**DRAFT**

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Reggie Woodruff

Energy Program Manager

Lands and Realty Management

USDA Forest Service

201 14th Street SW

Mailstop 1124

Washington, DC 20250-1125

(202) 205-1196

Re: Request for Comments on the USDA Forest Service Proposed Rule on Procedures for Operating Plans and Agreements for Vegetation Management Within and Along Powerline Rights-of-Way; 84 *Fed. Reg.* 50698 (August 25, 2019)

To Mr. Woodruff:

The National Rural Electric Cooperative Association (NRECA) submits these comments in response to the request by the U.S. Department of Agriculture (USDA) Forest Service (agency) for public input on its proposal to revise its existing special use regulations for issuing or reissuing authorizations for powerline rights-of-way (ROW).[[1]](#footnote-1) The focus of the agency revisions is to incorporate and implement Section 512 under Title V of the Federal Land Policy and Management Act (FLPMA), as enacted by Congress in the 2018 Consolidated Appropriations Act. Congress amended the law to establish requirements for the development and approval of operating plans and agreements for vegetation and facility management on National Forest System (NFS) lands within ROW for electric transmission and distribution facilities and on their abutting lands. NRECA fully supported these congressional efforts to help improve the approval process for accessing transmission and distribution infrastructure crossing federal lands. If finalized, this proposed rule should provide for the long-term, cost-effective, and efficient management of electric facilities and vegetation, including hazard trees, to enhance electric system reliability, promote public safety, and avoid fire hazards.

NRECA is the national trade association representing nearly 900 local electric cooperatives. America’s electric cooperatives belong to the communities that they serve and comprise a unique sector of the electric industry. From growing suburbs to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation’s landscape. NRECA serves its members as an advocate for legislative and regulatory policies that are scientifically sound, cost-effective, and balance consumer interests and environmental protection.

NRECA’s member cooperatives include 62 generation and transmission (G&T) cooperatives and 831 distribution cooperatives. All but three of these co-ops are classified as small business entities per the Small Business Administration. The G&Ts provide wholesale power to distribution co-ops through their own electric generation facilities or by purchasing power on behalf of their distribution members. The distribution co-ops are the foundation of the electric cooperative network, delivering electricity and other services directly to the end of line co-op consumer-members. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

For 75 years, electric cooperatives have proudly shouldered the responsibility of bringing electricity to rural America. This obligation is not without its challenges. These sparsely populated, and primarily residential communities are more expensive to serve and provide less revenue per consumer compared to the more industrialized and densely-populated areas served by investor-owned or municipal utilities. Electric co-ops serve an average of eight consumers per mile of distribution line and collect annual revenue of approximately $19,000 per mile, while others in the utility sector average 32 customers and $79,000 in annual revenue per mile. In addition, electric co-ops serve 93 percent of the nation’s persistent poverty counties. These factors make it especially important for co-ops to keep their electric rates affordable, particularly for those who can ill afford increased electricity bills, while maintaining reliability and improving sustainability. Under the cooperative business model, costs are born by the cooperative member-owners – the distribution co-ops that own the G&Ts and the individual consumers that “own” the distribution co-ops.

In addition to providing affordable electric service, cooperatives play a vital role in transforming the electric sector. This includes working to improve the resiliency and efficiency of their systems. Altogether, co-ops own and maintain 2.6 million miles or 42 percent of the nation’s electric distribution lines. Some of this distribution infrastructure, as well as transmission lines, substations, access roads, and other related facilities are located on NFS lands. Thus, co-ops must acquire special use authorizations to access electric utility ROW, as well as complete necessary facility inspection, vegetation management, and operation and maintenance (O&M) activities. These activities are a key part of ensuring the safe and reliable delivery of electric services.

Often, electric cooperatives have experienced unreasonable delays in receiving agency authorizations to perform vegetation management and O&M work necessary to keep the lights on. This includes instances where requests to remove hazard trees that present imminent risk of damaging infrastructure, causing outages or other reliability concerns, or sparking fires are delayed or denied. When fires occur, co-ops are routinely held liable for fire suppression costs, injury and damages. Again, these are costs that both the co-op and ultimately the consumer-member must bear. Once co-ops receive approvals, they are also often faced with inconsistent terms and conditions that can cause challenges with efficiently managing ROWs and electric infrastructure.

