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Via electronic submission at <https://cara.ecosystem-management.org/Public/CommentInput?Project=58928>

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***Re: George Washington and Jefferson National Forests Oak and Woodland Restoration Project***

Dear Ms. LeMaster,

Thank you for the opportunity to comment on the October 13, 2020 scoping notice for the proposed George Washington and Jefferson National Forests Oak and Woodland Restoration Project. We offer these comments on behalf of the Virginia Wilderness Committee, the Virginia Chapter-Sierra Club, and the Southern Environmental Law Center.

We generally support the substance of this proposal to manage white pine across the George Washington and Jefferson National Forests (GWJNF). Moving even-aged, white pine-dominated stands, particularly former plantations, towards improved species and structural diversity, favoring species that are characteristic for those stands including hard mast producing species, is valuable work that is likely to enjoy broad stakeholder support when conducted in appropriate locations. For example, on the George Washington National Forest (GWNF), the GWNF Stakeholder Collaborative specifically supported this type of management in the group's comments on the draft revised GWNF forest plan.<sup>1</sup> And although there is not a formal collaborative stakeholder group focused on the Jefferson National Forest (JNF), our organizations and others often have encouraged the Forest Service to focus scarce resources on work that is most needed, including the type of management proposed here, and have offered constructive information and ideas for ways the agency can do so effectively and efficiently.

This proposal starts with one foot on a solid foundation. The Forest Service has outlined some sound building blocks likely to garner significant public support. Former pine plantations are some of the most degraded stands that can benefit from management, and the scoping notice identifies smart steps that should help the agency focus the management it is proposing and avoid expending resources on the small subset of the most risky or controversial stands. The

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<sup>1</sup> See Attachment, Letter from 14 Organizations to Maureen Hyzer, U.S. Forest Service (Oct. 17, 2011). Even at that time, this was not a new idea; the Forest Service's Southern Region previously had identified restoration of diversity to low-diversity stands, such as former pine plantations, as a potential focus area for restoration work in the Southern Appalachians.

Forest Service has done good early work to develop the *substance* of this proposal, and it already has many ingredients of a project likely to successfully accomplish the goals outlined in the scoping notice.

Unfortunately, the *process* that the Forest Service has proposed threatens to derail this important work because, as we explain below, it would violate the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). As a consequence, instead of promoting efficiency and flexibility, the proposed process would likely mire the project's objectives in controversy and delay, and lead to worse outcomes on the ground. We strongly urge the Forest Service to reconsider or modify its proposed process before the agency invests any further resources in this approach.

We offer these comments in the spirit of collaboration. We greatly appreciate the Forest Service's stated commitment to public engagement and a collaborative approach. We also appreciate the outreach efforts that the Forest Service has already undertaken, including the October 27, 2020 virtual public meeting for the project. And we understand—and share—the Forest Service's desire to identify NEPA efficiencies and to see much of the proposed management implemented. There is common ground here. Our comments on the proposed process are negative because we want to be forthright about our concerns at an early stage, propose ways to resolve those concerns, and work efficiently towards a solution that advances the project's laudable management goals.

## **1. Overview of the Proposed Process**

The Forest Service acknowledges that it is proposing a new approach to environmental analysis. In general, the Forest Service historically has analyzed proposed vegetation management projects on the GWJNF in accordance with NEPA by identifying stands proposed for management, analyzing the effects of the proposed management at relevant scales, and adhering to public notice-and-comment procedures *before* issuing a final decision.<sup>2</sup> This order of operations is true to NEPA's "twin aims"—that the agency will consider the environmental impacts of its proposed actions, and that it will inform the public that environmental concerns have been part of the agency's decisionmaking process. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

The process that the Forest Service is proposing for this project would flip that paradigm on its head. In particular, the agency is proposing a two-step process of condition-based management that defers selection of sites and treatments to a later decision not subject to public notice and comment. At the first step, the agency proposes to prepare an environmental assessment (EA) that it calls the "Project EA" to accompany a decision notice that "would not allow for the explicit implementation of a treatment project but would rather outline how to proceed forward with post decision clearance on a stand specific basis through the utilization of an implementation checklist."<sup>3</sup> Our understanding is that the public will have an opportunity to

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<sup>2</sup> See U.S. Forest Service, Oak and Woodland Restoration Project: Virtual Public Meeting Slides at 20, 23 (Oct. 27, 2020), available at <https://bit.ly/32sxzBJ>.

