July 23, 2020

Via Regulations.gov (Docket ID BLM-2020-0002; RIN 1004-AE61)

U.S. Department of the Interior, Director (630)
Bureau of Land Management
1849 C St. NW, Room 2134LM
Washington, D.C. 20240

RE: Forest Management Decision Protest Process and Timber Sale Administration
RIN 1004-AE61; Docket ID BLM-2020-0002; 85 Fed. Reg. 34,689 (June 8, 2020)

Dear Forest, Range, Riparian, and Plant Conservation Division:

The American Forest Resource Council (AFRC) submits the following comments on the Department of the Interior's proposal to revise its regulations for protests of forest management decisions and administration of the timber sale process. AFRC strongly supports the proposal to streamline the process for the sale of forest products and improve BLM's ability to conduct much needed active forest management on the landscape.

AFRC is a regional trade association whose purpose is to advocate for sustained yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. We do this by promoting active management to attain productive public forests, protect adjoining private forests, and assure community stability. We work to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout the West. Many of our members have their operations in communities adjacent to BLM managed land that this amendment will impact, and the management on these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves. Rural communities, such as the ones affected by this project, are particularly sensitive to the forest products sector in that more than 50% of all manufacturing jobs are in wood manufacturing.

AFRC is pleased to see BLM's proposal to revise its regulations for protests of forest management decisions and for timber sale administration. The proposed changes will enable BLM to effectively implement their Resource Management Plans' objectives and deliver the outputs and outcomes that those Plans mandate in a timely manner. Proper management of the lands under the Oregon and California Grant Lands Act and the Coos Bay Wagon Road Grants Lands Act (O&C Act) managed by BLM in western Oregon is particularly critical to the economic vitality and health of AFRC

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member companies. The timber manufacturing sector, and the thousands of people it employs, in Oregon and surrounding states, is at risk without a predictable, reliable, and sustainable supply of timber products from the O&C Lands. Loss of manufacturing infrastructure would not only devastate the rural economies in this region but would also lead to a diminishment of the array of wood products that this region provides for the American public. BLM's ability to effectively deliver this supply of timber products is challenged by numerous factors, including duplicative and burdensome processes that neither offer added value toward informed and timely decision making, nor quality environmental analyses.

Part 5000 Administration of Forest Management Decisions

Section 5003.3

AFRC fully supports BLM's proposal to eliminate the protest process described in 5003.3. The National Environmental Policy Act (NEPA) already provides a robust public engagement process that allows interested stakeholders to provide substantive input to proposed actions by federal agencies to improve both the quality of environmental analysis and the ability of BLM staff to make informed decisions. Two major pillars of NEPA's environmental review process are: (1) better informed decisions and (2) citizen involvement.[1] The regulations that affect how BLM implements NEPA should be crafted to advance these two principles. Central to the proposed regulation revision is the question of whether the "protest" regulation described under 43 C.F.R. § 5003.3 advances the public involvement component of NEPA and fosters better informed decisions. It does not. Nor does the protest provide a meaningful review of agency exercise of discretion, as it is conducted by the same office that prepares the project and is duplicative of appeal rights before the Interior Board of Land Appeals (IBLA).

There are many opportunities for public involvement before BLM issues a forest management decision. It is critical that BLM receives public input in a manner that allows it to be considered and, where appropriate, incorporated into environmental analyses and project design elements. The process is most effective when the manner of public engagement occurs incrementally over the course of a project at key junctures in its development. This includes early engagement while a project is still nascent, during project development while BLM is processing early public input, and following publication of environmental documents (e.g., draft Environmental Assessment or Environmental Impact Statement) so that the public can respond directly to the substance of the analysis. Recognizing the effectiveness of scoping, Congress has legislated its use when establishing statutory Categorial Exclusions for the Forest Service and other agencies. 16 U.S.C. §§ 6591b(f), 6591d(f).

BLM adheres to this timeline by formally soliciting feedback from the public during these critical junctures for each proposed action. Although BLM does not have NEPA specific regulations, the Council on Environmental Quality's (CEQ) regulations and BLM's Handbook on NEPA provide guidance on the public engagement process.[2] The level of public involvement varies with the different

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[1] Council on Environmental Quality, *A Citizen's Guide to the NEPA (2007)*, available at https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf.

[2] We refer here to the CEQ regulations as currently effective. Although CEQ has published revisions to its NEPA rules, those revisions will not become effective prior to September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). The new CEQ regulations offer some streamlining of NEPA decision-making,

types of NEPA compliance and decision-making. The initial solicitation is commonly referred to as "scoping" and typically occurs at the genesis of a proposed action. 40 C.F.R. § 1501.7. At this stage, BLM will inform the public that forest management actions are being considered in a certain area. Often specific actions and specific areas are not yet firmly defined. The purpose of scoping is to determine issues to be addressed and to identify the significant issues related to a proposed action. 40 C.F.R. § 1501.7. The issues identified by the public during scoping may point to environmental effects, shape the proposed action or alternatives, and/or lead to the identification of design features or mitigation measures. We find this stage of public outreach to be the most effective opportunity to have public input heard by BLM in a manner that allows it to be incorporated into the project design.