Timely and consistent approvals – especially with the increase in catastrophic wildfires – are essential for co-ops to meet mandatory reliability standards, ensure a proper functioning energy grid, and reduce the potential risk of fire hazards. Therefore, it is important to NRECA and its members that revisions to the USDA Forest Service special use regulations are promptly finalized and implemented as intended by Congress to improve decision-making efficiency. We appreciate the agency’s efforts to promulgate this rulemaking within the timeframe slated by Congress. NRECA provides the following additional comments on the proposed rule.

**Ensure Consistent Implementation with the BLM.**

Per FLPMA Section 512(c)(4)(A), the agency shall jointly develop with the Department of the Interior (DOI) Bureau of Land Management (BLM) a consolidated and coordinated process for the review and approval of proposed operating plans and agreements. This process should include timelines and benchmarks for (1) the submission of agency comments on the proposed plans or agreements and schedules for final decision; (2) the timely review of modification of the plans or agreements in cases in which modifications are necessary; (3) a process for modifying plans or agreements in a prompt manner if changed conditions necessitate such a modification; and (4) a process that ensures, to the maximum extent practicable, prompt agency review and approval of plans or agreements within 120 days from the date the plan or agreement is submitted.

Given the linear nature of electric cooperative transmission and distribution infrastructure, facilities transverse myriad landscapes which can include both NFS and BLM-managed lands. It is imperative that the Forest Service and BLM work together to develop and implement this joint process, as envisioned by Congress, for consistent inter- and intra-agency implementation. NRECA urges the agency to have this process in place concurrent with the publication of the final rule to ensure timely, efficient, and consistent reviews and approvals. Any delay in developing and implementing this joint process will result in delays in approving proposed plans and agreements, thereby threatening the safe, reliable operation of electric systems and ability to mitigate fire hazards. Further, NRECA encourages the agency to be transparent with the process so that electric co-ops and other stakeholders understand agency expectations upfront. Such transparency will also aid in holding the agency accountable in meeting the review and approval timelines set by Congress.

**Train Agency Personnel on Electric System Requirements.**

Congress has encouraged the agency to work in consultation with the electric utility industry to develop a program to train field personnel involved in vegetation management decisions relating to electric transmission and distribution facilities.[[2]](#footnote-2) The training should help agency personnel understand electric utility obligations to maintain a safe and reliable electric system, including compliance with relevant reliability standards and fire safety requirements. There is an on-going loss of institutional knowledge and expertise regarding these issues given the large number of agency personnel reaching retirement eligibility coupled with high staff turnover. By linking the skills of electric co-op experts and agency field staff, the goals of both parties can be better met – ensuring the safe, reliable, and affordable delivery of electricity, while sustaining the health, diversity, and productivity of the Nation’s forests and grasslands.

NRECA and its members are committed to continuing to build collaborative partnerships with the agency, including assisting with developing utility-specific training programs and materials for field staff. NRECA members have also offered to meet with their respective local agency staff to share information regarding a general overview of the co-op system, typical vegetation management and O&M practices, and compliance requirements. These trainings could be tailored to best suit the needs of the local co-op, community, and Forest Service unit. We believe working hand-in-hand with open communication and an understanding of each parties’ mission will help allow for more efficient and consistent approvals of plans and agreements going forward. NRECA and its members look forward to working with the agency to meet Congress’ expectation.

**Minimize the Need for Case-by-Case Approvals.**

NRECA and its members support the agency’s efforts to minimize the need for case-by-case approvals for non-emergency vegetation management, facility inspection, and O&M of electric transmission and distribution facilities.[[3]](#footnote-3) Further, the ability for co-ops to address emergency vegetation management without prior consent, including the removal or pruning of hazard trees, is essential to avoid the disruption of electric service and mitigate immediate fire and safety threats. We support the agency’s clarification that the electric utility owner or operator shall notify the authorized agency officer in writing within 24 hours of the hazard tree removal or pruning. Providing written notification helps eliminate the potential for non-compliance with the regulation should agency personnel be unavailable in situations such as government shutdowns, federal holidays, and weekends. NRECA and its members encourage the agency to continue seeking ways to streamline and lessen the need for case-by-case approvals.