<sup>3</sup> Scoping Notice at 1.

comment on a draft of the Project EA.<sup>4</sup> The Project EA and decision “would outline eligible stand conditions and potential treatments based on the existing conditions of the stands. The EA will address resource specific issues that exist across the landscape on similar type resource conditions.”<sup>5</sup> In other words, the conditions that *might* be treated at a particular site are common on the landscape, but the Forest Service would not treat those conditions everywhere they occur or identify all the locations up front; it would instead choose which sites will receive treatment in a future decision (outside the NEPA process) and then apply an implementation checklist.

At the second step, the agency proposes so-called implementation projects, in which it will select stands and treatments “based on markets, road conditions[,] and the outcome of stand review and accessibility.”<sup>6</sup> Implementation projects will not receive analysis in their own EA or environmental impact statement (EIS), nor will they rely on a categorical exclusion. Instead, the Forest Service proposes to approve implementation projects using a checklist based on the Project EA. Forest Service specialists responsible for key resources “would be required to sign the checklist to identify site specific design elements that may be required and [to] verify” that the impacts of the implementation project” are captured within the impacts “accounted for within the analysis of the [Project] EA.”<sup>7</sup> The Deputy Forest Supervisor will also sign these implementation checklists, and the checklist for an implementation project must be completed “at the initiation of the [timber] sale administration process.”<sup>8</sup> During the October 27 virtual public meeting, Forest Service staff confirmed that implementation checklists would not be subject to public notice and comment. Instead, each fiscal year, the agency would identify stands that might receive management during that year and notify the public, but the public would not have any formal opportunity to comment.

Please let us know if we have misunderstood the proposed process, because any such misunderstanding could affect the concerns we discuss below. Assuming we are not significantly mistaken about what the agency is proposing, the proposed process will violate NEPA.

## **2. Problems with the Proposed Process**

The process that the Forest Service is proposing has numerous legal and practical problems. First, it is fundamentally incompatible with NEPA. Second, it cannot produce a defensible finding of no significant impact (FONSI), which means an EA cannot support this project in any event. Third, it is inconsistent with the applicable forest plans and NFMA. And finally, it disadvantages both the public and the Forest Service itself without any countervailing gains in efficiency or flexibility.

### ***a. The proposed process unlawfully circumvents NEPA***

NEPA requires that agencies take a “hard look” at the environmental consequences of their proposed actions and provide the public with “relevant environmental information” before

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<sup>4</sup> We ask that the agency confirm this understanding.

<sup>5</sup> Scoping Notice at 1.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

making decisions. *Roberston v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).<sup>9</sup> Although NEPA “does not require adherence to any particular analytic protocol,” *Southeast Alaska Conservation Council v. U.S. Forest Service*, 443 F. Supp. 3d 995, 1006 (D. Alaska 2020), and does not mandate that an agency reach any particular result, the statute and its “action-forcing” procedures are designed to prohibit uninformed decisionmaking, *Methow Valley Citizens Council*, 490 U.S. at 350–51, which means agencies must comply with NEPA first and make decisions second.

NEPA is fundamentally incompatible with the proposed process. Condition-based management is not inherently unlawful when used in the context of a programmatic analysis to which future NEPA decisions will be tiered, *see* 40 C.F.R. § 1501.11, but when it is deployed in a way that allows for the exercise of consequential discretion like choosing between sites and treatments without public input—as it would be here—condition-based management violates NEPA. The Southern Environmental Law Center and other organizations submitted detailed comments on the Forest Service’s recent proposal to endorse condition-based management in the agency’s NEPA regulations, and we refer you to those comments for an overview of the flaws with that approach generally.<sup>10</sup> In these comments, we highlight two key legal deficiencies in the process that the Forest Service is proposing here.

