

January 11, 2021

USDA – Forest Service  
Mr. Reggie Woodruff  
Attn: Lands and Realty Management  
1400 Independence Av., SW, stop 1124  
Washington D.C. 20250

Reginal.woodruff@usda.gov

*Via email on Forest Service comment portal*

Re: Comments on U.S. Forest Service Proposed Amendment to FSM 2700,  
2740 – Vegetation Management Pilot Projects

Dear Forest Service Lands team:

Attached please find the comments of Xcel Energy on the U.S. Forest Service's Proposed Amendment to the Forest Service Manual for Special Uses by the addition of FSM 2740 - Vegetation Management Pilot Projects and Forest Service Handbook 2709.11 and related guidance.<sup>1</sup> (See <https://cara.ecosystem-management.org/Public/CommentInput?project=ORMS-2717>). We believe the issues identified by these items should be addressed by the Forest Service in the final changes to the Manual and would appreciate the opportunity to discuss them as conformity and consistency of interpretation are crucial to effective implementation of the various federal initiatives concerned with preventive measures to protect National Forest System Lands against wildfire risk. For instance, the processes established by this Manual clouds and limits, rather than clarifies and recognizes, the Congressional intent of allowing pilot projects on lands adjacent to relevant facility rights-of-way (ROW). It does this, in part, by improperly expanding interpretation of other fire risk management legislation in a manner that confounds implementation of the law.

The complexity and limitations contained in the draft Manual Chapter will not best attain the Congressional objectives from §8630 of the Agriculture Improvement Act of 2018 (Farm Bill or FB). Perhaps most importantly, there are provisions that are inconsistent with the implementing statute and preclude operation of the Pilot Program despite no clear Congressional expression of such intent. Given the considerable, capital intensive infrastructure projects placed at risk, the Manual must permit flexibility to achieve the objectives of the statutes, related law and the federal-private partnerships they create to protect private investment in public services that create a secure, national electric infrastructure.

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<sup>1</sup> These comments cite to sections of the proposed Forest Service Manual changes and are intended to apply to all Forest Service documents modified to incorporate the Pilot Project Program of the 2018 Farm Bill §8630.

As a guiding principle, it would seem that the objective of this Manual should be to facilitate management of wildfire risk in every form authorized by Congress rather than to complicate the planning process and dominate the partnerships created by Congress. We urge you to review these comments in conjunction with those submitted today by Xcel Energy on the Forest Service Guidance proposed for implementation of FLPMA §512.

### Statutory Objective and Forest Service Policy

The Farm Bill §8630 statutory objective is to encourage powerline and facility ROW operators and the Forest Service to partner in voluntarily conducting proactive vegetation management projects to better protect utility infrastructure from potential passing wildfires. FB § 8630(b)(1). The proposed Manual objective is to implement the Farm Bill pilot project program with a stated Forest Service policy to authorize pilot projects. This policy would be achieved more robustly by imposing fewer restrictions on program operation, approving pilot program plans and clarifying implementation conflicts created by the Manual. Some examples of these opportunities follow.

### Hazard Tree Restriction from Pilot Program

The Manual defines a Hazard Tree as any “‘vegetation’ (whether located on NFS lands inside or outside the linear right-of-way for the powerline facility), that has been designated, prior to failure, by a certified or licensed arborist or forester...” FSM 2740.5. This definition adopts the definition contained in the proposed FLPMA §512 Guidance, which greatly expands the FLPMA Hazard Tree definition, which is limited to trees, rather than all vegetation.

Having utilized an overly broad definition of Hazard Tree, the Manual then precludes any Hazard Tree controls on lands subject to the Pilot Program. There is no statutory or valid regulatory basis for this arbitrary limitation.

Additionally, and perhaps most importantly, the Manual creates ambiguity with respect to where the Pilot Project may be conducted. While the statute clearly precludes operation of the Pilot Program within the boundary of the ROW, which is not at issue, FLPMA §512 provides for fire risk vegetation management to lands abutting the ROW without defining the term abutting. To further complicate matters, the FLPMA §512 implementing Guidance, supplemented by this Manual, has chosen to reformulate the requirement for fire risk vegetation management as applying to Forest Service “lands inside the linear right-of-way for powerline facilities and on *NFS lands adjacent to either side of the right-of-way...*” instead of the statutory requirement for “vegetation within the width of the right-of-way and abutting Federal land.” *Compare* FSM 2709 (emphasis added) with 43 USC §1772(a)(3)(B) and (e).

In addition to changing the statutory standard without providing any definition or interpretation as to the “replacement” standard inserted into the guidance, ambiguity is created based on the restriction with respect to where the Pilot Program may be implemented. The Manual limits

applications for Pilot Projects to “NFS lands that are not covered by that [powerline facility or natural gas pipeline] authorization.” FSM 2742.3.b(2).<sup>2</sup>

An applicant for a Pilot Project may only operate within 150 feet of the ROW transmission line and comprise an overall total width of no more than 200 feet. AND, these vegetation management projects may only be conducted “on National Forest System land adjacent to...” the ROW. However, under FLPMA §512, vegetation management is statutorily permitted on lands abutting the ROW. Under the implementing Guidance, this is stated to be lands adjacent to the ROW. However, the Guidance precludes Pilot Projects on lands “covered by that authorization....”, which are the only lands authorized by the Farm Bill for Pilot Projects.

