



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596-AD36

Land Uses; Special Uses; Procedures for Operating Plans and Agreements for Powerline Facility Maintenance and Vegetation Management Within and Abutting the Linear Boundary of a Special Use Authorization for a Powerline Facility

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture is amending its existing special use regulations to implement section 512 of the Federal Land Policy and Management Act (FLPMA), as added by section 211 of division O, Consolidated Appropriations Act, 2018 (hereinafter “section 512”). This section governs the development and approval of operating plans and agreements for maintenance and vegetation management of electric transmission and distribution line facilities (powerline facilities) on National Forest System (NFS) lands inside the linear boundary of special use authorizations for powerline facilities and on abutting NFS lands to remove or prune hazard trees.

DATES: This rule is effective [**Insert date 30 days from date of publication in the FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

Background and Need for the Final Rule

The final rule is being promulgated pursuant to section 512 (43 U.S.C. 1772), which is an amendment to Title V of FLPMA (43 U.S.C. 1761-1772). Section 501(a)(5) of FLPMA (43 U.S.C. 1761(a)(5)) authorizes the Forest Service to issue or reissue right-of-way authorizations for powerline facilities on NFS lands. Section 501(b)(1) of FLPMA (43 U.S.C. 1761(b)(1)) provides that prior to issuing or reissuing a special use authorization for a right-of-way, the Forest Service must require that the applicant submit any plans, contracts, or other information related to the proposed or existing use of the right-of-way that the Agency deems necessary to determine, in accordance with FLPMA, whether to issue or reissue the authorization and the terms and conditions that should be included in the authorization.

Section 503(c) of FLPMA (43 U.S.C. 1763(c)) provides that right-of-way authorizations must be issued or reissued pursuant to Title V of FLPMA and its implementing regulations and must also be subject to such terms and conditions as the Forest Service may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination. Section 505 of FLPMA (43 U.S.C. 1765) gives the Forest Service broad discretion to establish terms and conditions in right-of-way authorizations, including terms and conditions that will effectuate the purposes of FLPMA and its implementing regulations and minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment (43 U.S.C. 1765(a)(i)-(ii)). In addition, section 505(b) (43 U.S.C. 1765(b)) requires the Forest Service to include terms and conditions in right-of-way authorizations that the Agency

deems necessary to protect federal property and economic interests; efficiently manage the lands which are subject or adjacent to the right-of-way; protect lives and property; protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and otherwise protect the public interest in the lands traversed by or adjacent to the right-of-way.

Consistent with this statutory authority, the Forest Service regulates the occupancy and use of NFS lands for powerline facilities through issuance of a special use authorization under 36 CFR part 251, subpart B. The Forest Service must include in special use authorizations terms and conditions the Agency deems necessary to effectuate the purposes of FLPMA and its implementing regulations (36 CFR 251.56(a)(1)(i)(A)); minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment (36 CFR 251.56(a)(1)(i)(B)); protect federal property and economic interests (36 CFR 251.56(a)(1)(ii)(A)); efficiently manage the lands subject and adjacent to the authorized use (36 CFR 251.56(a)(1)(ii)(B)); protect lives and property (36 CFR 251.56(a)(1)(ii)(D)); protect the interests of individuals living in the general area of the authorized use who rely on resources of the area (36 CFR 251.56(a)(1)(ii)(E)); and otherwise protect the public interest (36 CFR 251.56(a)(1)(ii)(G)).

Based on these statutory and regulatory requirements, the Forest Service issues special use authorizations for powerline facilities that require the holder, in consultation

with the Forest Service, to prepare an operating plan that includes provisions governing powerline facility maintenance and vegetation management on NFS lands within and abutting the right-of-way (43 U.S.C. 1761(b)(1); 36 CFR 251.56(a)(1)). Special use authorizations for powerline facilities on NFS lands also require Forest Service approval of the operating plan before it is implemented.

In 2018, Congress amended FLPMA to add section 512, which establishes requirements for the development and approval of operating plans and agreements for powerline facility maintenance and vegetation management on NFS lands within the linear boundary of a special use authorization for a powerline facility and on abutting NFS lands to remove or prune hazard trees. These requirements build on the Forest Service's preexisting authority in section 501(b)(1) of FLPMA (43 U.S.C. 1761(b)(1)) to require holders of powerline facility authorizations to have an operating plan. This final rule implements section 512.

