



## **The Forest Service & Categorical Exclusions: Misuse and Obfuscation Reveal a Clear Need for Changes**

### **Introduction**

The United States Forest Service manages 193 million acres across the country. Its mission is to sustain the health, diversity, and productivity of the nation's forests and grasslands. Among the numerous laws and regulations that guide the agency's achievement of its mission is the National Environmental Policy Act of 1969 (NEPA).<sup>1</sup> Often considered the bedrock of environmental law, NEPA requires federal agencies to take a hard look at potential environmental consequences of proposed actions such as logging, mining, road-building and other extractive uses, in order to arrive at fully informed decisions. Government transparency, accountability, and meaningful public involvement are at the heart of NEPA.<sup>2</sup> By requiring analysis of site-specific actions documented in an environmental impact statement or assessment, NEPA ensures the Forest Service considers reasonable alternatives and adheres to a “look-before-you-leap” approach to public land management.

Over the years, numerous court opinions have refined the law's application, providing critics of NEPA with fodder for accusations that the requisite analysis has become too burdensome, and that lawsuits challenging Forest Service actions prevent the agency from doing good work. This is certainly a false narrative, but one that resulted in numerous legislative and administrative efforts to modify and weaken the law and its implementing regulations. Among those efforts is expanding the use of categorical exclusions (CEs), which allows the agency to forego detailed analysis of, and public participation in, certain types of actions.

The use of CEs has been increasing, but the extent is unclear and difficult to track based on publicly available information.. This review sought to determine how the Forest Service is using specific vegetation management CEs, if such use represents an abuse of its authority, and if there are trends that warrant closer examination. This paper first explains CEs, specifically those pertaining to vegetation management, then provides an explanation of methods, an examination of findings, and a discussion of their implications.

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<sup>1</sup> National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, et seq.)

<sup>2</sup> 42 USC § 4332

## What is a Categorical Exclusion?

Forest Service CEs are a category of agency actions that purportedly do not individually or cumulatively have a significant effect on the human environment, and thus require less rigorous environmental analysis and public involvement.<sup>3</sup> CEs were initially established by the Council for Environmental Quality (CEQ) to reduce paperwork and expedite project implementation for agency actions that do not have a major environmental effect.<sup>4</sup> Projects authorized under a CE are not subject to analysis and documentation in an environmental assessment (EA) or environmental impact statement (EIS).<sup>5</sup> They are also not subject to administrative review, meaning that the agency is not required to provide the public an opportunity to submit an objection to the project, so any challenges must occur in the courts. CEs exist for several federal agencies, and can be established either by law or through federal rulemaking. For this paper, we focused on CEs used by the Forest Service for vegetation management.

### Legislative CEs - The Healthy Forest Restoration Act

Among the laws Congress passed authorizing the Forest Service to use CEs is the 2003 Healthy Forest Restoration Act (HFRA), which was amended in 2014 and again in 2018 to expand the types of actions that the Forest Service can authorize with a CE.<sup>6</sup> HFRA CEs are separate from CEs issued under NEPA's implementing regulations, which are discussed below. HFRA was initially enacted to reduce the risk of wildfires.<sup>7</sup> Congress has since expanded HFRA's focus to include CE authorization for projects that address insect and disease infestations, and habitat improvements for sage grouse and mule deer.<sup>8</sup> HFRA has been a major point of controversy, with proponents arguing that it helps to reduce wildfire risk, and opponents arguing that it opens up previously protected lands to logging and other vegetation removal actions under the false guise of healthy forest management and habitat restoration.

HFRA was expanded in the 2014 Farm Bill with the addition of Sections 602 and 603, which provided that, within 60 days, State governors could request the Forest Service identify vast areas experiencing "declining forest health" made evident by insect and disease infestations, among other factors.<sup>9</sup> The law allows the agency to add additional areas after the initial deadline. Section 603 allows projects on up to 3,000 acres to be categorically excluded within the identified area and can include any type of logging, prescribed burning, or other actions the Forest Service identifies as

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<sup>3</sup> 40 C.F.R. §1508.4

<sup>4</sup> 40 C.F.R. §1500.4(p), 40 C.F.R. §1500.5(k)

<sup>5</sup> 40 C.F.R. §1508.4

<sup>6</sup> 16 U.S.C. § 6501

<sup>7</sup> *Id.*

<sup>8</sup> 16 U.S.C. 6591a, 16 U.S.C. 6591b, 16 U.S.C. 6591e

<sup>9</sup> Section 8204 of the Agriculture Act of 2014 (Public Law 113-79) amended Title VI of the Healthy Forests Restoration Act of 2003 (HFRA) (16 U.S.C. 6591 et seq.) to add Sections 602 and 603.

“restoration treatments.”<sup>10</sup> The Consolidated Appropriations Act of 2018 (2018 Omnibus Act) amended HFRA by adding Section 605, which established a CE for hazardous fuels reduction projects on up to 3,000 acres if they are in an area designated under section 602.<sup>11</sup> In 2018, Congress further amended section 602 and added section 606, which authorizes CEs for vegetation management projects on up to 4,500 acres to protect, restore, or improve mule deer and sage grouse habitat.<sup>12</sup>

### Regulatory CEs

The CEQ regulations also allow federal agencies, including the Forest Service, to create their own CEs through rulemaking.<sup>13</sup> Early examples demonstrate that projects authorized by these CEs were meant to be more procedural or have minor effects. For example, those established by the Secretary of Agriculture include budgeting, policies for routine administrative activities, and conducting education sessions, among others.<sup>14</sup> Other examples include mowing lawns around agency buildings, repaving parking lots, creating administrative policies, and many others that would easily qualify as minor actions.<sup>15</sup>

Subsequent regulations, in 2008 and 2013, significantly expanded the use of CEs for more substantive and impactful projects. The Forest Service regulations at 36 C.F.R. §220.6(e) lists twenty separate actions that qualify for authorization using a CE authorization where the Forest Service must have a “supporting record” (case or project file) and require the agency to issue a decision memo.<sup>16</sup> Examples include various timber management activities, including “timber stand and/or wildlife habitat improvement activities,” prescribed fire and salvage logging.<sup>17</sup> The regulation at §220.6(d) lists ten actions where the Forest Service does not have to issue a decision memo or produce a supporting record.<sup>18</sup> These actions are intended to be more administrative or procedural in nature, and have fewer environmental impacts than those in §220.6(e).

