restoration fund for long-term cost-share partnerships
- Work with Congress to open timber markets for export

Introduction:

The Property and Environment Research Center (PERC) respectfully submits this comment to the U.S. Department of Agriculture on the Executive Order on Tackling the Climate Crisis at Home and Abroad. PERC is a nonprofit research organization located in Bozeman, Montana that explores market-based solutions to environmental problems. Founded in 1980, PERC's mission is to improve environmental quality through markets, entrepreneurship, and property rights. PERC conducts original research that applies free market principles to resolve

environmental disputes in a cooperative manner. This comment is based on our recent report [Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis](#), which analyzes several innovative partnerships between the Forest Service, states, and private groups to understand the obstacles that limit forest restoration and reforms that can help the agency and its partners tackle the wildfire problem.¹

The Department is right to address the problem of catastrophic wildfires. Across the West, more than 10 million acres burned in 2020—a record in modern history.² These fires consumed more than 17,500 structures and more than \$3.5 billion in firefighting costs.³ Tragically, dozens of lives were lost, and many more people were displaced by evacuation orders. Fires released smoke that degraded air quality nearby and hundreds of miles away. They also destroyed wildlife habitat, including for imperiled species, and the fires' aftereffects will soon lead to erosion that harms water quality in local watersheds.

Some factors that contribute to declining forest health and increasing fire risk, such as climate change, require long-term policy changes with benefits that will be realized only gradually. Forest restoration projects offer a way to mitigate these risks in the short term. One study led by Forest Service scientists estimated that of four factors driving fire severity in the western United States, live fuel “was the most important,” accounting for 53 percent of average relative influence, while climate accounted for 14 percent.⁴ Whatever the future course of climate change policy, the fact remains that many national forests have already accumulated decades worth of underbrush and fuels, escalating present fire risk. Forest restoration can help reduce these risks in the short run by creating and maintaining healthy, resilient forests and maximizing the ecological, environmental, and economic benefits people derive from them. By promoting landscapes with healthy forests and diverse forest types, restoration projects can reduce the risk of megafires and provide other conservation benefits.

The Forest Service's ability to pursue forest restoration, however, is hampered by several obstacles, including limited funding, red tape, and litigation. Forest restoration is costly, and the agency's budget for it has stagnated. There are opportunities to reform and improve Forest Service practices to help the agency work better with states, tribes, and private partners to fix America's forests.

¹ Holly Fretwell and Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC Public Lands Report (April 2021), www.perc.org/forests.

² See National Interagency Fire Center, *National Large Incident Year-to-Date Report*, <https://gacc.nifc.gov/sacc/predictive/intelligence/NationalLargeIncidentYTDRpt.pdf>.

³ See Headwaters Economics, *Wildfires Destroy Thousands of Structures Each Year* (2020), <https://headwaterseconomics.org/naturalhazards/structures-destroyed-by-wildfire/>. See also *National Large Incident Year-to-Date Report*, *supra* n. 2.

⁴ Among the four factors driving fire severity in the western United States, live fuel accounted for an estimated 53.1 percent of average relative influence, fire weather accounted for 22.9 percent, climate accounted for 13.7 percent, and topography accounted for 10.3 percent. See Sean A. Parks et al., *High-Severity Fire: Evaluating Its Key Drivers and Mapping Its Probability Across Western US Forests*, *Environmental Research Letters* (2018), <https://doi.org/10.1088/1748-9326/aab791>.

Our *Fix America's Forests* report identifies eight needed reforms to expand state and private partnerships and encourage more forest restoration. The Forest Service should implement those reforms within its authority and work with Congress and other agencies to implement other reforms.

Encourage Collaboration Rather Than Conflict

1. Improve and expand the Forest Service's categorical exclusions under the National Environmental Policy Act (NEPA) and work with Congress to improve and expand others

If states, tribes, conservation groups, and other stakeholders are going to pay for and implement forest restoration projects, they may also want a hand in designing them. This, however, means wading into the NEPA process. The NEPA process and resulting uncertainties make it difficult for states, tribes, conservation groups, and other stakeholders to partner with the Forest Service on forest management activities. Reforms to streamline NEPA could allow innovative forest restoration models to scale beyond their current limits.