First, where site-specific information is relevant to site-specific decisions, NEPA requires analysis and disclosure of that information before site-specific decisions are made. *See 'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1094–95 (9th Cir. 2006). Even when an agency proposes a two-step programmatic approach to NEPA for a project, “the critical inquiry . . . is not whether the project’s site-specific impact should be evaluated in detail, but when such detailed evaluation should occur.” *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). The time to “fully evaluate[]” site-specific impacts arrives when the agency makes a “critical decision” to “act on site development”—a threshold that is reached when “the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to a project at a particular site.” *Id.* (internal quotation marks omitted); *see also 'Ilio'ulaokalani Coal.*, 464 F.3d at 1095–96 (same).

Here, the Forest Service is proposing to finish its NEPA analysis too early. Site-specific information is highly relevant to Forest Service project decisions. The agency implicitly concedes as much by proposing an implementation checklist that includes site-specific issues. The problem with the proposed process is that, until the Forest Service identifies stands and the treatments they will receive—that is, “until a concrete development proposal crystallizes the dimensions of [the] project’s probable environmental consequences,” *Block*, 690 F.2d at 761—the agency will not have the information it needs to evaluate site-specific impacts during its NEPA analysis. And because the Project EA and decision “would not allow for the explicit

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<sup>9</sup> *See also, e.g., Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (“NEPA was passed by Congress to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action *before* the government launches any major federal action.” (emphasis added)).

<sup>10</sup> *See* Attachment, Comments on *Proposed Rule: National Environmental Policy Act (NEPA) Compliance*, (84 Fed. Reg. 27,544, June 13, 2019), submitted by The Wilderness Society, Western Environmental Law Center, Southern Environmental Law Center, et al. (Aug. 25, 2019) (“Rulemaking Comments”), at pp. 186–94.

implementation of a treatment project,”<sup>11</sup> the Forest Service is proposing an approach that necessarily would have the NEPA process conclude at a point well before the agency makes a “critical decision” to act “at a particular site”—a sequence that NEPA does not allow. *Block*, 690 F.2d at 761.

To be clear, the problem with the proposed process is timing. We take the Forest Service at its word that the agency would account for some site-specific factors during each implementation project. But implementation checklists would not be NEPA documents that would themselves take a hard look at effects; they would be designed to confirm site conditions rather than analyze site-specific impacts, and they would not be subject to NEPA’s notice-and-comment procedures. We appreciate the Forest Service’s stated receptiveness to informal public input in the future, but nothing prevents the Forest Service from reversing its position later (due to personnel turnover or for any other reason). Only the NEPA process provides a guarantee. In order to meet its NEPA obligations, the agency must analyze and consider impacts, publically disclose and discuss them in its documents, and provide an opportunity for meaningful public comment, all before making a decision.

Second, NEPA requires that agencies consider alternatives to their proposed actions, whether in an EA or an EIS. *See* 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.14 (EIS) and 1501.5(c)(2) (EA). A NEPA document that identifies only total acreage of potential timber harvest, but provides no information about the location, concentration, and timing of that timber harvest and associated road construction, does not provide a meaningful comparison of alternatives. *See Southeast Alaska Conservation Council*, 443 F. Supp. 3d at 1014. So even if the agency considers alternatives later—after the NEPA process has concluded—that consideration comes too late. And more generally, a NEPA process that obscures the differences between alternatives is unlawful on its face. *See Oak Ridge Envtl. Peace Alliance v. Perry*, 412 F. Supp. 3d 786, 856 (E.D. Tenn. 2019).

The choices of locations and treatments are perhaps the most consequential decisions that the Forest Service ever makes. Those choices can be significant individually, like when a regeneration harvest will be located in rare old growth forests, or they can be significant cumulatively, like when successive projects include small incursions into rare or exemplary habitats or unroaded areas—a death by a thousand cuts. The public deserves, and under NEPA is entitled to, the opportunity to offer alternative sites for timber harvest that can meet the Forest Service’s stated project purpose with less harm. The forest conditions that might be treated under this proposal could occur in places where commercial timber harvest would be unwarranted and harmful, and they also could occur in other places where it would be appropriate and beneficial. The choice of which sites to treat and how to treat them cannot proceed without site-specific NEPA analysis.

