

# Report for Congress

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## **Wildfire Protection: Legislation in the 107<sup>th</sup> Congress and Issues in the 108<sup>th</sup> Congress**

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# Wildfire Protection: Legislation in the 107<sup>th</sup> Congress and Issues in the 108<sup>th</sup> Congress

## Summary

The 2000 and 2002 fire seasons were, by most standards, among the worst in the past 50 years. Many argue that the threat of severe wildfires has grown, because of unnaturally high fuel loads (*e.g.*, dense undergrowth and dead trees), raising concerns about damage to property and homes in the “wildland-urban interface” (WUI) — homes in or near forests. Debates about fire control and protection, including funding and fuel treatments (*e.g.*, thinning and prescribed burning), have focused on national forests and other federal lands, but nonfederal lands are also at risk.

Federal wildfire management funding rose dramatically after the severe 2000 fire season. In September 2000, President Clinton proposed a new National Fire Plan, requesting \$1.8 billion to supplement the \$1.1 billion originally requested for FY2001. Congress largely enacted this proposal and funding request, and the expanded wildfire management programs (excluding the supplemental firefighting money) have generally been sustained. In the FY2003 Interior Appropriations bill (H.R. 5093), the House added, and the Senate debated adding, money for firefighting in the summer of 2002; this legislation was not enacted.

Reducing fuel loads has been proposed for fire protection. Several tools exist — prescribed burning, salvage and other timber cutting, and thinning. Stewardship (goods-for-services) contracting has been suggested as a way to fund additional fuel reduction. Proponents of fuel reduction have expressed frustration with project delays from environmental analyses of, and public participation in, agency decisions (primarily under the National Environmental Policy Act, NEPA) and from administrative appeals and judicial challenges of decisions. Critics, however, are concerned that hasty action will allow environmentally damaging timber harvesting, without adequate environmental review and public oversight.

On August 22, 2002, President Bush proposed the Healthy Forests Initiative, to improve fire protection through fuel reduction. Related bills were introduced in the 107<sup>th</sup> Congress; however, none was enacted. Several would have eliminated or reduced NEPA analysis of environmental impacts, broadly or within prescribed conditions. Some measures proposed eliminating, reducing, or modifying public involvement in agency decisions. Many would have exempted fuel reduction from administrative reviews, and two sought to repeal the statute establishing the Forest Service administrative appeals process. Several would have prohibited, restricted, or altered judicial review for fuel reduction projects. However, many also would have required a new collaborative process for decisions on fuel reduction. Most proposals would have established priorities for action, typically emphasizing the WUI, municipal watersheds, and areas with insect and disease infestations and blown-down trees. Some of the bills sought to limit the acreage treated under the newly-established procedures, to exclude specific classes of lands, and/or to restrict road construction. Two would have authorized stewardship goods-for-services contracting. Most proposals would have established permanent programs. This report is an overview of wildfire protection activity in the 107<sup>th</sup> Congress, and is unlikely to be updated.

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# Wildfire Protection: Legislation in the 107<sup>th</sup> Congress and Issues in the 108<sup>th</sup> Congress

Wildfires and efforts to halt the damage they cause have been the focus of increased attention. The 2000 and 2002 fire seasons were, by most standards, among the worst in the past 50 years, and many argue that the threat of severe wildfires has grown because many forests have unnaturally high fuel loads (*e.g.*, dead trees and dense undergrowth) and an historically unnatural mix of plant species (*e.g.*, exotic invaders).<sup>1</sup> These higher threats have raised concerns about damages to homes that increasingly abut or are surrounded by forests — the “wildland-urban interface”, or WUI. The threats have led to debates over fire control and fire protection efforts, including questions about funding levels and fire protection treatments (*e.g.*, thinning and prescribed burning). Debates have focused on federal lands, especially the national forests, since federal lands are subject to congressional authority, but the threats are not limited to federal lands.

## Wildfire Management Funding

The severe 2000 fire season led President Clinton to propose, in September 2000, a new program of fire control, protection, and funding — the National Fire Plan. The President requested an additional \$1.8 billion to supplement the \$1.1 billion for FY2001 wildfire management requested before the fire season began. Much of the funding was to pay for FY2000 firefighting, but money was also increased for fuel treatment, burned area restoration, assistance to affected communities, and preparation for future fire seasons. Congress largely enacted this proposal in the Interior Appropriations Act for FY2001 (P.L. 106-291).

President Bush’s FY2003 budget request proposed continuing most of the wildfire management programs expanded under President Clinton. Table 1 shows annual fire management appropriations for FY1999–FY2003 for the major funding categories: preparedness (having equipment and personnel ready to fight fires); suppression (fighting ongoing fires); fuel reduction treatments; burned area restoration and rehabilitation; and other (fire research, facilities, state and local assistance for firefighting and economic recovery, etc.). The table includes funding for the USDA Forest Service (about two-thirds of the total) and for the Department of the Interior through the Bureau of Land Management (BLM). The FY2003 appropriations show the Administration’s request, the levels passed by the House in H.R. 5093, and the levels recommended by the Senate Appropriations Committee (S.Rept. 107-201).

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<sup>1</sup>See CRS Report RS20822, *Forest Ecosystem Health: An Overview*.