One way to reduce NEPA burdens is to increase the acreage limits that apply to the categorical exclusions for forest restoration projects. Although the limit varies somewhat across different categorical exclusions, several are limited to 3,000 acres or less.⁵ Given the size of the restoration backlog and the willingness of private partners to contribute more, these limits are low. Indeed, several other categorical exclusions, including habitat improvement projects, have no acreage limit whatsoever.⁶ While the Forest Service and Congress may not want to go that far, the limit for forest restoration projects could still be raised significantly.⁷

Categorical exclusions could also be made easier to apply by clarifying or eliminating vague standards that apply to several of them. The categorical exclusion for wildfire resilience projects, for instance, is replete with vague standards that complicate its application and invite conflict.⁸ Such complexity may explain why it takes an average of

⁵ See 16 U.S.C. § 6591(d) (3,000-acre limit for "wildfire resilience projects). See also 36 C.F.R. § 220.6(e)(25) (2,800-acre limit for forest restoration projects). See also § 220.6(e)(13) (250-acre limit for post-fire salvage projects).

⁶ See, e.g., 36 C.F.R. § 220.6(e)(6).

⁷ Recently, based on a review of 68 projects completed under environmental assessments from 2012 to 2016, the Forest Service determined that a restoration project of up to 7,300 acres would not have a significant effect on the environment, under certain conditions. See Forest Service, *Supporting Statement for Addition of New Categorical Exclusion For Certain Restoration Projects* (May 1, 2019), <https://www.fs.fed.us/emc/nepa/revisions/includes/docs/RestorationCESupportingStatement.pdf>.

⁸ These vague standards include: "maximize retention of old-growth and large trees, to the extent that the trees promote stands that are resilient to insects and disease, and reduce the risk or extent, or increase the resilience to, wildfires;" "is developed through a collaborative process;" "prioritize[]" certain locations; and "extraordinary circumstances." See 16 U.S.C. § 6591d. While all of these legislative goals may be admirable, stating them so imprecisely invites conflict.

206 days—or approximately seven months—just to document that a project qualifies for a categorical exclusion.⁹

2. Work with the Fish and Wildlife Service to finalize reforms that streamline consultation under the Endangered Species Act for forest restoration projects.

The Ninth Circuit's *Cottonwood* decision and other precedents subject the Forest Service and its partners to continually changing rules. A new endangered species' listing or designation of critical habitat can upend a host of earlier decisions fully consistent with the facts and law that existed when they were made. Worse, the precedent effectively compels the agency to use its limited resources redoing the analysis for decisions with no on-the-ground impacts. The Obama administration's Forest Service even asked the Supreme Court to overturn the Ninth Circuit's holding to create greater certainty over forest restoration projects.¹⁰

Of course, the Forest Service should ensure that its actions do not jeopardize endangered species or harm their habitat. But of equal concern is the possibility that these harms could result from the failure to act in response to extreme wildfire risks and declining forest health. To strike a better balance, the Forest Service could work with Congress to overturn *Cottonwood* and adopt the Tenth Circuit's approach nationwide, under which consultation is not required for a forest plan nor for similar decisions with no immediate on-the-ground impacts.¹¹ Individual projects would still be subject to full consultation requirements, but because they cover a shorter time frame, the moving-target risk would be lessened.

This would have the added benefit of making it quicker and cheaper for the Forest Service to update forest plans, many of which date from the early 1980s. With substantial changes in fire risk, forest health, and public perceptions about the values that national forests should advance, making it easier for the Forest Service to adjust forest plans would allow them to better reflect current needs and goals.

