

March 25, 2020

[Submitted online via CARA at <https://cara.ecosystem-management.org/Public/CommentInput?Project=56770>]

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Re: Piney River Vegetation Project- comments on Draft EA

Dear District Ranger Stull:

Thank you for the opportunity to comment on the Draft EA for the proposed Piney River Vegetation Project. Thank you also for answering some of our questions about the project during our phone call on March 10, 2020. We appreciate your willingness to engage with us, and we look forward to future discussions. We submit these comments on behalf of the Southern Environmental Law Center and the Virginia Wilderness Committee.

First, we are pleased with the positive changes the District has made since scoping, such as removing from the proposed action several units that overlaid an Inventoried Roadless Area and removing Unit 10 to mitigate impacts to various resources. We recognize the effort that went into preparing the Draft EA, which, except as discussed below, generally includes a level of analysis that equips both the Forest Service and the public to meaningfully analyze the effects of the proposed action. This Draft EA provides a refreshing comparison to the scant analysis we sometimes see, typified most recently by the strikingly infirm Draft EA for the proposed Eastern Divide Phase II Project on the Eastern Divide Ranger District.

As we discussed on our March 10 phone call, however, we are troubled by the District's proposal to carry out commercial timber harvest via thinning in three patches of existing old growth. As we mentioned on the call, this is the first project since the new Forest Plan that takes the drastic step of proposing to cut verified, existing old growth. For reasons detailed below, any harvest of old growth raises serious concerns. We also reiterate our request that the District provide the old growth tally sheets for the project, which we need to evaluate the project.¹ Once that information is made available, we will likely have additional comments to share with the District.

We are concerned that, on the current record, the proposed harvest of old growth violates NFMA and NEPA. First, we do not think that the rationales stated in the Draft EA –

¹ It is quite understandable that we still have not received the old growth tally sheets given the intervening COVID-19 pandemic, but we would appreciate receiving them as soon as possible.

enhancing habitat for the cerulean warbler and creating late successional open canopy forest²—are appropriate, likely to be effective, and/or adequately justified by the Draft EA. Second, the Draft EA does not include the analysis that the Forest Plan requires be performed and disclosed for public participation before any harvest of old growth may occur. Third, the Draft EA does not provide adequate analysis to justify a Finding of No Significant Impact (FONSI). Finally, we doubt the District could justify a FONSI for a project that includes commercial harvest of old growth; an EIS would likely be required before the District could lawfully approve the proposed action.

1. Rationales in the Draft EA

We do not think that the rationales stated in the Draft EA—enhancing habitat for the cerulean warbler and creating late successional open canopy forest³—are appropriate, likely to be effective, and/or adequately justified by the Draft EA.

A. *Cerulean Warbler habitat*

As an initial matter, it is far from clear that the proposed management in old growth patches will provide any benefit to the cerulean warbler. The Draft EA simply posits that thinning existing old growth “can advance stands towards a late-open successional structure that benefit[s] many avian species including Cerulean warblers.”⁴ However, whether this management will have a beneficial effect is more complex than the Draft EA acknowledges. A 2013 report by researchers from various agencies and institutions, including the Forest Service, identified several habitat characteristics that cerulean warblers prefer:

- “Ceruleans will use relatively small forest patches (~25 ac), but typically in landscapes that are primarily forested (e.g. > 75% forest cover within ~6 miles of the project area).”⁵
- “Ceruleans are often associated with canopy gaps and also use internal forest edges including . . . edges of small timber harvests However, they are less abundant near abrupt or ‘hard’ edges between forest cover and large expanses of open land In southern West Virginia, for example, cerulean abundance decreased near mountaintop mine edges and in northern West Virginia, they avoided edges of a large powerline right-of-way that was ~75 feet wide.”⁶
- “In the Appalachians, cerulean primarily occur along ridges and steep, upper slopes and appear to cluster near areas of local relief such as knobs and bluffs.”⁷

² See Draft EA at 34–35.

³ See Draft EA at 34–35.

⁴ Draft EA at 35.

⁵ Wood et al., *Cerulean Warbler: Management Guidelines for Enhancing Breeding Habitat in Appalachian Hardwood Forests* 4 (Feb. 2013), available at http://amjv.org/wp-content/uploads/2018/06/cerulean_guide_1-pg_layout.pdf.