Section 512 of FLPMA repeatedly uses the phrase, "on abutting lands, including hazard trees," in referring to vegetation management outside the linear boundary of a special use authorization for a powerline facility that is covered by the operating plan or agreement for that authorization. Taking section 512 as a whole, the phrase, "on abutting lands, including hazard trees," is best interpreted as referring to hazard trees on abutting lands. The definition for "hazard tree" in section 512 contains specific parameters for determining the location of hazard trees outside the linear boundary of a special use authorization for a powerline (i.e., if the trees failed, they would be likely to cause substantial damage or disruption to a transmission or distribution facility or come within 10 feet of an electric power line). To that extent, the definition for "hazard tree"

prescribes the scope of vegetation management on NFS lands abutting the linear boundary of an authorization for a powerline facility. Accordingly, to clarify the scope of vegetation management on abutting NFS lands under section 512 of FLPMA, the preamble and the text of the final rule refer to vegetation management “on abutting lands to remove or prune hazard trees as defined in the final rule.”

The Department anticipates that implementation of the final rule will promote the reliability of the United States’ electrical grid and will reduce the threat of damage to powerline facilities, natural resources, and nearby communities by streamlining approval for routine and emergency vegetation management on NFS lands within the linear boundary of a special use authorization for a powerline facility and on abutting NFS lands to remove or prune hazard trees as defined in the final rule.

Summary of Public Comments

On September 25, 2019, the Forest Service published a proposed rule in the **Federal Register** (84 FR 50698) with a 60-day comment period, ending November 25, 2019, to implement section 512. The Forest Service received 17 written comments, consisting of letters and web-based submittals. All commenters generally supported the proposed rule. Commenters were primarily electric utilities and generally expressed the need for additional details and clarity on how operating plans and agreements for a powerline facility would be reviewed and approved by the Agency.

The intent of this final rule is to incorporate the provisions of section 512 into the Forest Service’s special use regulations, rather than to provide specific direction on how to implement those provisions, such as specifying timeframes and steps for Forest Service review and approval of operating plans and agreements for a powerline facility or

categories of actions covered by operating plans and agreements for a powerline facility that are categorically excluded from documentation in an environmental assessment (EA) or environmental impact statement (EIS). In coordination with the U.S. Department of the Interior's Bureau of Land Management (BLM), which is also subject to section 512, the Forest Service will publish proposed directives for public comment that would provide specific direction on how to implement section 512 consistent with BLM's implementation of the statute.

Comments and Responses

Comment: Multiple commenters recommended that the Agency specifically identify categorical exclusions from documentation in an EA or EIS (CEs) that could be used for vegetation management of powerline facilities, maintenance of powerline facilities, and other types of activities conducted on NFS lands within the linear boundary of a special use authorization for a powerline facility and on abutting NFS lands to remove or prune hazard trees as defined in the final rule. Additionally, multiple commenters noted the need for clarity on the applicability of consultation requirements under the Endangered Species Act (ESA) and National Historic Preservation Act (NHPA) for those activities and how the Agency would meet those requirements with the 120-day period for review and approval of proposed operating plans and agreements for powerline facilities.

Response: The Agency has confirmed that it has CEs to support expedited approval of routine maintenance that involves minimal ground disturbance and routine vegetation management that involves limited areas on NFS lands within the linear boundary of a special use authorization for an existing powerline facility and on abutting

NFS lands to remove or prune hazard trees as defined in the final rule. Discussions with the U.S. Department of the Interior and the Advisory Council on Historic Preservation have confirmed that Forest Service approval of routine maintenance and vegetation management on NFS lands within the linear boundary of an authorization for an existing powerline facility, and on abutting NFS lands to remove or prune hazard trees as defined in the final rule, requires consultation under the ESA and NHPA. Additional evaluation and discussions are ongoing about review and approval of powerline facility activities to determine the content of additional applicable CEs, whether to propose legislation or amendments to Forest Service NEPA regulations, and to determine the applicability of programmatic agreements to satisfy consultation under the ESA and NHPA. Those discussions will inform the Agency's forthcoming proposed directives implementing this final rule.

Comment: Multiple commenters expressed concern that the proposed rule did not address coordination between the Forest Service and BLM to develop a common process for approving operating plans and agreements for powerline facilities and vegetation management, maintenance, and inspections conducted under those operating plans and agreements.

Response: Consistent with section 512(c)(4)(A)(iv) of FLPMA, paragraph (h)(6)(i) of the final rule states that the procedures developed jointly with BLM will provide that a proposed operating plan or agreement must be approved, to the maximum extent practicable, within 120 days from the date the proposed operating plan or agreement was received by the authorized officer, with the understanding that such factors as the number of proposed operating plans and agreements under review by an

authorized officer and the number of powerline facilities covered under a single operating plan or agreement may affect the practicability of approving a proposed operating plan or agreement within 120 days from the date of receipt. Based on coordination with BLM as required by section 512(c)(4)(A)(iii) of FLPMA, paragraph (h)(6)(i) of the final rule also states that, to the maximum extent practicable, a proposed modification to an approved operating plan or agreement must be approved within 120 days from the date the proposed modification was received by the authorized officer.

