On December 10, 2020, the Forest Service published for public comment proposed Forest Service Manual 2740 to implement Title VIII, Subtitle F, section 8630, of the Agriculture Improvement Act of 2018, hereinafter “the Farm Bill.” The Farm Bill provides for the Forest Service to authorize vegetation management pilot projects conducted by non-federal entities on National Forest System (NFS) lands that are not covered by a special use authorization for a powerline facility or natural gas pipeline, hereinafter “pilot projects.” The 30-day comment period ended January 11, 2021. One electric utility company requested that the Agency extend the comment period beyond 30 days; the Agency did not grant the request.

Comments on the Proposed Directive
The Agency received timely comments from 4 respondents, including electric utility companies and one member of the public. The comment from the member of the public was generally supportive of vegetation management as a means for mitigating wildfire, supporting wildlife, and enhancing maintenance of powerline facilities. The remaining comments are addressed below, organized by topic.

Authorization of Pilot Projects Pending Approval of a Proposed Operating Plan or Agreement for a Powerline Facility

Comment: One commenter requested that pilot projects be authorized for powerline facilities that are not covered by an approved operating plan or agreement.

Response: Pilot projects may be authorized for powerline facilities that are not yet covered by an approved operating plan or agreement, provided that the pilot projects do not include felling and pruning of hazard trees and access roads and trails, which are covered by the special use authorization for the associated powerline facility issued under Title V of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1761-1772.

Limitations on the Scope of Pilot Projects

Comment: One commenter expressed concern that the proposed directive would inappropriately limit the scope of pilot projects by using the term “adjacent” instead of “abutting” in reference to the linear right-of-way for a powerline facility or natural gas pipeline and by defining the term “hazard tree” consistent with section 512 of FLPMA, 43 U.S.C. 1772. The commenter added that broadening the definition of “hazard tree” in the Agency’s regulations implementing section 512 of FLPMA by including vegetation other than trees precludes any hazard tree management on NFS lands subject to pilot projects.

Response: The term “abutting” is defined as “to be next to or have a common boundary with.” The term “adjacent” is defined as “next to or adjoining something else.” The terms “abutting”
and “adjacent” are therefore synonymous. The terms “abutting” and “adjacent” both appear in section 512 of FLPMA as descriptors for NFS lands next to either side of a powerline facility right-of-way. The Farm Bill used the term “adjacent,” not “abutting.” In the proposed directive, the Agency decided to use a single term, “adjacent,” which is more commonly understood and less legalistic than the term “abutting.”

Section 512 of FLPMA governs operating plans and agreements for powerline facilities on federal lands, including vegetation management inside the linear right-of-way for a powerline facility and outside the linear right-of-way to fell or prune hazard trees. Section 512 of FLPMA defines the term “hazard tree” to mean any tree or part of a tree inside or outside a right-of-way that has been designated, prior to failure, by a certified or licensed arborist or forester under the supervision of the Forest Service or the owner or operator of a powerline facility to be dead, likely to die within the routine vegetation management cycle, or likely to fail within the routine vegetation management cycle; and if the tree or part of the tree failed, likely to cause substantial damage or disruption to a powerline facility or come within 10 feet of an electric powerline.

Consistent with the Forest Service’s statutory authority under Title V of FLPMA and based on public input, the Agency expanded the definition of “hazard tree” in its regulations and directive implementing section 512 of FLPMA to include brush, shrubs, and other plants because those types of vegetation may also be harmful or disruptive to powerline facilities and services.

The Farm Bill defines the term “right-of-way” as a “special use authorization issued by the Forest Service allowing the placement of utility infrastructure.” The Farm Bill expressly limits pilot projects to “NFS land adjacent to those rights-of-way” and expressly states that the “pilot program shall not apply in a right-of-way.” Thus, the Farm Bill limits pilot projects to NFS lands that are not covered by a special use authorization for a powerline facility, including the operating plan or agreement for that authorization. Section 512 of FLPMA and the Agency’s implementing regulations provide for operating plans and agreements for powerline facilities to cover felling and pruning of hazard trees outside the linear right-of-way for a powerline facility. Therefore, felling and pruning of hazard trees cannot be conducted under pilot projects.