3. Work with Congress to reduce the effects of litigation on the Forest Service's capacity to restore forests

While litigation can be a source of frustration for Forest Service personnel, the added expenses, delays, and uncertainty may be even more disruptive for private partners putting their own time and money on the line for forest restoration. The possibility that a project could get bogged down in litigation risks stranding potential investor funds for a

⁹ Where there are no significant environmental impacts expected, NEPA compliance can delay projects for nearly two years. See U.S. Forest Service, *Proposed National Environmental Policy Act Rule* (2019), <https://www.fs.fed.us/emc/nepa/revisions/includes/docs/NEPARuleFactSheet.pdf>.

¹⁰ The Obama administration's Forest Service asked the Supreme Court to overturn the Ninth Circuit's holding for this reason, explaining that *Cottonwood* "has the potential to cripple the Forest Service." See Pet. for Cert., *U.S. Forest Serv. v. Cottonwood*, No. 15-1387 (filed June 10, 2016).

¹¹ See *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007).

project that may never go forward or, even if it does, would have an unpredictable timeline for generating a return. The Forest Service should work with Congress to avoid these downsides, without sacrificing the benefits of environmental litigation, through reforms that provide greater transparency and predictability to those participating in forest restoration.

First, Congress can require lawsuits challenging forest restoration projects to be filed soon after a project is approved. Currently, lawsuits can be filed up to six years after project approval.¹² A shorter deadline would let the Forest Service, private partners, and investors know early on whether a project will likely be tied up in litigation, enabling them to better allocate their resources and, perhaps, walk away from the project. While this could provide early confidence to those funding or performing forest restoration, it would not significantly frustrate the ability to bring worthy cases. Many challenges are already filed soon after a project's approval.¹³ And some state analogs to NEPA require lawsuits to be filed quickly, without unduly restricting litigation. California's Environmental Quality Act, for instance, requires many challenges to be filed within 30 days.¹⁴

A shorter statute of limitations could have the added benefit of spurring greater collaboration by encouraging a project's critics to develop detailed objections early rather than flyspecking an agency decision after the fact. During the Four Forest Restoration Initiative NEPA analysis, for instance, the Forest Service was able to avoid substantial litigation by requiring objectors to articulate their concerns in advance and meet with the agency to discuss them. This allowed the agency to modify the project to address those concerns or prepare a sufficiently detailed explanation of why it declined to do so, increasing the likelihood that the decision would be upheld by courts and reducing the incentive to litigate.

The Forest Service could also work with Congress to make litigation less disruptive by reforming injunctions. Currently, courts can enjoin projects pending the outcome of litigation and, if the challenge is successful, permanently enjoin them until the agency cures the error. This can give litigants a substantial amount of leverage while a lawsuit is going forward, even if the lawsuit is ultimately unsuccessful, because people may be wary of investing in a project when they cannot be certain how long a case will take or what the outcome will be. To provide greater predictability, Congress could expedite cases concerning forest restoration projects by limiting how long preliminary injunctions can remain in place before a court ultimately decides a case.¹⁵

¹² See 28 U.S.C. § 2401(a).

¹³ Plaintiffs have numerous ways to seek a quick decision blocking a project, including temporary restraining orders and preliminary injunctions. If they wait too long and fail to obtain relief in the trial court, however, a case could be moot (because the challenged project has already been completed) before any appeal is resolved.

¹⁴ See Cal. Pub. Res. Code § 21167(b).

¹⁵ The proposed Emergency Wildfire and Public Safety Act, for instance, would limit preliminary injunctions to 60 days and direct courts to expedite review of forest restoration projects. See S. 4431, 116th Cong. § 101(d)(6) (2020).

Ordinarily, when a court determines that an agency has improperly approved some action the proper course is to “vacate” that approval until the agency cures the error. However, Congress can override this rule. Given the substantial risks of doing nothing in areas that are already at high or very high risk of fire and that border populated areas, the Forest Service could work with Congress to impose a heavier burden to justify blocking a forest restoration project in these areas, such as limiting injunctions to cases where moving forward would be objectively unreasonable.