The Department has determined that it would be more appropriate to enumerate other aspects of the process for approving operating plans and agreements for powerline facilities and vegetation management, maintenance, and inspections conducted under those operating plans and agreements in Forest Service directives, rather than in this final rule. The Forest Service will be publishing for public comment the proposed directives implementing this final rule. In addition, consistent with section 512(c)(4)(A) of FLPMA and paragraph (h)(6) of the final rule, the Forest Service is working with BLM to develop joint procedures for reviewing and approving proposed operating plans and agreements, which the Agency anticipates including in the proposed directives implementing this final rule.

The Department has determined that it would be more appropriate for operating plans and agreements to be in effect concurrently with their associated powerline authorization. Therefore, rather than providing for submission of a new proposed operating plan or agreement upon expiration of an existing operating plan or agreement before expiration of the corresponding powerline authorization, paragraph (h)(7) of the final rule provides that every 5 years from the approval date of an operating plan or

agreement, the owner or operator must review and, as necessary, update the operating plan or agreement to ensure consistency with changed conditions and submit it to the authorized officer for review and approval. Like the proposed rule, paragraph (h)(7) of the final rule also provides that upon expiration of a special use authorization for a powerline facility, the owner or operator must prepare a new proposed operating plan or agreement, either solely or in consultation with the authorized officer, and submit it to the authorized officer for review and approval.

Comment: Multiple commenters asked how the Agency would determine which existing operating plans are consistent with the requirements in section 512 of FLPMA and who would make that determination.

Response: Forest Service authorized officers have delegated authority to manage NFS lands under their jurisdiction in accordance with applicable statutes, regulations, and Forest Service directives, including the authority to determine whether existing operating plans are consistent with section 512, as implemented by §251.56(h) of this final rule. The Department agrees that the proposed rule did not specifically address the authorized officer's authority to make this determination. Accordingly, the Department has revised paragraph (h)(3) of the final rule to provide that the authorized officer, in consultation with the owner or operator of a powerline facility, will determine whether an existing operating plan for a powerline facility is consistent with §251.56(h) and will notify the owner or operator of that determination, and that within 18 months of the date of notification that an existing operating plan is inconsistent with 36 CFR 251.56(h), the owner or operator must modify the existing operating plan to be consistent with 36 CFR 251.56(h) and submit it to the authorized officer for review and approval. The

Department has further revised paragraph (h)(3) of the final rule to provide, pursuant to the authority in 43 U.S.C. 1761(b)(1), that if an owner or operator does not have an operating plan, within 3 years from the effective date of the final rule, the owner or operator must submit to the authorized officer a proposed operating plan consistent with 36 CFR 251.56(h) for review and approval.

Comment: Multiple commenters recommended that the Agency specify which reliability standards could be used by electric utilities to develop operating plans and agreements for a powerline facility.

Response: The Department has determined that it would be more appropriate to specify applicable reliability standards for powerline facility operating plans and agreements in forthcoming proposed Forest Service directives, which will be published for public comment.

Comment: Multiple commenters expressed concern about a lack of clarity regarding the difference between liability standards for powerline facility operating plans and liability standards for powerline facility operating agreements. One commenter stated that it was unfair to have a lower liability standard for one segment of the electric utility industry. Other commenters stated that strict liability should not apply to vegetation management for powerline facilities to give utilities a greater incentive to complete the work.

Response: The Department believes that the proposed and final rules clearly iterate the difference between liability standards for powerline facility operating plans and liability standards for powerline facility operating agreements. Consistent with section 512(g)(1), paragraph (h)(9)(i) of the final rule provides for both powerline facility

operating plans and powerline facility operating agreements that strict liability in tort may not be imposed on an owner or operator of a powerline facility for injury or damages resulting from the authorized officer'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. These conditions on strict liability in tort do not apply to any other type of special use besides powerline facilities.

In addition, consistent with section 512(g)(2), paragraph (h)(9)(ii) of the final rule provides that for 10 years from the date of enactment of section 512 on March 23, 2018, strict liability in tort for injury or damages resulting from activities conducted by an owner or operator under an approved powerline facility operating agreement may not exceed \$500,000 per incident. This limitation on strict liability in tort applies only to powerline facility operating agreements. It does not apply to powerline facility operating plans or to operating plans for any other types of special uses.

Section 504(h)(2) of FLPMA (43 U.S.C. 1764(h)(2)), which is codified in the Forest Service's regulations at 36 CFR 251.56(d)(2), provides that any regulation imposing strict liability in tort must include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented.

