

Mr. Chairman,

My name is Steve Eubanks and I am submitting this written testimony related to your hearing. I retired from the Forest Service in January, 2008 following a 38-year career with the agency. At retirement, I was Forest Supervisor of the Tahoe National Forest in California. Prior to that I was Forest Supervisor of the Chippewa National Forest in Minnesota, Leader of the National Recreation Strategy in the Forest Service's Washington, D.C. headquarters, and District Ranger on two districts in the Pacific Northwest.

Let me begin by saying that from my frequent contacts with Forest Service employees I believe morale is good overall. There have been many challenges to employees over the last few years, but I have found Forest Service employees as a whole to be "can-do" people who continue to try to achieve high quality work regardless of any negative impacts occurring around them.

You will undoubtedly hear testimony and opinions about many factors that can create negative morale in an agency's workforce. Related to the Forest Service, I believe you will hear about such things as workforce downsizing related to budget reductions and outsourcing of important positions. While I believe these factors are important and have certainly affected morale in the Forest Service, I would like to focus my testimony on a factor that I believe is affecting both morale and productivity and which, if addressed constructively, could allow the Forest Service to function affectively even with its currently reduced workforce.

The factor I would like to address is what has been referred to "analysis paralysis" and is related to appeals and litigation of national forest projects. Planning and preparation of national forest projects normally requires analysis--usually extensive analysis by experienced resource professionals--under the guidelines of the National Environmental Policy Act (NEPA) followed by preparation of detailed documents listing environmental effects. Preparation of NEPA documents involves significant public participation so that issues and concerns can be fully discovered and addressed. In addition, there is ample opportunity for public review and comment of NEPA documents before a line officer approves the final document and project plans. Once that approval occurs, there is an opportunity for any dissatisfied person or organization to appeal the approval decision. Note that this appeal opportunity is somewhat unique for Forest Service NEPA decisions--most federal agencies' decisions are not subject to appeal. Whether the appeal has merit or not, resolution of the appeal can and usually does take several months. This delays implementation of the proposed project and can result in the project being cancelled because it is no longer viable. If the original NEPA decision is upheld, dissatisfied persons or organizations can still litigate to stop the project from going forward. Litigation further delays implementation and is even more likely to result in the project no longer being viable.

All the above leads to a number of observations and realities:

-Persons or organizations can appeal NEPA decisions whether or not their concerns have real resource or scientific merit. In other words, they can appeal simply because they philosophically disagree with certain types of forest management, even if those kinds of management are part of the Forest Service's legislated mission. There are many such persons and organizations that appeal and litigate nearly all projects that conflict with their beliefs.

-Because of current legislation, litigants who do prevail in their case against the government can and almost always do recover all costs associated with their lawsuit. If the government prevails, no such recovery option exists. Contrary to common belief, this puts the government at a serious disadvantage. Most people believe the government has unlimited budgets to deal with legal challenges and payment of court costs. This simply is not the case. Payment of court costs to successful litigants must often come from a national forest's project budget. This results in a direct reduction in the forest's ability to complete other resource work with those funds. Ultimately, though, such costs are paid by the taxpayers of the U.S.

-The outcomes of lawsuits often hinge on seemingly minor process weaknesses. Since the legal and legislative framework guiding NEPA work is so complex, it is not difficult for litigants to find process flaws. There is not necessarily any consideration for whether or not the process flaws will have any affect on the quality of the proposed resource project. All this again favors the litigant.

-Many projects are time-critical, so the simple act of appealing or litigating a NEPA decision can render the project moot due to the delays that result. Thus, even if an appeal or litigation has no real merit, the appellant or litigant can achieve their objective even if they do not prevail in their appeal or lawsuit.

-Many projects can involve a cost associated with resource degradation or loss. An example might be a proposed project to remove beetle-killed trees from a campground. If the project is timely, the cost of removing the trees can be covered by the value of the trees for various products. If the project is delayed, the trees no longer have value and removal must be paid for from project funds. Cost of resource degradation or loss is not covered by appellants or litigants whether or not they prevail in their challenge.

-The process of planning projects and preparing the accompanying NEPA documents involves extensive amounts of time and effort by numerous resource specialists. Often, the amount of time involved in preparing the documents is significantly larger than is needed to ensure high quality on-the-ground projects because the possibility of appeals and litigation leads to a desire for creating a "bullet-proof document." Often, the basic resource planning can be completed in 3 months time, but additional document perfection can involve another 6 to 9 months. Thus resource professionals spend a large amount of their time writing and perfecting documents rather than using their time and expertise to implement projects that protect or enhance forest resources. This fact, coupled with the frequent loss of court cases, is a real cause of frustration and lost productivity.

-The ecosystem result of 'analysis paralysis' is the delay or elimination of many high priority forest management projects in national forests across the country. Forests are thus becoming increasingly vulnerable to insects, disease and wildfire. While all these factors are natural parts of forest ecosystems, the current magnitude of their impact is no longer natural. As an example, the size and intensity of wildfires in the west are well above normal and increasing. Forest management is not needed on every acre of national forests, but some management is required to reduce the negative effects now occurring. Appeals and litigation are significantly affecting the ability to get any management done. Forests and important forest resource benefits like water, wildlife habitat, carbon sequestration and recreation are being heavily impacted.

What can be done to address this situation? One approach is quite simple in concept and mechanics but would require political courage. That approach is to pass legislation to require litigants, perhaps even appellants, to post a performance bond when they challenge a NEPA decision. The amount of the bond would vary and would be adequate to cover potential court costs and also costs of any resource value that could be lost due to delay of the proposed resource project. The bond would be forfeited if the litigant lost the lawsuit (or appeal if appellants are included). Requiring a bond would not eliminate challenges to NEPA decisions, but it would reduce or eliminate frivolous challenges. People or organizations would have to be more certain of the merits of their challenges before proceeding. This would allow Forest Service resource specialists to focus more on high priority resource work, less on preparing 'paper', and that would result in more and better resource management work on-the-ground. A related benefit would be the ability to implement the Forest Service mission with a smaller workforce that spends less time on paperwork that adds little value to the quality of actual forest management work. And concurrently, morale of the Forest Service workforce would likely improve proportionately.

Most people, including most Forest Service employees, believe that having a process for the public to adequately participate in project planning and assessment is important. Most probably also agree there should be an avenue for challenging questionable projects. The real question is whether or not those whose basic philosophy conflicts with the Forest Service's legislated mission should be able to attack that mission through appeals and litigation (i.e.; through the judicial system) or whether they should have to seek legislative changes to the mission as would seem to be more appropriate.

Thank you for your interest in forestry issues and your consideration of this testimony. If you have any questions, please feel free to contact me as I would be happy to offer clarification or additional thoughts.

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