Following the scoping period, interested stakeholders often have follow-up conversations, meetings, and field trips with BLM staff to discuss the comments submitted. This allows BLM to ask clarifying questions from written comments and the interested party to provide more context as necessary to ensure that input is properly processed.

In certain instances, BLM may choose to expand on CEQ regulatory requirements and Handbook guidance for public engagement. In these scenarios, BLM may supplement solicitation for scoping comments with an array of public outreach tools. The description below outlines the standard scoping process and supplemental public engagement actions facilitated by the Upper Willamette Field Office for a project called King Mosby:[3]

The Upper Willamette FO promoted public involvement by the following methods:

- *Posted, on December 20, 2018, the scoping notice and project map on the publicly accessible BLM's National Environmental Policy Act (NEPA) National Registry, ePlanning website, to allow for a 30-day public scoping period, which ended on January 19, 2019. This scoping notice was transmitted by email to interested parties.*
    - *The BLM received two comment letters in response to the scoping notice, Oregon Wild and the AFRC. The BLM subsequently met with both organizations and furthermore engaged in additional correspondence to clarify a proposed alternative provided by Oregon Wild.*
- *Mailed letters to adjacent landowners within one mile of the King Mosby project, notifying them about the project and the public scoping period and encouraging them to share any concerns or special knowledge of the project area.*
    - *The BLM received no responses from these mailings.*
- *Sent coordination letters to the Confederated Tribes of Siletz, the Confederated Tribes of Grand Ronde, and the Confederated Tribes of Warm Springs, inviting them to consult on the proposed action.*
    - *The BLM received no response from any of the Tribes.*
- *Hosted, on October 16, 2019, a public meeting in Cottage Grove to discuss the project and proposed alternatives.*

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but eliminating protests on timber sales remains of paramount importance for improving BLM decision-making.

[3] Bureau of Land Management, Northwest District, Upper Willamette Field Office (March 2, 2020). *King Mosby Timber Management Project.*

- *One individual attended. No comments were generated from this meeting.*

This chronology is not required nor typical for early public engagement on most BLM projects, but does represent the discretion occasionally exercised by BLM on certain projects to exceed CEQ regulatory and Handbook guidance.

BLM will publish a draft analysis document after the scoping period and subsequent outreach opportunities that discloses the findings from their environmental review. The draft Environmental Assessment (EA) or Environmental Impact Statement (EIS) includes several alternative methods to attain the project objectives and are developed in direct response to public scoping comments. Although BLM is only required to solicit comments for draft EISes, 40 C.F.R. § 1503.1, the agency always elects to solicit public comments for draft EAs that involve timber harvest. And although there is no requirement to circulate EAs in draft form,[4] BLM nearly always does so. For draft EISes, BLM must explain why the comments do not further agency response or reasons which support the agency's position. 40 C.F.R. § 1503.4. Although not required to, BLM often includes in EAs a detailed description of its consideration of public scoping comments. In some cases, this description includes an explanation of why certain comments or proposed alternatives were not incorporated into the analysis. Public involvement at the draft EA or EIS stage gives the public the opportunity to raise issues with the environmental analysis as well as to follow-up on whether BLM incorporated previous input provided during the scoping phase. AFRC regularly provides such feedback on each draft EA or EIS.

Overall, NEPA provides ample opportunity for the public to comment and communicate concerns regarding significant issues related to the environmental effect(s) of an action with BLM. The scoping phase, project development phase, and the draft EA or EIS phase represent one of the most robust engagement processes available to the public, with typical duration of one to three years and produces substantial analysis documents.[5]

The protest process provided in the current BLM regulations is not additive to the public involvement process that is already provided under NEPA. The exhaustive public engagement process outlined above occurs between interested stakeholders and local BLM staff. Local BLM staff reads and responds to the scoping comments, reads and responds to the comments to pre-decisional NEPA documents, facilitates public meetings, and facilitates public field trips. At the conclusion of this process, the local BLM staff who developed the project have heard and responded to the input and concerns from the public at length. For that reason, protests rarely lead to changes to the original decision. This step has proven to add little value to either the quality of the environmental analysis or to the decision-making process as the substance of the protests is, by design, duplicative of the written comments submitted during scoping and project development.

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[4] An agency "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b). This means that "the circulation of a draft EA is not required in every case." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 952 (9th Cir. 2008).

[5] In 2018, the average preparation time for an EIS for BLM was about 1,414 days or 3.8 years. *See* The National Association of Environmental Professionals, 2018 Annual NEPA Report at Table 4-1, available at, https://naep.memberclicks.net/assets/documents/2019/NEPA_Annual_Report_2018.pdf.

In fact, occasionally BLM will receive protests that are openly duplicative to comments submitted previously. A protest from an individual on a 2016 Medford District timber sale called "Nedsbar" provides one such example. Following a statement of general disagreement with BLM's decision, the protest stated "Additionally, I repeat my comments of August 8th, 2016 here";[6] this was followed by several paragraphs apparently copied from previously submitted comments. These were comments that BLM staff had previously reviewed and considered during development of the EA. Following the protest submittal, they were required to respond to those comments again.