Other than the requirement for a cap on strict liability in tort in section 504(h)(2), the conditions on strict liability in tort in section 512(g)(1) for operating plans and agreements, and the limitation in section 512(g)(2) on strict liability in tort for agreements, Title V of FLPMA imposes no restrictions on strict liability in tort under a special use authorization for a powerline facility, including for vegetation management on NFS lands within the linear boundary of the authorization and on abutting NFS lands

to remove or prune hazard trees as defined in the final rule.

Comment: Multiple commenters requested that additional terms be defined and that the term “non-emergency vegetation management” be removed to reduce confusion in describing “routine vegetation management.”

Response: The Department agrees that it would be helpful to add definitions to the final rule, consistent with Agency and utility industry practice and based on comments received on the proposed rule, for the following key terms of art in the context of powerline facility maintenance and vegetation management: “emergency maintenance,” “non-routine maintenance,” and “routine maintenance”; “emergency vegetation management” and “non-emergency (routine) vegetation management”; “minimum vegetation clearance distance”; “maximum operating sag”; and “powerline facility.”

For simplicity, the Department has changed the term “electric transmission or distribution facility” to “powerline facility,” which is defined as “one or more electric distribution or transmission lines authorized by a special use authorization, and all appurtenances to those lines supporting conductors of one or more electric circuits of any voltage for the transmission of electric energy, overhead ground wires, and communications equipment for communications uses that solely support operation and maintenance of the electric distribution or transmission lines and is not leased to other parties for communications uses that serve other purposes.” If an owner or operator leases space or communications equipment to other parties for purposes other than operation and maintenance of a powerline facility, a separate communications use authorization is required per 36 CFR 261.10(a) and Forest Service Handbook 2709.11, Chapter 90.

The Department has retained the term “non-emergency vegetation management” to clarify that it includes all vegetation management that is not encompassed by the term “emergency vegetation management.” However, because the utility industry typically uses the term “routine vegetation management,” the Department has added the word “routine” after the phrase “non-emergency” to this term and uses the term “routine vegetation management” elsewhere in the rule to refer to “non-emergency vegetation management.”

In addition, the Department has clarified that the definition of “hazard tree” includes brush, shrubs, and other plants besides trees, since these other types of vegetation may also pose a risk to a powerline facility. The Department has also revised the definition for “linear right-of-way” to explain that the linear boundary of a right-of-way is delineated by its legal description. The revised definition clarifies what is meant by vegetation management on NFS lands inside the linear boundary of a special use authorization for a powerline and on abutting NFS lands to remove or prune hazard trees, for purposes of section 512 of FLPMA.

Comment: Multiple commenters expressed concern that the proposed regulation would require owners and operators to get additional written approval for powerline facility maintenance and vegetation management covered by an approved operating plan or agreement.

Response: To clarify written approval requirements, paragraph (h)(5)(vi) of the final rule requires operating plans and agreements to address the types of activities that the owner or operator will be allowed to conduct upon approval of the operating plan or agreement by the authorized officer without additional prior written approval under

existing Forest Service regulations at 36 CFR 251.61, including routine vegetation management and routine maintenance, and those activities that will require additional prior written approval from the authorized officer under 36 CFR 251.61, including but not limited to non-routine maintenance and construction of roads and trails in support of a powerline facility.

In addition, consistent with section 512(f)(3) of FLPMA, paragraph (h)(5)(viii) in the final rule provides that routine vegetation management must have prior written approval from the authorized officer, unless all 3 of the following conditions are met: (1) the owner or operator has submitted a request for approval to the authorized officer in accordance with the specified timeframe in the approved operating plan or agreement; (2) the proposed vegetation management is in accordance with the approved operating plan or agreement; and (3) the authorized officer has failed to respond to the request in accordance with the specified timeframe in the approved operating plan or agreement. Further, while paragraph (h)(5)(viii) of the final rule provides that emergency vegetation management does not require prior written approval from the authorized officer, the owner or operator must notify the authorized officer in writing of the location and quantity of the emergency vegetation management within 24 hours of completion.

Comment: Multiple commenters expressed concern that the proposed regulation did not specify who would establish the applicable minimum clearance distance between vegetation and powerline facilities. These commenters stated that the applicable minimum vegetation clearance distance (MVCD) should be considered and that it should be up to the utilities to determine the applicable MVCD.

Response: The definition for “hazard tree” in section 512 and 36 CFR 251.51 of

the final rule states that a hazard tree must be designated by a certified or licensed arborist or forester under the supervision of the Forest Service or the owner or operator. Section 512(c)(2) provides that owners and operators subject to mandatory reliability standards established by the Electric Reliability Organization (ERO) may use those standards as part of their operating plan or agreement. The Energy Policy Act of 2005 created the ERO, an independent, self-regulating entity that enforces mandatory electric reliability rules on all users, owners, and operators of the nation's electric transmission system. The North American Electric Reliability Corporation (NERC) is the ERO that develops and enforces electric generation and transmission reliability standards for North America.