**Table 1. Federal Wildfire Management Appropriations,  
FY1999-FY2003**  
(in millions of dollars)

	Prepared- ness	Suppression	Fuel Reduction	Restore & Rehab.	Other <sup>a</sup>	Total
FY1999	527.7	443.8	98.8	5.5 <sup>b</sup>	26.9	1,102.7
FY2000	566.6	887.3	117.0	20.0	35.2	1,626.1
FY2001	917.9	1,097.1 <sup>c</sup>	400.1	246.5	235.9	2,887.5
FY2002	903.4	682.7	395.2	82.7	174.7	2,238.8
FY2003						
Request <sup>d</sup>	877.9	581.1	414.2	23.6	126.0	2,022.9
House	918.6	581.1	414.5	83.0	171.6	2,168.8
S. Rec.	877.9	581.1	414.8	23.6	134.2	2,023.5

<sup>a</sup> Includes BLM funding for the Joint Fire Sciences Program; excludes Forest Service funding of state and volunteer fire assistance under the State & Private Forestry branch.

<sup>b</sup> BLM burned area restoration and rehabilitation funding included in suppression for FY1999.

<sup>c</sup> Includes \$624.6 million for FY2000 firefighting and emergency burned area rehabilitation.

<sup>d</sup> The Administration's request is adjusted to exclude the costs of a proposal to shift some of the cost of federal health and retirement benefits.

In addition to FY2003 wildfire management funding, the House included \$700 million in H.R. 5093 for FY2002, to reimburse agencies for firefighting efforts during the severe 2002 fire season. After initially opposing supplemental fire funding, the Bush Administration requested an additional \$825 million in August 2002. This amount was offered in a Senate floor amendment by Sen. Byrd (No. 4480). An amendment to the Byrd amendment by Sen. Craig (No. 4518) on hazardous fuel reduction became a major focus of the floor debate, but the discussions and negotiations on a bipartisan substitute did not resolve the issue. Debate stalled on September 25, 2002, and the Senate enacted continuing funding resolutions, instead of the Interior (and many other) appropriations acts. These continuing resolutions did not provide supplemental FY2002 firefighting funds.

## Hazardous Fuel Treatment

The presence of unnaturally high fuel loads (*i.e.*, dense undergrowth and dead trees) in many forests has spurred interest in treatments to reduce those loads. It is widely presumed that lower hazardous fuel loads will reduce the extent, severity, and control costs of wildfires. Several tools exist for reducing fuel loads. Prescribed burning — setting fires under prescribed weather and fuel conditions — can be effective for converting small fuels (grasses, needles or leaves, twigs) to minerals and carbon dioxide and other gases, but prescribed fires produce large quantities of smoke and can be difficult to control. Salvage and other timber harvesting can reduce biomass in medium- and large-diameter trees, but the limbs and tree tops — the “slash” — left after logging increase fuel loads, at least until the slash has rotted

or been burned or removed; in addition, commercial sales may be ineffective for removing small-diameter and low quality trees. Thinning, especially precommercial thinning (cutting trees with little or no commercial value), may be effective at reducing medium- and small-diameter trees, but also leaves behind slash, and is usually quite expensive.

These and other tools and techniques are commonly used in combination to achieve the desired goals (lower fuel loads, better water quality, etc.). A single tool might be sufficient for a particular site, but the variety of forest conditions suggests a coordinated program of relevant tools and techniques. The need to combine tools and the high cost of many tools has led some observers to propose a different approach: trading goods (timber) for services (other activities in the same area). This approach has been called goods-for-services contracting, land management service contracting, stewardship contracting, end-results contracting, and other terms. These contracts are largely modified timber sales, where the agency requires timber purchasers to perform other, typically related services (*e.g.*, precommercial thinning), and in return pay less for the timber.<sup>2</sup> To date, however, this approach has only been authorized as pilot programs for the Forest Service.

Critics question the effectiveness of fuel treatment. Research has shown that treatments (including, but not limited to, reducing fuels) can protect individual structures.<sup>3</sup> Many anecdotes have reported that fuel reduction treatments have helped in controlling wildfires. However, research documenting the effectiveness of broad-scale fuel reduction treatments for reducing the extent, severity, and control costs of wildfires is generally lacking.<sup>4</sup>

Proponents of fuel reduction have expressed frustration with project delays resulting from analyses of the environmental effects of proposed projects, from public involvement in agency planning and decisionmaking, and from administrative and judicial challenges to agency decisions. The National Environmental Policy Act of 1969 (NEPA; P.L. 91-190, 42 U.S.C. §§4321-4347) requires federal agencies to assess the possible environmental effects of their actions and to involve the public in their decisions. The Endangered Species Act (ESA; P.L. 93-205, 16 U.S.C. §§1531-1540) requires federal agencies to consult with the U.S. Fish and Wildlife Service (or, in some cases, NOAA Fisheries) on actions that might jeopardize a listed endangered or threatened species or adversely modify the species' critical habitat. The agency and certain interest groups see these laws as causing lengthy delays for projects seen as critical to protecting wildlands and communities from wildfire. Opponents contend that these laws are designed to protect the environment, and are

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<sup>2</sup>See CRS Report RS20985, *Stewardship Contracting for the National Forests*.

<sup>3</sup>See J. Cohen and J. Saveland, "Structure Ignition Assessment Can Help Reduce Fire Damages in the W-UI," *Fire Management Notes*, v. 57, no. 4 (1997): 19-23.

<sup>4</sup> One study reported that certain fuel reduction treatments can moderate extreme wildfires in some ecosystems and can improve firefighter safety, but observed that fuel reduction treatments might not be effective in other ecosystems and in windy conditions. See Philip N. Omi and Erik J. Martinson, *Final Report: Effect of Fuels Treatment on Wildfire Severity*, unpublished report submitted to the Joint Fire Science Program Governing Board (Fort Collins, CO: Colorado State Univ., Western Forest Fire Research Center, March 25, 2002).

suspicious of Administration plans that could increase timber harvests for the industry and road construction into roadless areas while, they assert, reducing public input into decision-making.