⁶ *Id.*

⁷ *Id.*

- “Within ridge top forests, cerulean often favor mesic, north- and northeast-facing slopes, although other aspects are used.”⁸

Some of these habitat preferences suggest that the proposed action will provide no benefit to cerulean warblers. For example, cerulean warblers may use forest stands around 25 acres in size, but the old growth patches proposed for management range between 5 and 15 acres.⁹ The problem of stand size is particularly noticeable in Units 3 and 6, because the old growth patches in those units will be islands of mature forest surrounded by regeneration harvest.¹⁰ Relatedly, the District should assess whether the surrounding regeneration harvest will leave “hard edges” that actually deter cerulean warblers.¹¹

If the District desires to create favorable habitat for cerulean warblers, it should first consider whether a no-action approach would yield better results. Cerulean Warbler: Management Guidelines for Enhancing Breeding Habitat in Appalachian Hardwood Forests notes that “[o]ld growth forests naturally develop a more open and complex canopy structure, as well as multi-layered shrub and mid-story layers,” so the proposed management may be unnecessary altogether.¹² At a minimum, before management designed to help the cerulean warbler, the District must consider the factors relevant to creating attractive habitat, including at least stand size, forest structure, and forest density across the landscape.¹³

B. Late-open canopy structure

As discussed, we strongly urge the District to avoid cutting any existing old growth to create late successional open canopy forest. If the District desires to use silviculture to open up the canopy (instead of or in addition to prescribed fire), it should do so in late-closed forest, which is abundant across the GWJNF. To do so by cutting old growth would squander a scarce resource.

Both the Forest Plan and the 1997 Regional Guidance, Guidance for Conserving and Restoring Old-Growth Forest Communities on National Forests in the Southern Region (“Regional Guidance”) recognize that old growth is a valuable natural resource worthy of protection, restoration, and management that provides a variety of ecological, social, and spiritual values.¹⁴ The network of large, medium, and small patches of old growth is intended to provide the ecological integrity of old-growth communities, representation of all old growth forest community types, distribution of these patches and types across the landscape, and connectivity between the old growth patches.¹⁵

⁸ Id.

⁹ Compare id. at 4 with Draft EA at 34.

¹⁰ See Draft EA at 35.

¹¹ See Wood et al., supra, at 4.

¹² Id. at 3 (emphasis added).

¹³ See id.; see also Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (an agency action is arbitrary and capricious when the agency does not “consider an important aspect of the problem”).

¹⁴ GW Forest Plan FEIS at 3-229 to 3-231; Regional Guidance at 12-14.

¹⁵ Regional Guidance at 15-18; Forest Plan at 2-21, Appendix B.

Yet as the Forest Service acknowledged in the Final EIS supporting the 2014 Plan, even developing the Regional Guidance for old growth was difficult because “so few representatives of old growth conditions exist[.]”¹⁶ Indeed, “old growth communities are rare or largely absent in the southeastern forests from Virginia south to Florida,” perhaps representing only around 0.5% of the total forest acreage in the Southeast.¹⁷ And according to the Regional Guidance for Old Growth, old growth is “the missing portion of the southern forest ecosystems.”¹⁸

It is critical to remember that old growth, which actually exists on the ground, is not the same as “possible old growth” estimated in the Forest Plan. The GW has no forest-wide, field-verified existing old growth inventory. Instead, during forest planning, the Forest Service’s estimated existing and possible old growth, as well as acreage objectives for different old growth types.¹⁹ These estimates were based on the agency’s stand database (FSVeg), not on-the-ground field inventories.²⁰ In this inventory, FSVeg forest types were aggregated into old growth forest community types (OGFT), as described in the Regional Guidance, and those stands meeting the minimum age were identified as possible old growth.²¹ This was “an initial screen and inventory” only and most of the possible old growth “[was] not visited to verify the existence of old growth[.]”²² On-the-ground verification occurs only at the project level.²³

