

Uneasy Riders: A Citizen, a Cow, and NEPA

by Mary O'Brien

Mary O'Brien, Ph.D., is Southern Utah Forests Project Manager at the Grand Canyon Trust.

This Article looks at one recurring activity that falls within the purview of the National Environmental Policy Act (NEPA)¹: livestock grazing on arid and semi-arid U.S. Forest Service lands west of the Rockies.² The relationship of this activity to environmental assessments (EAs), categorical exclusions (CEs), environmental impact statements (EISs), and ultimately §101 of NEPA are briefly described.

This Article proposes that the general inability of the Forest Service to meet its obligations under NEPA for livestock grazing is not due to a problem with NEPA, but rather that NEPA has succeeded at revealing fundamental problems with current management of livestock grazing on Forest Service lands. A proposal for a programmatic EIS is offered.

I. EAs of Livestock Grazing: No Significant Impact?

EAs inhabit a blurred world within NEPA because their processes and sideboards are unclear.

Technically, they are to be an exploration of whether significant environmental impacts attend a proposal. If, upon analysis, the agency determines significant impacts may attend the proposed activity, an EIS is to be prepared before approval of the activity. If the EA projects no significant impacts upon implementation of the action, a finding of no significant impact (FONSI) is prepared.

In between, the process is vague: Will there be a draft EA? That isn't required, but sometimes a draft EA is prepared.

The agency must involve the public "to the extent practicable" in preparing EAs,³ but what is practicable in the eyes of an understaffed agency?

The agency must "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,"⁴ but does that evidence need to be available for review and correction or comment by the public before a FONSI and decision are issued?

An EA should include a brief discussion of "alternative courses of action for any proposal which involves unresolved conflicts concerning alternative uses of available resources,"⁵ but must an agency discuss a reasonable alternative submitted by a nongovernmental organization?

All the above, but also one additional question, looms large in the case of livestock grazing in the arid and semi-arid public lands west of the Rockies: Can the current Forest Service management of livestock grazing *ever* be considered nonsignificant in light of its multiple impacts?

Any person who has walked numerous public lands livestock allotments in the arid and semi-arid West can attest to the common, profound, and myriad impacts of cattle and sheep grazing; and particularly of cattle impacts on creeks and riparian areas. To name a few impacts: Cattle prefer to spend time in the riparian areas surrounding creeks, springs, and ponds, with the result that deep-rooted willows and cottonwood are often diminished or eliminated; exotic, shallow-rooted Kentucky bluegrass spreads; the weakened banks of shallow-rooted vegetation are broken under the weight of the cattle; sediment dumps into the streams; the creeks and streams widen due to the busted banks and incise as floods rush off slopes lacking the tall, deep-rooted perennial grasses the livestock have selectively grazed. The creeks and streams become entrained within ever-deepening channels; water becomes warmer as shade from cottonwood, willows, other woody vegetation and overhanging grasses and sedges is reduced by grazing and browsing; algae proliferate due to the defecation of hundreds of cattle; and fish eggs are smothered in sediment or trampled.

Wet meadows are often trampled, hummocked, and compacted by sheep or cattle, reducing the percolation of water underground to recharge aquifers, and transforming the

1. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

2. The reference to "west of the Rockies" is due to an understanding that grassland and shrubland assemblages east of the Rockies evolved in the presence of large herds of bison, and are thus more resistant to many livestock grazing impacts than grasslands and shrublands west of the Rockies, which experienced the activities of relatively few bison. See Richard N. Mack & John N. Thompson, *Evolution in Steppe With Few Large, Hooved Mammals*, 119 AM. NATURALIST 757-73 (1982).

3. CEQ NEPA Regulations, 40 C.F.R. §1501.4(b).

4. *Id.* §1508.9(a)(1).

5. *Id.* §1508.9(b).

vegetation to dry-land plants. Wet and dry meadows are usually cropped to golf-course height, eliminating all but ground-hugging flowers such as dandelion, as well as their butterfly, bee, and hummingbird pollinators. Springs are piped at their source for livestock troughs, or trampled into muddy depressions.

In the uplands, aspen sprouts are browsed, dooming the aspen stand as the overstory trees die. Understory forbs (broad-leaved, non-woody plants; herbs) and grasses are closely cropped or eliminated beneath aspen, ponderosa pine, sagebrush, and other woody species, reducing or eliminating habitat for the prey of carnivores and for dependent species such as sage grouse and other ground-nesting birds. Exotic or “increaser” species such as cactus or lupine that are not palatable to livestock expand at the expense of grazed native species.

When native grasses and forbs become scarce, the Forest Service has seeded vast acreages with exotic pasture grasses such as crested wheatgrass, smooth brome, and intermediate wheatgrass in order to retain feed for livestock. These seedings have often become monocultures, effectively eliminating native grasses, forbs, and spatial heterogeneity. Bare soil increases, exposing slopes to erosion; flats to compaction; and vast acreages to cheatgrass and noxious weeds such as starthistle. Where cheatgrass spreads, fire return intervals can shrink from 15-20 years to 2-3 years, resulting in the loss of slow-growing shrubs and perennial bunchgrasses essential for wildlife.