Fuel treatment proponents also argue that administrative appeals of Forest Service fuel reduction projects add substantially to the delays.<sup>5</sup> Two separate studies examined administrative appeals of fuel reduction projects. The General Accounting Office (GAO) reported that Forest Service data showed 20 of 1,671 projects (1%) had been appealed.<sup>6</sup> In contrast, the Forest Service reported that 155 of 326 mechanical fuel reduction projects (48%) had been appealed.<sup>7</sup> One review by a forest advocacy group, however, reported that the Forest Service study contained unreliable and biased data.<sup>8</sup>

Some argue that fuel reduction is an emergency that warrants immediate action. More acres burned during the 2000 fire season than in any other year since 1960, and early severe fires in Arizona and Colorado made the 2002 fire season seem destined to be even worse. (The 2002 season moderated somewhat later in the summer, but still ranked 4<sup>th</sup> in acres burned since 1960.) In the 2002 fire season, fires caused extensive impacts with smoke and apparent threats to homes, but burned less than 1% of the wildlands in the interior West.<sup>9</sup> No data exist on the acres burned in the WUI, nor on the number or proportion of WUI homes burned or evacuated.

## Legislative Issues

Concerns over wildfire threats spawned numerous legislative proposals. Bills addressed various aspects of federal wildfire management: environmental considerations; public involvement and challenges to decisions; priorities for action; limitations on action; and other factors.

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<sup>5</sup>The Forest Service allows the public to request an internal agency review of its decisions, as required by §322 of the FY1993 Interior Appropriations Act (P.L. 102-381; 16 U.S.C. §1612 note).

<sup>6</sup>U.S. General Accounting Office, *Forest Service: Appeals and Litigation of Fuel Reduction Projects*, GAO-01-1114R (Washington, DC: Aug. 31, 2001).

<sup>7</sup>U.S. Dept. of Agriculture, Forest Service, *Factors Affecting Timely Mechanical Fuel Treatment Projects* (Washington, DC: July 2002). Note that mechanical fuel reduction is a subset of all fuel reduction practices.

<sup>8</sup>Jeffrey Morton and Laura McCarthy, *A Comparison of Two Government Reports on Factors Affecting Timely Fuel Treatment Decisions* (Santa Fe, NM: The Forest Trust, Sept. 3, 2002).

<sup>9</sup>As of November 15, a total of 7.11 million acres had burned in 2002, including 2.56 million in the eight interior western states (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming), according to the National Interagency Fire Center [<http://www.nifc.gov/fireinfo/nfnmap.html>] on January 16, 2003. These states contain nearly 470 million acres of wildlands (257 million acres of federal lands plus 212 million acres of non-federal forests and rangelands, according to the USDA Natural Resources Conservation Service, *Summary Report: 1997 National Resources Inventory* [Washington, DC: Dec. 2000], pp. 18-24). Thus, 0.55% of wildlands in these 8 states burned in wildfires in 2002.

**Environmental Considerations.** NEPA documentation and ESA consultation were the focus of wildfire protection legislation in the 107<sup>th</sup> Congress, although some bills contained additional ecological safeguards. Many bills would have required the completion of projects under a May, 2002 Forest Service plan, *A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment, 10-Year Comprehensive Strategy Implementation Plan*, often “notwithstanding” NEPA. In two proposals, this direction to complete projects would have been limited to “condition class 3” lands.<sup>10</sup> A few bills would have extended this approach broadly, to all proposed fuel treatment projects.

Two bills would specifically have allowed “categorical exclusions” (CEs) from NEPA documentation for projects on class 3 lands, generally in the WUI, except under “extraordinary circumstances.” Categorical exclusions can be used by the Forest Service for projects that are known to have minimal environmental impacts. However, some CEs have been controversial, and current guidance on CEs includes timber sales of less than 250 thousand board feet (250 mbf) or salvage sales of less than 1 million board feet (1 mmbf).<sup>11</sup> A court injunction currently prevents the agency’s use of these CEs for timber harvesting and thinning projects.<sup>12</sup> Forest Service policy had prevented CEs from being used for projects in the presence of extraordinary circumstances, such as in roadless areas or in endangered species habitat. However, in December 2001, the agency changed its policy to allow decision-makers to use CEs in extraordinary circumstances, if they determine that the proposed actions would not have a significant effect on the environment.

Two proposals would have directed the use of “alternative arrangements” for NEPA documentation. Alternative arrangements, under 40 CFR §1506.11, allow agencies to negotiate expedited NEPA procedures with the Council on Environmental Quality for emergencies. One would have directed such procedures for designated “emergency mitigation areas,” while the other would have authorized such procedures for actions that would shift class 3 or class 2 lands to class 1.

Finally, one bill would have authorized analysis of only one alternative, rather than the broad array required by NEPA. However, in cases where the alternative includes new road construction, the NEPA analysis would have been required to include at least one option with no road building (and thus essentially requiring a second alternative).

Fewer proposals addressed ESA processes. Four proposals would effectively have eliminated the required ESA consultations for projects that might jeopardize a

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<sup>10</sup>Condition classes 1, 2, and 3 refer to areas with low, moderate, or high (respectively) likelihood of significant ecological damage from wildfire, as identified in *Development of Coarse-Scale Spatial Data for Wildland Fire and Fuel Management*, Gen. Tech. Rept. RMRS-87 (Fort Collins, CO: USDA Forest Service, April 2002).