Based on our research, there are five CEs under §220.6(e) the Forest Service typically used to authorize timber management, including logging, thinning, prescribed burning:

- §220.6(e)(6) allows for timber stand and/or wildlife improvement activities with *no acreage*

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<sup>10</sup> 16 U.S.C. § 6591b

<sup>11</sup> P.L. 115-141

<sup>12</sup> See the Agriculture Improvement Act of 2018 P.L. 115-334, 16 U.S.C. § 6591e

<sup>13</sup> 40 C.F.R. § 1507.3

<sup>14</sup> 7 C.F.R. § 1b.3

<sup>15</sup> 36 C.F.R. § 220.6(d)(3)

<sup>16</sup> 36 C.F.R. § 220.6(e), (the Court’s opinion in *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) precludes the Forest Service from using the CE authority under 36 C.F.R. 220.6(e)(9)). 36 C.F.R. §220.6(f).

<sup>17</sup> 36 C.F.R. § 220.6(e)

<sup>18</sup> 36 C.F.R. § 220.6(d)

*limit.*<sup>19</sup> Actions under this CE cannot include the use of herbicides or more than 1 mile of new road construction, though there are no restrictions on the miles of existing roads the agency may utilize. Such actions can include girdling trees to create snags, thinning brush, or conducting prescribed burns. Our research determined that the Forest Service appears to use this regulatory CE used most frequently.

- §220.6(e)(11) allows for post-fire rehabilitation activities on up to 4,200 acres.<sup>20</sup> Examples of post-fire rehabilitation activities authorized under this CE include fence replacement, tree planting, or repairing roads, so long as there is no use of pesticides and a project is conducted within 3 years of a wildland fire. It is important to note for our discussion below that although the examples provided in the rules for the use of this CE do not include timber harvest, the agency has been utilizing this CE for post-fire logging.
- §220.6(e)(12) allows for harvest of live trees on less than 70-acre projects, so long as no more than ½ mile of temporary road is constructed.<sup>21</sup> This includes the removal of individual trees or commercial thinning of overstocked stands to promote stand health and vigor, but cannot be used for even-aged regeneration harvest (i.e. clearcuts). Actions authorized under this CE include the removal of individual trees for sawlogs, specialty products, and fuelwood.
- §220.6(e)(13) allows for the salvage of dead and dying trees on less than 250 acres, with no more than ½ mile of temporary road construction.<sup>22</sup> Examples include the harvest of trees damaged by weather or fire. Proposed actions can also include incidental removal of live or dead trees for landings, skid trails, or road clearing.
- §220.6(e)(14) allows for commercial and non-commercial sanitation harvest of trees to control insects and disease.<sup>23</sup> As with §220.6(e)(13), actions approved under this CE must not exceed 250 acres and cannot include more than ½ mile of temporary road construction. Examples include felling and harvesting trees adjacent to those infested by pine beetles, and the removal and/or destruction of infested trees affected by a new exotic insect or disease.

### Extraordinary Circumstances

For a project to qualify for a CE, the Forest Service's regulations require that there be no

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<sup>19</sup> 36 C.F.R. § 220.6(e)(6)

<sup>20</sup> 36 C.F.R. § 220.6(e)(11)

<sup>21</sup> 36 C.F.R. § 220.6(e)(12)

<sup>22</sup> 36 C.F.R. § 220.6(e)(13)

<sup>23</sup> 36 C.F.R. § 220.6(e)(14)

“extraordinary circumstances,” as determined by the project’s effect(s) on seven resource conditions:

1. threatened or endangered species;
2. floodplains, wetlands, and municipal watersheds;
3. congressionally designated areas such as wilderness, wilderness study areas, or national recreation areas;
4. inventoried roadless areas;
5. research natural areas;
6. American Indian or Native Alaskan religious and cultural sites; and
7. archaeological sites, or historic properties or areas.<sup>24</sup>

The mere presence of one or more of these resources doesn’t necessarily mean that extraordinary circumstances exist. There must be a cause and effect relationship, where the degree of effect on the resource(s) determines whether there are any extraordinary circumstances. It is during the scoping process that the Forest Service makes this cause and effect determination.

Scoping is “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.”<sup>25</sup> Scoping is required for all Forest Service proposed actions, including those that may be categorically excluded from further analysis and documentation in an EA or an EIS.<sup>26</sup> The Forest Service Handbook recognizes that “[s]coping is important to discover information that could point to the need for an EA or EIS versus a CE [and] is the means to identify the presence or absence of any extraordinary circumstances that would warrant further documentation in an EA or EIS.”<sup>27</sup> During the scoping process, the agency should analyze the proposed project in conjunction with “any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.”<sup>28</sup> Scoping complexity should be commensurate with project complexity.<sup>29</sup> Based on scoping, if the Forest Service determines that it is uncertain whether the proposed project may have a significant effect on the environment, the agency must prepare an EA, and if the agency determines that the project may have a significant environmental effect, it must prepare an EIS.<sup>30</sup>

As part of the scoping process, the Forest Service is required to “[i]nvite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental

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<sup>24</sup> 36 C.F.R. §220.6(b)(1)

<sup>25</sup> 40 C.F.R. §1501.7.