**Limit Strict Liability.**

Consistent with FLPMA Section 512(g)(1), Congress stated that the agency shall not impose strict liability in tort on an owner or operator for injury or damages resulting from the agency’s unreasonably withholding or delaying approval of an operating plan or agreement or unreasonably failing to adhere to an applicable schedule in an approved operating plan or agreement. Further, Congress set reasonable strict liability limits in Section 512(g)(2) for injury or damages resulting from activities conducted by an owner or operator under an approved agreement. As discussed above, the costs of maintaining electric infrastructure, performing vegetation management and O&M activities, and any incurred liability and fire suppression costs are passed to the co-op consumer-members. Capping strict liability for those co-ops subject to an agreement, instead of an operating plan, allows limited financial resources to be focused on conducting necessary facility inspections, line O&M activities, and ROW vegetation management – including hazard tree removal – to enhance reliability, and mitigate safety and fire threats. NRECA recommends the agency implement these strict liability provisions as intended by the 2018 Consolidated Appropriations Act.

**Support the Development of Agreements.**

Electric transmission and distribution facility owners or operators that are not subject to the mandatory reliability standards established by the Electric Reliability Organization or that sold less than or equal to one million megawatt hours of electric energy for purposes other than resale during each of the three calendar years immediately preceding the enactment of the 2018 Consolidated Appropriations Act may enter into an agreement with the agency in lieu of an operating plan.[[4]](#footnote-4) Many NRECA members with electric infrastructure on NFS lands will qualify for the use of agreements. We encourage the agency to support the development of such agreements by creating a culture within the agency that prioritizes the review and approval of agreements, as well as fosters coordination and collaboration between the owner or operator and the Forest Service.

**Clarify the Minimum Requirements for Agreements.**

The 2018 Consolidated Appropriations Act directs the agency to set forth specific minimum requirements for agreements used by certain owners and operators, in lieu of operating plans.[[5]](#footnote-5) NRECA and its members value plans and agreements as tools to improve communications between owners or operators and the agency. However, we recommend clarifying the minimum requirements for agreements to ensure consistency and alignment with the underlying law. NRECA recommends the agency clarify that proposed §251.56(h)(5)(i) through (vi) are minimum content requirements for operating plans only and do not apply to agreements. More specifically, NRECA recommends the following revision be made at §251.56(h)(5), with the ~~strikethrough~~ indicating where we suggest the agency make a deletion:

(5) *Content of operating plans and agreements*. At a minimum, operating plans ~~and agreements~~ shall:

Henceforth, NRECA recommends the agency then add clarification that in addition to applying to plans, §251.56(h)(5)(vii) through (ix) also include minimum content requirement for agreements. This clarifying statement could be added after the conclusion of (vi) and prior to the start of (vii), with subsequent subsections renumbered as necessary.

Further, a key provision of the 2018 Consolidated Appropriations Act authorizes owners and operators to conduct emergency vegetation management without prior approval, with the only requirement being notification to the authorized agency officer within 24 hours after the emergency action occurs. This ability is essential for owners and operators to quickly address imminent dangers of vegetation or hazard trees contacting powerlines from within or adjacent to the ROW to avoid disruption of electric service and eliminate immediate fire and safety hazards. The agency has proposed including this emergency vegetation management notification provision at §251.56(h)(5)(viii)(B). However, that section is specific to those activities that require approval from the agency (e.g., owner or operator performance of routine vegetation management). By also including the emergency vegetation management notification requirements in this section, NRECA is concerned this could lead to confusion and inconsistent application of the underlying statute. It is our understanding the Congress intended to provide the authorization to address hazard trees in emergency conditions regardless of whether an owner or operator has an approved plan or agreement. Therefore, NRECA recommends the agency move proposed §251.56(h)(5)(viii)(B) regarding emergency vegetation management as a standalone section or include it as a subsection under §251.56(h)(5)(vii), which outlines other instances where the owner or operator must notify the agency.