<sup>11</sup>U.S. Dept. of Agriculture, Forest Service, “Chapter 30: Categorical Exclusions from Documentation,” *FSH 1909.15 – Environmental Policy and Procedures Handbook* (Washington, DC).

<sup>12</sup>*Heartwood, Inc. v. United States Forest Service*, 73 F.Supp. 2d 962 (S.D. Ill. 1999), *aff’d* 230 F.3d 947 (7<sup>th</sup> Cir. 2000).



species or degrade critical habitat. However, one was limited to specific existing timber sale areas that have been the subject of litigation and a settlement agreement, and another would have prohibited timber harvesting in areas where “any threatened or endangered bird species is known to be nesting ....” In addition, one proposal would have required consultations to be completed within 75 days, and would have directed agency budget priorities to assure that the deadline was met. Two proposals would have directed the agencies to develop expedited consultation procedures.

One bill took a quite different tack. Fuel reduction projects would have been authorized in threatened or endangered species habitat, if the species had a recovery plan calling for frequent ground fires as part of the recovery, and if the projects would have reduced the threat of catastrophic crown fires.

Finally, a few bills would have directed the agencies to maintain “old and large” trees, although the language varied. One bill would have required retaining at least the 10 largest trees on each acre. Another would have required keeping old and large trees, and focusing projects on removing small-diameter trees and brush. A third would have directed the agencies to retain “an ecologically sufficient number of old and large trees appropriate for each ecosystem” and to emphasize “thinning from below” (*i.e.*, the removal of the smallest trees in the stands being thinned). Finally, one would have limited the cutting of “fire resistant, pre-fire-exclusion old and large trees ... so as to maintain as nearly as possible an ecologically optimum number of such trees ....”

**Public Involvement.** NEPA also requires public involvement in agency decision-making that affects the environment. Typically, agencies undertake “scoping” early in the process to understand public interests and identify possible alternative actions, then may get public comments on the draft alternatives in the environmental documents and adjust the proposed action in response to those comments. In addition, the Forest Service provides an opportunity for the public to request an internal review (known as an administrative appeal) of its final decisions, as required by §322 of the FY1993 Interior Appropriations Act (P.L. 102-381; 16 U.S.C. §1612 note). The public can also challenge the legality of most agency decisions in court.

Most legislative proposals to reduce fuels generally would have altered public involvement under NEPA. Proposals directing completion of fuel reduction projects under the May, 2002 *Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment, 10-Year Comprehensive Strategy Implementation Plan* generally would have halted the public involvement process, although public input may have been at or near completion already. Other proposals essentially would have eliminated NEPA public involvement, either by exempting fuel reduction projects from NEPA or by authorizing categorical exclusions for projects, although all of the latter proposals specifically would have directed scoping (and thus presumably public input) on fuel reduction projects.

As noted above, two proposals would have directed the use of “alternative arrangements” for NEPA documentation for emergency mitigation areas and for emergency circumstances, respectively. Alternative arrangements, under 40 CFR §1506.11, allow agencies to negotiate expedited NEPA procedures with the Council

on Environmental Quality for emergencies. Since procedures would have to be negotiated, the direction might have altered NEPA public involvement, and might have induced greater use of alternative arrangements, but the nature and extent of changes in public involvement are unclear. One proposal seems more explicit, as it would have established shorter time limits for filing and reviewing comments.

One bill would have altered NEPA public involvement in another way. The bill sought to establish a new “pre-decisional” process to obtain public input earlier in the decision-making. Another proposal generally would have authorized the NEPA analysis to consider only one alternative for public comment, instead of an array of alternatives as required by law.

Many of the legislative proposals to reduce fuels would have made the projects not subject to administrative appeals. Some would have exempted fuel reduction projects from Forest Service regulations under §322 of the FY1993 Interior Appropriations Act. Others would have exempted such projects from all administrative appeals, without mentioning §322. Two proposals would have repealed §322 of the FY1993 Interior Appropriations Act, effectively eliminating the legal requirement for the Forest Service to provide such administrative reviews. (Note that §322 is also the source requiring public notice of agency decisions.) Finally, one bill would have established a new process to expedite administrative review of fuel reduction projects, to supplant the §322 process in this context.

Several bills, although exempting fuel reduction projects from administrative appeals, would have directed the agencies to establish a new collaborative process for decision-making. The new processes would have been required to be consistent with the Forest Service’s May 2002 *10-Year Implementation Plan*. In addition, one proposal would have allowed the agencies to use the collaborative process developed under the Secure Rural Schools and Community Self-Determination Act of 2000 (P.L. 106-393, 16 U.S.C. §500 note).

Finally, several proposals would have restricted or altered judicial review of fuel reduction projects. Some would have made decisions not subject to judicial review, while one would have made just the environmental analysis and public involvement processes not subject to such review. Several would have shortened the time allowed for filing lawsuits (to as little as 7 days); many of the same bills would have set deadlines for court rulings (to as little as 45 days). Some would have prohibited or restricted preliminary injunctions during court deliberations while others would have restricted agency action pending a court decision.

Standards for court rulings also would have been modified in some proposals. One would have set the sole standard as “arbitrary and capricious;” the more usual “arbitrary and capricious or otherwise not in accordance with applicable law” was contained in two proposals, although one would also have excluded several statutes (including NEPA and ESA) from “applicable law.” One bill would have directed courts to “consider the public interest in avoiding long-term harm” by taking action, and to “give deference to any agency finding” that avoiding long-term harm outweighs the short-term effects of action.