Both the FLPMA §512 and Farm Bill Guidance and Manual provision must be clarified to eliminate the confusion and inconsistent use of simple statutory terminology by these guidance documents.

#### Marking Pilot Projects On the Ground

While Pilot Projects have a statutory width dimension, they do not contain a length limitation. Given the purpose of Pilot Projects, it is conceivable their length can and likely will exceed their width. The imposition of on the ground physical marking of the project area may be burdensome and impractical. 2742.3.b(3). As such, if the Forest Service believes physical marking to be necessary, it should only be required on a case by case basis where good cause exists for the burden, which seemingly has little benefit given program objectives.

#### Simultaneous Conduct of Pilot Project and Vegetation Risk Management Activities

The Manual seeks to assure that the Pilot Project is not “conducted simultaneously with vegetation management conducted under the special use authorization or the powerline or natural gas pipeline...” 2742.3.b(3). There is no explanation as to why this requirement is necessary, useful or how it will be interpreted. It also ignores the practical reality of how field crews operate. It is inexplicable what benefit would be achieved by restricting Pilot Program field work from being conducted at the same time as field crews are implementing FLPMA §512 vegetation fire risk management activities within and abutting the very same ROW. This requirement should be eliminated from the Manual.

#### Current Expiration of Pilot Project Program Subject to Renewal

The Farm Bill Pilot Project Program expires on October 1, 2023, although is subject to renewal by Congress. FSM 2743.1.c. The Manual precludes authorization of Pilot Projects that might continue after this date. However, rather than precluding those projects, the Manual could instead authorize

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<sup>2</sup> See also FSM 2740 Digest, 2740 Introduction, 2740.5, Hazard Tree at 2 and NFS Lands Not Covered..., 2741.1, 2742.3.b(2) - (5), 2743.3.a, 2743.4.a and b, 2744.5, and 2745.4 - 6 and 85 Fed. Reg. 79463 (December 10, 2020) (“pilot projects may not overlap with vegetation management conducted under the special use authorization...”).

these project following those dates subject to Program renewal by Congress. It would be more efficient and effective for this approach to be used by the Forest Service.

#### Deletion of Reference of Pilot Projects as Vegetation Management

The Manual requires removal of clause III.F related to vegetation management from Form FS-2700-4. FSM 2743.1.c. We have been unable to locate the referenced clause in the FS list of Forms obtained by a search for this form. As such, we are unable to comment on this provision at this time and request further clarification from the Forest Service.

#### Inappropriate Limitation of Pilot Projects to Thinning

Perhaps in a demonstration of the Forest Service perspective on the Pilot Program, the Manual limits Pilot Projects to “include only thinning and treatment of surface fuels, ladder fuels, and activity fuels to create or maintain shaded fuel breaks or other appropriate measures recommended by Forest Service fire scientists or fire managers.” FSM 2743.3.b. No such limitation is contained in the Farm Bill.

The Farm Bill is positive legislation that encourages the Forest Service to partner with electric facility ROW operators on a proactive, voluntary basis to conduct vegetation management projects to better protect utility infrastructure from potential passing wildfires. FB §8630(b)(1). While the legislation “may include thinning and treatment of ...fuels,” it is not so limited. In addition, Executive Order 13855 (84 Fed. Reg. 45-48, December 21, 2018) is ignored in its entirety. EO 13855 recognizes the importance of active management of vegetation needed to treat dangerous wildland fire conditions on federal lands and the challenges associated with the regulatory process. *Id.* §1, at Policy and (c). The limitation on activities that may be included in a Pilot Program Project is inconsistent with the EO. The EO also calls for streamlining agency administrative and regulatory policies for fuel reduction in a variety of ways, including **adhering** to minimum time periods and identification of categorical exclusions from the National Environmental Policy Act and creating collaborative partnerships. *Id.* §§ 3 and 6.

While the guidelines identify the requirement to achieve approval within 120 days, there is no penalty or apparent implementation plan, beyond identification of an abundance of opportunities for not meeting those timeframes. Furthermore, the private federal partnership encouraged by the EO and the MOU is ignored, with no mention of the EO focus on reduction of wildland fire fuel loading. *Id.* §6(b).

The Manual must be modified so as not to so narrowly limit the Pilot Projects contemplated by Congress.

#### Liability for Wildfires

The Manual states that in establishing the maximum dollar amount for Forest Service fire suppression cost it shall take into account the lower of the average per acre, documented cost and the strict liability provisions at 36 CFR §§ 251.56(d)(2) and (h)(9)(ii), as applicable. FSM 2744.3.

The Manual should mandate use of the lower value, up to the statutory liability limit, rather than have it “taken into account.”

#### Other Laws Should Facilitate Pilot Program Implementation

The Farm Bill directs the Forest Service to utilize the authority of other laws to implement the Pilot Project Program. FB §8630(g). The Manual identifies no other laws, other than its inappropriate use of FLPMA §512 to limit Program implementation as discussed above.

#### Conclusion

Thank you for your consideration of these comments intended to achieve the statutory objective of an efficient, timely process to establish and implement the Pilot Project Program for wildfire risk reduction through vegetation management on National Forest System lands.

Sincerely,

Carly Rowe  
Manager, Siting and Land Rights