

Amendment to FSH 2709.11, Chapter 50, Section 52.2

Final Clause B-39 Implementing Section 8630 of the 2018 Farm Bill

October 29, 2021

B-39. Vegetation Management Pilot Projects. Include clause B-39 entirety and without modification in all special use permits (using form FS-2700-4) for a vegetation management pilot project conducted under section 8630 of the Agriculture Improvement Act of 2018 (section 8630 of the 2018 Farm Bill) and FSM 2740, hereinafter “pilot project.”

Under the title of the form, after “AUTHORITY,” include the following: Section 8630 of the Agriculture Improvement Act of 2018, Pub. L. No. 115-343, 43 U.S.C. 1772 note.

In the Authority clause, clause I.A, include the following as the name of and citation for the authority: section 8630 of the Agriculture Improvement Act of 2018 (section 8630 of the 2018 Farm Bill), Pub. L. No. 115-343, 43 U.S.C. 1772 note.

In the Term clause, clause I.C, do not include a term that extends beyond October 1, 2023, when section 8630 of the 2018 Farm Bill expires.

If the Cutting, Disposal, and Planting of Vegetation clause, clause III.F, is included in form FS-2700-4, delete the first sentence, which reads: “This permit does not authorize the cutting of trees, brush, shrubs, and other plants (“vegetation”).”

Before including clause B-39 in form FS-2700-4, remove in their entirety the following existing standard clauses for non-federal entities on pages 4 through 7 of the form:

- Damage to United States Property, clause IV.F.
- Indemnification of the United States, clause IV.I.
- Strict Liability, clause IV.K.

Insert clause B-39 in its entirety and without modification as clause IV.F in FS-2700-4.

Re-designate existing Bonding clause, clause IV.J, as clause IV.I.

Re-designate the existing Insurance clause, clause IV.L, as clause IV.J. Include the bracketed phrase, “, including those arising from strict liability,” in paragraph 1 of the re-designated Insurance clause, clause IV.J.1.

Ensure that the permit area as reflected in the legal description does not include National Forest System lands covered by the special use authorization for the powerline facility or natural gas pipeline (i.e., is outside the linear right-of-way for the powerline facility or natural gas pipeline and does not include access roads and trails outside the linear right-of-way and, in the case of a powerline facility, does not include hazard trees outside the linear right-of-way).

In addition, ensure that the permit area as reflected in the legal description is marked on the ground to separate the permit area from the National Forest System lands covered by the special use authorization for the powerline facility or natural gas pipeline.

Before issuing the permit, reach agreement with the pilot project proponent on the maximum dollar amount for the holder to reimburse the Forest Service for fire suppression costs per clause IV.F.7(c) of the permit.

F. VEGETATION MANAGEMENT PILOT PROJECTS UNDER SECTION 8630 OF THE 2018 FARM BILL, HEREINAFTER “PILOT PROJECTS.”

1. Definitions. The following definitions apply to this permit:

(a) Access Road or Trail. For purposes of vegetation management for a powerline facility or natural gas pipeline, a road or trail constructed, operated, and maintained by the holder that is necessary to access a powerline facility or natural gas pipeline or its linear right-of-way.

(b) Conductor. Cable or wire that transmits electricity.

(c) Flashover. An electric discharge over or around the surface of an insulated conductor that may result in fire through the ignition of surrounding objects.

(d) Fuel. A combustible, wildland vegetative material, either living or dead.

(1) Activity Fuel. A fuel resulting from or altered by forestry practices such as timber harvesting or thinning, as opposed to a naturally created fuel.

(2) Ladder Fuel. A fuel that provides vertical continuity, thereby allowing a fire to spread relatively easily from surface fuels into the crowns of trees or shrubs, thus initiating and ensuring the continuation of movement of the fire through the crowns of trees independently of the fire on the ground.

(3) Shaded Fuel Break. A fuel break built in timbered areas where the trees are thinned and pruned to reduce their fire potential yet retain enough canopy to make a less favorable microclimate for surface fires.

(4) Surface Fuel. Loose vegetative litter on the ground typically consisting of fallen leaves or needles, twigs, bark, cones, and small branches that have not yet decayed enough to lose their identity and interspersed with or partially replaced by grasses, forbs, low and medium shrubs, tree seedlings, heavier branch wood, downed logs, and stumps.