NERC reliability standards generally establish the reliability requirements for planning and operating the North American electric generation and transmission system. The current NERC reliability standard, FAC-003-4, requires electric utilities to conduct vegetation management to avoid encroachment of vegetation into the minimum vegetation clearance distance (MVCD). For example, vegetation outside the linear boundary of a special use authorization for a powerline facility may fall, sway, or grow into the MVCD and therefore may have to be removed under NERC reliability standard FAC-003-4 as part of vegetation management conducted under that authorization. Thus, the MVCD helps determine the location of hazard trees for purposes of section 512 of FLPMA and vegetation management under an operating plan or agreement for a powerline facility.

The applicable MVCD under NERC reliability standard FAC-003-4 is determined based on the voltage and height of a powerline facility and ranges from 1 to 18 feet. The

MVCD gives utilities a uniform, objective standard for determining whether vegetation poses an imminent threat to their powerlines and therefore constitutes a hazard that is likely to cause substantial damage to the powerlines or disrupt powerline service. Incorporating MVCD, an industry-wide standard, into operating plans and agreements and powerline authorizations will provide consistency in administration of authorizations for powerline facilities on NFS lands.

Accordingly, in the definition for “hazard tree,” the Department has added a reference to the MVCD to clarify that the applicable MVCD may exceed the 10-foot parameter specified in section 512. In addition, the Department has added a definition to the final rule, consistent with Agency and utility industry practice and based on comments received on the proposed rule, for “minimum vegetation clearance distance” and a definition for “maximum operating sag,” a term included in the definition for “minimum vegetation clearance distance.” The applicable MVCD will be specified in the special use authorization for a powerline facility and associated approved operating plan or agreement. Moreover, consistent with NERC reliability standard FAC-003-4, the Department has added language to the definition of a hazard tree to clarify that it may include vegetation in a position that, under geographical or atmospheric conditions, could cause the vegetation to fall, sway, or grow into a powerline facility before the next routine vegetation management cycle.

These definitions make clear, consistent with section 512, that vegetation management conducted on NFS lands inside the linear boundary of a special use authorization for a powerline facility and on abutting NFS lands to prune or remove hazard trees, as provided for in these definitions, is covered by the operating plan or

agreement for the powerline facility authorization and is therefore subject to the liability standards in that authorization.

Regulatory Certifications

Executive Order 12866

Executive Order (EO) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this final rule is not significant.

Executive Order 13771

The final rule has been reviewed in accordance with EO 13771 on reducing regulation and controlling regulatory costs and has been designated as an “other action” for purposes of the EO.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

This final rule will establish procedures for the development and approval of operating plans and agreements for vegetation management and powerline facility maintenance on NFS lands within the linear boundary of a right-of-way for a powerline facility and on abutting NFS lands to remove or prune hazard trees as defined in the final rule. Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment or environmental impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Department has concluded that this final rule falls within

this category of actions and that no extraordinary circumstances exist which would require preparation of an environment assessment or environmental impact statement.

Regulatory Flexibility Act Analysis

The Department has considered this final rule under the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This final rule will not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The final rule will not impose recordkeeping requirements on small entities; will not affect their competitive position in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Forest Service has determined that this final rule will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Department has considered this final rule under the requirements of EO 13132, *Federalism*, and has determined that the final rule conforms with the Federalism principles set out in the EO; will not impose any compliance costs on the states; and will not have substantial direct effects on the states, the relationship between the federal government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further assessment of Federalism implications is necessary.

Consultation and Coordination with Indian Tribal Governments

The Department has determined that national tribal consultation is not necessary for this final rule. This final rule, which would implement statutory requirements governing operating plans and agreements for special use authorizations for powerline

facilities on NFS lands, is programmatic and will not have any direct effects on tribes. Tribal consultation will occur as appropriate in connection with specific applications for powerline facility rights-of-way on NFS lands.

No Takings Implications

The Department has analyzed this final rule in accordance with the principles and criteria in EO 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*. The Department has determined that the final rule will not pose the risk of a taking of private property.

Controlling Paperwork Burdens on the Public

This final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 U.S.C. 1320 that are 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 do not apply.

Energy Effects

The Department has reviewed this final rule under EO 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Department has determined that this final rule does not constitute a significant energy action as defined in the EO.

Civil Justice Reform

The Department has reviewed this final rule under EO 12988, *Civil Justice Reform*. Upon adoption of this final rule, (1) all state and local laws and regulations that conflict with the final rule or that would impede its full implementation will be

preempted; (2) no retroactive effect will be given to the final rule; 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), the Department has assessed the effects of this final rule on state, local, and tribal governments and the private sector. This final rule 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.