There is no question that the Forest Service plans to choose sites and treatments outside the NEPA process. The agency is proposing a project that “spans across the entirety of the George Washington and Jefferson National Forests including the Lee, North River, James River, Warm Springs, Glenwood, Pedlar, Eastern Divide, and Clinch Ranger Districts and the Mount

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<sup>11</sup> Scoping Notice at 1.

Rogers National Recreation Area;”<sup>12</sup> that contemplates commercial timber harvest including forest types “totaling roughly 53,000 acres across the GWJNF,” up to 1,100 acres of harvest annually on the George Washington National Forest and 700 acres of harvest annually and the Jefferson National Forest,<sup>13</sup> for at least a decade;<sup>14</sup> and that involves silvicultural prescriptions ranging from thinning to clearcutting.<sup>15</sup> The agency plainly must pick and choose. NEPA is concerned with the differences between those choices.

We anticipate that the Forest Service may believe its proposed process is authorized by *WildEarth Guardians v. Conner*, 920 F.3d 1245 (10th Cir. 2019). It is not. *WildEarth Guardians v. Conner* stands for a remarkably narrow rule that does not apply here: that an EA need not specify where timber harvest will occur if the choice of sites is “not material” to determining whether the project will adversely impact resources identified in comments (in that case, lynx). *Id.* at 1259. But where, as here, the choice of sites will surely be material to impacts on a litany of resources,<sup>16</sup> *WildEarth Guardians v. Conner* offers no shortcut.

In sum, the proposed process contravenes NEPA’s requirements to consider impacts and alternatives at relevant scales, and involve the public in those considerations, *before* site-specific decisions are made and decision documents signed.

***b. The proposed process cannot support a FONSI***

The Forest Service cannot outline and analyze this project’s implementation framework in an EA instead of an EIS.<sup>17</sup> As an initial matter, it is far too early for the Forest Service to predict that this project will not require an EIS. On the contrary, even at this early stage, and even crediting that the Forest Service plans to “streamline[]” design of the project “by removing areas that may pose potential issues,”<sup>18</sup> the scale of the proposed management and its likely impacts is enormous.

More fundamentally, the Forest Service cannot reach a defensible FONSI until it conducts site-specific analysis. A FONSI “briefly presents the reasons why the proposed agency

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<sup>12</sup> *Id.* at 2–3.

<sup>13</sup> *Id.* at 1–3. The Scoping Notice estimates that there are roughly 1,900 stands comprising 53,000 acres of Forest Types 3, 9, and 10 across the GWJNF, but the number of those stands eligible for treatment under the project presumably would be smaller based on design criteria like road proximity. However, the 53,000 acre figure does not account for the fact that the Forest Service is also proposing to include stands with a “30% or greater white pine component in the dominant and co-dominant canopy classes,” regardless of forest type. Scoping Notice at 3. This category seems extremely broad. White pine is native to the GWJNF, with an ecologically appropriate role. There may well be a vast amount of forest that has at least a third white pine in the co-dominant canopy. Problematically, unlike stands listed in FSVeg as forest types 3, 9, and 10, stands that would be eligible for treatment because they contain 30% or greater white pine component in the dominant and co-dominant canopy classes cannot even be preliminarily identified in a desktop GIS analysis.

<sup>14</sup> During the October 27 virtual public meeting, Forest Service staff explained that the agency would rely on the Project EA to support implementation projects until the EA goes stale.

<sup>15</sup> *See id.* at 3.

<sup>16</sup> These include, but are not limited to, impacts on soils, vegetation, water quality, erosion, sedimentation, RFSS and TES species and habitat, carbon sequestration, recreation, old growth, and more. Given the scope and scale of the proposed management, it is not possible to anticipate and list all resources that may be affected.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at 6.

action will not have a significant impact on the human environment.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757–58 (2004). But an agency cannot conclude that a project’s impacts will not be significant if the agency does not know what those impacts will be (*e.g.* what treatments will be implemented) and when or where they will occur (*e.g.* what stands will be treated). Simply stated, the same actions in different places will have different impacts. *See, e.g., New Mexico ex rel. Richardson v. Bureau of Land Mgmt*, 565 F.3d 683, 706 (10th Cir. 2009) (“Disturbances on the same total surface acreage may produce wildly different impacts on plants and wildlife depending on the amount of contiguous habitat between them.”).