The keystone control by wolves of burgeoning elk populations is prevented in the name of reducing depredations on cattle; and the keystone hydrological engineering of beaver is diminished due to competition with cattle for willow, cottonwood, and aspen.

National forest livestock allotments are expected to have NEPA analyses for their allotment management plans (AMPs) and/or term grazing permits, which are issued every 10 years to the permittee(s). As well, operating instructions (AOIs) are to be issued annually to specify needed fence or other repairs, on-off dates, and any other year-specific activities.

Because national forest livestock allotments number in the thousands in the West, the Forest Service is loathe to prepare EISs for individual allotments, whether for AMPs or term grazing permits (which are up for reissuance every 10 years). Because conditions vary with individual allotments, the Forest Service has difficulty accurately describing site-specific problematic conditions in a multiple-allotment NEPA document. AOIs are completed without NEPA analyses.

The result is that AMPs and/or term grazing permits are often analyzed within EAs. The decision to issue AMPs or 10-year term grazing permits under an EA appears to be largely an avoidance of EIS preparation, rather than an effort

to resolve uncertainty as to whether significant impacts are involved. Either within the EA itself or within monitoring data obtained via Freedom of Information Act requests, the forest Forest Service commonly indicates such significant impacts as downward trends in bare soil, expansion of seeded monocultures, or exceedance of riparian utilization standards. The agency rarely if ever has surveyed populations or habitat conditions on or near the allotment for threatened species, the forest’s “management indicator species,” or the forest’s listed sensitive species; existence or extirpation of amphibians; recruitment trends in cottonwood, aspen, or willow; trends of incision, widening, and warming of streams; or population trends of birds on the district or national forest, let alone the allotment.

The Forest Service rarely cites relevant scientific literature documenting the observed impacts of livestock on these and myriad other features of riparian or upland conditions for which the Forest Service does not have site-specific allotment data. When problematic conditions are mentioned, vague commitments to future adaptive management are made, but these lack clear triggers for applying the unspecified adaptive management measures.

II. CEs for Livestock Grazing: When NEPA Is Not Getting Done

Because the national forests are so far behind in analyzing their livestock allotments with any timely NEPA analysis at all, the U.S. Congress has repeatedly relieved national forests of their NEPA responsibility by allowing the forests to renew term grazing permits with CEs,⁶ either as a temporary measure until NEPA analysis is completed⁷ or instead of NEPA, as when Congress recently allowed the Forest Service to renew 10-year term permits on 900 allotments considered by the Forest Service to be meeting or moving toward Forest Service objectives and standards.⁸ A difficulty with the latter process is that if the agency does not have the staff and resources to timely assess their allotments under NEPA, they also do not have the staff and resources to document that the allotments are meeting or moving toward forest plan objectives and standards.⁹ A national lawsuit has been filed

6. BOBBY MCENANEY, NATURAL RESOURCES DEFENSE COUNCIL, *GRAZING, PERMIT RENEWALS, AND NEPA: THREE DECADES OF INACTION* (2008). For a copy, contact Bobby McEnaney at bmcananey@nrdc.org.

7. Rescission Act of 1995, Pub. L. No. 104-19, 109 Stat. 194, §504; extended in 2003 Omnibus Appropriations Bill, Pub. L. No. 108-7, 117 Stat. 11, §328).

8. Fiscal Year 2005 Consolidated Appropriations Act, Pub. L. No. 108-447, 117 Stat. 842, for fiscal years (FY) 2005-2007; extended to the end of FY 2008.

9. The Forest Service may categorically exclude a decision under this congressional allowance only if: (1) it does not increase grazing; (2) the Forest Service has monitoring data showing that the grazing is meeting or satisfactorily moving toward applicable ecological objectives; and (3) the Forest Service has demonstrated there will be no significant impacts to certain special resources such as threatened or endangered species, wetlands, and wilderness areas.

alleging that many allotments granted 10-year permits with one of the 900 CEs in fact are *not* meeting even the minimal Forest Service specifications for using this congressionally approved CE process.¹⁰

III. Livestock Grazing EISs: At Ground Level

Livestock grazing EISs often attract close inspection by grazing reform groups, and have a poor track record of prevailing against court challenges.¹¹ This is basically due to the fact that the livestock grazing involves so many landscape-scale and severe environmental impacts that those who challenge the sufficiency of the EIS can usually find evidence on the ground that those impacts have not been fully or accurately depicted in the EIS. The on-ground evidence brought to court is sometimes gathered on the allotment(s) by those who are challenging the sufficiency of the EIS, but perhaps more often simply by closely reading the monitoring reports filed by Forest Service staff or contractors.

Addressing cumulative impacts adequately is similarly difficult, because livestock are generally grazing (and impacting) all livestock-accessible lands within the district and forest, and adjacent national forests. As the Bureau of Land Management (BLM) similarly grazes most of its livestock-accessible lands, the cumulative impacts extend throughout the entire arid and semi-arid public lands west of the Rockies. Private lands, which fill in much of the open lands between the BLM and Forest Service lands, are also grazed and have often been wholly converted to exotic pasture grasses.