**Priorities for Action.** Two principal sets of priorities for fuel reduction activities were included in legislation. Three bills contained seven criteria, in order of priority: (1) within  $\frac{1}{4}$  mile of private lands with protective treatments; (2) fire hazard or insect-infested stands near private lands or communities; (3) densest insect infestations that could spread; (4) fire hazard or insect-infested stands near sites with high resource values; (5) fire hazard or insect-infested stands within “skidding distance” of existing roads; (6) concentrations of insect-infested trees; and (7) densest stands most susceptible to insects and near infested trees.

Five proposals included similarly-worded criteria: (1) the WUI; (2) municipal watersheds; and (3) areas affected by insects or diseases, containing windthrow (trees blown down), or susceptible to “reburn” (burned areas with sufficient fuel remaining to burn again). Another generally followed this set, but used areas proximate to municipal water supply systems (instead of municipal watersheds) and “at-risk” federal lands, defined as areas with windthrow or the existence or threat of large-scale disease or insect infestation; this proposal also included threatened and endangered species habitat as a priority, if the species recovery plan identified the importance of natural fire regimes and if action would provide protection from catastrophic wildfire. It should be noted that only one bill included a definition of the WUI. With no standards for WUI, there would effectively have been no guidance on which areas would have priority for action.

Two proposals contained other criteria for action. One would have directed tree removal projects in areas with high fuel loads and the possibility of harmful crown fires or with fire-killed or fire-damaged trees. The other would have directed designation of emergency mitigation areas that were affected by severe drought and had many dead or dying trees “because of disease, insect infestation, an invasive plant species, or other natural disaster.”

In addition, a few proposals would have required expenditure of at least 70% of funds for fuel reduction projects to be spent in the WUI or within  $\frac{1}{2}$  mile of communities or municipal watersheds.<sup>13</sup> Further, one proposal would have required 100% of funds to be spent on condition class 3 lands. Finally, two proposals would also have required 10% of funds be spent on projects that benefit small businesses located in “small, economically disadvantaged communities.” Other bills would not have established funding restrictions or priorities.

**Limitations on Actions.** Several proposals would have set limits on the acreage treated under the established procedures, but the acreage limits varied widely, from as little as 7,000 to more than 10 million acres. Two proposals specified areas excluded from fuel reduction projects under the established procedures: designated wilderness, wilderness study areas, and areas where vegetative removal was prohibited by law or proclamation in one; and designated wilderness, roadless areas recommended for wilderness, and areas where timber harvesting was prohibited by law in the other.

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<sup>13</sup>H.R. 5358 (Inslee; the Community Protection Against Wildfire Act of 2002) would have required that 85% of all National Fire Plan funds be spent in the WUI, as defined in the bill.

In addition, several proposals addressed road construction and roadless areas. Some would have directed that authorized activities would “not affect the determinations” of areas’ “wilderness capability, wilderness suitability, and/or roadless character.” Several proposals would have restricted new road construction — prohibiting all new roads, all new roads into inventoried roadless areas, or new permanent roads into roadless areas.

**Other Issues.** Two other issues were addressed in some of the proposals: goods-for-services contracting and the duration of the authorization. Two proposals would have authorized goods-for-services contracting in a manner similar to (but without reference to) the authorization for Forest Service pilot projects in §347 of the FY1999 Interior Appropriations Act (enacted as §101(e) of division A of P.L. 105-277; 16 U.S.C. §2104 note). Another would have extended the §347 pilot project authorization to an additional 19 Forest Service projects and to 26 Interior Department projects.

Regarding the duration of the authorization, with two exceptions the proposals would have established permanent programs. One exception would have authorized activities through FY2011, and the other would have authorized activities through FY2005.

## Legislative Proposals

The concerns over wildfire threats spawned numerous legislative proposals. The earliest proposals generally were briefer, with additional concerns included in the later proposals, especially after the President proposed his Healthy Forests Initiative on August 22, 2002. The following list identifies legislation introduced in the 107<sup>th</sup> Congress on wildfire protection, its principal sponsor, and the short title (if any).<sup>14</sup>

- H.R. 4775; Daschle. §706 of the Supplemental Appropriations Act for FY2002 (P.L. 107-206).
- H.R. 5214; Rehberg. The National Forest Fire Prevention Act.
- H.R. 5309; Shadegg. The Wildfire Prevention and Forest Health Protection Act of 2002.
- H.R. 5319; McInnis. The Healthy Forests Reform Act of 2002.
- H.R. 5319, as reported with an amendment in the nature of a substitute by the House Committee on Resources (H.Rept. 107-770, Part 1). The Healthy Forests and Wildfire Risk Reduction Act of 2002.
- H.R. 5341; C. Taylor. National Forest Fire Fuels Reduction Act.
- H.R. 5376; Combest, by request of the Administration (and hence also known as the Administration’s legislative proposal).
- S. 2811; Enzi. The Emergency Forests Rescue Act of 2002.
- S. 2920; Baucus.
- S.A. 4518; Craig. Emergency Hazardous Fuels Reduction Plan.
- S.A. 4685; Bingaman-Daschle.

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<sup>14</sup>Numerous other draft legislative proposals were circulated, particularly substitutes for the Craig Amendment (S.A. 4518), and one from Senators Wyden and Feinstein is available at [<http://wyden.senate.gov>].