**Encourage and Assist Those Co-ops Voluntarily Enhancing Habitat.**

Congress directed the agency to encourage and assist willing owners and operators of electric transmission and distribution facilities to incorporate on a voluntary basis vegetation management practices to enhance habitats that benefit pollinators and other wildlife, if the practices are compatible with the vegetation management practices necessary for system reliability and safety.[[6]](#footnote-6) As discussed above, routine electric utility vegetation management practices along powerline ROW and abutting lands are essential for meeting mandatory reliability standards, mitigating risks of vegetation-related outages and other operational issues, and reducing wildfire risks. By integrating various vegetation management techniques, electric co-ops can provide secondary ecological benefits while promoting plant communities that do not interfere with overhead power lines, pose fire hazards, or hamper facility access.

America’s electric cooperatives take pride in being good environmental stewards of the land. For decades, NRECA members have implemented voluntary projects and adjusted vegetation management practices to benefit wildlife and their habitat, along with other environmental initiatives. Whenever possible, voluntary conservation is preferable from NRECA’s perspective as it can potentially preclude the need to list species as either threatened or endangered under the Endangered Species Act (ESA). Species listings and resulting prohibitions on activities can impose costs to co-ops that make it difficult to implement without passing them directly to their consumer-members. In addition, we recognize that it is often collaborative voluntary efforts that have resulted in the greatest species conservation success stories (e.g., delisting of the bald eagle under the ESA).

For example, the monarch butterfly – who’s range spans 49 states of the country – has experienced significant population declines over the past 30 years. Given this broad range, nearly all NRECA members could be affected if the monarch is listed under the ESA. An ESA listing would likely result in project delays and increased costs and liability to co-op vegetation management programs. To assure regulatory certainty and operational flexibility in the event the monarch gains ESA protections, NRECA has worked on behalf of its members to contribute to the development of a voluntary monarch butterfly conservation initiative. If finalized, nearly all NRECA members will be eligible to participate in the National Monarch Butterfly Candidate Conservation Agreement with Assurances/Candidate Conservation Agreement (Monarch CCAA/CCA).[[7]](#footnote-7) The integration of the CCA with the CCAA helps ensure a streamlined, consistent approach for conservation efforts implemented on both private and federal lands.

The Monarch CCAA/CCA provides an opportunity for the agency to support co-ops enrolled in the agreement in their efforts to benefit the monarch butterfly. NRECA encourages the agency to support, and not hinder, co-ops that voluntarily undertake this and other initiatives. Regardless of whether the monarch is listed under the ESA, co-ops are already implementing projects to benefit the species, as well as other pollinators and wildlife. NRECA recommends the agency express its support and willingness to assist owners and operatives in voluntary habitat enhancement initiatives within the preamble of the proposed rule.

**Allow for the Use of Unmanned and Other Emerging Technologies.**

Electric co-ops take numerous steps to ensure system reliability and resilience, as well as mitigate safety and fire hazards. This includes routinely inspecting and repairing substations, transformers, conductors, towers, poles, pole attachments, and other equipment. The ability to quickly inspect and identify areas of damage and degradation is even more critical following an outage, storm, wildfire, or other natural disaster where a rapid response is necessary to minimize threats to life, economics, and national security.

Working on, and around, electric infrastructure is hazardous, costly, and time consuming.[[8]](#footnote-8) The hazards that exist during routine inspections are significantly compounded when the equipment has been damaged or the surrounding terrain has been made more dangerous by natural disasters like storms and wildfires. Efforts to conduct facility inspections and maintain ROW vegetation clearances are typically some of the largest ongoing operational costs for co-ops. Historically, co-ops primarily conducted inspections and damage assessments visually using personnel, either working from the ground, a bucket truck, or in a manned aircraft. Incorporating the use of unmanned aerial systems (UAS) gives co-ops the ability to conduct these same inspections without putting personnel in dangerous proximity to electric infrastructure. Additionally, the technology has the potential to provide co-ops with better information than visual inspection on a faster timeline and at a lower cost.