In some cases, BLM receives protests that do not even contain any substantive protest points. A recent timber sale on the Eugene District, called Pedal Power, received one such protest. This protest, and others similar to it, expressed general satisfaction or dissatisfaction with how BLM manages the O&C Lands. Fortunately, BLM is not required to commit extensive resources responding to such protests; however, local staff still must review the protests to ***determine*** that there are no substantive points. This type of review contributes to the overall workload dedicated to protest responses. And in other cases, the protest process merely serves as an opportunity for members of the public to attack and intimidate BLM staff and decisionmakers. A protest in 2015 on a Medford District timber sale called Lower Grave included the statement: "Really, you should be embarrassed by these responses. They call into the question not just the competence of the staff member who made them and is being passed off as a 'Subject Matter Expert', but also it calls into question the competence and objectivity of the Manager who allowed this into the record."[7] Surely such attacks to those BLM staff referenced could have been delivered via standard letter or email if the individual wished to express their anger, rather than through an administrative protest. This regulation was not established as a vehicle for members of the public to simply express their opinion on a forest management decision, yet that is exactly what is happening on some timber sales.

Therefore, challenging the forest management decision with the same BLM staff that a party has been engaged with for over a year is redundant and irrational, particularly when those challenges contain substance irrelevant to the Decision.

Instead, the protest process is a mechanism that allows professional advocates and special interest groups to cause significant delays and increased costs to the award and implementation of timber sales based on ideology—not science, substance, or legitimate legal concerns. They accomplish this by filing extremely lengthy protests that take significant time and resources for BLM to generate a response. Professional advocacy and special interest groups developed this strategy of delay based on the fact BLM regulations and policies mandate that local BLM staff respond in writing to each protest "point" raised. 43 C.F.R. § 5003.3(e). Since the BLM has not established any format or guidelines, such as page limits, for the substance of administrative protests, these protests can contain an infinite amount of protest "points," each warranting a written response from local BLM staff before the agency awards the timber sale contract. 43 C.F.R. § 5003.3(f). BLM's current policies preclude the award of a timber sale until it responds to administrative protests, so there exists an incentive for anyone who

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[6] Salant Family Ranch, *Protest of the Nedsbar Forest Project Decision Record and Finding of No Significant Impact* (2016).

[7] Tara Lowrance-Mattis, *Protest of the Decision Record and Final Finding of No Significant Impact for Vegetation Management Project Environmental Assessment#* DOI-BLM-ORWA-M070-2013-0003-EA *for the Lower Grave Timber Sale# ORM07-TS-15-3* (2015).

wishes to halt a given timber sale to include in their protest as many "points" as possible and as many pages as possible.

This incentive has proven to be valuable for certain groups, particularly in southwest Oregon on the Medford District. Since 2015, nearly every single decision in the Medford District that authorizes the sale of timber products has received administrative protests. Often, those protests are extremely lengthy with dozens of protest points. In 2018, subsequent delays of protest responses on the Medford District become so egregious that the Oregon State Office issued a formal directive that guided each District to:

> *"Prioritize the resolution of administrative protests on timber sale decisions. After the close of the protest period, immediately begin the protest resolution process. As directed in the Forest Product Sale Procedure Handbook 5450-1 on page 1, 'Districts are to plan any protest and appeal response work in such a way as to complete the administrative review process within a time period that will result in the award of a sold timber contract within 90 days after the sale date.'"*

This directive did little to assist the District in managing its immense protest workload as the average time of protest response since 2017 is approximately *655 days* (this statistic does not account for those protests which remain in limbo due to pending responses). But protest response time can be even more egregious. For example, the protest response time for a timber sale named East West Junction was *2,141 days—that's over 5 years*! By the time the East West Junction timber sale was awarded, BLM reduced the volume of timber available for harvest by 700 MBF. The table below was compiled by AFRC staff and is an illustration of the status and timelines of numerous protested timber sales on the Medford District.

Sale	Volume (MBF)	Auction Date	Award Date	Days Unawarded
Lower Grave	8,458	8/27/2015	Never	NA
Clarks Dog	4,275	5/26/2016	7/25/2017	425
Lost Rogue	4,886	9/22/2016	8/23/2017	335
Obenchain	3,736	8/23/2018	3/22/2019	211
Griffin Half Moon	8,970	9/13/2018	NA*	669*
Upper Cow	8,396	8/25/2016	8/1/2017	341
Pickett Up	453	6/28/2018	Never	NA
East West Junction	1,533	5/15/2013	3/26/2019	2,141
Milk Duds	4,771	9/22/2016	4/8/2019	917
Shady Elk	5,949	9/14/2017	3/20/2019	552
Oh Henry	8,150	9/14/2017	NA*	1,033*
Evan's Gem	5,145	9/26/2019	NA*	291*
Oh Windy	13,644	9/26/2019	NA*	291*
Pickett Hog	3,580	9/14/2017	Never	NA

*Sale remains unawarded. Days unawarded calculated from auction date to time of this letter.

