To: Interested Persons
From: Mike Anderson, The Wilderness Society
Re: Senator Barrasso's "National Forest Ecosystem Improvement" Bill
Date: April 24, 2017

Following is a summary and analysis of S. 879, the "National Forest Ecosystem Improvement Act," which Senator Barrasso introduced on April 6, 2017. The bill is essentially identical to S. 1692, which Barrasso introduced in 2015 during the 114th Congress.

S. 879 consists of two titles. Title I – Forest Management Activities – is similar to Senator Barrasso's previous national forest bill, the "National Forest Jobs and Management Act" (S. 1966, 113th Congress). Title II – Categorical Exclusions – mostly duplicates portions of a bill sponsored by Representative Westerman, the "Resilient Federal Forests Act" (H.R. 2647, 114th Congress).

Title I – Forest Management Activities

Purposes and Definitions. The two purposes of Title I are to "establish a reliable and predictable timber supply from the National Forest System…to help fund ecosystem restoration" and to "expedite and prioritize forest management activities to achieve ecosystem restoration objectives" (Sec 101). *Utilizing commercial timber harvest to fund ecosystem restoration is often counterproductive, as the timber harvest can exacerbate unhealthy forest conditions, thus creating the need for additional restoration.* Section 102 defines "restoration" to mean "any activity that helps to recover, reestablish, or maintain the resilience or adaptive capacity of an ecosystem" (Sec. 102(1)(A)). Restoration activities are defined as timber harvesting, thinning, prescribed fire, or other types of vegetation manipulation (Sec. 102(1)(B)).

Ecosystem Restoration Projects. Section 103 directs the Forest Service to implement "ecosystem restoration projects" to accomplish eight broad objectives, ranging from restoring terrestrial habitat to reducing the risks of insect and disease infestations and wildland fire severity potential (Sec. 103(a)). *Included in the objectives of ecosystem restoration projects are timber stand improvement and creating "early seral" habitat (i.e. clearcuts). These activities are not restoration, and may well undermine legitimate restoration activities.* The bill excludes such projects from Wilderness areas and other areas where removal of vegetation is prohibited by law (Sec. 103(b)).

Mandatory Treatment Acreages. Section 104 requires the Forest Service to accomplish national restoration treatment acreages each year, starting in 2018. The annual minimum acreage requirements are 1 million acres of mechanical treatments and 1 million acres of prescribed fire (Sec. 104(a)). The bill specifies that the 1 million acres of mechanical treatments must include at least 400,000 acres of commercial thinning and 60,000 acres of even-aged management (i.e., clearcutting) ((Sec. 104(a)(1)). Each Forest Service region would be assigned a portion of the required acreage of restoration treatments (Sec. 104(b)).

Section 104 is highly problematic because it would impose unrealistic logging mandates and require the Forest Service to prioritize logging over all other uses of the national forests. First,

due primarily to funding limitations, the Forest Service has only been able to implement commercial thinning on approximately 100,000 acres per year and all types of mechanical treatments on about 200,000 acres per year.[1] *Thus, the bill would require the Forest Service to increase logging and other mechanical treatments by four to five times more than recent amounts.*

Second, unlike other recent bills that have included acreage targets or goals for mechanical treatment for specific areas,[2] *S. 879 appears to create an inescapable legal mandate to achieve the timber targets on the entire National Forest System. Thus, absent a major increase in congressional funding, the Forest Service could be required to divert resources away from all other multiple-use activities in order to accomplish the legally-required amount of logging and other mechanical treatments.*

Finally, by requiring 60,000 acres of clearcuts every year, which can create significant future fire risks and increase treatment costs, the legislation would exacerbate the risks of catastrophic wildfire in the future.

NEPA. Section 105 requires the Forest Service to prepare an environmental assessment (EA) for each ecosystem restoration project (Sec. 105(a)). 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. (Sec. 105(c)). 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 (Sec. 105(d) and (c)).

This section is problematic because it 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 artificial 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 Title II, these provisions would significantly reduce environmental safeguards and public involvement opportunities in national forest management.