List of Subjects

Electric power, Mineral resources, National Forests, Rights-of-way, and Water resources.

Therefore, for the reasons set out in the preamble, the Department is amending part 251, subpart B, of title 36 of the Code of Federal Regulations as follows:

PART 251—LAND USES

Subpart B—Special Uses

1. Revise the authority citation for subpart B to read as follows:

Authority: 16 U.S.C. 460l-6a, 460l-6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761-1772.

2. Amend § 251.51 by

- a. Adding in alphabetical order the definitions of “emergency maintenance,” “emergency vegetation management,” and “hazard tree,”;

- b. Revising the definition of “linear right-of-way,”; and

c. Adding in alphabetical order the definitions of “maximum operating sage,” “minimum vegetation clearance distance,” “non-emergency (routine) vegetation management,” “non-routine maintenance,” “operating plan or agreement for a poweline facility,” “owner or operator,” “powerline facility,” and “routine maintenance”.

The additions and revision read as follows:

§ 251.51 Definitions.

* * * * *

Hazard tree—for purposes of vegetation management for a powerline facility, any tree, brush, shrub, other plant, or part thereof, hereinafter “vegetation” (whether located on National Forest System lands inside or outside the linear boundary of the special use authorization for the powerline facility), 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 to be:

(1) Dead; likely to die or fail before the next routine vegetation management cycle; or in a position that, under geographical or atmospheric conditions, could cause the vegetation to fall, sway, or grow into the powerline facility before the next routine vegetation management cycle; and

(2) Likely to cause substantial damage to the powerline facility; disrupt powerline facility service; come within 10 feet of the powerline facility; or come within the minimum vegetation clearance distance as determined in accordance with applicable reliability and safety standards and as identified in the special use authorization for the powerline facility and the associated approved operating plan or agreement.

* * * * *

Linear right-of-way—an authorized right-of-way for a linear facility, such as a road, trail, pipeline, electric transmission line, fence, water transmission facility, or fiber optic cable, whose linear boundary is delineated by its legal description.

Maintenance.(1) *Emergency maintenance*—immediate repair or replacement of any component of a powerline facility that is necessary to prevent imminent loss, or to redress the loss, of electric service due to equipment failure in accordance with applicable reliability and safety standards and as identified in an approved operating plan or agreement.

(2) *Non-routine maintenance*—realigning, upgrading, rebuilding, or replacing an entire powerline facility or any segment thereof, including reconductoring, as identified in an approved operating plan or agreement.

(3) *Routine maintenance*—repair or replacement of any component of a powerline facility due to ordinary wear and tear, such as repair of broken strands of conductors and overhead ground wire; replacement of hardware (e.g., insulator assembly) and accessories; maintenance of counterpoise, vibration dampers, and grading rings; scheduled replacement of decayed and deteriorated wood poles; and aerial or ground patrols to perform observations, conduct inspections, correct problems, and document conditions to provide for operation in accordance with applicable reliability and safety standards and as identified in an approved operating plan or agreement.

* * * * *

Maximum operating sag—The theoretical position of a powerline facility conductor (wire) when operating at 100 degrees Celsius, which must be accounted for when determining minimum vegetation clearance distance.

Minimum vegetation clearance distance—a calculated minimum distance stated in feet or meters measured from a powerline facility conductor (wire) at maximum operating sag to vegetation on National Forest System lands within the linear boundary of a special use authorization for a powerline facility and on abutting National Forest System lands to remove or prune hazard trees, which the owner or operator uses to determine whether vegetation poses a system reliability hazard to the powerline facility.

* * * * *

Operating plan or agreement for a powerline facility (hereinafter “operating plan or agreement”)—a plan or an agreement prepared by the owner or operator of a powerline facility, approved by the authorized officer, and incorporated by reference into the corresponding special use authorization that provides for long-term, cost-effective, efficient, and timely inspection, operation, maintenance, and vegetation management of the powerline facility on National Forest System lands within the linear boundary of the authorization for the powerline facility and on abutting National Forest System lands to remove or prune hazard trees, to enhance electric reliability, promote public safety, and avoid fire hazards.

* * * * *

Owner or operator—for purposes of a powerline facility, the owner or operator of the powerline facility or a contractor or other agent engaged by the owner or operator of the powerline facility.

* * * * *

Powerline facility—one or more electric distribution or transmission lines authorized by a special use authorization, and all appurtenances to those lines supporting

conductors of one or more electric circuits of any voltage for the transmission of electric energy, overhead ground wires, and communications equipment for communications uses that solely support operation and maintenance of the electric distribution or transmission lines and is not leased to other parties for communications uses that serve other purposes.