Occasionally, the protest process derails the implementation of timber sales completely. In September 2017, BLM offered a timber sale called "Pickett Hog" and received a bid from a local mill. That timber sale attracted several administrative protests. One of those protests was from an organization that submitted a *250-page protest containing 126 individual protest points*.[8] Among those points included the claim that the 460-page EA failed to consider the *"impacts of the timber harvest on the Earth's 6th Mass Extinction."* Despite the absurdity of such protest points, the local BLM office attempted to respond in writing to these 126 points for almost 12 months only to watch the Taylor Creek Fire consume the timber sale in the summer of 2018.[9] The timber offered for sale burned. The purchaser of the sale lost all of their time and expenses put forth to purchase the sale. BLM achieved none of the desired outcomes on the project (notably the O&C Act's mandate for sustained yield timber management). And taxpayers footed the bill for what was ultimately a wasted effort that consumed over two years of the BLM's time—all due to the strategic abuse of the protest process by opportunistic advocacy and special interest groups.

Although the Pickett Hog protest is an extreme example of the standard protests filed against BLM timber sale decisions, most protests remain egregious in length, complexity, and intent. The protest filed on the Cold Elk Project by a consortium of "environmental" groups represents the type of protest that BLM typically receives.[10] Although this protest does not exceed 200 pages, it does consume nearly 60 pages of text. The other notable distinction between this protest and the Pickett Hog protest is that this example failed to clearly list each protest "point." This omission places an additional burden on local BLM staff to find and clearly identify the protest "points" from these pages. This extra step consumes a significant amount of time for local BLM staff before they can even begin to develop written responses to those points. The timber sale associated with the Cold Elk Decision and protest took *917 days* to award due to delays caused by protest response, 827 days longer than BLM State policy directs. Some might point to Lower Grave as a positive outcome as the project and sale were eventually overturned in court. But that final court decision did not occur until *four years* after auction, well past the point where a reasonable timber purchaser would want to know whether or not the sale was worth continuing to pursue.

Not only have these strategic delays discouraged the attainment of BLM's Resource Management Plan objectives, but they have also caused repercussions to the local wood products industry, the logging and trucking industry, and the communities they help support. In March 2019, Swanson Group, which has been a family operated company since 1951, was forced to permanently close its sawmill in Glendale, Oregon. According to a Random Lengths report, Swanson said the closure was necessitated by log supply constraints forced on the company by federal timber policy.[11] Delays and disruptions to those BLM sales purchased by Swanson Group surely contributed to the log supply constraints that necessitated the Glendale sawmill closure.

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[8] Deer Creek Valley Natural Resource Conservation Association, *Administrative Protest of Decision Record #1 and Associated Pickett West Forest Management Project Environmental Assessment (DOI-BLM-ORWA-M070-2016-006-EA) and the Final Finding of no Significant Impact (FONSI) (2017).*

[9] https://www.registerguard.com/opinion/20180821/timber-sale-delays-cause-jobs-and-revenue-to-go-up-in-smoke.

[10] Klamath Siskiyou Wildlands Center, Oregon Wild, Cascadia Wildlands, *Administrative Protest of the Cold Elk Forest Management Project Decision Record #1 (2016)*.

[11] https://www.timberindustrynews.com/swanson-group-permanently-close-glendale-sawmill/

In 2016, after over 90 years in business, Rough & Ready permanently closed its sawmill in Cave Junction, Oregon, representing the last sawmill in Josephine County. The family owned mill's co-owner told the Oregonian that "Environmental groups have protested sales targeting larger trees, and the mill didn't see enough of a future supply to fill more than one of three shifts."[12] The closure resulted in the loss of 85 jobs in a town with a population less than 2,000. One of last BLM sales purchased by Rough & Ready, called "Heppsie," received a 45-page protest from a consortium of environmental groups.[13] Prominent on page 2 of the protest was a list of three project elements that, if removed, would result in that consortium rescinding the protest. Such a quid pro quo strategy seems to stray considerably from the intent of the protest process described in 43 C.F.R. § 5003.3 and is further evidence of the abuse of the process.

Repercussions to purchasers and operators are significant even on those timber sales where protest response delays are not as lengthy as those outlined above. A delay of even three months could compromise the ability of a purchaser to complete contract stipulations in a timely manner due to the extensive amount of seasonal operating restrictions standard on most BLM timber sales. Those delays can result in layoffs of timber sale operations staff. For example, consider a sale that sells on August 1st. The contract requires that road construction be completed between June 1 and October 31. That road construction is integral to facilitating harvesting operations—meaning that if the June-October window for road construction is missed, then no timber harvest can occur until the following June. If that sale is protested and the protest response delays award of the sale from August 1st to November 1st, that purchaser has missed the window for completing road work and, therefore, is unable to begin harvest operations until the following June. This scenario played out in 2019 on the Coos Bay District. A timber sale named "Rock Weaver" was purchased by 3H Forestry in August. The award of the timber sale was delayed beyond 90 days due to protest response, which extended into November, past the deadline for roadwork. In the case of Rock Weaver, 3H lost both the summer road construction season and, subsequently, the winter harvest operating season and was compelled to lay off loggers and truck drivers for an extended period. Had the sale been awarded in a timely manner, those layoffs could have been avoided.