Broadening the definition of “hazard tree” to include brush, shrubs, and other plants besides trees precludes these other plants from being felled or pruned under a pilot project if these other plants meet the definition of a hazard tree. The Agency believes that treating these other plants as hazard trees when they meet the statutory and regulatory definitions is consistent with the express intent of section 512 of FLPMA to enhance safety and reliability of powerline facilities on NFS lands. In addition, existing standard vegetation management clauses in powerline facility authorization forms apply to brush, shrubs, and other plants besides trees.

Trees, brush, shrubs, and other plants that are not hazard trees and that are within the other parameters for pilot projects under the Farm Bill (i.e., no more than 150 feet from either side, and no more than a total width of 200 feet from both sides, of a powerline facility) may be felled or pruned under a pilot project permit.
Use of Other Laws to Facilitate Pilot Project Implementation

Comment: One commenter stated that the proposed directive inappropriately relies on section 512 of FLPMA to limit the scope of pilot projects, instead of relying on other laws to implement the Farm Bill.

Response: The proposed and final directives implementing the Farm Bill are consistent with all applicable law, including the Farm Bill, Title V of FLPMA, section 28 of the MLA, and the Forest Service’s implementing regulations at 36 CFR Part 251, Subpart B. In particular, the proposed and final directives implementing the Farm Bill must be consistent with the limitations on pilot projects under the Farm Bill relative to the special use authorization for their associated powerline facility or natural gas pipeline.

The Farm Bill defines the term “right-of-way” as a “special use authorization issued by the Forest Service allowing the placement of utility infrastructure.” The Farm Bill expressly limits pilot projects to “NFS land adjacent to those rights-of-way” and expressly states that the “pilot program shall not apply in a right-of-way.” The Farm Bill also states that “[p]articipation in the pilot program shall not affect any legal obligations or liability standards that arise under the right-of-way for activities in the right-of-way.” Thus, the Farm Bill limits pilot projects to NFS lands that are not covered by a special use authorization for a natural gas pipeline or powerline facility.

Section 512 of FLPMA and the Agency’s implementing regulations provide for special use authorizations for powerline facilities to cover felling and pruning of hazard trees outside the authorized linear right-of-way for a powerline facility. As a result, felling and pruning of hazard trees outside the linear right-of-way for a powerline facility cannot be covered by a pilot project permit and must be subject to the liability standards under Title V of FLPMA, not the Farm Bill.

Requirement to Mark Pilot Projects on the Ground

Comment: One commenter stated that the requirement to mark trees in pilot project areas may be burdensome and impractical and should be required only case by case where good cause exists.

Response: In conducting a pilot project in accordance with the Farm Bill, participating utilities must adhere to “Forest Service regulations that apply to contractors removing vegetation on NFS land pursuant to a timber sale or stewardship contract.” Those regulations, as implemented by Forest Service directives, require marking of trees to be felled to ensure the safety of personnel and protection of natural resources, including unnecessary or unapproved felling of trees. In addition, vegetation to be felled under a pilot project permit must be marked to distinguish it from vegetation to be felled under the associated special use authorization for a powerline facility or natural gas pipeline, which is subject to different statutory requirements, including different liability standards.

Requirement Not to Conduct Pilot Projects Simultaneously with Vegetation Management Conducted under the Associated Special Use Authorization for a Powerline Facility or Natural Gas Pipeline
Comment: One commenter requested elimination of the requirement that pilot projects not be conducted simultaneously with vegetation management conducted under the associated special use authorization for a powerline facility or natural gas pipeline. The commenter believed that the requirement ignores the practical reality of how field crews operate in conducting vegetation management and that the requirement is not necessary or beneficial.

Response: Pilot projects are authorized under separate statutory authority, the Farm Bill, from their associated powerline facility or natural gas pipeline, which is authorized under Title V of FLPMA or section 28 of the Mineral Leasing Act (MLA), 30 U.S.C. 185. All three statutes authorize vegetation management, but subject to different requirements, including different liability standards. If vegetation management under pilot projects is not differentiated from vegetation management under the associated special use authorization for a powerline facility or natural gas pipeline, it will not be possible to apply the appropriate statutory requirements. It is therefore necessary and beneficial to distinguish between vegetation management conducted under the Farm Bill and vegetation management conducted under the other two authorities. It may be difficult or impossible to make this distinction if pilot projects are conducted simultaneously with vegetation management conducted under a special use authorization for a powerline facility or natural gas pipeline because the activities may occur in the same area.

Expiration of Pilot Project Authority

Comment: One commenter stated that the Agency should allow pilot projects to be authorized beyond October 1, 2023, when the Farm Bill expires, subject to extension of the Farm Bill by Congress.