(e) 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 right-of-way for the powerline facility), that has been designated, prior to failure, by a certified or licensed arborist, qualified vegetation management specialist, or forester under the supervision of the holder to be:

(1) Dead; likely to die or fail within the 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 MVCD 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.

(f) Linear Right-of-Way. An authorized right-of-way for a linear facility, such as a road, trail, pipeline, powerline facility, fence, water transmission facility, or fiber optic cable, whose linear boundary is delineated by its legal description (36 CFR 251.51).

(g) Maximum Operating Sag. The theoretical position of a conductor when operating at 100 degrees Celsius, which must be accounted for when determining the MVCD.

(h) Minimum Vegetation Clearance Distance (MVCD). A calculated minimum distance that is stated in feet or meters to prevent flashover between conductors and vegetation for various altitudes and operating voltages and that is measured from a conductor at maximum operating sag to vegetation on National Forest System lands within the linear right-of-way for a powerline facility and on National Forest System lands adjacent to either side of the linear right-of-way for a powerline facility for purposes of felling or pruning hazard trees, which the holder uses to determine whether vegetation poses a system reliability hazard to the powerline facility.

(i) National Forest System Lands. For purposes of this permit, lands within the National Forest System as defined in section 11(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1609(a)), other than a National Grassland or a land utilization project on land designated as a National Grassland and administered pursuant to sections 31, 32, and 33 of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1010, 1011, 1012).

(j) National Forest System Lands Covered by the Special Use Authorization for the Natural Gas Pipeline. For purposes of this permit, the linear right-of-way for the natural gas pipeline associated with a pilot project, which generally has a total width of no more than 50 feet, and access roads and trails outside that linear right-of-way (30 U.S.C. 185(d)).

(k) National Forest System Lands Covered by the Special Use Authorization for the Powerline Facility. For purposes of this permit, the linear right-of-way for the powerline facility associated with a pilot project and hazard trees and access roads and trails outside that linear right-of-way (43 U.S.C. 1772; 36 CFR 251.56(h); FSH 2709.11, Ch. 80).

(l) National Forest System Lands Not Covered by the Special Use Authorization for the Natural Gas Pipeline. For purposes of this permit, National Forest System lands, except for

access roads and trails, outside the linear right-of-way for the natural gas pipeline associated with a pilot project (30 U.S.C. 185(d)).

(m) National Forest System Lands Not Covered by the Special Use Authorization for the Powerline Facility. For purposes of this permit, National Forest System lands, except for hazard trees and access roads and trails, outside the linear right-of-way for the powerline facility associated with a pilot project (43 U.S.C. 1772; 36 CFR 251.56(h); FSH 2709.11, Ch. 80).

(n) 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 that is owned by the holder; that solely supports operation and maintenance of the electric distribution or transmission lines; and that is not leased to other parties for communications uses that serve other purposes.

2. Legal Effect of This Permit.

(a) Relationship of This Permit to the Authorization for the Powerline Facility or Natural Gas Pipeline. This permit is legally entirely separate from the special use authorization for the powerline facility or natural gas pipeline. The liability provisions in this permit apply only to the pilot project covered by this permit. The pilot project conducted under this permit cannot be conducted on National Forest System lands covered by the special use authorization for the powerline facility or natural gas pipeline (i.e., cannot be conducted inside the linear right-of-way for the powerline facility or natural gas pipeline and cannot include access roads and trails outside the linear right-of-way and, in the case of a powerline facility, cannot include felling or pruning of hazard trees outside the linear right-of-way). The liability provisions in this permit have no effect on the liability provisions in the special use authorization for the powerline facility or natural gas pipeline, including the liability provisions that apply to felling and pruning of hazard trees inside and outside the linear right-of-way.

(b) Liability Provisions Applicable to the Authorization for the Powerline Facility or Natural Gas Pipeline. The liability provisions in the special use authorization for the powerline facility or natural gas pipeline apply to vegetation management covered by that authorization, including vegetation management inside the linear right-of-way and, in the case of a powerline facility, felling and pruning of hazard trees outside the linear right-of-way.