Although some livestock impacts are present only in some sites, dozens of impacts recur on the public lands throughout the West, with cumulative regionwide reductions in biodiversity and ecosystem functioning. The particular impacts consequent to livestock grazing have ever-growing significance in light of observed and predicted climate change impacts in the Southwest including higher temperatures; reduced snowpack and earlier snowmelt; longer droughts; more erratic, but more intense precipitation events rushing over drought-stressed lands and further incising channels; vegetation die-offs; and the spread of invasive, exotic species.¹²

The problem with doing a sufficient grazing EIS lies not with NEPA. Rather, the open, transparent process of NEPA, coupled with judicial review, reveals that the problem lies with livestock grazing as currently practiced in arid and

semi-arid Forest Service lands west of the Rockies. The grazing cannot meet the meaning of a FONSI, i.e., no significant impacts; and it cannot be justified in an EIS vis-à-vis reasonable alternatives of no grazing or greatly reduced grazing. The impacts are too many, serious, irreversible, and unavoidable given the current levels, frequency, and geographic extent of the livestock grazing.

IV. A Call for a Programmatic EIS: Alternatives to Current Livestock Management at the NEPA §101 Level

Section 101 of NEPA calls on the federal government

... to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may ... attain the widest range of beneficial uses of the environment without degradation ... or other undesirable and unintended consequences.

At this point in time, as the Forest Service struggles to exercise its responsibilities in light of climate change, a programmatic EIS of livestock grazing on Forest Service lands throughout the arid and semi-arid lands west of the Rockies is in order. That programmatic EIS would take a 5,000-foot view of the alternatives for Forest Service lands that are currently grazed by livestock. One alternative would be to allow for voluntary permit retirement for conservation purposes with options for compensation by private conservation permit buyers. That or another alternative could propose environmental and economic criteria for prioritizing which livestock allotments should be closed, or made available for voluntary permit retirement, long-term conservation non-use, or other means of ecosystem conservation or restoration. Various alternatives could be compared in terms of the ecosystem services that would be offered in particular ecosystems or land use categories, e.g., wilderness, with and without various levels of livestock grazing; as well as species that would increase or decline. Options for permittees and for ranch lands adjacent to the forests could be explored, because reasonable alternatives that are not within the jurisdiction of the Forest Service can be included within an EIS.¹³

Such a programmatic EIS could be preceded by collaboration among the Forest Service, conservation organizations, livestock industry representatives, ecosystem services assessors and economists, and others for the purpose of exploring a comprehensive range of reasonable alternatives that could be considered in the programmatic EIS.

Public lands livestock grazing has been remarkably resistant to reform over the years due to political pressures. At the same time, it has remarkably extensive and severe impacts that degrade federal public lands throughout the arid and semi-arid West. Council on Environmental Quality NEPA regulations require the discussion of these impacts, and they require that all reasonable alternatives to current grazing be

10. Western Watersheds Project et al. v. U.S. Forest Service, No. C 08-01460 PJH (N. D. Cal. filed May 30, 2008).

11. See, e.g., Idaho Watersheds Project v. Hahn, 307 F.3d 815, 33 ELR 20076 (9th Cir. 2002); Western Watersheds Project v. Bennett, 392 F. Supp. 2d 1217 (D. Idaho 2005); and Western Watersheds Project v. Kraayenbrink, 538 F. Supp. 2d 1302, 37 ELR 20147 (D. Idaho 2007).

12. See, e.g., Stefan Rahmstorf et al., *Recent Climate Observations Compared to Projections*, 316 SCIENCE 709 (May 4, 2007); Richard Seager et al., *Model Projections of an Imminent Transition to a More Arid Climate in Southwestern North America*, 316 SCIENCE 1181-84 (May 4, 2007); Richard Kerr, *Climate Change Hot Spots Mapped Across the United States* 321 SCIENCE 909 (Aug 15, 2008); Dian Seidel et al., *Widening of the Tropical Belt in a Changing Climate*, NATURE GEOSCIENCE (Jan. 2008), available at <http://www.nature.com/naturegeoscience>; Tim Barnett et al., *Human-Induced Changes in the Hydrology of the Western United States*, 319 SCIENCE 1080-83 (2008), available at <http://www.sciencemag.org>; David Breshears et al., *Regional Vegetation Die-Off in Response to Global-Change-Type Drought*, 102 PROC. NAT'L ACAD. SCI., 15144-48 (2005).

13. CEQ NEPA Regulations, 40 C.F.R. §1502.14(c).

rigorously explored and objectively evaluated. The alternatives that need to be explored are systemic throughout the Forest Service, and are best explored at the highest levels of the agency.

Finally, NEPA itself declares it to be national policy that wherever possible, federal programs are to prevent environmental degradation and support diversity. Under this policy, the Forest Service has a responsibility to initiate a public exploration of alternatives, under NEPA and in light of climate change, to current management of livestock grazing on the national forests of the arid and semi-arid West.