The protests on the Pickett Hog, Heppsie, Rock Weaver and Cold Elk Projects do not reflect the outcome that the protest regulation intended to foster; reading through those 250 pages on the Pickett Hog protest and quid pro quo in the Heppsie protest is clear evidence of this reality. The process has digressed drastically from the intended objective of the 1984 rulemaking and has been used deliberately to cripple the ability of an agency action to proceed.

Even the Congress has weighed in on the relationship between the failed protest process and the timely sale and award of BLM timber sales in Western Oregon. In multiple Fiscal Years, the Committee considering Interior Appropriations has addressed this issue in its report on the Appropriations legislation. Most recently in the Fiscal Year 2021 House Interior Appropriations bill, report language has been attached to the agency's budget calling on BLM to act:

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[12] https://www.oregonlive.com/environment/2013/04/closure_of_rough_ready_in_mill.html

[13] Klamath Siskiyou Wildlands Center, *Administrative Protest of the Heppsie Forest Management Project Decision Record and Finding of No Significant Impact* (2012).

"Timber targets.—The Committee continues to be troubled by the disparity in timber targets compared with timber awarded and harvested on some districts. The Bureau is ***once again*** directed to prioritize response to administrative protests on timber sales in a timely manner and to report timber sale accomplishments in volume of timber sold and awarded, rather than merely the volume offered for sale, and shall report to the Committee on its progress"[14] (emphasis added).

The protest process is also redundant to the appeal process. If an individual or group who has participated in the process believes that a BLM forest management decision is unlawful, then they may pursue an administrative appeal to the Department of Interior, Office of Hearings and Appeals (OHA), Interior Board of Land Appeals (IBLA). The OHA was established as part of the Secretary of the Interior's office in 1971 to rectify the perception of a lack of objectivity inherent in the then-existing system which reviewed decisions entirely within the Department of the Interior.[15] Additionally, in section 102(a)(5) of the Federal Lands Policy Management Act (FLPMA), Congress declared that "in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required . . . to structure adjudication procedures to assure . . . objective administrative review of initial decisions." 43 U.S.C. § 1701(a)(5). The OHA and IBLA are neither part of BLM nor part of the Office of the Solicitor and thereby provide such "objective administrative review." The objectivity provided by the OHA and IBLA makes appeal to those boards the most appropriate means for challenging local BLM decisions. Unlike the protest process, an IBLA appeal does not result in an indefinite delay of the award of a timber sale. Instead, IBLA regulations provide that a stay request that is not acted upon within 45 days is deemed denied. 43 C.F.R. § 4.21(a)(3). Before IBLA, a stay may only be issued if the appellant satisfies a four-factor test analogous to the test for obtaining a preliminary injunction in court. 43 C.F.R. § 4.21(b)(1), (2).[16] This is much more fair and rigorous than the automatic extended delay afforded by the protest process.

Eliminating the protest process would not necessarily lead to an increase in the number of appeals being made before the IBLA. Special interest groups currently protest more timber sales due to the automatic delay and the lack of required specificity in the protest process that furthers the objective of delaying timber sale decisions. The fact that only a portion of the protest decisions are being appealed to the IBLA demonstrates that protesters are not interested in advancing their objections to federal court and/or their appeal points are so weak that IBLA would deny the stay. For that reason, protesters would only file an administrative appeal before IBLA if they have already decided to advance their case to federal court.

The protest process interferes with BLM timber sales in all regions and districts. Specific to western Oregon, there is a legal problem with the protest regulations. We believe that retaining the protest process is ***inconsistent with BLM's obligations under the O&C Act and therefore eliminating***

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[14] House Committee on Appropriations, *Report to Accompany H.R. 7612, Department of the Interior, Environment, and Related Agencies Appropriations Bill*, H.R. Rep., No. 116-448, at 16 (July 14, 2020), available at https://www.congress.gov/116/crpt/hrpt448/CRPT-116hrpt448.pdf.

[15] David L. Hughes, *Practice and Procedure Before the Interior Board of Land Appeals*, 14 Pub. Land L. Rev. 113, 116 (1993).

[16] *See Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

protests is required by the O&C Act.[17] As the Bureau is well aware, the O&C Act imposes several mandatory duties regarding management of the O&C lands. These lands "shall be managed … for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield."[18] This means "[e]very year, BLM *is required* to sell or offer for sale an amount of timber that is not less than the declared annual sustained yield capacity of the timberland subject to the O & C Act."[19] Further, "When managing O&C timberland, then, BLM must ensure that the land continues to produce timber." The agency "must ensure that the timber produced on O&C land is sold, cut, and removed in conformity with the principle of sustained yield. These are mandatory directives from Congress."[20] Sustained yield has always meant "the annual cut was to be about the same as the annual timber-growing capacity."[21] Common understandings of the term indicate production "continuously" and in "perpetuity" an "annual or *regular* periodic output" from the land.[22] BLM regulations are consistent with this definition.[23]

The current protest process prevents BLM from achieving its sale mandates. Even when the process runs smoothly it adds at least 90 days to the sale preparation period. And as we have seen, sometimes much more is added. If BLM is to return to sustained-yield forestry on the O&C Lands, it cannot afford these delays, nor does the O&C Act permit them. And to the extent FLPMA could be read in favor of retaining protests, the O&C Act controls.[24]