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Vegetation management. (1) *Emergency vegetation management*—unplanned pruning or removal of vegetation on National Forest System lands within the linear boundary of a special use authorization for a powerline facility and unplanned pruning or removal of hazard trees on abutting National Forest System lands that have contacted or present an imminent danger of contacting the powerline facility to avoid the disruption of electric service or to eliminate an immediate fire or safety hazard.

(2) *Non-emergency (routine) vegetation management*—planned actions as described in an operating plan or agreement periodically taken to remove vegetation, in whole or in part, on National Forest System lands within the linear boundary of a special use authorization for a powerline facility and on abutting National Forest System lands to remove or prune hazard trees to ensure normal powerline facility operations and to prevent wildfire in accordance with applicable reliability and safety standards and as identified in an approved operating plan or agreement.

3. Amend § 251.56 by adding paragraph (h), to read as follows:

§ 251.56 Terms and conditions.

* * * * *

(h) *Operating plans and agreements.* An operating plan or agreement consistent with this paragraph (h) is required for new and reauthorized powerline facilities on

National Forest System lands.

(1) *Use of operating plans.* Operating plans, rather than agreements, are required for powerline facilities that are subject to the mandatory reliability standards established by the Electric Reliability Organization and that sold more than 1,000,000 megawatt hours of electric energy for purposes other than resale during each of the 3 calendar years immediately preceding March 23, 2018.

(2) *Use of operating agreements.* Powerline facilities that are not subject to the mandatory reliability standards established by the Electric Reliability Organization or that sold less than or equal to 1,000,000 megawatt hours of electric energy for purposes other than resale during each of the 3 calendar years immediately preceding March 23, 2018, may be subject to an agreement, instead of an operating plan. Powerline facilities that are not subject to an agreement must be subject to an operating plan.

(3) *Existing operating plans and lack of an operating plan.* The authorized officer shall determine, in consultation with the owner or operator of a powerline facility, whether the existing operating plan for that powerline facility is consistent with this paragraph (h) and shall notify the owner or operator of that determination. Within 18 months of the date of notification that the existing operating plan is inconsistent with this paragraph (h), the owner or operator shall modify the existing operating plan to be consistent with this paragraph (h) and shall submit it to the authorized officer for review and approval. Existing operating plans that are consistent with this paragraph (h) do not have to be submitted for reapproval by the authorized officer. If an owner or operator does not have an operating plan, within 3 years from **[insert date 30 days after date of publication in the FEDERAL REGISTER]**, the owner or operator shall submit to the

authorized officer a proposed operating plan consistent with this paragraph (h) for review and approval.

(4) *Development of proposed operating plans and agreements.* Owners and operators may develop a proposed operating plan or agreement on their own or in consultation with the authorized officer.

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

(i) Identify the powerline facility covered by the operating plan or agreement (hereinafter “covered line”);

(ii) Consider preexisting operating plans and agreements for the covered line;

(iii) Address coordination between the owner or operator and the Forest Service and specify their points of contact;

(iv) Describe the vegetation management, inspection, and operation and maintenance methods that may be used to comply with all applicable law, including fire safety requirements and reliability standards established by the Electric Reliability Organization (owners and operators subject to mandatory reliability standards established by the Electric Reliability Organization or superseding standards may use those standards as part of their operating plan); the applicable land management plan; environmental compliance; resource protection; fire control; routine, non-routine, and emergency maintenance of the covered line; and road and trail construction, reconstruction, and maintenance in support of the covered line;

(v) Identify best management practices for vegetation management; the applicable minimum vegetation clearance distance; procedures for designating, marking, and

removing or pruning hazard trees and other vegetation; and road and trail standards and best management practices;

(vi) Address the types of activities that shall be allowed by the owner or operator upon approval of the operating plan or agreement by the authorized officer without additional prior written approval as a new, changed, or additional use or area under 36 CFR 251.61, including routine vegetation management and routine maintenance, and those activities that shall require additional prior written approval from the authorized officer as a new, changed, or additional use or area under 36 CFR 251.61, including but not limited to non-routine maintenance and construction of roads and trails in support of the covered line;

(vii) Specify timeframes for:

(A) The owner or operator to notify the authorized officer of routine, non-routine, and emergency maintenance of the covered line and routine and emergency vegetation management for the covered line;

(B) The owner or operator to request approval from the authorized officer of non-routine maintenance of and routine vegetation management for the covered line; and

(C) The authorized officer to respond to a request by the owner or operator for approval of non-routine maintenance of and routine vegetation management for the covered line;

(viii) Include the following procedures with regard to whether authorized officer approval is required for vegetation management:

(A) *Routine vegetation management.* Routine vegetation management must have prior written approval from the authorized officer, unless all 3 of the following conditions

are met:

(1) The owner or operator has submitted a request for approval to the authorized officer in accordance with the specified timeframe in the approved operating plan or agreement;

(2) The proposed vegetation management is in accordance with the approved operating plan or agreement; and

(3) The authorized officer has failed to respond to the request in accordance with the specified timeframe in the approved operating plan or agreement.