Moreover, the Forest Service cannot rely on mitigation to reach a FONSI until the agency considers site-specific factors.<sup>19</sup> “A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). Rather, mitigation must be detailed with enough specificity “to ensure that environmental consequences have been fairly evaluated.” *Id.* The Forest Service cannot meet that standard until it knows (or discloses) where impacts will occur and what they will be. Indeed, more broadly, a “perfunctory description of mitigating measures” is inconsistent with NEPA’s “hard look” requirement altogether. *Id.*

***c. The proposed process is inconsistent with the applicable forest plans and violates NFMA***

The proposed process also runs afoul of NFMA because it is inconsistent with the applicable forest plans. *See* 16 U.S.C. § 1604(i). In particular, the forest plans for both the GWNF and the JNF provide that each “Forest Plan will be implemented through a series of project-level decisions based on appropriate site-specific environmental analysis and disclosure to assure compliance with [NEPA].”<sup>20</sup> But the proposed process would not provide site-specific environmental analysis *or* disclosure of that analysis. Furthermore, site-specific analysis is necessary to ensure that the Forest Service has met and documented its compliance with its substantive obligations under NFMA.

***d. The proposed process harms the public and the Forest Service with no countervailing benefit***

In addition to its legal flaws, there are practical problems with the proposed process. For years, forest stakeholders in Virginia have used the NEPA comment process to provide the agency with a wealth of information about the impacts of proposed projects on specific sites, often resulting in positive changes to projects supported by both the public and the agency.<sup>21</sup> Likewise, the NEPA process historically has formed the backbone of collaboration between stakeholders and the Forest Service. Comments periods, public meetings, informal dialogue, and

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<sup>19</sup> If the Forest Service proceeds with this project and proposes to reach a FONSI, it must be clear about whether it is proposing a mitigated FONSI.

<sup>20</sup> GWNF Forest Plan at 5-1; JNF Forest Plan at 5-1; *see also, e.g.,* JNF Forest Plan at 2-1 (“Any decisions on projects to implement the [Forest Plan] are based on site-specific analysis in compliance with [NEPA].”).

<sup>21</sup> This mutually beneficial relationship also exists at the national scale. The attached Rulemaking Comments submitted by the Southern Environmental Law Center and other organizations provide a data-driven discussion of how public input improves projects. *See* Attachment, Rulemaking Comments at 84–85, nn. 189–90, and appendices cited therein.

draft and final NEPA documents provide a process and structure for sharing information about impacts and alternatives, discussing issues that arise, and documenting project plans, enabling clear understanding by all concerned and follow-through by agency staff during implementation. This proposed end run around NEPA would not only deprive the public of a meaningful say in how its lands are managed, it would also deprive the Forest Service of access to crucial information.

Meanwhile, the supposed benefits of the proposed process are illusory. It is far from clear that the proposed process will save any time or effort. Instead, it is likely to waste resources trying to reinvent the wheel in piecemeal fashion when a sound, well-understood process already exists. The agency's overarching objectives here—to move the project forward expeditiously, make environmental analysis more efficient by minimizing risks and impacts, avoid controversial sites that require extra time to address, and focus on the most feasible stands—are all reasonable and can be included in the normal NEPA process. During the October 27 virtual public meeting, Forest Service personnel expressed hope that this project would follow the collaborative examples of the Lower Cowpasture and North Shenandoah projects. We agree that those projects offer good models, which can continue to be improved upon. The Lower Cowpasture project is a particularly good example. It was the first large-scale project implemented under the revised GWNF forest plan. Despite spanning the adoption of a new forest plan and turnover in key Forest Service staff, the project took only three years to develop from inception to the first timber sale being marked and sold. The decision approved a roughly ten-year plan of work across a nearly 78,000-acre project area, including approximately 3,400 acres of timber harvest and thinning, 1,900 acres of which is commercial harvest. The project received broad public support and the objection that some of our organizations filed in order to clarify certain details was speedily resolved. The North Shenandoah project planning took a bit longer, for reasons that we don't fully understand. Still, the final North Shenandoah project spans a 100,000-acre project area with a multi-year plan of work, including roughly 5,000 acres of timber harvest and thinning, with approximately 3,500 acres of that commercial harvest. We did not object to this project and we look forward to implementation.