As stated above, AFRC believes that every member of the public should have an opportunity to challenge the legal legitimacy or obvious errors of BLM forest management decisions prior to litigation. The IBLA appeal process is that opportunity. The protest process, on the other hand, is duplicative of, not only the appeal process, but the entire public engagement process from scoping to development of the NEPA document. It has proven to add nothing of substance to the intent of NEPA. It has proven to be counterproductive to the original intent of the protest process at the time of establishment of the 1984 regulation to "expedite implementation of decisions relating to timber management" and to "increase the probability that private businesses dependent upon the Bureau of Land Management's timber management contracts would be able to accomplish their regularly scheduled activities." The protests and documentation of timber sale award delay cited in this letter validate the fact that the process has

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[17] 43 U.S.C. §§ 2601-06; 50 Stat. 874 (1937).
[18] O&C Act, section 1; 43 U.S.C. § 2601.
[19] *Swanson Grp. Mfg. LLC v. Bernhardt*, 417 F.Supp.3d 22, 27 (D.D.C. 2019).
[20] *AFRC v. Hammond*, 422 F.Supp.3d 184, 190 (D.D.C. 2019).
[21] David Maldwyn Ellis, "The Oregon and California Railroad Land Grant, 1866-1945," 39 *Pac. Nw. Q.* 253, 276 (1948). Historically, "Sustained-yield operations on the old land grant have proved a courageous and intelligent method of utilizing and conserving the timber resources of the region." *Id.* at 283.
[22] Soc'y of Am. Foresters, *The Dictionary of Forestry* 183 (2d ed. 2018).
[23] 43 C.F.R. § 2400.0-5(p); *see also* 25 U.S.C. § 407, 25 C.F.R. § 163.11 (same for administration of Indian forestlands by the Bureau of Indian Affairs).
[24] FLPMA section 701(b) states, "[N]otwithstanding any provision of this Act [FLPMA], in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a–1181j) [O&C Act], and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail." Pub. L. No. 94–579 (S 507), § 701(b), Oct. 21, 1976, 90 Stat 2743, 2786 (1976).

instead ***delayed*** implementation of decisions relating to timber management and ***decreased*** the probability that private businesses dependent upon BLM's timber management contracts would be able to accomplish their regularly scheduled activities. For these reasons, **we urge the BLM to eliminate the protest process entirely.** It serves no other purpose than to delay timber sales and burden local BLM staff with cumbersome workloads that preclude them from working on future timber sale projects.

Replacing the protest process with additional processes such as a post-decision 10-day comment periods, as the Proposed Rule suggests, will not improve the quality of the environmental analysis documents, improve decision-making ability by BLM staff, or reverse the trends of delayed implementation of timber sale decisions and timber sale operations. It would simply add more delay. An additional 10-day comment period after a robust public engagement process extending for over a year is irrational and redundant.

Section 5003.1

The proposed revision to 43 C.F.R. § 5003.1 would impact BLM's ability to issue decisions in full force and effect and potentially include specific criteria for doing so. **AFRC supports the clarification in 43 C.F.R. § 5003.1 that forest management decisions, at the discretion of the officer, can be implemented immediately or at a different date specific in the decision**. This will mean that the 30-day period for appealing to IBLA (43 C.F.R. § 4.411) is no longer an automatic source of delay.

Within the IBLA process, as currently structured, a party may file a petition for stay along with a notice of appeal. 43 C.F.R. § 4.21. **AFRC also supports the proposed revision because it clarifies that forest management decisions are not automatically stayed under 43 C.F.R. § 4.21 if a notice of appeal or stay pending appeal is lodged with IBLA**. A party requesting a stay "bears the burden of proof to demonstrate that a stay should be granted," 43 C.F.R. § 4.21 (b)(2), and IBLA regulations treat a stay as denied once 45 days have passed. 43 C.F.R. § 4.21 (b)(3), (b)(4). Maintaining the IBLA process will allow BLM to go "full force and effect" on timber sale projects even if the appeal is pending, which is not the case under the current protest process.

This revision is also relevant to the excessive delays in timber sale implementation outlined above. There are numerous time-sensitive reasons why an authorized officer would determine a need to issue a forest management decision in full force and effect. Rather than attempt to capture all of those reasons in a regulation, it would serve BLM decision makers better if the language was flexible and adaptive to locally identified issues. Including language in the regulation such as "BLM can issue decisions in full force and effect if the authorized officer determines that attainment of certain objectives of the project are time-sensitive and delaying action would compromise the likelihood of attaining them" would allow BLM to address unforeseen time sensitive factors impacting forest management actions with full force and effect decisions. It is unreasonable to assume that BLM can foresee the full range of time-sensitive issues relating to forest management decisions at the time of this revision. Including an incomplete range would hamper BLM decisionmakers' discretion in the future to effectively address time-sensitive issues.

For example, BLM decisionmakers in the Medford District could have identified the annual risk of extreme fire behavior on the Pickett Hog timber sale and issued a decision in full force and effect. Doing so could have allowed implementation of the timber sale prior to fire season. In this scenario, BLM would have achieved their timber harvest and fuels reduction objectives in a manner that could have reduced the spread of the Taylor Creek fire. Other site-specific reasons could arise that compel an authorized officer to favor streamlined implementation but attempting to identify them all is ill-advised.