(c) Enforcement of Liability Provisions. The authorized officer shall enforce the liability provisions in this permit entirely separately from the liability provisions in the special use authorization for the powerline facility or natural gas pipeline.

3. Limitations on the Location of the Pilot Project. The pilot project conducted under this permit:

- (a) May be conducted only on National Forest System lands that are not covered by the special use authorization for the powerline facility or natural gas pipeline;
- (b) May not extend for more than 150 feet from either side of the powerline facility or natural gas pipeline;
- (c) May have a total width of no more than 200 feet including both sides of the powerline facility or natural gas pipeline; and
- (d) May not be conducted in wilderness; in a wilderness study area; in an inventoried roadless area; or on federal land on which removal of vegetation is restricted or prohibited by federal statute or presidential proclamation.

4. Location of the Pilot Project Area. The pilot project area as reflected in the legal description for this permit may not include National Forest System lands covered by the special use authorization for the powerline facility or natural gas pipeline, authorization identification number [authorization ID], issued on [date], hereinafter “authorization for the powerline facility or natural gas pipeline.” The holder shall mark the location of the pilot project area on the ground so as to allow the authorized officer to determine that the pilot project area does not include National Forest System lands covered by the authorization for the powerline facility or natural gas pipeline.

5. Operating Plan. At a minimum, the operating plan for this permit shall:

- (a) Address reporting of removal of vegetation, including slash, and road use and repair;
- (b) Describe the area where the pilot project will occur in sufficient detail to allow the authorized officer to determine where it will be conducted relative to the National Forest System lands covered by the authorization for the powerline facility or natural gas pipeline and to determine that the pilot project will be conducted on National Forest System lands that are not covered by that authorization; and
- (c) Describe how the holder will mark the location of the pilot project on the ground in a manner that will demonstrate that it will be conducted on National Forest System lands that are not covered by the authorization for the powerline facility or natural gas pipeline.
- (d) Provide that the pilot project shall not be conducted simultaneously with vegetation management conducted under the authorization for the powerline facility or natural gas pipeline.

6. Additional Requirements for Conducting Pilot Projects. In addition to the other requirements in this permit, the holder shall meet the following requirements specific to pilot projects:

- (a) Minimization of Ground Disturbance. The pilot project authorized by this permit may involve only limited vegetation management activities that create the least ground

disturbance and least disturbance to wildlife reasonably necessary to protect powerline facility or natural gas pipeline infrastructure from a wildfire originating on National Forest System lands that are not covered by the authorization for the powerline facility or natural gas pipeline, based on applicable models, including Forest Service fuel models.

(b) Vegetation Management Activities. The pilot project authorized by this permit may include thinning and treatment of surface fuels, ladder fuels, and activity fuels to create or maintain shaded fuel breaks or other appropriate measures recommended by Forest Service fire scientists or fire managers.

(c) Forest Service Requirements. In conducting the pilot project authorized by this permit, the holder shall adhere to Forest Service requirements:

(1) Pertaining to spark arresters;

(2) Limiting or prohibiting certain activities conducted by other parties in the permit area, based on weather conditions and fire danger; and

(3) Applicable to other parties removing vegetation on National Forest System lands under a timber sale or stewardship contract, including requirements pertaining to:

(A) Protection of residual trees and timber damaged by contractors;

(B) Protective measures needed for plants, animals, cultural resources, and cave resources;

(C) Stream protection and erosion control;

(D) Fire plans, precautions, and precautionary periods;

(E) Fire suppression costs; and

(F) Employment of eligible workers.

(d) State Requirements. In conducting the pilot project authorized by this permit, the holder shall adhere to state requirements pertaining to prevention of wildfires and contractors' removal of vegetation.

(e) Activity Fuels. In conducting the pilot project authorized by this permit, the holder shall treat any activity fuels in a manner that is satisfactory to the authorized officer; does not result in a fire hazard; and reduces the risk of an insect or disease outbreak.