<sup>26</sup> 36 C.F.R. §220.4(e)

<sup>27</sup> Forest Service Handbook 1909.15 Ch. 31.3

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 36 C.F.R. §220.6(c)

grounds).”<sup>31</sup> There are a number of ways that agencies can notify the public.<sup>32</sup> At a minimum, the Forest Service must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures,” and “[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.”

Notably, in March, 2020, the Forest Service revised their CE Handbook<sup>33</sup> in the wake of litigation challenging some of the HFRA CEs and whether an analysis of "extraordinary circumstances" is required. Pursuant to what the Forest Service had argued in the litigation, the agency removed the requirement to analyze extraordinary circumstances for projects conducted under HFRA section 603.<sup>34</sup> In effect, this creates a wholesale exemption from NEPA for a broad category of projects identified as either insect and disease or hazardous fuels reduction on up to 3,000 acres.

## Methods

This paper provides an initial review of the Forest Service’s use of specific CE authorities from January through March, 2020 (Q1), based on projects we found on the agency’s Schedule of Proposed Actions (SOPAs). On a quarterly basis, each national forest posts a SOPA on the agency website, which contains a list of proposed actions that will soon begin or are currently undergoing environmental review.<sup>35</sup> The SOPA is intended to make the public aware of upcoming and ongoing projects, so that they can contact the agency about their interest in specific proposals and desire to receive additional information and participate in the NEPA process. Notably, the SOPA is not to be used as the sole scoping mechanism for a proposed action.<sup>36</sup>

In order to identify vegetation management projects proposed or authorized under a CE, we reviewed the SOPAs for each national forest in Forest Service Regions 1 - 6, though in Region 2 we only included those in the states of Wyoming and Colorado and the Black Hills National Forest. In total, we reviewed the SOPAs for 75 national forests across 11 states.<sup>37</sup>

The initial purpose of our CE project review was to determine possible issues in the Forest Service’s

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<sup>31</sup> 40 C.F.R. §1507.1(a)(1)

<sup>32</sup> 40 C.F.R. §1506.6.

<sup>33</sup> FSH 1909.15 Ch. 30

<sup>34</sup> *Id.*, at 32.3(5)

<sup>35</sup> *See* 36 C.F.R. §220.3, <https://www.fs.fed.us/sopa/>

<sup>36</sup> *Id.*, at §220.4(e)(3)

<sup>37</sup> The Northern Region (R1) covers six states (Montana, Northern Idaho, North Dakota, Northwestern South Dakota, Northeast Washington, and Northwest Wyoming). The Rocky Mountain Region (R2) covers five states (Colorado, Nebraska, Kansas and most of Wyoming and South Dakota). The Southwestern Region (R3) covers two states (New Mexico and Arizona). The Intermountain Region (R4) covers four states (Southern Idaho, Nevada, Utah and Western Wyoming). The Pacific Southwest Region (R5) covers two states (California and Hawaii). The Pacific Northwest Region (R6) covers two states (Washington and Oregon).

use of specific CE authorities. We used the Q1 2020 SOPA to identify vegetation management projects the Forest Service planned to authorize using a CE. We included those that the SOPA's project purpose column labeled as forest products, vegetation management, fuels management, or other similar labels. In some instances we relied on the project description included on the SOPA, or in the project documents themselves when the SOPA was unclear, to determine if the project may fall under one of the pertinent CE authorities. We then compiled the following information for each project based on the SOPA and the information available in the supporting record: the project title, forest, ranger district, project status/date, acres, proposed actions, and the CE authority cited (if available). We recorded the information for each project on a spreadsheet organized by the Forest Service region.

We encountered several obstacles due to the nature of the SOPA listings and inconsistencies in the available information in the supporting record:

- First, we were unable to consistently list the acreage for every project because the Forest Service either did not provide the acreage or only provided partial acres for specific treatment. Some projects simply listed general sizes such as “up to 3000 acres.”
- Second, we were unable to identify the specific CE authority for every project. Many scoping documents either listed multiple CE authorities without associating them with a specific action or omitted them altogether. For projects with multiple authorities listed, we recorded those that pertain to vegetation management only when it was clearly specified in the scoping notice or decision memo. Projects with no authority listed were labeled as unspecified.
- Third, for many projects, we were only able to discern that its purpose included vegetation management by reading through scoping notices or supporting files that were sometimes poorly scanned pdf images of the documents, thereby making them unsearchable and in some cases illegible. Documentation was widely inconsistent, including following different formats and even the use of terms and descriptions, making it difficult to identify and track information for many projects. Although the documents we reviewed are accessible to the public because they are posted online, many of them are certainly not “accessible” in terms of the public's ability to track and read through them.