The point of these examples is that the agency can get a lot of work done using a project planning process that includes proper, site-specific environmental analysis. Without such analysis to support and inform these projects, we do not believe they would have overcome potential concerns and gained the general support they enjoy. These projects are good models to build upon, but they are not perfect. The Forest Service can reflect on them, replicate the best elements, improve on others, glean certain efficiencies, and apply those lessons learned as it properly plans this project. We would be glad to share our observations about these prior projects, if the agency wishes to consider them as it proceeds with a proper NEPA process.

The Forest Service asserts that the proposed process is desirable because it promotes flexibility, so the agency can respond to volatile timber markets, and because it allows the agency to focus surveys and field clearance work and stands that are more likely to receive treatment.<sup>22</sup> But the proposed process likely will not deliver on either goal. Instead, it will elicit serious inefficiencies. First, it will encourage interested organizations and members of the public to submit kitchen-sink comments for fear that site-specific concerns will be disregarded or

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<sup>22</sup> Scoping Notice at 6.



deemed legally waived if raised in the future. Second, it will maximize the potential for controversy. Publication of EAs and EISs with site-specific impact analysis “gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process.” *Methow Valley Citizens Council*, 490 U.S. at 349. That assurance disappears if the agency defers site-specific analysis until after the NEPA process is complete. When a draft decision is issued, members of the public may be forced to choose between foregoing their legal rights or pursuing objections and beyond. Because implementation projects will not be subject to NEPA, the proposed process unnecessarily raises the stakes of deciding whether to object when a decision is issued—at what may be the last opportunity to be involved in agency decisionmaking affecting tens of thousands of acres over years and years. We understand that the Forest Service cannot always prioritize avoiding objections, but the agency should not implement a process that incentivizes objections.

### **3. Alternatives to the Proposed Process**

We are confident there are alternative processes available that will allow the Forest Service to realize NEPA efficiencies while still meeting its NEPA obligations. We also believe these alternative processes will allow the Forest Service to continue building upon the work it has done already to design a restoration project that likely will garner broad stakeholder support. We offer several suggestions below, which we hope will be a starting point for future discussions.

One alternative process would be for the Forest Service to conduct landscape-scale analysis and site-specific analysis in a single NEPA process. This path would require the agency to complete site-specific analysis and alternatives consideration now; a commitment to consider impacts and alternatives in the future will not suffice. Those analyses would be reflected in a NEPA decision document authorizing implementation.

A second alternative process would be for the Forest Service to break up the project into a series of smaller EAs or EISs.

A third alternative option would be to complete a programmatic environmental analysis now and then tier subsequent site-specific NEPA decisions to that programmatic analysis in the future. This approach would promote efficiencies because the Forest Service will not need to replicate its programmatic analysis later. In this category, we encourage the agency to consider the programmatic approach employed successfully in the Restoration of Dry Forest Communities Project on the South Zone of the Cherokee National Forest. That project involved a collaborative and programmatic approach to environmental analysis that has yielded positive results. In 2019, the Cherokee National Forest (CNF) produced an EA and signed a decision notice (without objection) to “identify ecological desired conditions, propose a suite of actions that could be taken when various conditions exist within a stand, and identify additional criteria or design elements that should be applied to specific actions”—addressing restoration goals across 62,000 acres across the South Zone of the CNF and providing a programmatic analysis to which later

EAs or categorical exclusions could tier.<sup>23</sup> Just last month, the agency signed a decision notice based on an EA tiered to the programmatic analysis, authorizing over 1,000 acres of commercial timber harvest (again without objection).<sup>24</sup> The key difference between this option and what the Forest Service has proposed for the GWJNF is that the analytical framework for the Restoration of Dry Forest Communities Project includes site-specific analysis during a stepped-down public NEPA process before site-specific decisions are made.