Co-ops deploy UAS and other technologies for diverse purposes, which may require using specialized and differing equipment. For example, co-ops may deploy UAS equipped with LiDAR[[9]](#footnote-9) to assist with vegetation management to detect issues such as encroachments and hazard trees. Co-ops can then leverage these data to ensure proper tree trimming and clearance levels around transmission and distribution lines to prevent reliability concerns and mitigate wildfire risks. Infrared cameras, as another example, may be used to identify equipment failure in early stages and therefore, prevent unscheduled and costly outages. These technologies continue to evolve and improve.

The 2018 Consolidated Appropriations Act recognizes the value of unnamed and other emerging technologies in more efficiently identifying vegetation managing needs; reducing the risk of wildfires; and lowers energy costs for consumers.[[10]](#footnote-10) NRECA recommends the agency incorporate provisions in the proposed rule and associated preamble to promote agency understanding and support of these technologies.

**Enhance the Use of Categorical Exclusions.**

Environmental reviews and associated documentation requirements under the National Environmental Policy Act (NEPA) often add significant delays, costs, and liability for co-ops awaiting agency decisions on new special use authorizations and renewals or amendments to existing authorizations. The agency currently has a backlog of more than 5,000 applications in need of environmental analysis and decision, on top of the approximately 3,000 new special use permit applications that are submitted annually for approval. Congress directed the agency to identify categories of actions, including those actions carried out under plans and agreements, for which neither an Environmental Impact Statement (EIS) nor Environmental Assessment (EA) under NEPA will be required.[[11]](#footnote-11)

As previously expressed, NRECA supports the agency’s efforts to modernize its NEPA procedures to increase efficiency of environmental analyses and produce higher quality, science-based decisions consistent with NEPA’s requirements.[[12]](#footnote-12) More specifically, NRECA supports the agency’s proposed series of new and revised Categorical Exclusions (CE),[[13]](#footnote-13) which if finalized will improve electric co-ops’ ability to operate and maintain infrastructure located on NFS land. NRECA encourages the agency to continue to enhance the use of CEs, including establishing CEs to cover routine O&M and vegetation management activities. We also recommend expanding existing CEs to clarify the inclusion of existing access roads and the ability to use selective low-volume pesticides for vegetation control. These activities are unlikely, either individually or cumulatively, to have significant environmental impacts and should therefore fall into the agency’s discretion to categorize these actions as excluded from requiring environmental analysis.

NRECA believes the abovementioned CE enhancements will enable the continued protection of the nation’s forests and grasslands, while contributing to more consistent and timely completion of NEPA environmental reviews and approvals. It is important that the agency finalize and implement these CEs to prevent delays in approving proposed plans and agreements. Such delays will otherwise threaten the safe, reliable operation of electric systems and ability of owners and operators to mitigate fire hazards.

**Streamline Section 106 Compliance.**

In addition to NEPA, compliance with Section 106 of the National Historic Preservation Act (NHPA) often adds significant delays for co-ops awaiting agency approvals. NRECA is concerned that these delays, especially when stacked with the time needed to develop, review, and approve plans and agreements, will lead to the agency missing the 120-day window to issue approvals. NRECA and its members encourage the agency to evaluate ways to streamline and bring consistency to the Section 106 consultation process (e.g., develop programmatic agreements, improve data sharing amongst stakeholders).

**Strategically Leverage ROW to Limit Wildfires.**

In August 2018, the agency announced it is rethinking its approach for land management given concerns over longer fire seasons and the rising size and severity of wildfires, along with the expanding risk to communities, natural resources, and public safety. The Forest Service currently implements various tools to reduce fuel loads and improve forest conditions. Yet, catastrophic wildfires and corresponding losses to life and property have continued to grow, partly because treatments have been uncoordinated and not at the right scale. In its accompanying high-level report, [[14]](#footnote-14) the agency contemplates ways to increase collaboration, shared stewardship, and co-manage wildfire risk.