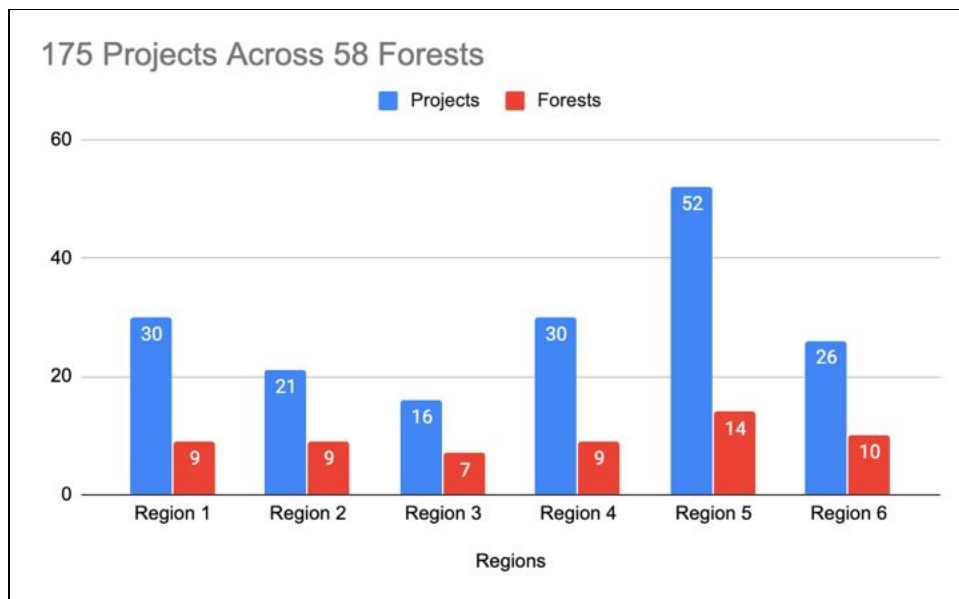
Due to these obstacles and inconsistencies, in order to maximize the confidence in our findings we found it necessary to only include projects where we could confirm the project activities involved some form of cutting or prescribed burning likely to fall under the pertinent CE authorities. This required a careful review of the project descriptions included on the SOPAs or in the project files (scoping notice, decision memo or other documentation) to verify the proposed actions or, if

provided, the specific CE authority. Further, some project descriptions disclosed the size of the analysis area, while others detailed specific treatment areas, and still others failed to provide any acreage at all. The lack of consistent information hindered our ability to uniformly record project information, most often pertaining to acres and the associated CE authority. Despite the inconsistencies we were able to gain valuable insights into the Forest Service’s use of CEs for vegetation management.

### Summary of Findings

Out of the 74 National Forests in Regions 1 through 6, we identified 175 projects across 58 forests. Region 5 contained the most projects, with 52 projects on 14 of its 17 forests. While Regions 1 and 4 each had 30 projects, there is a significant difference in acreage (215,737 acres in Region 1 compared to 1,341,717 in Region 5. (see Figure 5).

**Figure 1. Number of Projects by Region**



Of the 175 projects across Regions 1-6, we found 41 projects for which decision memos had been issued, and all but one decision identified the CE authority used to justify the project. (Figure 2). However, we found that 43% (76) of all projects failed to disclose the CE authorities in the scoping document. Scoping is supposed to be “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.”<sup>38</sup> By failing to identify the CE authority during scoping, the Forest Service abrogated its responsibility under NEPA to provide the relevant information to the public so that they can be informed of and provide input on the proposed action, including identifying significant issues and whether the Forest

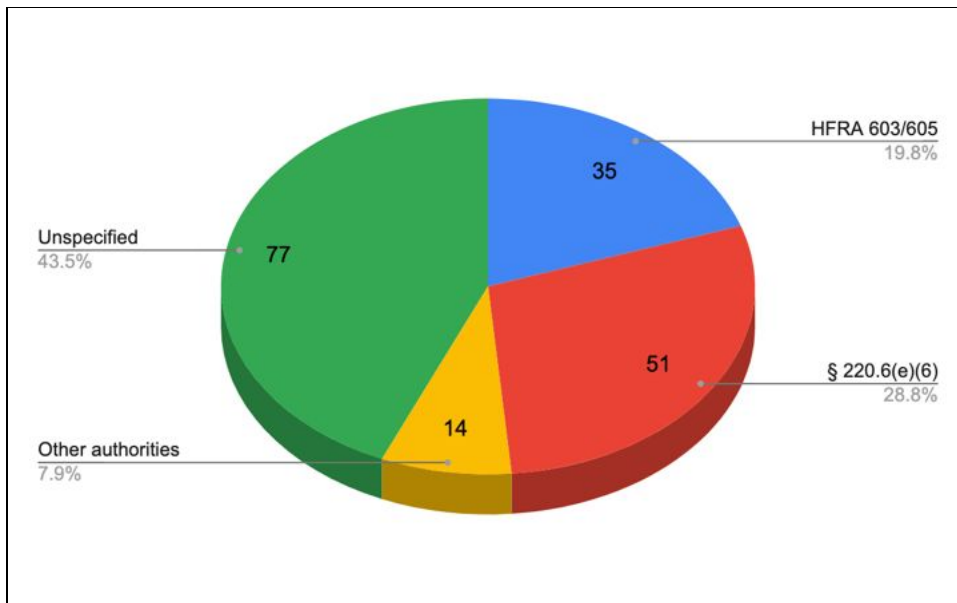
<sup>38</sup> 40 C.F.R. §1501.7



Service is correctly using the particular CE authority.

In addition, we found considerable variability in the agency's use of SOPAs, which are supposed to be used to inform the public about proposed and ongoing actions for which a final decision (decision memo for CEs) will be or has been issued.<sup>39</sup> However, there is no consistency for how long projects appear on the SOPAs, with some persisting on the list for years and others dropping off after a few quarters.