(B) *Emergency vegetation management.* Emergency vegetation management does not require prior written approval from the authorized officer. The owner or operator shall notify the authorized officer in writing of the location and quantity of the emergency vegetation management within 24 hours of completion;

(ix) Include the following procedures for modification of an approved operating plan or agreement:

(A) The authorized officer shall give the owner or operator of the covered line prior notice of any changed conditions that warrant a modification of the approved operating plan or agreement;

(B) The authorized officer shall give the owner or operator an opportunity to submit a proposed modification of the approved operating plan or agreement, consistent with the procedures described in paragraph (h)(6) of this section, to address the changed conditions;

(C) The authorized officer shall consider the proposed modification consistent with the procedures described in paragraph (h)(6) of this section; and

(D) The owner or operator may continue to implement the approved operating plan or agreement to the extent it does not directly and adversely affect the conditions prompting the modification; and

(x) For agreements only, reflect the relative financial resources of the owner or operator of the covered line compared to other owners or operators of a powerline facility.

(6) *Review and approval of proposed operating plans and agreements.* Proposed operating plans and agreements shall be submitted to the authorized officer for review and approval in writing before they are implemented. Proposed operating plans and agreements shall be reviewed and approved in accordance with procedures developed jointly by the Forest Service and the United States Department of the Interior, Bureau of Land Management, which shall be consistent with applicable law. These procedures shall:

(i) Provide that a proposed operating plan or agreement or proposed modification to an approved operating plan or agreement shall be approved, to the maximum extent practicable, within 120 days from the date the proposed operating plan or agreement or proposed modification was received by the authorized officer, with the understanding that such factors as the number of proposed operating plans and agreements under review by an authorized officer and the number of powerline facilities covered under a single operating plan or agreement may affect the practicability of approving a proposed operating plan or agreement within 120 days from the date of receipt; and

(ii) Specify a timeframe for submission of applicable Agency comments on a proposed operating plan or agreement

(7) *Review and expiration of approved operating plans and agreements.* Every 5 years from the approval date of an operating plan or agreement, the owner or operator shall review and, as necessary, update the operating plan or agreement to ensure consistency with changed conditions and shall submit it to the authorized officer for review and approval in accordance with the procedures described in paragraph (h)(6) of this section. Upon expiration of a special use authorization for a powerline facility the owner or operator must prepare a new proposed operating plan or agreement, either solely or in consultation with the authorized officer, and submit it to the authorized officer for review and approval in accordance with the procedures described in paragraph (h)(6) of this section.

(8) *Reporting of requests and responses to requests for routine vegetation management.* The Forest Service shall annually report on its website requests for approval of routine vegetation management pursuant to paragraph (h)(5)(viii)(A) of this section and responses to those requests.

(9) *Strict Liability.* (i) Notwithstanding paragraph (d)(2) of this section, strict liability in tort may not be imposed on an owner or operator for injury or damages resulting from the authorized officer'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.

(ii) Notwithstanding paragraph (d)(2) of this section, for 10 years from March 23, 2018, strict liability in tort for injury or damages resulting from activities conducted by an owner or operator under an approved agreement may not exceed \$500,000 per incident.

(10) *Forest Service directives.* To enhance the reliability of the electric grid and to reduce the threat of wildfire damage to, and wildfire caused by vegetation-related conditions within or on, powerline facility rights-of-way and by hazard trees on abutting National Forest System lands, the Forest Service shall issue and periodically update directives in its directive system (36 CFR 200.4) to ensure that provisions are appropriately developed and implemented for powerline facility vegetation management, powerline facility inspection, and operation and maintenance of powerline facility rights-of-way. The directives shall:

(i) Be developed in consultation with owners;

(ii) Be compatible with mandatory reliability standards established by the Electric Reliability Organization;

(iii) Consider all applicable law, including fire safety and electrical system reliability requirements, such as reliability standards established by the Electric Reliability Organization;

(iv) Consider the 2016 Memorandum of Understanding on Vegetation Management for Powerline Rights-of-Way Among the Edison Electric Institute, Utility Arborist Association, the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, the Forest Service, and the U.S. Environmental Protection Agency, and any successor memorandum of understanding;

(v) Seek to minimize the need for case-by-case approvals for routine vegetation management (including hazard tree removal), powerline facility inspection, and operation and maintenance of powerline facilities; and

(vi) Provide for prompt and timely review of requests to conduct routine

vegetation management.

James E. Hubbard

Under Secretary

Natural Resources and Environment

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