The list excludes two wildfire-related bills which do not generally address wildfire protection on federal lands: S. 2670 (Kyl, the Wildfire Prevention Act of 2002) to establish fire and restoration research institutes; and H.R. 5358 (Inslee, the Community Protection Against Wildfire Act of 2002) to authorize grants for community and private land wildfire assistance.

Below is a bill-by-bill description of how the proposal addresses each issue. In addition, table 2 summarizes how each legislative proposal addresses the issues.

**H.R. 4775 (Daschle), §706 of the Supplemental Appropriations Act for FY2002 (P.L. 107-206).**

*NEPA Environmental Consideration and Public Involvement.* Directs completion of specified projects and projects in seven identified timber sale analysis areas, “notwithstanding” NEPA. Note that the projects and timber sale analysis areas are covered by an existing settlement agreement pursuant to litigation.

*ESA Consideration.* Not specified, but directs completion of specified projects and projects in specified areas, “notwithstanding any other provision of law....”

*Other Ecological Restrictions.* Directs activities to conform with the existing settlement agreement.

*Administrative Appeals.* Specified projects and projects in specified areas are not subject to §322 appeals.

*Judicial Review.* Specified projects and projects in specified areas are not subject to judicial review.

*Priorities for Action.* Identifies seven criteria in order of priority, with additional criteria for specified areas.

*Limitations on Action.* Limits action to the seven identified timber sale analysis areas, variously estimated at 7,000 to 70,000 acres. Requires action to be consistent with the settlement agreement.

*Stewardship Contracting.* Not authorized.

**H.R. 5214 (Rehberg), the National Forest Fire Prevention Act.**

*NEPA Environmental Consideration and Public Involvement.* Authorizes timber projects within timber sale analysis areas, “notwithstanding” NEPA.

*ESA Consideration.* Not specified, but authorizes timber projects within specified areas, “notwithstanding any other provision of law ....”

*Other Ecological Restrictions.* Directs that authorized actions “shall not affect the determination of any area’s wilderness capability, wilderness suitability, or roadless character.”

*Administrative Appeals.* Authorized projects are not subject to §322 appeals.

*Judicial Review.* Authorized projects are not subject to judicial review.

*Priorities for Action.* Identifies seven criteria in order of priority. (The seven are nearly identical to the criteria in H.R. 4775.)

*Limitations on Action.* Apparently limited to existing timber sale analysis areas.

*Stewardship Contracting.* Not authorized.

**Table 2. Federal Wildfire Management Legislative Proposals and Issues**

	NEPA	ESA	Ecological Restraints	Admin. Appeals	Judicial Review	Priorities	Acreage	Roads	Stew. Con.
H.R. 4775	complete projects	exempt		exempt	exempt	7 criteria	7,000–70,000	no effect	
H.R. 5214	exempt	exempt		exempt	exempt	7 criteria		no effect	
H.R. 5309	exempt	exempt		exempt	exempt	high fuel load areas			
H.R. 5319, introduced	alt. process; pre-decisional input	75 days for consultation		repealed	45 days for decision; no agency action	WUI, <i>et al.</i>			perm. author.
H.R. 5319, as reported	complete projects; one alternative	recovery plan	keep old & large trees	new process	60+ days for decision; no prelim. injunctions	WUI, <i>et al.</i> ; 70% in WUI	WUI + 2 million “at risk”	no roads in roadless	more proj.
H.R. 5341	exempt	exempt		exempt	45 days for decision; no agency action	7 criteria		no effect	
H.R. 5376	complete projects; collaboration	expedited consultation		repealed	360 days for decision; no prelim. injunctions; consider long-term v. short-term effects	WUI, <i>et al.</i>	10 million + class 3		perm. author.
S. 2811	alt. arrangements					emergency areas			
S. 2920	complete projects; CEs; collaboration		keep old & large trees; thin	exempt		WUI, <i>et al.</i>	3.75 million	no new roads	
S.A. 4518	complete projects; collaboration	expedited consultation	keep 10+ large trees	exempt	360 days for decision; no prelim. injunctions	WUI, <i>et al.</i>	10 million	no perm roads in roadless	
S.A. 4685	complete projects; CEs; collaboration		keep old & large trees; thin	exempt		WUI, <i>et al.</i> ; 70% within ½ mile	2.5 million	no roads in roadless	

**H.R. 5309 (Shadegg), the Wildfire Prevention and Forest Health Protection Act of 2002.**

*NEPA Environmental Consideration and Public Involvement.* Authorizes Forest Service Regional Foresters to exempt covered projects from NEPA documentation and public involvement.

*ESA Consideration.* Not specified, but authorizes Forest Service Regional Foresters to exempt covered projects “from any provision of law ...”

*Other Ecological Restrictions.* None specified.

*Administrative Appeals.* Exempts covered projects from §322 notice, comment, and appeals.

*Judicial Review.* Exempts covered projects from judicial review.

*Priorities for Action.* None specified.

*Limitations on Action.* Covered projects are limited to areas with high fuel loads and a significant threat of harmful crown fires, or with dead or fire-damaged trees.

*Stewardship Contracting.* Not authorized.

**H.R. 5319, as Introduced (McInnis), the Healthy Forests Reform Act of 2002.** Funding (more than \$7 billion) authorized for FY2004–FY2011.

*NEPA Environmental Consideration and Public Involvement.* Identifies wildfire threat as an emergency circumstance authorizing alternative NEPA arrangements under 40 CFR §1506.11. Directs the Council on Environmental Quality (CEQ) to establish an expedited NEPA process for each action certified by the Secretary concerned, and specifies time limits for the expedited process. Also establishes a new pre-decisional review process for all Forest Service activities.