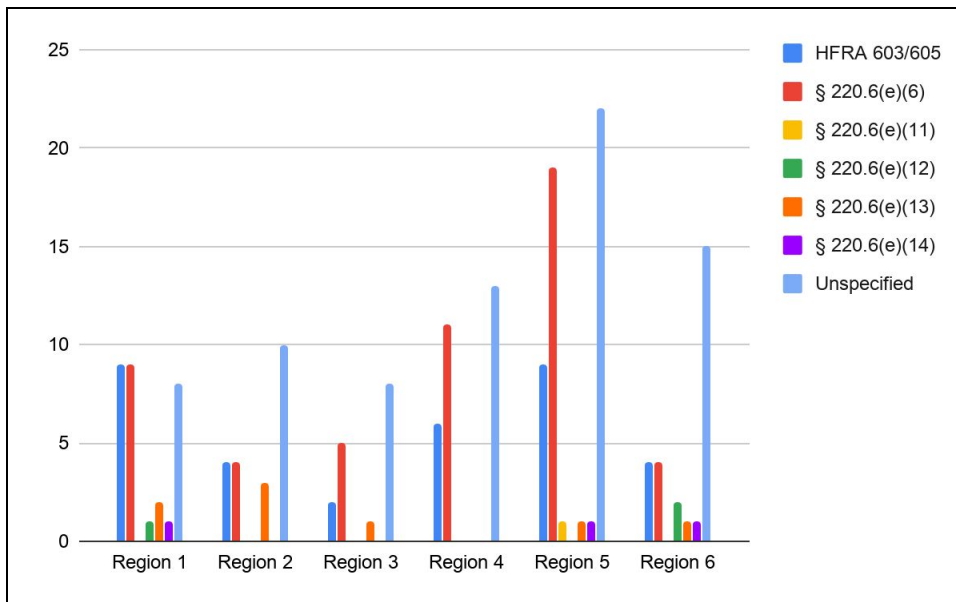
**Figure 2. Number of Projects by CE Authorities**



While the failure to specify the CE authority was spread out across all regions, when disclosed some regions used certain authorities more than others: Regions 1, 2, and 6 used HFRA and §220.6(e)(6) fairly evenly, while Regions 4 & 5 use §220.6(e)(6) far more than any others. It is important to note that many projects utilize multiple CE authorities for different actions and we recorded projects that cited HFRA and those under §220.6(e) specific to tree cutting and prescribed burning, (see Figure 3). As a result, three projects were counted twice in Figures 2 and 3. Overall, §220.6(e)(6) is the most commonly used.