The major lack of verified existing old growth is one reason why we would greatly prefer not to see late-open conditions created out of existing old growth. In light of all this, it seems particularly appropriate to protect any existing old growth that is identified. Conversely, logging existing old growth based on unverified assumptions about its existence elsewhere seems contrary to the evidence before the agency regarding the significance and rarity of old growth conditions. This approach creates the risk that rare old growth on the District will be logged based on predicted amounts of old growth forestwide, only for later discovery that the predictions were inaccurate. As discussed below, this would be very difficult to justify, especially without an EIS.²⁴

Given the rarity and importance of old growth forest in the Southern Appalachians, the little existing old growth forest that has been identified in the field on the GW, and the century or two required to replace old growth, we firmly believe that any existing old growth should be protected and not logged. Moreover, we believe that protecting existing old growth in the project area would allow this project to move forward more quickly with the majority of proposed management that is less controversial and thus more likely to lead to acceptance and

¹⁶ FEIS at 3-229.

¹⁷ FEIS at 3-229; Regional Guidance at 1.

¹⁸ Regional Guidance at 1.

¹⁹ FEIS at 3-231.

²⁰ FEIS at 3-231.

²¹ FEIS at 3-231.

²² FEIS at 3-231; see also GW Forest Plan at B-3.

²³ FEIS at 3-231.

²⁴ Old growth forests hold biological, wildlife, recreational, research, scientific, educational, cultural, aesthetic, and spiritual values. *See* Region 8 Guidance at 12-14. Old growth forest takes centuries to develop, so it is irreplaceable on a human time scale if it is replaceable at all. *See Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1382 (9th Cir. 1998); *Idaho Sporting Congress v. Alexander*, 222 F.3d 562 (9th Cir. 2000).

support. This was the approach used in the collaborative Lower Cowpasture and North Shenandoah projects, which contributed greatly to the projects gaining support and moving along more rapidly.

Lastly, from a practical standpoint, it would likely save the District time and resources to create late-open forest by thinning late-closed forest or using other methods such as prescribed fire, rather than by cutting old growth; as we explain below, the District has significant obligations under NFMA and NEPA when it proposes to harvest old growth that can be avoided (in the case of NFMA) or mitigated (in the case of NEPA) if the District pursues its goals in ordinary late-closed forest instead.

2. NFMA

The Draft EA does not satisfy the requirements of the Forest Plan and thus violates NFMA.²⁵ The Forest Plan aims to ensure that the GW has a network of old growth areas, consisting of a mix of large, medium, and small patches embedded in a forest matrix dominated by mid- and late-successional forest where old growth areas are generally interconnected by mature forest.²⁶

As described above, the Plan does this by estimating possible and future old growth, as well as acreage objectives for different old growth types.²⁷ Based on these figures alone, the Forest Service concluded that there are about 245,000 acres of possible old growth in the GW, including around 151,000 of OGFT 21 (Dry-Mesic Oak) and 17,000 acres of OGFT 25 (Dry & Dry-Mesic Oak-Pine).²⁸ While the Forest Service concluded that these two old growth forest community types (and only these two) are generally well-represented, it cautioned “there are specific forest types within this broader community classification that are not well-represented.”²⁹

In light of the foregoing, the Forest Plan requires site-specific analysis at the project level before any OGFT 21 or OGFT 25 may be harvested. The Plan does not identify which specific forest types are not well-represented, a fact that we raised in our administrative appeal of the Plan. Accordingly, the District must ascertain this now. The District must also determine whether the specific forest types proposed for harvest are well-represented and whether those patches contribute to the matrix of large, medium, and small old growth patches.³⁰ The Plan requires this analysis to include discussion of old growth characteristics found in the area, the effect of the proposed harvest on these characteristics, and the effect the action will have on the contribution of the area to the Forest’s old growth inventory.³¹ In short, the District can thin

²⁵ See 16 U.S.C. § 1604(i); see also GW Forest Plan at 1-2 (“All projects and activities authorized by the Forest Service must be consistent with the Forest Plan.”).

²⁶ See GW Forest Plan at B-5.

²⁷ FEIS at 3-231.

²⁸²⁸ Plan at B-3, B-6.

²⁹ Id. at B-7.

³⁰ Id.

³¹ Id.

existing old growth only if it demonstrates during project analysis that the old growth in question does not contribute to the Forest old growth inventory.³²

During resolution of our administrative appeal of the Plan, we discussed these issues with Ken Landgraf and Karen Overcash. We urged the agency to establish criteria for representation and distribution of old growth patches at relevant scales (e.g., watershed and compartment), which would allow better analysis of the old growth network and any patches of existing old growth discovered during project planning.

