Regulatory Certifications for Final Directive
FSH 2709.11, Chapter 80 – Operating Plans and Agreements for Powerline Facilities
December 16, 2021

Regulatory Planning and Review (Executive Orders 12866 and 13563). Consistent with Executive Order (EO) 12866, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will determine whether proposed, interim, and final directives that impose, eliminate, or modify requirements on non-Forest Service parties are significant and will review any proposed, interim, or final directives that OIRA has designated as significant. OIRA has determined that this final directive is not significant. EO 13563 reaffirms the principles of EO 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Forest Service has developed the final directive consistent with EO 13563.

Congressional Review Act. Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 et seq.), OIRA has designated this final directive as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act. The final directive includes provisions for vegetation management, inspection, and operation and maintenance of powerline facilities that enhance the reliability of the electrical grid and reduce the threat of wildfire damage to and wildfire caused by vegetation-related conditions, including hazard trees inside linear rights-of-way for powerline facilities and on National Forest System lands adjacent to either side of the linear rights-of-way. Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment (EA) or environmental impact statement (EIS) “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Forest Service has concluded that this final directive falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an EA or EIS.

Regulatory Flexibility Act Analysis. As required by section 512 of the Federal Land Policy and Management Act and the Forest Service’s implementing regulations, the final directive includes provisions for vegetation management, inspection, and operation and maintenance of powerline facilities that enhance the reliability of the electrical grid and reduce the threat of wildfire damage to and wildfire caused by vegetation-related conditions, including hazard trees inside linear rights-of-way for powerline facilities and on National Forest System lands adjacent to either side of the linear rights-of-way. The final directive gives greater consideration than the proposed directive to the ability of smaller utilities with more limited resources to satisfy the minimum requirements for approval of a proposed operating plan or agreement. First, the final directive includes the option for the requisite environmental analysis and consultation for some or all types of activities under an approved operating plan or agreement to be completed case by case after, rather than before, a proposed operating plan or agreement is approved but before the activities are conducted. Second, the final directive shifts the due date for submitting a proposed operating plan or agreement that complies with applicable legal requirements from August 10, 2023, to 18 months from the date the authorized officer notifies the owner or operator of the
requirement to submit a compliant proposed operating plan or agreement, which can occur as late as September 30, 2026. With respect to small entities, the final directive provides that in determining the order of notification, the authorized officer may consider delaying notification to owners and operators that are eligible for an operating agreement, which are typically smaller utilities. Third, also specific to smaller utilities, the final directive specifically provides for ensuring that the minimum requirements of an operating agreement reflect the financial resources of the owner or operator compared to other owners or operators of a powerline facility by (1) considering whether the owner’s or operator’s financial resources merit a full or partial waiver of cost recovery fees for review and approval of the proposed operating agreement; review and approval of proposed modifications to the approved operating agreement; and approval of specific activities under the approved operating agreement and (2) directing the owner or operator to contact the Rural Utilities Service to determine if the work to be conducted under the proposed operating agreement qualifies for a Rural Utilities Service grid security and fire prevention loan. Based on the foregoing, the Forest Service has determined that the final directive will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

**Federalism.** The Forest Service has considered the final directive under the requirements of EO 13132, *Federalism.* The Forest Service has determined that the final directive conforms with the federalism principles set out in this EO; will not impose any compliance costs on the states; and will not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Forest Service has concluded that the final directive does not have Federalism implications.

**Consultation with Tribal Governments.** The Forest Service has determined that national tribal consultation is not necessary for the final directive. The final directive is programmatic and does not have any direct effects on tribes.

**Environmental Justice.** The Forest Service has considered the final directive under the requirements of EO 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.* The Forest Service has determined that the final directive is consistent with EO 12898.

**No Takings Implications.** The Forest Service has analyzed the final directive in accordance with the principles and criteria in EO 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights.* The Forest Service has determined that the final directive will not pose the risk of a taking of private property.

**Energy Effects.** The Forest Service has reviewed the final directive under EO 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.* The Forest Service has determined that the final directive will not constitute a significant energy action as defined in EO 13211, and OIRA has not otherwise designated the final directive as a significant energy action.
Civil Justice Reform. The Forest Service has analyzed the final directive in accordance with the principles and criteria in EO 12988, Civil Justice Reform. Upon issuance of the final directive, (1) all state and local laws and regulations that conflict with the final directive or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this final directive; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates. Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), signed into law on March 22, 1995, the Forest Service has assessed the effects of the final directive on state, local, and tribal governments and the private sector. The final directive will not compel the expenditure of $100 million or more by any state, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public. The final directive contains an information collection requirement as defined in 5 CFR Part 1320 that is not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and its implementing regulations at 5 CFR Part 1320 apply, and the information collection requirement was published for public comment. No comments were received on the information collection requirement.