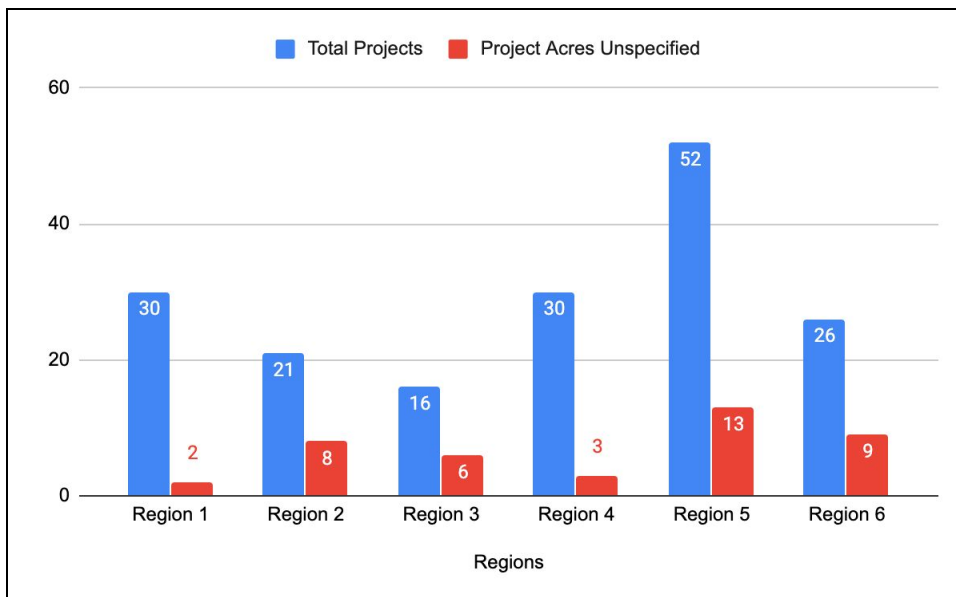
<sup>39</sup> 36 C.F.R. §220.3

**Figure 3. Number of Projects & Use of CE Authority by Region**



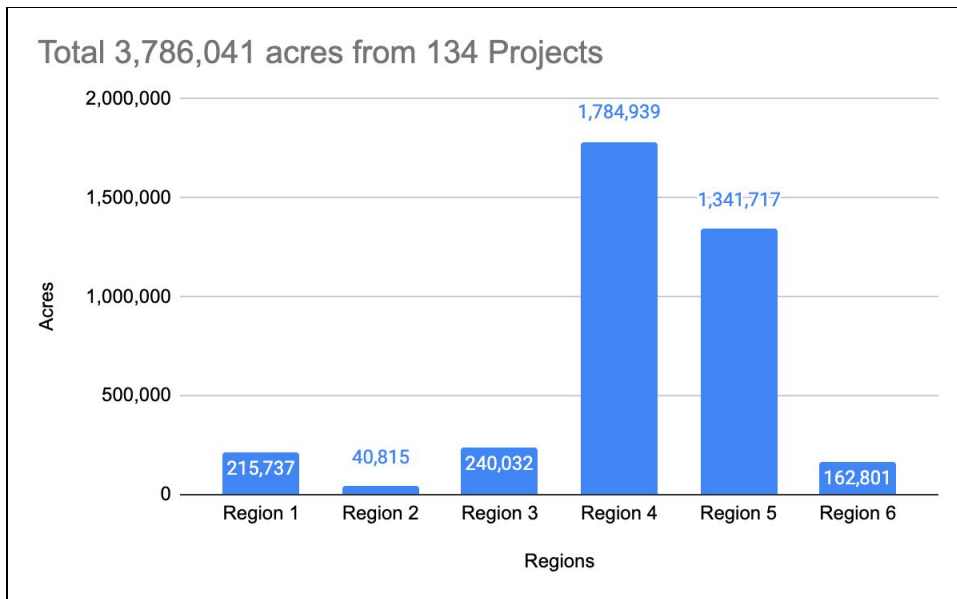
Out of 175 projects, 134 specified acreage of either the project’s total size or treatment areas, leaving 41 with no acreage identified. Table 4 displays how many projects in each Region did not include specific acreage. In terms of percent, Regions 2 and 3 had approximately 38% of projects lacking specific acres. Region 6 and 5 had the next highest rates at 35% and 25% respectively. Region 4 had a 10% rate of projects without specified acres and Region 1 had the lowest rate at 7%.

**Figure 4. Number of Projects Without Specified Acres**



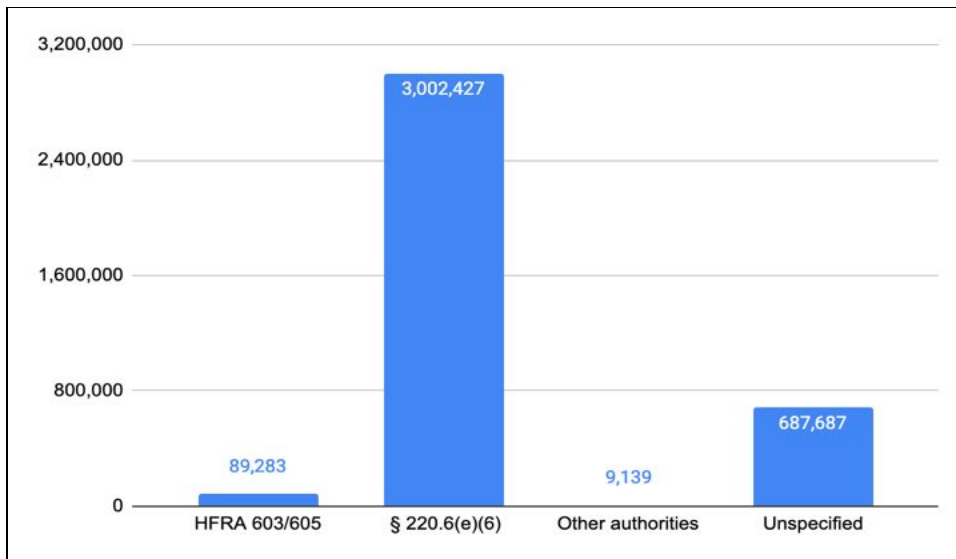
The number of projects and frequency of acres reported must be taken into account when evaluating which regions used CEs to authorize projects across the most acreage. Regions 1 and 4 offer the best comparison having the same number of projects and low rates of unspecified acres compared to the others. Figure 5, below, shows Region 4 had the most acres at over 1.78 million while Region 1 had just over 215,700 acres. Stated differently, Region 4 authorized projects across 12 times more land than Region 1 with the same number of projects. Region 5 had the next highest acreage at over 1.34 million, with one project accounting for 1 million acres. By far, Region 4 utilized CEs to authorize timber management projects across the most acreage.

**Figure 5. Total Known Acres by Region**

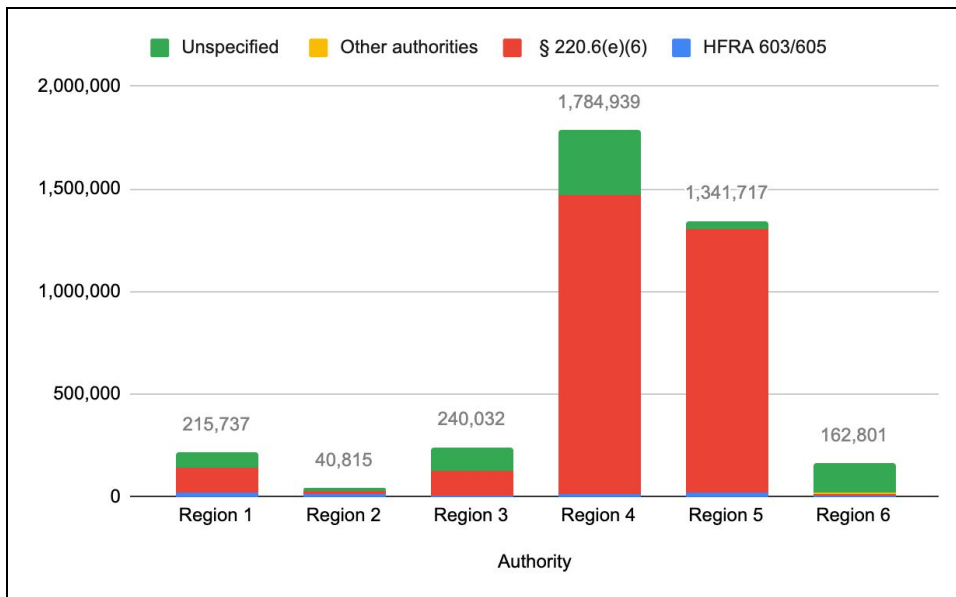


Across all regions, the Forest Service predominantly used §220.6(e)(6), timber stand and wildlife improvement activities, with 51 projects proposed on over 3 million acres, (Figures 3 & 6). Also note that the Forest Service did list acres for 134 projects as shown above, though it failed to specify the CE authority for 38 of those projects. Looking at Figure 7, it is apparent that Regions 4 & 5 proposed the most acres under §220.6(e)(6), and Region 6 had the most acres without specifying the CE authority.