Ultimately, the Forest Service provided the following in its Forest Plan Clarification Letter (“Clarification Letter”):

The Plan allows existing old growth within Old Growth Forest Type . . . 21 Dry-Mesic Oak Forest and Type 25 Dry & Dry-Mesic Oak-Pine Forest to be considered for timber harvest, following certain analysis required by the Plan. Any such analysis will include consideration of the contribution of identified patches [of old growth] to the representation, distribution, and abundance of the specific forest type within the old growth community classifications and the desired condition of the appropriate prescription. These decisions will be part of the project-level analysis and subject to public involvement.³³

The Draft EA does not include the requisite analysis. During our phone call, it seemed the District had perhaps conflated analysis of old growth forest community types and analysis of specific forest types within those old growth forest community types. Ensuring that the old growth falls within OGFT 21 or OGFT 25 is only the first step in determining if harvest can occur. The District must analyze each specific forest type implicated rather than discussing OGFT 21 writ large. This must include analysis of the contribution of each of these three patches of old growth to the “representation, distribution, and abundance of the specific forest type within the old growth community classifications.”³⁴

As an example, Unit 6 contains a 15 acre patch of Old Growth Type 21 comprised of Forest Type 53 (white oak, northern red oak-hickory) and Forest Type 55 (northern red oak).³⁵ To satisfy the Forest Plan, the District must analyze how this 15 acre patch contributes to the representation, distribution, and abundance of Forest Types 53 and 55 within OGFT 21 across the Forest. As the Clarification Letter recognizes, the GW Forest Plan “does not specify the precise criteria for the adequate representation, distribution, and abundance of all specific forest types within the OGFT 21 and 25 community classifications at relevant scales (e.g., watershed

³² Id.

³³ Clarification Letter at 2.

³⁴ Clarification Letter at 2.

³⁵ In addition, we note an apparent discrepancy between the Forest Type in Unit 1. Table 2 on Page 14 states that Unit 1 contains Forest Type 56 (cove) whereas Table 5 on Page 34 says it contains Forest Type 55 (northern red oak). Is the discrepancy because the old growth patch is Forest Type 55 while the rest of the unit is Forest Type 56?

and compartment); therefore, those issues will receive further consideration during plan implementation)."³⁶ The District must develop a sound method to do so now.

Moreover, the Clarification Letter provides that the District's consideration of representation, distribution, and abundance "will be part of the project-level analysis and subject to public involvement."³⁷ We need an understanding of this information and more site-specific information, including the old growth tally sheets, to evaluate the consequences of the proposed action. To that end, we recommend that the District provide the required analysis and re-open the comment period on the limited issue of the proposed harvest of old growth.

Since this is the first proposed harvest of old growth on the GW since plan revision, it would fall on the District to develop an acceptable method to complete the required analysis. If the District wants to move forward with this project more expeditiously, it should consider tailoring the project to avoid the old growth patches entirely.

3. NEPA

We are also concerned that the Draft EA's analysis of old growth violates NEPA for a variety of reasons. As an initial matter, NEPA, like the Forest Plan, requires that "environmental information is available to public officials and citizens before decisions are made and before actions are taken."³⁸ Unless the District makes the necessary old growth analysis available to the public and provides an opportunity for further public comment, this requirement will go unmet and NEPA will not be satisfied.

Furthermore, the Draft EA fails to take a "hard look" at the effect that the proposed action would have on old growth on the GW. NEPA requires the Forest Service to take a "hard look" at the environmental impacts of its proposed actions.³⁹ EAs "shall include brief discussions . . . of the environmental impacts of [a] proposed action."⁴⁰ The discussion and analysis of the environmental impacts "must provide sufficient information and detail to demonstrate that the agency took the required 'hard look' at the environmental consequences of the project before concluding that those impacts were insignificant."⁴¹ This "hard look" must include "some quantified or detailed information" supporting the conclusions of the EA.⁴² These "hard look" requirements serve two primary purposes: (1) they insure that the agency carefully will consider the effects of its actions on the environment, and (2) they insure that the public and other agencies will be able to analyze and comment meaningfully on the proposal

³⁶ Id.