Response: The Agency does not have the authority to authorize pilot projects beyond October 1, 2023, when the authority for pilot projects expires.

Deletion of Sentence in Permit Form Stating that Cutting of Vegetation is Not Authorized by the Permit

Comment: One commenter requested clarification regarding the direction in the proposed directive to delete the first sentence in clause III.F of the Special Use Permit, form FS-2700-4, when using the form to authorize pilot projects.

Response: Proposed FSM 2743, paragraph 1a, provides for using the Special Use Permit, form FS-2700-4, to authorize pilot projects. Proposed FSM 2743, paragraph 1d, provides for deleting the first sentence in the Cutting, Disposal, and Planting of Vegetation clause, clause III.F, if it is included in FS-2700-4 when using the form to authorize pilot projects. The Cutting, Disposal, and Planting of Vegetation clause is a standard clause governing felling, disposal, and planting of vegetation that is being added to form FS-2700-4 as part of revisions the Agency is making to existing special use authorization forms. The first sentence of the Cutting, Disposal, and Planting of Vegetation clause states that the permit does not authorize cutting of vegetation. This sentence directly contradicts the authority conferred by pilot project permits, i.e., the authority to conduct vegetation management on NFS lands that are not covered by the associated special use authorization for a powerline facility or natural gas pipeline, subject to the other parameters
prescribed by the Farm Bill. Therefore, the first sentence of this clause must be removed if the clause is included in form FS-2700-4 when it is used to authorize pilot projects.

Limitation of Pilot Projects to Thinning

Comment: One commenter stated that the proposed directive would incorrectly limit the types of vegetation management that may be conducted under pilot projects to those treatments specifically listed in the Farm Bill. The commenter further stated that the limitation in the proposed directive on the types of vegetation management activities that may be conducted under pilot projects is inconsistent with Executive Order 13855 and that the proposed directive does not provide for an implementation plan pursuant to the executive order or a penalty if operating plans or agreements are not approved in 120 days.

Response: The Farm Bill expressly limits the types of vegetation management activities that may be conducted under pilot projects. In particular, the Farm Bill states that pilot projects:

- shall involve only limited vegetation management activities that—
  - (A) shall create the least ground disturbance and least disturbance to wildlife reasonably necessary to protect utility infrastructure from passing wildfires based on applicable models, including Forest Service fuel models;
  - (B) may include 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 . . . .

The proposed directive is consistent with the limitations in the Farm Bill on vegetation management activities conducted under pilot projects.

Executive Order 13855, Promoting Active Management of America’s Forests, Rangelands, and Other Federal Lands To Improve Conditions and Reduce Wildfire Risk, does not authorize or apply to pilot projects. Rather, Executive Order 13855 primarily directs the Forest Service to develop goals and implementation plans for wildfire prevention activities and programs; coordinate with other federal agencies to prioritize and promptly implement post-wildfire rehabilitation, salvage, and forest restoration; streamline administrative and regulatory processes and policies relating to fuel reduction and forest restoration on NFS lands when appropriate; and develop a joint strategy with the U.S. Department of the Interior for reducing fire risk on federal lands.

Consistent with section 512 of FLPMA and its implementing regulations, Forest Service directives for powerline facility operating plans and agreements require that proposed operating plans and agreements submitted by owners or operators of powerline facilities be reviewed and approved to the maximum extent practicable within 120 days.

Liability for Wildfires
**Comment:** The proposed directive would provide that the holder of a pilot project permit must reimburse the Forest Service for all fire suppression costs for a wildfire caused by the holder’s operations under the permit, subject to the maximum dollar amount agreed upon by the authorized officer and the holder. The proposed directive would provide that, in agreeing to the maximum dollar amount, the authorized officer and the holder would have to take into account whichever is lower, the Forest Service’s average per acre fire suppression costs as documented by the Forest Service based on Fire and Aviation Management data for the previous 3 years in the state where the pilot project is to occur, or the amount of strict liability provided for in applicable regulations. One commenter stated that the proposed directive should mandate use of the lower maximum dollar amount, rather than merely requiring that the lower maximum dollar amount be taken into account.

**Response:** The proposed and final directives provide for consideration of the lower maximum dollar amount, rather than mandating it, because the Farm Bill requires the Forest Service and the holder of a pilot project permit to agree on the maximum dollar amount. If the directives mandated use of the lower maximum amount, the parties would not be able to come to agreement on the maximum dollar amount.