**Figure 6. Total Known Acres by CE Authority**



**Figure 7. Regional Use of CE Authorities by Acres**



The sheer size of many of the projects we analyzed, especially those authorized under §220.6(e)(6), raise concerns regarding its potential misuse, and impacts on Threatened and Endangered Species and their habitats, Native American cultural sites, and other extraordinary circumstances. For example, the proposed Pine Valley Habitat Improvement Project (Dixie National Forest, UT, Region 4) seeks to authorize a range of unspecified logging over an unspecified amount of time on 320,000 acres. The White River Forest Health and Fuels Project (White River National Forest, CO,

Region 2) proposed 1000 acres of pre-commercial thinning *every year* until “significant changes in condition warrant new analysis,” with no limit on the total acreage that could be “improved.”<sup>40</sup>

The East Zone Fire Management Project CE (Uinta-Wasatch National Forest, UT, Region 4),<sup>41</sup> proposed logging and burning across 900,000 acres. Here, the agency asserted it is “confident” that project planners “understand the effects,” largely on the basis of similar projects authorized under previous CEs and EAs. Basing a determination of no extraordinary circumstances or adverse effects largely on past decisions, without any site-specific analysis, does not take into account the unique contexts of the project area, especially across such vast acreage. The CE rules require that the Forest Service prove that there are no extraordinary circumstances or adverse effects present for each unique action precisely because the context varies depending on the specifics of every proposed project. The East Zone Fire Management Project CE (along with many others) also proposed activities within inventoried roadless areas, an explicitly mentioned resource consideration for determining the presence or absence of extraordinary circumstances. Rules for inventoried roadless areas provide that the harvest of timber can occur only if “expected to be infrequent.”<sup>42</sup> After public outcry, the Forest Service decided to withdraw this project, but explained it would proceed under multiple CEs instead of just one.

## Discussion

After reviewing the Forest Service’s use of vegetation management CEs in the first quarter of 2020, a number of concerning issues emerged. In conducting our review it became clear that it is extremely difficult for the public to track the Forest Service’s use of CEs based on SOPA reviews. Since they are only available on a quarterly basis, it is possible for the Forest Service to propose a CE project and issue a decision memo within the three month timeframe between SOPAs. In this scenario a project would appear as a “new listing” with its status as being “completed,” which prevents the public from participating in the scoping process. Outside reviewing the quarterly SOPAs, few options exist to learn about specific CE projects. The best approach is to request notification from each national forest and their local district offices. This is not an efficient method for tracking projects across multiple forests or at a regional scale, which is why the Forest Service provides the SOPAs. Another option is to submit a Freedom of Information Act (FOIA) request to each national forest for all CE projects being prepared or under analysis. This provides an effective means to learn about past projects or those being proposed for tracking purposes, but not for providing public comments since the agency has 20 business days to respond, by which time a comment period may

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<sup>40</sup> U.S. Forest Service, *White River Forest Health and Fuels Management Project Final Proposed Action* (Dec. 18, 2018), p. 3. <https://www.fs.usda.gov/project/?project=55257>

<sup>41</sup> U.S. Forest Service, *East Zone Fire Management Project* (Aug. 30, 2019), <https://www.fs.usda.gov/project/?project=56682>

<sup>42</sup> 36 C.F.R. § 294.42(e)(2)

have expired.

Further, CEs under §220.6(d) do not require a decision memo and do not appear on the SOPA, making it extremely difficult to track these projects and for the public to know if the Forest Service is using or abusing its CE authorities. For example, it is not uncommon for the Forest Service to use the authority at §220.6(d)(4) to clear large areas along roadsides, and in some instances, produce commercially viable timber sales.

A recent Ninth Circuit decision found that such actions run counter to §220.6(d)(4)'s intent:

We have no doubt that felling a dangerous dead or dying tree right next to the road comes within the scope of the “repair and maintenance” CE. But the Project allows the felling of many more trees than that. The rationale for a CE is that a project that will have only a minimal impact on the environment should be allowed to proceed without an EIS or and EA. The CE upon which the Forest Service relies authorizes projects for such things as grading and resurfacing of existing roads, cleaning existing culverts, and clearing roadside brush. A CE of such limited scope cannot reasonably be interpreted to authorize a Project such as the one before us, which allows commercial logging of large trees up to 200 feet away from hundreds of miles of Forest Service roads.<sup>43</sup>

Although the Forest Service must conduct scoping for any action under both §220.6(d) and (e), the public's ability to obtain the necessary information to provide informed comments during the scoping process is limited because there are no requirements for a specific comment period or method of public notification. In some instances, it appears that the agency intends scoping to be a purely internal review process and does not invite the public to provide comments that could help shape a project before it's finalized.<sup>44</sup> For example, the Nez Perce-Clearwater National Forest proposed the Forestwide Stand Improvement Project without ever offering a public comment period.<sup>45</sup>

Besides the challenges identifying and tracking CE projects, we found that for CEs under §220.6(e), which require a supporting record, the availability of, and level of detail and analysis in the record are inconsistent and frequently only available to the public after the decision memo has been issued. Sometimes these records can only be obtained through a FOIA request. During our evaluation of the scoping documents and other available information, we found the Forest Service did not

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<sup>43</sup> *Environmental Protection Information Center v. Ann Carlson*, D.C. No. 3:19-cv-06643-EMC, (N.D.CA, August 3, 2020).