4. Work with EPA to make it easier to exclude prescribed burns from state emissions calculations under the Clean Air Act

The Clean Air Act requires states to manage air pollution to meet standards set by the federal Environmental Protection Agency. Smoke contributes significantly to several regulated air pollutants, including particulate matter and ozone, but smoke is regulated differently depending on its cause. Wildfires are treated as “exceptional events,” and their smoke is excluded from state air quality calculations.¹⁶

Smoke from prescribed burns, however, counts against state compliance, despite both the EPA and states recognizing that this important forest restoration tool reduces dangerous air pollution overall.¹⁷ “Everyone recognizes that prescribed fire can produce smoke,” acknowledges Amy MacPherson from the California Air Resources Board. “But smoke you can plan for and is short-lived is generally preferable to what we’re seeing right now with these out-of-control wildfires.”¹⁸

Smoke from prescribed burns should be excluded from state emission calculations, in effect crediting them for avoiding worse air pollution from a later wildfire. In 2019, the EPA issued guidance allowing states to seek EPA permission to treat smoke from prescribed burns as exceptional events.¹⁹ However, as an informal rule, guidance like this can be reversed at a moment’s notice. Moreover, this guidance is “non-binding,” meaning the EPA does not commit to follow it even while it remains in effect. This limits the ability of states, the Forest Service, and partners to rely on it. Because guidance is given little or no weight in litigation, states and prescribed burn participants may also remain vulnerable to lawsuits.²⁰

¹⁶ See EPA, *Exceptional Events Guidance: Prescribed Fire on Wildland that May Influence Ozone and Particulate Matter Concentration* (2019), https://www.epa.gov/sites/production/files/2019-08/documents/ee_prescribed_fire_final_guidance_-_august_2019.pdf.

¹⁷ See *id.*

¹⁸ See Sophie Quinton and Alex Brown, *California May Need More Fire to Fix Its Wildfire Problem*, PEW: Stateline (Sept. 18, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/18/california-may-need-more-fire-to-fix-its-wildfire-problem>.

¹⁹ See *Exceptional Events Guidance*, *supra* n. 16.

²⁰ See Memo from the Associate Attorney General, Dept. of Justice, to Heads of Civil Litigation Components and U.S. Attorneys, Re: Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>.

A reform to exclude prescribed fires from state emission calculations would provide greater certainty to states, the Forest Service, and others implementing prescribed burns and address a significant obstacle to this important forest restoration tool.

Increase the Forest Service's Ability to Partner with Others

5. Maximize cooperative agreements with private partners to perform more restoration and work with Congress to expand flexibility for the Forest Service to enter longer-term contracts

The Forest Service regularly enters into contracts with outside entities to procure goods or services and signs onto cooperative agreements, which are non-binding arrangements that establish and direct mutually beneficial work with partners. Many of these contracts and cooperative agreements are limited to several years, a relatively short duration given the time needed to complete forest restoration work.

In 2009, Congress created the Collaborative Forest Landscape Restoration Program, which aimed to enhance forest health and reduce wildfire risk through 10-year stewardship contracts between the Forest Service and partners. Twenty-three projects were developed over the program's first decade, raising \$470 million in private funds and in-kind contributions and enabling restoration work on 5.7 million acres.²¹ Based on these promising results, Congress renewed the program in 2019 and authorized stewardship contracts to be renewed for another 10-year term under certain conditions.²² (In some high-risk fire areas, stewardship contracts can even be extended for up to 20 years.²³)

In some cases, however, a guarantee of 10 years may not be enough. In the case of the Four Forest Restoration Initiative, for example, the 580,000 acres of forest restoration projects identified in the NEPA process are dependent on the program being renewed for another 20 years. If the collaboration ends with the current contract, this forest restoration may not take place.