*ESA Consideration.* Requires consultations to be completed within 75 days, and requires agencies to allocate resources to achieve this requirement.

*Other Ecological Restrictions.* None specified.

*Administrative Appeals.* Repeals §322.

*Judicial Review.* Requires challenges to be filed within 15 days, and a court decision within 45 days; prohibits implementation of action for 45 days.

*Priorities for Action.* Identifies four criteria for action: WUI; near municipal watersheds; areas afflicted or imminently threatened by disease or insect infestation; and areas with windthrow or at high risk of reburn.

*Limitations on Action.* None specified.

*Stewardship Contracting.* Authorizes a new, permanent program.

**H.R. 5319, as Reported, the Healthy Forests and Wildfire Risk Reduction Act of 2002.**

*NEPA Environmental Consideration and Public Involvement.* Authorizes NEPA analysis to include only one alternative (rather than the broad array required by NEPA), unless the alternative includes road construction; then at least one alternative must include no new roads.

*ESA Consideration.* No change in consultation. Excludes action in threatened or endangered species habitat unless the species recovery plan includes natural fire regimes for recovery and the project improves protection from catastrophic fire.

*Other Ecological Restrictions.* Limits removal of “fire resistant, pre-fire-exclusion old and large trees” to retain “an ecologically optimum number of such trees ...” Also directs emphasis on thinning from below.

*Administrative Appeals.* Establishes a new administrative appeals process to supplant §322 for covered projects.

*Judicial Review.* Requires challenges to be filed within 15 days, and a court decision within 60 days, although extensions are allowed. However, no temporary injunctions are allowed.

*Priorities for Action.* Identifies four criteria for action: WUI (70% of funding); lands where fire would affect municipal water supply systems; “at-risk” lands (defined as lands with windthrow or existing or threatened large-scale insect or disease infestation); and threatened or endangered species (T&E) habitat. Also includes a process for refining the definition of WUI.

*Limitations on Action.* Limits treatment acreage of at-risk lands and T&E habitat to 2 million acres annually. Covered projects are limited to condition class 3 and adjacent or intermingled condition class 2 lands. Prohibits covered projects in wilderness and wilderness study areas and areas where removing vegetation is restricted. Prohibits building new roads into roadless areas in covered projects.

*Stewardship Contracting.* Expands the number of Forest Service contracts authorized, and authorizes a limited number of stewardship contracts for Department of the Interior lands.

### **H.R. 5341 (C. Taylor), the National Forest Fire Fuels Reduction Act.**

In addition to these several issues, this proposal allows its provisions to be used for timber sales in preparation, allows the agency to use timber sale funds for projects, exempts “forest fire fuels reduction timber sales” from various contracting and procurement requirements, directs reforestation of harvested lands, authorizes sales where the costs are likely to exceed revenues, and directs that these sales not substitute for “planned non-forest fire fuels reduction timber sales.” The bill also contains a provision directing expeditious timber sales in northern spotted owl habitat “notwithstanding any other law ...”

*NEPA Environmental Consideration and Public Involvement.* Authorizes “forest fire fuel reduction timber sales” within timber sale analysis areas, “notwithstanding” NEPA.

*ESA Consideration.* Authorizes sales “notwithstanding” ESA, but prohibits cutting in timber sale units where T&E bird species is known to be nesting.

*Other Ecological Restrictions.* None specified.

*Administrative Appeals.* Exempts sales from administrative review.

*Judicial Review.* Directs projects to proceed “notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment ...” Requires challenges to be filed within 15 days, and a court decision within 45 days; prohibits awarding sales for 45 days.

*Priorities for Action.* Identifies seven criteria in order of priority. (The seven are nearly identical to the criteria in H.R. 4775.)

*Limitations on Action.* Prohibits sales in designated wilderness areas; roadless areas recommended for wilderness by the agencies; and areas where timber harvesting is prohibited by law. Directs that authorized actions “shall



not affect the determination of any area's wilderness capability, wilderness suitability, or roadless character.”

*Stewardship Contracting.* Not authorized.

**H.R. 5376 (Combest).** This is the Bush Administration's legislative proposal for its Healthy Forests Initiative.

*NEPA Environmental Consideration and Public Involvement.* Directs completing fuel reduction projects under the May, 2002 *Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment, 10-Year Comprehensive Strategy Implementation Plan* on condition class 3 areas. Directs a new collaborative process for selecting projects.

*ESA Consideration.* Directs expedited consultation procedures.

*Other Ecological Restrictions.* None specified.

*Administrative Appeals.* Exempts projects from administrative review and repeals §322.

*Judicial Review.* Requires challenges to be filed within 60 days, and a court decision within 360 days; prohibits temporary injunctions. Prohibits judicial review of processes established. Requires courts to consider the long-term effects of inaction and give deference to agency findings that “the public interest in avoiding the short-term effects of such action is outweighed by the public interest in avoiding long-term harm to such ecosystems.”

*Priorities for Action.* Identifies four criteria for action: WUI; municipal watersheds; areas affected by disease or insect activity or windthrow; or susceptible to catastrophic reburn. (The four are quite similar to the criteria in H.R. 5319 as introduced.)

*Limitations on Action.* Limits treatment to 10 million acres, plus additional condition class 3 lands.

*Stewardship Contracting.* Authorizes a new permanent program.