<sup>44</sup> Notably, this will not improve under the Forest Service's [proposed new NEPA regulations](#), which would require scoping only for the CEs currently set out under §220.6(e).

<sup>45</sup> See <https://www.fs.usda.gov/project/?project=58299>. While the agency rightly consulted with the Nez Perce Tribe, it failed to seek input from interested persons as required under 40 CFR 1501.7.

consistently identify the CE authority, the acreage or the location of specific actions, much less provide information about the type of timber management activities proposed. In many instances the agency did not disclose the acres or CE authority until after a decision was made, if at all. Where the agency utilized more than one CE authority, it rarely specified the acres associated with each one. Overall, the Forest Service inconsistently provided complete project information, leaving few options for the public to meaningfully engage in the process or learn about proposed actions and their impacts.

In addition, the decision memo is supposed to include sufficient information supporting the agency's need for the project, including:

- The location of the proposed action, including administrative unit, county, and State;
- The decision to be implemented and the reasons for categorically excluding the proposed action including: (i) The category of the proposed action, (ii) The rationale for using the category and, if more than one category could have been used, why the specific category was chosen; and (iii) A finding that no extraordinary circumstances exist;
- Findings required by other laws such as, but not limited to findings of consistency with the forest land and resource management plan as required by the National Forest Management Act; or a public interest determination (36 CFR §254.3(c));
- The date when the responsible official intends to implement the decision and any conditions related to implementation;
- Whether the decision is subject to review or appeal, the applicable regulations, and when and where to file a request for review or appeal.<sup>46</sup>

Yet, our research found that decision memos often lacked this information, including sufficient reasons for categorically excluding the project, how the project fits within the cited CE authority, or a detailed finding that no extraordinary circumstances exist. Further, the Forest Service does not have to show how it factors comments it receives during scoping into the decision. Thus, even if the agency does provide the required information in the decision memo, by this time it is too late - the public comment period, if one was even provided, is over. Consequently, we found that there is rarely an opportunity for meaningful public involvement, and in many instances the public is left in the dark as to the rationale behind the authorization or any extraordinary circumstances until the project has been approved.

Since CEs are not subject to administrative review, the only recourse left to the public is to challenge the project, including whether the Forest Service properly used its CE authority, in court. The obstacles, inconsistencies, and lack of transparency and public involvement invites litigation, which is an inefficient use of the agency's resources.

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<sup>46</sup> 36 C.F.R. §220.6(f).

Finally, the Forest Service relies heavily on the use of CEs. In fact, “... only 1.9 percent of the 33,976 USFS decisions between 2005 and 2018 were processed as Environmental Impact Statements, the most rigorous and time-consuming level of analysis, whereas 82.3 percent of projects fit categorical exclusions.”<sup>47</sup> Such extensive use of CEs by itself does not necessarily suggest an abuse of authority, yet when coupled with the number, size and scope of projects proposed during just the first quarter of 2020, our findings show the agency is authorizing projects covering tens of thousands, or even hundreds of thousands of acres for up to 15 years or more with little environmental review or public involvement, and no assessment of cumulative impacts. Ultimately, the Forest Service fails to show how so many projects covering so many acres do not involve extraordinary circumstances, such as impacts on Threatened or Endangered Species, Native American or archeological cultural sites, or wetlands. It appears that the Forest Service is using CEs as a blank-check to conduct logging, burning, and other vegetative treatments in a manner wholly outside the initial intent of the CE authorities themselves, and NEPA.

## Conclusion

Based on our review, it is likely that CE authorities are being used by the Forest Service for vegetation management beyond the intention specified by Congress or its regulatory authority and in violation of NEPA's two fundamental objectives: “First, [NEPA] ‘ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,’” and “second, it requires ‘that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.’”<sup>48</sup>

Of particular concern is the use of CEs for large, landscape-scale projects across tens, and even hundreds of thousands of acres on National Forest lands. By using CEs for such projects, the agency is excluding the public from the decision making process, especially when limiting documentation and access of the public to scoping, project files and decision memos. The failure of the Forest Service to identify the specific CE authority and acreage, or analyze impacts and the existence of extraordinary circumstances, cast serious doubt on the Forest Service's claim that it is properly using its authorities. In order to determine if these failures constitute a trend, more evaluation will be necessary; however, our findings indicate a clear need for changes.

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<sup>47</sup> Forrest Fleischman, Cory Struthers, Gwen Arnold, Mike Dockry, Tyler Scott, US Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining, *Journal of Forestry*, , fvaa016, <https://doi.org/10.1093/jofore/fvaa016>

<sup>48</sup> *Southeast Alaska Conservation Council, et al, v. United States Forest Service*, Case 1:19-cv-00006-SLG, p. 15 (D. AK) (March 11, 2200) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).



We strongly recommend that the Forest Service or Congress limit the use of CEs, including placing an acre limit on projects authorized under 36 C.F.R. §220.6(e)(6). Additionally, the agency must improve and standardize across all forests, the public notification of proposed projects and scoping notices to specify the CE authorities, acreages, specific project locations, and extraordinary circumstances. It must also make project files publicly available, provide a 30-day comment period, and ensure decision memos detail how the project will meet applicable requirements of the particular CE authority. Such actions are necessary to increase the accessibility of project information, better involve the public in agency decision-making, avoid litigation, and show that the agency is adequately conducting projects with the level of environmental consideration required by law.