For ambitious, forest-wide restoration efforts, the Forest Service needs flexibility to enter contracts of appropriate length and options to easily extend contracts, especially where anticipated projects must navigate environmental reviews and potential litigation. Absent such flexibility, short time limits may discourage potential partners, investors, and timber buyers.

²¹ See U.S. Forest Service, *Collaborative Forest Landscape Restoration Program 10-Year Report to Congress* (2019), https://www.fs.fed.us/restoration/documents/cflrp/REF_Report-CollaborativeForestLandscapeRestoration-508.pdf

²² See Consolidated Appropriations Act of 2018, H.R. 1625, 115th Cong. (2018), <https://www.congress.gov/115/bills/hr1625/BILLS115hr1625enr.pdf>.

²³ See Sec. 207 Consolidated Appropriations Act of 2018, H.R. 1625, 115th Cong. (2018), <https://www.congress.gov/115/bills/hr1625/BILLS-115hr1625enr.pdf>

This is especially true where long-term success depends on motivating the timber industry to build mill capacity and markets for small-diameter timber products. The types of investment that are necessary, such as new and retrofitted mills and biomass plants, cost tens of millions of dollars. Such expense is unlikely to be recouped in only a few years.

The Forest Service should be granted authority to enter into longer-term contracts and cooperative agreements for forest restoration work. It should also have the flexibility to easily extend contracts that would prolong ongoing restoration projects. Increasing the scale of forest restoration will require that the agency be able to commit to more contracts and cooperative agreements with long-term durations.

6. Maximize the Forest Service's existing Good Neighbor Authority and work with Congress to expand it

Good Neighbor Authority has helped the Forest Service partner with states, tribes, and counties to restore national forests as part of a broader, landscape-level approach. The Forest Service should continue to explore ways to partner with these entities through such "Good Neighbor" agreements to carry out needed restoration projects. The program would be more effective, however, with (1) greater flexibility for how revenues could be spent, (2) agreements that could easily be extended beyond the current 10-year stewardship contract limit, and (3) more opportunities for tribes and counties to participate.

Revenues earned through Good Neighbor Authority agreements are restricted to federal land. So long as federal lands benefit from the landscape-level restoration performed under these agreements, partners should have the flexibility to spend revenues where they would have the greatest impact. For instance, removing insect-infested trees or dangerous brush on neighboring state land may be a better use of revenues than replacing a culvert on federal land, even if considering only the benefits to federal land.

GNA partners should also have an option to easily extend the agreement past the current 10-year term limit permitted for stewardship contracts. This would allow time for partner agencies to build self-sufficient programs, assure them that investing in GNA administration and logistics will be worthwhile, and dedicate staff time to projects carried out under the program. Partners investing in the capacity to develop and implement GNA projects need time to recoup the returns from that investment.

Finally, tribes and counties should be treated as equal partners in GNA projects. States participating in GNA projects are entitled to keep timber revenues to compensate for their administrative costs and to fund forest restoration; however, counties and tribes are not permitted to retain revenues for work they perform. Updating the program would

simplify transactions for GNA projects on county and tribal lands and better engage these potential partners.

Open Markets

7. Work with Congress to establish a Forest Service restoration fund for long-term cost-share partnerships

Under the Antideficiency Act and appropriations rules, the Forest Service cannot obligate funds in advance of appropriations or after funding has expired.²⁴ This constrains its ability to participate as an equal financial partner when states, tribes, or private groups are willing to contribute funds to forest restoration. For instance, the Forest Service was unable to pay into the Forest Resilience Bond project in Tahoe National Forest, making the project financially dependent on California and the Yuba Water Agency.

In some cases, the benefits of healthier forests to states, tribes, and others can be sufficient for them to bear these costs alone. But in others, potential partners may be reluctant to invest in forest restoration without the agency also financially committing to the project for the same term. Likewise, private actors are unlikely to make the substantial investments required to expand milling capacity and create new processing methods for small-diameter wood without long-term financial commitments to restoration projects from the Forest Service. Furthermore, because privately funded forest restoration provides substantial benefits to the Forest Service, it is fair for partners to expect the agency to also contribute.

