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Route To :

Subject: NEPA and Management of Fish and Wildlife with States

To: Regional Foresters

This letter provides clarification on when to apply the National Environmental Policy Act (NEPA) requirements to State wildlife and fish transplantation, stocking and other population management activities proposed by the States. We hope this letter will help ensure a consistent, cooperative approach to our work with State wildlife and fish agencies. It outlines key principles, discusses those principles, and offers some examples.

Three Key Principles Apply:

1. We share responsibility with the States for managing fish and wildlife resources.

2. We use the framework in the Memorandums of Understanding (MOU's) between the Forest Service (FS) and the State fish and wildlife agencies to coordinate actions and resolve differences.

3. The NEPA process is triggered by Federal actions.

State and Federal Roles:

The Organic Administration Act, the Multiple Use-Sustained Yield Act, the Federal Land Policy and Management Act, the Sikes Act, the Wilderness Act and USDA and FS policy have recognized shared responsibilities between the FS and State wildlife agencies in the management of fish and wildlife resources on lands. These and other Federal statutes acknowledge the States' jurisdiction in resident fish and wildlife management.

Traditional divisions have been established between the FS and the States:

1. The States manage most resident fish and wildlife populations.

2. The FS primarily manages habitats for wildlife and fish.

Effective wildlife and fish management, our policy, and existing MOU's require cooperation between State agencies and the FS. Strong lines of communication in coordination of fish and wildlife management are expected.

For example, guidance for wildlife management, including stocking and transplants of fish and wildlife in Wilderness, is contained in the MOU among the FS, the Bureau of Land Management, and the International Association of Fish and Wildlife Agencies. Forest Plans should be coordinated with States (36 CFR 219.19 and 219.7c). Wherever possible, agencies should jointly agree on activities and areas of responsibility before implementation of transplantation or stocking projects (FSM 2641). The framework for coordination should be contained in a current MOU (FSM 2640.41 and 42).

Under existing law and Federal regulations, most State actions to manage fish and wildlife populations on national forests and grasslands do not require FS approval and are therefore not Federal actions subject to NEPA. State agencies generally regulate hunting, fishing, and trapping; conduct population surveys; and carry out stocking and transplantation without funding or approval by the FS. Just as the FS would involve the State wildlife agency in our decision making process, we should work with the State to provide input to their actions in areas that affect the resources of concern to each agency.

Except in unusual circumstances (e.g., emergency health or safety issues), a determination should be made by the FS before an action is developed as to whether it is or is not within the jurisdiction of the State and consistent with management direction for the national forest. The FS Manual 2640 provides guidance on coordination.

The FS has the responsibility and authority to protect Federal interests. The authorized forest officer, as specified in the FS Manual, has the responsibility to work diligently to resolve any proposed State action which could adversely affect resources under FS jurisdiction, or which would otherwise be inconsistent with Federal law, policy, or Forest Plans. If conflicts are not resolved, the matter should be successively elevated to higher levels for resolution. We would expect that the overwhelming majority of conflicts would be resolved under the cooperative spirit of the MOU's which guide our relationship with the States. If this approach is unsuccessful, as a last resort, the authorized officer could issue a site-specific closure order under 36 CFR 261, prohibiting the activity. We expect that closure orders would be rarely, if ever, invoked.

In order to assure the protection of Federal interests, the FS may examine the effects of State proposals on or affecting National Forest System (NFS) lands, even if no Federal action is involved. Such an examination (at varying degrees of detail) is part of the routine practice of coordination under our MOU's and does not constitute an analysis that would lead to a decision under NEPA. (See the National Baiting Policy at FSM 2643.12 for a specific application of the principle requiring monitoring of proposed State actions).[1]

Application of NEPA:

The NEPA process is triggered by Federal actions and decisions as described in 40 CFR 1508.18. In general, wildlife transplants and fish stocking activities

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[1]The baiting policy had been upheld by the Federal District Court for the District of Columbia (The Fund for Animals v. Thomas, Civ. No. 95-1177 (TPJ) (August 8, 1996)).

by a State agency do not require FS approval or decisions, are not Federal actions, and thus are not subject to NEPA. Actions are not Federal simply because FS personnel are consulted in the State's decision making or analysis process. Further, actions are not Federal just because the FS comments on the State's proposal, or has an interest in the State's decision. The FS shall not prepare NEPA documents for State actions that require no FS action, approval or funding. Thus, State transplants and stocking on NFS lands do not require NEPA unless there is a connected Federal action.