**S. 2811 (Enzi), the Emergency Forests Rescue Act of 2002.**

*NEPA Environmental Consideration and Public Involvement.* Directs that emergency mitigation areas are an emergency circumstance that warrants alternative NEPA arrangements from CEQ.

*ESA Consideration.* Not specified.

*Other Ecological Restrictions.* None specified.

*Administrative Appeals.* Exempts projects from §322.

*Judicial Review.* Not specified.

*Priorities for Action.* Emergency mitigation areas, defined as lands experiencing severe drought and with many trees “dead or dying because of disease, insect infestation, an invasive plant species, or other natural disaster.”

*Limitations on Action.* None specified.

*Stewardship Contracting.* Not authorized.

**S. 2920 (Baucus).**

*NEPA Environmental Consideration and Public Involvement.* Directs completing fuel reduction projects under the May, 2002 *Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment, 10-Year Comprehensive Strategy Implementation Plan*. Directs a new collaborative process for selecting projects. Authorizes categorical

exclusions from NEPA for projects on condition class 3 lands which remove no more than 250 thousand board feet of timber (or 1 million board feet of salvage timber), but requires scoping on all projects.

*ESA Consideration.* Not specified.

*Other Ecological Restrictions.* Directs retaining “old and large trees appropriate for each ecosystem type” and emphasizing removal of small diameter trees and brush.

*Administrative Appeals.* Exempts projects from §322.

*Judicial Review.* Not specified.

*Priorities for Action.* Identifies three criteria for action: WUI; municipal watersheds; or areas affected by disease or insect activity or windthrow. (The three are quite similar to the four criteria in H.R. 5319 as introduced.)

*Limitations on Action.* Limits treatment to 3.75 million acres. Prohibits new roads under these projects. Requires that at least 10% of funds be “spent on projects that benefit businesses that use hazardous fuels and that are located in small, economically disadvantaged communities.”

*Stewardship Contracting.* Not authorized.

#### **S.A. 4518 (Craig), the Emergency Hazardous Fuels Reduction Plan.**

*NEPA Environmental Consideration and Public Involvement.* Directs completing fuel reduction projects under the May, 2002 *Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment, 10-Year Comprehensive Strategy Implementation Plan* on condition class 3 areas, except in wilderness areas. Directs a new collaborative process for selecting projects.

*ESA Consideration.* Directs expedited consultation procedures.

*Other Ecological Restrictions.* Directs retention of “not less than 10 of the largest trees per acre in any treatment area ....”

*Administrative Appeals.* Exempts projects from administrative review.

*Judicial Review.* Requires challenges to be filed within 60 days, and a court decision within 360 days; prohibits temporary injunctions; and limits determination to whether project selection was arbitrary and capricious. Exempts new processes from judicial review.

*Priorities for Action.* Identifies four criteria for action: WUI; municipal watersheds; areas affected by disease or insect activity or windthrow; or susceptible to catastrophic reburn. (The four are identical to the criteria in H.R. 5376.)

*Limitations on Action.* Limits treatment to 10 million acres. Directs no new permanent roads in roadless areas.

*Stewardship Contracting.* Not authorized.

#### **S.A. 4685 (Bingaman-Daschle).**

*NEPA Environmental Consideration and Public Involvement.* Directs completing fuel reduction projects under the May, 2002 *Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment, 10-Year Comprehensive Strategy Implementation Plan* . Directs a new collaborative process for selecting projects. Projects are categorically excluded from NEPA if (1) within ½ mile of any community; or (2) in key municipal watersheds identified in forest plans where new road construction and timber sales are not allowed.

*ESA Consideration.* Not specified.

*Other Ecological Restrictions.* Directs retaining “an ecologically sufficient number of old and large trees appropriate for each ecosystem type,” and focusing on thinning from below.

*Administrative Appeals.* Exempts projects from §322.

*Judicial Review.* Not specified.

*Priorities for Action.* Identifies three criteria for action: WUI; municipal watersheds; and areas affected by disease, insect activity, windthrow, or subject to catastrophic reburn. (The three are quite similar to the four criteria in H.R. 5319 as introduced.) Also requires funds be spent only on condition class 3 lands, and that 70% be spent within ½ mile of any community or within key municipal watersheds.

*Limitations on Action.* Limits treatment to 2.5 million acres. Prohibits new roads in inventoried roadless areas. Also requires that at least 10% of funds be “spent on projects that benefit small businesses that uses [sic] hazardous fuels and are located in small, economically disadvantaged communities.”

*Stewardship Contracting.* Not authorized.

## Conclusion

The 2000 and 2002 fire seasons were among the worst in the past 50 years, burning millions of acres and hundreds of homes, and forcing evacuation of many communities. Many argue that the threat of severe wildfires has grown because many forests have unnaturally high fuel loads (*e.g.*, dead trees and dense undergrowth) and an historically unnatural mix of plant species (*e.g.*, exotic invaders). This has led to debates over fire control and fire protection efforts, including questions about funding levels and fire protection treatments (*e.g.*, thinning and prescribed burning). Numerous bills were introduced to facilitate fuel reduction treatments, generally by expediting environmental reviews, public involvement, and administrative and judicial challenges — or exempting fuel reduction from such practices — while establishing action priorities and limitations. Proponents argued that the threats, especially to homes in the wildland-urban interface (WUI), have become extreme, and that emergency action is needed to protect lives, property, and resources from catastrophic wildfires. Critics counter that the situation is less dangerous than is commonly portrayed, that the benefits of broad-scale fuel reduction (other than close to structures) are not well documented, and that expediting or eliminating environmental review and challenges to decisions can cause irreversible environmental damage.