³⁷ Clarification Letter at 2.

³⁸ 40 C.F.R. § 1500.1(b).

³⁹ Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 184 (4th Cir. 2005).

⁴⁰ 40 C.F.R. § 1508.9(b).

⁴¹ Sierra Nevada Forest Prot. Campaign v. Weingardt, 376 F. Supp. 2d 984, 990-991 (E.D. Cal. 2005) (quoting Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir.1988)).

⁴² Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004) (citations omitted).

and its impacts.⁴³ In addition, courts recognize that failing to properly assess old growth and account for impacts is a NEPA violation.⁴⁴

The Draft EA has two striking deficiencies. First, the analysis does not amount to a “hard look” for the same reason it violates the Forest Plan: because it skips the required analysis. Second, the Draft EA unreasonably relies on FS Veg data about possible old growth to assess the impact that the proposed action will have on old growth across the GW. However, FS Veg-documented possible old growth is not a proxy for existing old growth and relying on the assumption that acres of possible old growth will translate into existing old growth upon field review for a project is flawed. Given the notorious unreliability of both stand age and stand type within FS Veg data, actual existing old growth, once inventoried on the ground, is likely to be significantly less than the pool of possible old growth. Not only is the FS Veg data not equivalent to an old growth field survey, the data is not even comparable to a rudimentary, rapid assessment of a site for old growth conditions. The database also contains little or no information on one of the four old growth criteria: degree of evidence of human disturbance.

Just as it is highly unlikely that all possible old growth actually is existing old growth, it is highly likely that old growth exists in other stands not identified as possible old growth based on FS Veg and not allocated to future old growth management. As a result, the District cannot simply log existing old growth based on an estimated amount of old growth assumed to exist elsewhere – that may not actually exist or many not become old growth anytime soon. The District must account in some way for these discrepancies when it revisits its old growth analysis. Simply performing the analysis required by the Forest Plan will not cure the likely significant discrepancies between possible old growth and actual on-the-ground old growth.

Finally, the Draft EA cannot support a FONSI. Once the District conducts the required old growth analysis, it may be possible to determine whether a FONSI will be defensible. For now, however, we are seriously concerned that the District cannot lawfully approve commercial timber harvest of old growth without preparing an EIS. Under NEPA, significance depends on context and intensity.⁴⁵ Intensity, in turn, requires consideration of several factors including: “[u]nique characteristics of the geographic area,” the degree to which effects are likely to be “highly controversial,” and “[t]he degree to which the action may establish a precedent for future actions with significant impacts or represents a decision in principle about a future consideration.”⁴⁶

⁴³ Id. at 184.

⁴⁴ See Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1378 (9th Cir. 1998) (holding cumulative impact analysis of combined effect on depleting existing old growth habitat inadequate); Bair v. Cal. Dep’t. of Transp., C 10-04360 WHA, 2011 WL 2650896 (N.D. Cal. July 6, 2011) (issuing injunction for road widening through old-growth redwood area for issuing a FONSI instead of producing an EIS); Alliance for the Wild Rockies v. Wood, CIV 07-452-EJL, 2008 WL 2152237 (D. Idaho May 21, 2008) (enjoining timber sale where method of calculating old growth scientifically flawed).

⁴⁵ 40 C.F.R. § 1508.27

⁴⁶ Id. § 1508.27(b).

Here, those factors indicate that the proposed action would be significant. Old growth is a unique resource that is irreplaceable on a human time scale.⁴⁷ Moreover, this project is likely to be precedent-setting with respect to harvest of old growth on the GW; this is the first projecting proposing commercial harvest of old growth by any method since Plan Revision. If the District insists on management within these patches of old growth, it should consider whether thinning from below or another less intensive silvicultural prescription that avoids cutting the older trees would be appropriate and would allow the District to avoid preparing an EIS. We would be happy to discuss such options with the District.

Thank you for your consideration and please let us know if you have questions. We hope to have opportunities to discuss the project further with you and your staff.

Sincerely,

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⁴⁷ See Idaho Sporting Congress Inc. v. Alexander, 222 F.3d 562, 569 (9th Cir. 2000).