Congress recently created a separate wildfire “fire fix” disaster spending account to prevent “fire borrowing” and free up funds for forest restoration. But funding for forest restoration projects is often only effective if the agency can obligate such funds in ways that demonstrate a long-term commitment to partners.

The Forest Service should work with Congress to create an endowment-type fund for the agency or individual forest units with a permanent, flexible restoration fund that would allow the agency to engage in cost-share agreements of sufficient duration for investing partners to realize a return. Such a fund could make forest restoration collaborations feasible for partners who cannot bear project costs alone. It could also eventually make restoration more economical by spurring investment in milling capacity for small-diameter trees and the development of profitable uses for the material.

The National Forest Foundation, a congressionally chartered partner, could potentially administer such a fund, holding for future use forest restoration dollars that would not be subject to the Antideficiency Act or annual appropriations. The fund could perhaps leverage private dollars as well, similar to the National Park Foundation’s Centennial

²⁴ The majority of Forest Service discretionary funding is limited to a four-year period of availability for obligation, and the agency has five years to expend it once obligated.

Challenge program.²⁵ A dedicated source of funds for long-term cost-share agreements would allow the Forest Service to help finance forest restoration directly and encourage a steady supply of timber for markets.

The Nature Conservancy has been looking for several years to partner with a timber company to build a saw mill in eastern Washington to help with forest restoration there.²⁶ Although the organization has identified 4.3 million acres in need of thinning, prescribed burns, and other restoration work, no company has been willing to make the considerable investment required to construct a new mill in the area. If the Forest Service could make longer-term financial commitments to partnerships that would generate a predictable supply of small-diameter material, such investments would be easier to justify.

8. Work with Congress to open timber markets for export

From the late 1960s to the 1990s, Congress passed several pieces of legislation that restricted timber exports from federal lands across the West.²⁷ The intent of these laws was to ensure a continuous supply of timber to local mills and maintain local capacity. Due to a shift in federal forest management over recent decades, however, harvest volumes fell substantially, and many mills closed.²⁸ Thus, in many areas, there is not enough local capacity to remove the vegetation needed to reduce fire risks.

Today, removing these export restrictions would open western timber markets to more buyers. Because timber harvests often subsidize forest restoration, attracting the maximum number of bidders and highest possible timber prices increases the potential forest restoration that can be done.

Conclusion

Eighty million acres of national forests need restoration to reduce wildfire risks, increase resiliency to insects and disease, and improve watersheds. The Forest Service cannot do this alone. Tackling the problem is going to require the agency to work with states, tribes, conservation groups, and private sector partners who stand to benefit from healthier forests. Fortunately, several innovative cases help demonstrate how this can be done effectively and how such efforts can drive investment in markets and supply chains that will ultimately make

²⁵ See Congressional Research Service, *National Park Service Appropriations: Ten-Year Trends* (2019), <https://fas.org/sgp/crs/misc/R42757.pdf>.

²⁶ See Jim Peterson, *Ryan Haugo: Washington's National Forests — East of the Cascades... Good Fire, Bad Fire* (2016), <https://www.evergreenmagazine.com/ryan-haugo-washingtons-national-forests-east-of-the-cascades-good-fire-bad-fire/>.

²⁷ See U.S. Government Accountability Office, *Federal Timber Sales: Forest Service and BLM Should Review Their Regulations and Policies Related to Timber Export and Substitution* (2018), <https://www.gao.gov/assets/700/693932.pdf>.

²⁸ See U.S. Forest Service, *Selected Laws Affecting Forest Service Activities* (2004), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd608146.pdf

more forest restoration projects feasible. For these partnerships to reach their true potential, however, the Forest Service will need to make reforms and work with Congress to tackle persistent obstacles to forest restoration projects so that this important work can be done more quickly, at lower cost, and with less conflict.

To learn more about this research and the Fix America's Forests report, please visit perc.org/forests.