Part 5400 Sales of Forest Products; General

Regulations in 43 C.F.R. § 5420.0-6 prohibit the BLM from selling timber at less than appraised value. The proposed revision seeks to remove the phrase "prohibiting the sale of forest products at less than appraised value."

The timber sales that BLM analyzes, designs, and prepares fail to support local mills and the communities that they operate in if those sales are not designed in an economically viable manner. Nor can BLM meet the objectives of their management plans if sales fail to implement the associated treatments. Current policy requires BLM to conduct an appraisal and to establish a "minimum bid" that reflects that appraisal. Under this policy, a flawed appraisal will result in a flawed minimum bid and sales will fail to attract any bidders.

BLM Handbook 5400-1, Sale of Forest Products, describes the intent of appraisals in the following manner*:* "Forest products appraisals shall reflect current market conditions as closely as possible to assure that the Bureau receives a fair market value for forest products sold." This description of directing BLM to determine "fair market value" through the use of variables that "reflect current market conditions *as closely as possible*" supports the notion that BLM's appraisal system is designed to ***estimate*** fair market value, not to ***determine*** fair market value. The only true gauge of actual fair market value is through competitive bidding. BLM's objective in conducting appraisals should be to attract at least two interested purchasers to the bidding table and allow those purchasers to determine fair market value. We are encouraged to see the proposed revision include a similar recognition that *"*competitive bidding through an auction or sealed bid is generally superior at identifying the true market price." In recent years, BLM appraisals have occasionally failed to attract any bidders to the auction table. Oddly, this failure has often occurred in regions that are experiencing the highest demand for raw material. In fiscal year 2019 the Medford District offered for sale 19 timber sales and failed to attract any bidders on 10 of those sales. Those results indicate that on *more than 50% of the sales offered, BLM's appraisal failed to properly estimate fair market value*.

We are pleased to see a revision that would allow the BLM to award timber sale contracts on bids that come in below appraised value. This revision is logical as any timber sale that only attracts bids below appraised value obviously failed to properly estimate fair market value. We are hopeful that this revision will be approved and the amount of no-bid timber sales will be reduced drastically.

Potential purchasers who submit bids on BLM timber sales bear a significant upfront cost regardless of whether they are the high bidder and are awarded a contract or not. Included are costs incurred from assessing a timber sale, preparing a bid, and tendering a bid deposit. When a purchaser is the apparent high bidder that deposit remains in place regardless of whether a contract is awarded or not.

Couple this requirement with the lengthy delays associated with protest response and award discussed earlier and a purchaser could have their bid deposit held in limbo for several years. The proposed rule to refund up to half the bid deposit when award of a sale is delayed over 90 days is a positive step to providing purchasers some relief during delays caused by protest abuse. We urge you to approve this revision not only to provide relief but also to attract additional purchasers to the bidding table on sales that have received protests. Many small operators with limited capital may balk at submitting a bid on a protested timber sale due not only to the likelihood of delays but also to the financial burden that they would have to bear. The proposed revisions to performance bonds will alleviate this obstacle to many potential purchasers.

The factors that contribute to uneconomical timber sales and subsequent no-bids include flawed timber sale appraisals and also unreasonable risks to purchasers. In recent years, operating restrictions on certain BLM Districts have ballooned to a level that creates a risk that many purchasers are not willing to absorb. In some cases, a timber sale may only guarantee a purchaser unrestricted operating time of 45 days. For a three-year contract that equates to a mere 4 ½ months of time when operations can occur. In extreme cases, a timber sale may not include a single month without an operating restriction. One such example is on a Medford District timber sale called Clean Slate. The operating restrictions are so vast and complicated, the District had to compile a "matrix" to capture and illustrate them all in an understandable manner.

As you can see, *there is not a single month in the 12-month calendar where at least one required contract activity is not restricted***.** Some activities, including road construction, road maintenance, timber loading, timber hauling, ground based yarding, and rehabilitation activities do not have a ***single month*** in the calendar year that is ***not*** restricted! Restrictions for bald eagles, wet weather, and northern spotted owls collectively make executing this contract over the course of 36 extremely restricted months dubious as best. That matrix is shown below:

Clean Slate T.S. Seasonal Restriction Matrix ORM07-TS-18-08

	Unrestricted Period
	Restricted To Dry Condition
	Restricted To Dry Condition Waiver Required
E	**Bald Eagle Restricted Period, No Operations**
O/W	**NSO Restricted Period (May be waived if NSO protocol surveys determine owls are not nesting)**
O/D	**NSO Restricted Period (May be shortened or extended if owls are nesting)**
O/E	**NSO and Bald Eagle Restricted Period**

* Operations will be suspended if unacceptable damage to residual trees occur.