7. Liability.

(a) Strict Liability and Indemnification of the United States. Except as provided in clauses IV.F.7(b) through IV.F.7(d), the holder shall be liable for all costs, including but not limited to fire suppression costs and damage to Forest Service resources, as determined by the Forest

Service, that are incurred by the Forest Service in connection with the pilot project conducted under this permit, and shall indemnify, defend, and hold harmless the United States for any costs, damages, claims, liabilities, and judgments arising from past, present, and future acts or omissions of the holder in connection with the use or occupancy authorized by this permit. This indemnification provision includes but is not limited to acts and omissions of the holder or the holder's heirs, assigns, agents, employees, or contractors in connection with the use or occupancy authorized by this permit which result in (1) violations of any laws and regulations which are now or which may in the future become applicable; (2) judgments, claims, demands, penalties, or fees assessed against the United States; (3) costs, expenses, and damages incurred by the United States; or (4) the release or threatened release of any solid waste, hazardous waste, hazardous materials, pollutant, contaminant, oil in any form, or petroleum product into the environment. The authorized officer may prescribe terms that allow the holder to replace, repair, restore, or otherwise undertake necessary curative actions to mitigate damages in combination with or as an alternative to monetary indemnification.

(b) Forest Service Contributions. The authorized officer may contribute funds for the pilot project authorized by this permit if the authorized officer determines and documents that the contribution is in the public interest.

<USER NOTES FOR CLAUSE F.7(c)>

<The amount of strict liability under 36 CFR 251.56(d)(2) applies to holders that are subject to an operating plan under 36 CFR 251.56(h)(1). The amount of strict liability under 36 CFR 251.56(h)(9)(ii) applies to holders that are subject to an operating agreement under 36 CFR 251.56(h)(2).>

(c) Liability for Wildfires. Except as provided in clause IV.F.7(d) and (e), the holder shall reimburse the Forest Service for all fire suppression costs for a wildfire caused by the holder's operations under this permit, subject to the maximum dollar amount agreed upon by the authorized officer and the holder prior to commencement of the pilot project authorized by this permit. In agreeing to the maximum dollar amount, the authorized officer and the holder shall take into account whichever is lower, the Forest Service's average per-acre fire suppression costs as documented by the Forest Service based on Fire and Aviation Management data for the previous 3 years in the state where the pilot project is to occur, or the amount of strict liability provided for in 36 CFR 251.56(d)(2) or 36 CFR 251.56(h)(9)(ii), as applicable and as amended.

(1) If the holder provides services, personnel, supplies, or equipment to suppress a wildfire caused by the holder's operations under this permit or at the request of the Forest Service, the authorized officer shall credit the cost of those services, personnel, supplies, or equipment toward the maximum dollar amount agreed to under clause IV.F.7(c).

(2) If the actual cost of the services, personnel, supplies, or equipment exceeds the maximum dollar amount agreed to under clause IV.F.7(c), the authorized officer shall reimburse the holder for the excess.

(d) Negligently Caused Wildfires

(1) Wildfires Caused by Negligence Other Than Failure to Meet Expressly Imposed Requirements. Except as provided in clause IV.F.7(d)(2), costs borne by the holder for damages to Forest Service resources and fire suppression costs resulting from a wildfire caused by the negligence of the holder or the holder's agent, including a wildfire caused by smoking by persons engaged in operations under the permit, shall not exceed \$500,000.

(2) Wildfires Caused by Failure to Meet Expressly Imposed Requirements. The holder shall bear all the costs of damages to Forest Service resources and fire suppression costs, with no limitation, resulting from the start or spread of a wildfire caused by the failure of the holder or the holder's agent to comply with specific safety requirements expressly imposed by the Forest Service as a condition of conducting the pilot project authorized by this permit or imposed by section 8630 of the 2018 Farm Bill.

<USER NOTES FOR CLAUSE F.7(e)>

<Include clause F.7(e) in pilot project permits associated with a powerline facility. Otherwise, delete clause F.7(e).>

(e) Wildfires Caused by Hazard Trees that are Improperly Felled or Pruned under This Permit. Felling and pruning of hazard trees are not authorized by this permit. Felling and pruning of hazard trees are authorized by the special use authorization for the powerline facility. Liability for wildfires caused by hazard trees that are improperly felled or pruned under this permit shall be subject to the liability provisions of the special use authorization for the powerline facility.