#### 4. The Proposed Management

Despite our serious concerns with the proposed process, we reiterate that we generally support this project's on-the-ground goal of managing white pine dominated stands to diversify the mix of characteristic species like oak, hickory, yellow pine, and we are particularly enthusiastic about the focus on former pine plantations.<sup>25</sup> The Forest Service has identified an initial set of parameters (and may identify more) that should serve to reduce environmental impacts and public concerns, expedite the agency's project development and analysis, and garner public support. The basic components of this project and its parameters are very positive. We see that these elements reflect the agency's focus on priorities and an understanding of the issues that have occasionally, unnecessarily hung up some past projects and slowed the bulk of good, uncontroversial work from moving forward quickly. The *substance* of this project has very good initial building blocks.

Although we do not believe the Forest Service can or should move forward with the proposed *process*, we offer several comments on issues that the Forest Service should consider going forward—whether as design criteria, in site-specific analyses, or in a programmatic NEPA document. However, we emphasize that our suggestions are not an exhaustive list. In fact, attempting to develop design criteria or spot issues before sites or treatments are selected highlights a fundamental flaw in the Forest Service's proposed process: it is simply not possible for the agency or the public to anticipate and account for the full panoply of impacts a vegetation management project might have in the abstract, especially in a region as ecologically and socially complex as the Southern Appalachians.

- **Roads:** The Forest Service should set an annual cap on the amount of temporary road construction and road reconstruction that would be authorized under the project, regardless of how many implementation projects occur in a year. Relatedly, the Forest Service should drastically lower the amount of temporary road construction or road reconstruction that is authorized for each implementation project. It is not clear why the project would authorize one mile each of temporary road construction and road reconstruction when eligible stands must be within 50 feet of a system road.<sup>26</sup> In addition, the Forest Service will need to consider the GWNF and JNF forest plans and

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<sup>23</sup> Decision Notice and Finding of No Significant Impact, Restoration of Dry Forest Communities on the South Zone of the Cherokee National Forest at 2 (Sept. 11, 2019), available at <https://bit.ly/38DXdHM>. The project page for this programmatic analysis is available on the Forest Service website at <https://www.fs.usda.gov/project/?project=55303>.

<sup>24</sup> See generally Decision Notice, 2020 Dry Forest Community Restoration Project (Oct. 5, 2020), available at <https://bit.ly/3lrgBve>. The project page for this stepped down analysis is available on the Forest Service website at <https://www.fs.usda.gov/project/?project=58129>.

<sup>25</sup> See Scoping Notice at 2.

<sup>26</sup> See *id.* at 3.

transportation analyses before investing in road reconstruction, to ensure investments are not made in roads which may be high impact/low value roads prioritized for decommissioning.

- **Slopes and Soils:** The scoping notice states that stands would be eligible if they are “*largely* located on slopes less than 35%.”<sup>27</sup> How is the Forest Service defining “largely” in this context? In any event, the Forest Service should avoid stands that are located on slopes 35% or greater, whether in whole or part. Steep portions of stands could be treated as noncommercial inclusions, or the Forest Service could consider non-ground disturbing harvest techniques. Relatedly, stands on soils prone to erosion should be avoided.<sup>28</sup>
- **Desired Conditions:** The Forest Service should be clear about how it is defining its desired outcomes for the project, including how it is defining the term woodlands. We understand from the October 27 virtual public meeting that the Forest Service plans ongoing public engagement on this issue, and we look forward to learning more. Particularly for the stands described as natural stands, and especially for those over 50 years old, it will be important to explain how the stands’ white pine component departs from desired or reference conditions and to explain how the proposed treatment will move the stand towards desired conditions.
- **Roadless and Potential Wilderness Areas:** We are very glad to see the Forest Service avoiding inventoried roadless areas. We are also glad to see the agency considering potential wilderness areas (PWAs) at the beginning of project planning. The scoping notice states that stands would be eligible if they are “not *entirely* contained within a [PWA].”<sup>29</sup> How is the Forest Service defining “entirely” in this context? Regardless, the agency must also identify areas that qualify as PWAs. On the GWNF, there is a fairly recent inventory of PWAs identified during forest plan revision. But on the JNF, there is no PWA inventory. The old roadless area inventory does not include many areas that qualify as PWAs. Special care must be taken to identify areas on the Jefferson that qualify as PWAs and avoid altering them. Because the Forest Service has said it plans to streamline its analysis by removing areas that may present issues,<sup>30</sup> the agency should simply disqualify any stands that encroach on a PWA, whether in whole or part. At a minimum, the Forest Service must commit that any treatment of stands located partially within a PWA will not disqualify that area for inventory and consideration in the future.
- **Old Growth:** The Forest Service should disqualify any stands that contain old growth. At a minimum, the Forest Service cannot treat any patches of old growth in this project without site-specific analysis in accordance with the relevant forest plan. For example, on the GWNF, harvest of old growth must be supported by analysis that