Binding Arbitration. Section 106 requires the Forest Service to establish a binding arbitration/alternative dispute resolution process for ecosystem restoration projects that have been collaboratively developed or identified in a community wildfire protection plan (Sec. 106(a) and (b)). For these types of 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 (Sec. 106(d)). The demand for arbitration must include an alternative proposal for the

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[1] For data on commercial thinning acreage, see USDA Forest Service, Harvest Trends on National Forest System Lands 1984 to Present, https://www.fs.fed.us/forestmanagement/documents/harvesttrends/NFS_HarvestHistory1984-2016.pdf. For data on mechanical treatment acreage, see USDA Forest Service, 2012. "Increasing the Pace of Restoration and Job Creation on Our National Forests," pp. 4-5. http://www.fs.fed.us/publications/restoration/restoration.pdf.

[2] For example, S. 1301, the "Oregon Eastside Forests Restoration, Old Growth Protection, and Jobs Act of 2013," sets mechanical treatment targets, but only requires them to be implemented "to the maximum extent practicable" (Sec. 103(b)(1)).

project (Sec. 106(d)(2)(B)(ii)). The objector and the Forest Service would select the arbitrator from a list of at least 20 certified arbitrators developed by the agency (Sec. 106(c) and (e)). The arbitrator would select either the Forest Service's project or the objector's alternative proposal (Sec. 106(f)(2)). The entire arbitration process would be completed within 90 days after the filing of a demand for arbitration (Sec. 106(g)). The arbitrator's decision would not be subject to judicial review, except in instances of corruption, fraud, bias, or other misconduct by the arbitrator (Sec. 106(h)(3)).

The proposed arbitration process is seriously flawed because it provides no means to ensure that the Forest Service is actually following environmental laws, or even the requirements of S. 1691. The arbitrator would not be able to consider and rule on the legal adequacy of the process by which the agency arrived at its decision. Conceivably, a local district ranger or forest supervisor could entirely skip normal public involvement and Endangered Species Act requirements in order to achieve their legally-mandated mechanical treatment targets.

Litigation Bonding. Section 107 would require anyone who files a lawsuit challenging an ecosystem restoration project to post a bond equal to the anticipated costs, expenses, and attorneys' fees of the Forest Service as defendant in the case (Sec. 107(a)(2)). The bond would not be returned unless the plaintiffs prevailed on all of their legal claims in the lawsuit (Sec. 107(c)). This section of Title I is similar to the litigation bonding requirement contained in Title III of H.R. 2647, except that it does not limit prevailing plaintiffs' ability to obtain reimbursement of costs and attorneys' fees under the Equal Access to Justice Act.

The proposed bonding requirement is totally contrary to the current legal requirements for civil actions in the United States, where parties to litigation are required to pay their own costs. Having to post a bond to cover the Forest Service's and U.S. attorneys' staff time and expenses would create an insurmountable financial barrier for all but a few organizations and individuals. Even adjacent landowners would have to pay a hefty bond in order to go to court to challenge Forest Service management activities that affect their lands. The bill's requirement for the plaintiff to prevail on all of their claims in order to recover their bond is also manifestly unfair since it would mean that a plaintiff would lose the entire bond even if the plaintiff prevailed on all claims except one.

Title II – Categorical Exclusions

Title II of S. 879 creates three new types of categorical exclusions (CEs) that exempt national forest logging activities up to 5,000 acres (or in some cases 15,000 acres) from complying with the requirements of the National Environmental Policy Act. It also provides an alternative to the Endangered Species Act's interagency consultation process.

"Critical Response" CE. Section 202 provides CE authority for forest management projects whose "primary purpose" is to address insect and disease infestations, reduce hazardous fuels, protect a municipal water source, protect critical habitat from catastrophic disturbance, or increase water yield (Sec. 202(a)). The projects generally can be up to 5,000 acres in size, but they can be as large as 15,000 acres if they are collaboratively developed, proposed by a

Resource Advisory Committee, or covered by a community wildfire protection plan (Sec, 202(b)).