Actions are considered Federal if:

a) FS approval is required to carry out the project; or
b) the implementation of the project is substantially dependent upon FS funds, personnel, or equipment for which the FS has control.

If the State is using Federal funds other than FS funds such as Bonneville Power funds but FS funds are not being used, it may be considered a Federal action if that funding plays a critical role in the activity, but it is not a FS action. National Environmental Policy Act compliance is the responsibility of the funding agency, such as the Bonneville Power Administration. If more than one Federal agency, including the FS, is providing the funding for the project, the Federal agencies should determine which Federal agency will have primary responsibility for NEPA compliance and work cooperatively on needed NEPA documents (40 CFR 1501.5 and 1501.6).

When the State carries out its responsibilities on NFS lands, some activities associated with State actions (i.e., access, habitat improvements, use of pesticides, or construction of facilities or structures) may require FS authorization depending upon specific policy for those actions or areas. The FS would assure that the appropriate NEPA analysis and decision making is conducted. This analysis would likely address the effects of the State action as a "connected action."

Two questions must be addressed to determine whether a State action is a "connected action." The first question is, "Could one agency's action proceed without the other?" If the answer is "yes," than the two actions may be separated. If the answer is "no," then they may be "connected actions." The second question is, "Are the two actions separated in time where one agency's action is not ripe for decision?" If both actions are ripe for decision, and one action could not proceed without the other, then they are "connected actions."

There is an important distinction between actions that are connected as part of the decision versus actions that must be considered as part of the environmental analysis as reasonable and foreseeable. The environmental effects of a State action that is reasonable and foreseeable, but not ripe for decision, should be analyzed and disclosed, but the alternatives and decision addressed in the NEPA document may be limited to those actions authorized by the FS. The FS would have to look at alternatives related to the authorities that we exercise. In other words, the FS would have to disclose environmental consequences of all actions in the environmental analysis, and where actions are connected, they must be addressed in the decision being made by the FS.

Examples:

The following examples are used to illustrate application of the above principles. Please use caution when applying these examples, as every situation should be evaluated based upon the specific proposal and on a case-by-case basis. All examples would be coordinated under the MOU framework between the FS and the State.

Example 1:

A State wildlife agency proposes to stock mountain goats to a particular mountain range in your national forest. Mountain goats are not indigenous to the area, but have been present for more than 50 years. This activity is not inconsistent with the Forest Plan. This is a State action. The FS may provide comments to the State regarding the proposal, but no NEPA documentation is involved.

Changing the scenario slightly, a proposed transplant (a new population) requires the use of a helicopter in a Wilderness area, which requires FS authorization. The FS proposes to authorize the State to use helicopters in the Wilderness to conduct the transplant. The FS would be required to comply with NEPA for this Federal action (i.e., authorization of the use of the helicopter). The transplant of the goats would be outside the scope of the NEPA decision since it is a State action, but the environmental effects of the transplant would have to be discussed as reasonable foreseeable actions.

Example 2:

The State fish and game agency proposes to transplant (a new population) a Federally listed threatened or endangered fish species to habitat that it historically occupied.

In the first variation of this example, the Forest Plan direction is not compatible with the specific location needs for the proposed transplant and recovery of the listed fish species. The FS works with the State on a local level to see if there are alternative areas that would better fit the existing Forest Plan and still accommodate the objectives for recovery.

A suitable alternative is not found. The FS enters into a process to amend the Forest Plan, which requires NEPA on the amendment. The establishment of habitat management direction for the population is analyzed under NEPA. The transplant itself would be analyzed and described as a "connected action."

In the second variation, the transplant proposal is not in conflict with the existing Forest Plan. The FS has reviewed and commented on the State proposal. The listed fish species transplant occurs. National Environmental Policy Act documentation is not required.

In a third scenario, the proposed transplant requires application of rotenone to kill a population of fish. In order to accomplish the application, a canal across NFS land is needed to facilitate lowering the water level in the lake. The project is not funded by the FS. Because the State has responsibility for management of the fish populations, NEPA would be required for permitting the canal and the environmental analysis would have to disclose the effects of the connected action of rotenone treatment and the fish transplant.

In summary, we want to emphasize the importance of collaboration and coordination in defining appropriate State and Federal activities at the field level, and the use of the NEPA process only with regard to Federal decisions. Questions may be directed to Tom Darden (T.Darden:W01A, 202-205-1275), or Rhey Solomon (R.Solomon:W01C, 202-205-0939) of the Chief's Office.

/s/ Sterling J. Wilcox
for

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