** In-stream work periods for culvert cleaning are June 15th- September 15th

Dry Condition Haul = Loading, hauling, and certain non-emergency road maintenance activities (including blading of aggregate roads, rocking, and cross drain installation) would not occur on hydrologically-connected rocked or natural surface roads when water is flowing in the ditchlines or during any conditions that would result in any of the following: surface displacement such as rutting or ribbons; continuous mud splash or tire slide; fines being pumped through road surfacing from the subgrade and resulting in a layer of surface sludge; road drainage causing a visible increase in stream turbidities; or any condition that would result in water being chronically routed into tire tracks or away from designed road drainage during precipitation events. Hauling on natural surface or hydrologically-connected rocked roads would not resume for a minimum of 48 hours following any storm event that results in ¼ inch or more precipitation within a 24 hour period, and until road surface is sufficiently dry to prevent any of the above conditions from reoccurring.

Dry Condition Ground-based harvesting and Temporary Route work = Ground-based harvesting & yarding, temporary route work, and rehabilitation activities would not occur when soil moisture at a depth of 4-6 inches is wet enough to maintain form when compressed, or when soil moisture at the surface would readily displace, causing ribbons and ruts along equipment tracks. These conditions are generally found when soil moisture at a depth of 4-10 inches is between 15-25% depending on soil type.

Sale Area	Activity	Jan		Feb		Mar		Apr		May		Jun		Jul		Aug		Sep		Oct		Nov		Dec	
		1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15
Cable Yard Unit w/ NSO Restrictions: 3-9, 3-11, 22-5	Manual Falling and Bucking*					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
	Cable Yarding*					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
	Loading and Hauling					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
	Temp. route/ landing const., All rehabilitation activities, Rd Maintenance**					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
Cable/ Ground Based Yard Unit w/ NSO Restrictions: 3-10, 21-8, 21-12, 23-3, 23-4	Manual Falling and Bucking*					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
	Cable Yarding*					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
	Yarding					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
	Loading and Hauling					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								
	Temp. Route Construction, All Rehabilitation Activities & Road					O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/W	O/D	O/D	O/D								

Sale Area	Activity	Jan		Feb		Mar		Apr		May		Jun		Jul		Aug		Sep		Oct		Nov		Dec	
		1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15	1	15
Cable/ Ground Based Yard Unit w/ Bald Eagle Restrictions: 17-2	Manual Falling and Bucking*			E	E	E	E	E	E	E	E	E	E	E	E	E	E								
	Cable Yarding*			E	E	E	E	E	E	E	E	E	E	E	E	E	E								
	Yarding			E	E	E	E	E	E	E	E	E	E	E	E	E	E								
	Loading and Hauling			E	E	E	E	E	E	E	E	E	E	E	E	E	E								
	Temp. Route Construction, All Rehabilitation Activities & Road Maintenance**			E	E	E	E	E	E	E	E	E	E	E	E	E	E								
Cable/ Ground Based Yard Unit w/ NSO and Bald Eagle Restrictions: 13-4	Manual Falling and Bucking*			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E								
	Cable Yarding*			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E								
	Ground-based Harvesting & Yarding			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E								
	Loading and Hauling			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E								
	Rehabilitation Activities & Road			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/E								
Ground-based & Cable Yard Unit w/NSO and Bald Eagle restrictions: 13-3	Manual Falling and Bucking*			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/W	O/W	O/D	O/D	O/D								
	Cable Yarding*			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/W	O/W	O/D	O/D	O/D								
	Ground-based Harvesting & Yarding			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/W	O/W	O/D	O/D	O/D								
	Loading and Hauling			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/W	O/W	O/D	O/D	O/D								
	Temp. Route Construction, All Rehabilitation Activities & Road Maintenance**			E	E	O/E	O/E	O/E	O/E	O/E	O/E	O/E	O/W	O/W	O/D	O/D	O/D								

In such cases, a purchaser is often left with no other option than to request a contract extension to realistically execute the contract stipulations. The proposed revision to section 5473.4(c) adds unusual weather conditions to the list of reasons BLM may grant an extension for a contract. The proposed revision also amends section 5473.4(d) for contract extension related to fire and other natural and man-made disasters. This revision allows BLM to extend contracts to facilitate the harvest of damaged timber on both federal and non-federal lands. We appreciate these steps toward alleviating some of the inherent risk associated with executing timber sale contracts amidst the gauntlet of operating restrictions. However, we believe more substantial steps need to be taken to effectively mitigate the risk associated with staggering operating restrictions on sales like Clean Slate, which has gone no-bid twice. One potential step could be extending the maximum contract length for timber sales. Section 5463.1 establishes a maximum period for cutting and removal of timber of 36 months for BLM timber sale contracts. For sales like Clean Slate, "36 months" is not truly *36 months*, but rather the meager amount of time permitted through the Restriction Matrix. **BLM should strongly consider revising section 5463.1 to create flexibility in the maximum period for cutting to allow BLM to offer appropriate length contracts for heavily restricted timber sales like Clean Slate.**

In conclusion, we appreciate the substance of the proposed regulation revisions and are confident that, if adopted, it will assist BLM land managers in meeting their Management Plan objectives without compromising the intent of the NEPA. Public engagement will continue to be robust and well-informed decisions will continue to be fostered. The results will include timely provision of timber products to local manufactures, support to the rural communities where those manufacturers operate, attainment of BLM management plan objectives, and an engaged and informed public.

Respectfully,

Travis Joseph
President