In contrast, the 2014 Farm Bill created a CE for collaboratively-developed restoration projects within the wildland urban interface or specified high-risk forest areas up to 3,000 acres in size that preserve old-growth forests and focus on scientifically sound ecological restoration. S. 1691 would authorize a five-fold increase in the Farm Bill's maximum size of CE projects and would eliminate any requirement to protect old-growth forests or focus on scientifically sound ecological restoration.

Salvage Logging CE. Section 203 provides CE authority to expedite salvage operations up to 5,000 acres in size that are carried out in response to fire or other "catastrophic event" (Sec. 203(a), 203(b), and Sec. 201(6)). Salvage logging is defined to include projects designed to provide funding for other forest projects (Sec. 201(6)(C)). The bill disallows permanent road construction but places no restriction on temporary road building, and it allows stream buffer protection to be modified by the Regional Forester (Sec. 203(c)).

This is 20 times larger than the Forest Service's current 250-acre size limitation for salvage logging CEs, which was adopted by the Bush Administration. Furthermore, the bill would allow an unlimited amount of temporary road building to occur in post-fire salvage logging projects up to 5,000 acres with no assessment of environmental effects, despite strong scientific evidence that temporary road building can have extremely harmful impacts on soils and water quality in burned landscapes. Even without road building, salvage logging can have significant environmental effects if it is not carefully planned. Weakening stream buffer protection for salvage logging could put water quality at risk.

Early Successional Forests CE. Section 204 provides CE authority for logging projects up to 5,000 acres in size whose primary purpose is to create early successional forests for "wildlife habitat improvement and other purposes." Projects must be carried out "in accordance with the applicable forest plan" (Sec. 204(a)).

Creation of early successional forests is commonly accomplished by clearcutting. The breadth of this language suggests that CEs for up to 5,000-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 forests plan, this CE could authorize eight square miles of clearcutting with no consideration of environmental impacts on scenery, water quality, etc.

ESA Consultation. Section 205 adopts streamlined Endangered Species Act (ESA) consultation procedures for Forest Service projects covered by any of the three new CEs created by S. 1691. For those CE projects, ESA consultation would be satisfied by complying with "alternative consultation procedures" that were adopted by the Bush Administration in 2004 to simplify the ESA consultation process used by the U.S. Environmental Protection Agency (EPA) in registering new pesticides. The practical effect of Section 205 would be that, for those CE projects, the Forest Service (1) would no longer be required to obtain the concurrence of the U.S. Fish and Wildlife Service (USFWS) that the projects are not likely to adversely affect a

threatened or endangered species, and (2) would take over responsibility from USFWS for preparing ESA biological opinions. In addition, Section 205 imposes interim time deadlines, requiring the alternative consultation process to be completed within 40 days after the Forest Service initiates the process (Sec. 205(b)).

This proposal undermines a bedrock environmental law, the ESA. It would authorize a special "self-consultation" process for the Forest Service that largely bypasses the ESA's interagency consultation process. Furthermore, the proposed ESA streamlining process for Forest Service CEs is illogical because the process was specifically designed to complement the EPA's pesticide registration process, which is far different in scope and scientific rigor than the Forest Service's forest management process. A similar "self-consultation" process was administratively put in place in 2004 for projects on national forests and BLM lands implemented under the National Fire Plan. The program was scrapped in 2011 because the "USFS failed to fulfill the standards" required by the agreement.[3]

Conclusion

S. 879 would greatly increase logging of national forest lands, while reducing environmental safeguards and opportunities for public involvement in national forest management. Annual acreage mandates for mechanical treatments would compel the Forest Service to prioritize logging over all other uses and resources. Large expanses of forest up to 15,000 acres in size could be logged with no consideration of the 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. Two bedrock environmental laws – NEPA and ESA – would be 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.

[3] National Marine Fisheries Service and U.S. Forest Service, "Use of the ESA Section 7 Counterpart Regulations for Projects that Support the National Fire Plan; Program Review 2005-2008."