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<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> The inability to analyze erosion risk without site-specific analysis underscores the problems with attempting to proceed without such analysis.

<sup>29</sup> Scoping Notice at 3. (emphasis added).

<sup>30</sup> *Id.* at 6.

includes “consideration of the contribution of identified patches to the representation, distribution, and abundance of the specific forest type within the old growth community classifications and the desired conditions of the appropriate prescription.”<sup>31</sup>

- **Commercial Treatment:** The scoping notice states that the Forest Service proposes annual caps on timber harvest acreage across the GWJNF, but does not dictate whether that acreage will be clearcut, thinned, or something in between.<sup>32</sup> The Forest Service must analyze the impacts of its proposed annual harvest under the most intensive silvicultural prescription the project would employ to ensure that the agency does not overlook impacts. We stress that this issue exposes the flaws in the proposed process.
- **Post-Commercial Treatment:** The scoping notice acknowledges that post-commercial treatments may be necessary to achieve desired outcomes in treated stands.<sup>33</sup> The Forest Service must analyze the impacts of the proposed management if stands cannot receive post-commercial treatment due to budgetary or logistical issues.
- **NNIS:** It is very important that the Forest Service avoid and minimize the spread of non-native invasive species (NNIS). In many locations, both pre- and post-harvest treatment for NNIS will be essential to prevent the spread of NNIS and the agency should therefore commit to those treatments as part of any project. Yet the scoping notice suggests only that NNIS infestations “may be treated” and “will be monitored.”<sup>34</sup> Ground disturbing activities including commercial timber harvest are known vectors for the spread of NNIS, so this is a significant concern.
- **Species:** How does the Forest Service propose to account for or design around RFSS and TES species and their habitats? Likewise, how does the Forest Service plan to ensure that the project will comport with applicable requirements of the Endangered Species Act?

## 5. Conclusion

We greatly appreciate the agency’s stated desire to approach this project collaboratively, and we would look forward to participating in further project planning to refine this proposal and to successfully implement the proposed management. At the same time, we want to be clear about our concerns with the process that the Forest Service is proposing. We believe there are opportunities here to do great work on the GWJNF and gain procedural efficiencies while complying with NEPA’s requirements. We appreciate the opportunity to comment on this project and we would welcome the opportunity to discuss the project further with the Forest Service. Indeed, we believe it would be much more efficient and productive to work through the NEPA

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<sup>31</sup> GWNF Forest Plan Clarification Letter at 2.

<sup>32</sup> Scoping Notice at 3–4.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 5.

issues in dialogue and we would look forward to a conversation as an initial follow-up on these comments. Please do not hesitate to contact us.

Sincerely,

A handwritten signature in blue ink, appearing to be 'SG', with a long horizontal stroke extending to the right.

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Attachments

### **List of Attachments**

Letter from 14 Organizations to Maureen Hyzer, U.S. Forest Service (Oct. 17, 2011).

Comments on *Proposed Rule: National Environmental Policy Act (NEPA) Compliance*, (84 Fed. Reg. 27,544, June 13, 2019), submitted by The Wilderness Society, Western Environmental Law Center, Southern Environmental Law Center, et al. (Aug. 25, 2019)