Given millions of miles of ROW span the landscape across diverse ecosystems, including fire-prone areas, there may be opportunities to further leverage some of these ROW and abutting areas. The spread of invasive plants such as cheatgrass, as well as the build up of other flammable native vegetation, can increase fuel loads. This can create or increase fire hazards that threaten electric infrastructure. Properly maintaining vegetation in ROW can prevent the spread of invasive species, provide wildlife habitat, and act as effective fuel breaks to limit and fight wildfires. NRECA members are interested in collaborating with the agency to explore ways to build upon the 2018 Consolidated Appropriations Act (e.g., pilot projects) to further address these issues on federal land. For long-term success, these potential opportunities should seek to be well coordinated in advance of implementing any land treatments, protect infrastructure and the environment, and enhance electric system reliability. In addition, NRECA believes the agency should not hold co-ops strictly liable for participating in such collaborative efforts to reduce fire risk and improve forest health.

**Provide Additional Guidance and Directives.**

This rulemaking plays an important role in enhancing the reliability of the electric grid and reducing the threat of wildfire to, and wildfire caused by vegetation-related conditions within, electric transmission and distribution ROW and abutting federal land. Ensuring consistent implementation with Congress’ intent will be the key to its success. Therefore, NRECA and its members encourage the agency to issue and periodically update guidance to ensure provisions are appropriately developed and implemented for utility ROW vegetation management, facility inspection, and O&M activities. Agency efforts to issue guidance are also supported by the 2018 Consolidated Appropriations Act.[[15]](#footnote-15)

**Conclusion**

NRECA appreciates the opportunity to provide comments on ways the USDA Forest Service can improve the efficiency of approving powerline special use authorizations and associated plans and agreements related to facility inspection, vegetation management, and O&M activities. NRECA and its members believe the abovementioned provisions will enable the continued protection of the nation’s forests and grasslands, while enhancing reliability and mitigating safety and fire hazards. We welcome a chance to discuss our comments further with your team and look forward to continuing to work with the agency to coordinate the implementation of this program.

If you have any questions regarding these comments, please contact me at Janelle.Lemen@nreca.coop.

Respectfully,

Janelle Lemen

Regulatory Director, Environmental Policy

National Rural Electric Cooperative Association

cc: T. Cromwell, NRECA

R. Cronmiller, NRECA

P. Sharma, SBA Office of Advocacy

L. Cusick, USDA RUS

D. Jiron, USDA Forest Service

1. 36 *Fed. Reg.* 251, Subpart B, June 6, 1980. [↑](#footnote-ref-1)
2. FLPMA Section 512(i). [↑](#footnote-ref-2)
3. § 251.56(h)(10)(v). [↑](#footnote-ref-3)
4. FLPMA Section 512(d)(1). [↑](#footnote-ref-4)
5. FLPMA Section 512(d)(2). [↑](#footnote-ref-5)
6. FLPMA Section 512(i)(3). [↑](#footnote-ref-6)
7. *84 Fed. Reg.* 15229 (April 15, 2019). [↑](#footnote-ref-7)
8. US Dept. of Labor, Occupational Safety & Health Administration, “Safety and Health Topics: Electrical” (November 14, 2019). [↑](#footnote-ref-8)
9. LiDAR refers to “light detection and ranging,” which is a surveying method that uses pulsed lasers to measure distances. [↑](#footnote-ref-9)
10. FLPMA Section 512(i)(4). [↑](#footnote-ref-10)
11. FLPMA Section 512(c)(5). [↑](#footnote-ref-11)
12. *See*: NRECA comment letter submitted August 26, 2019 on the Forest Service NEPA compliance proposed rule, 84 *Fed. Reg.* 27544 (June 13, 2019); NRECA comment letter submitted February 2, 2018 on the agency’s advance notice of proposed rulemaking to revise its NEPA procedures, 83 *Fed. Reg.* 302 (January 3, 2018). [↑](#footnote-ref-12)
13. 84 *Fed. Reg.* 27544 (June 13, 2019). [↑](#footnote-ref-13)
14. *See*: Forest Service “*Toward Shared Stewardship Across Landscapes: An Outcome-Based Investment Strategy,*” FS-118 (August 2018). [↑](#footnote-ref-14)
15. FLPMA Section 512(b)(1). [↑](#footnote-ref-15)