

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
UNITED STATES FOREST SERVICE

In re Objection to the Draft Decision Notice,)
Finding of No Significant Impact, and)
Environmental Assessment for the)
Wildlife Openings Management Project,)
National Forests in North Carolina)
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Center for Biological Diversity, MountainTrue,)
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Objectors)

Objection No. _____

NOTICE OF OBJECTION AND STATEMENT OF REASONS

Objection Prepared By:

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Pursuant to 36 C.F.R. § 218.8(d)(3), The Southern Environmental Law Center is designated as the lead objector.

NOTICE OF OBJECTION

Pursuant to 36 C.F.R. § 218, The Southern Environmental Law Center, Center for Biological Diversity, and MountainTrue (Conservation Groups) object to the Draft Decision Notice and Finding of No Significant Impact (Decision and FONSI), selecting the proposed action alternative described in the Wildlife Opening Management on the National Forests in North Carolina Final Environmental Assessment (EA). The Decision, FONSI, and underlying EA violate the National Environmental Policy Act (NEPA) and the requirements of 36 C.F.R., Chapter II, Part 220, and the National Forest Management Act (NFMA). The responsible official for this project is James Melonas, Forest Supervisor, National Forests in North Carolina. The public notice was published in the Asheville Citizen Times on February 16, 2022. This objection is timely.

The Conservation Groups' members use and appreciate North Carolina's forests and wild lands for their scenic beauty, observing wildlife, remote and quiet hiking, hunting, fishing, camping, spiritual renewal, and other recreational and educational activities. The project will adversely affect the Conservation Groups and their members by interfering with these uses of the project area. The Conservation Groups actively participate in the management of the National Forests of North Carolina, and have submitted extensive comments and participated in meetings and public hearings during forest planning and many other management activities taking place on these lands.

The Southern Environmental Law Center, legal counsel to the Conservation Groups, is a regional non-profit organization working to conserve natural resources on public lands throughout the Southern Appalachians.

For the reasons that follow, the Conservation Groups request that the Forest Service revisit the project decision and correct the legal errors in its analysis.

ELIGIBILITY TO OBJECT

The Center for Biological Diversity, and Mountain True (Objectors) file this objection to the Wildlife Openings Management Project, for which the responsible official is Forest Supervisor James Melonas, pursuant to 36 C.F.R. Part 218. Objectors have previously submitted timely specific written comments regarding the Wildlife Openings Management Project during designated opportunities for public comment (at Draft Environmental Assessment). Most of the issues discussed in this Objection were raised in Objectors' prior comments, and Objectors hereby incorporate those comments by reference. All remaining issues concern information and decisions that were not available at the Draft EA stage.

STATEMENT OF REASONS

The Southern Environmental Law Center submits this objection on behalf of MountainTrue and the Center for Biological Diversity (hereinafter, "Conservation Groups"). We write to express our continuing concerns about the proposal to increase the use of herbicides in the management of existing wildlife openings on North Carolina's National Forests ("NFsNC"). Because many of our concerns have already been expressed in our comments on the Draft Environmental Analysis ("Draft EA"), we attach and incorporate these comments by reference here. Attachments 1 and 2.

The Conservation Groups' members use and appreciate North Carolina's forests and wild lands, and they are active participants in the management of the NFsNC. As detailed in our comments on the Draft EA, this project is representative of the increased reliance on herbicide by the Forest Service and by third parties to achieve silvicultural, agricultural, and other objectives. Unfortunately, the Final EA for this project is also emblematic of a general failure to appropriately limit and fully examine the impacts of herbicides as their use increases. Instead of thoroughly considering herbicide risks and imposing appropriate limits, the instant proposal rubber-stamps their increased use across a broad range of ecosystems. This will make herbicides a tool of first resort across the Forests, even where manual or mechanical treatment would be

better for plant and wildlife communities. At the same time, the agency's analysis of this decision assumes without justification that the impacts will be minimal. The Final EA does not correct these fundamental errors, and therefore we object.

I. Improvements Made to the Final EA Raise More Questions Than They Answer.

Conservation Groups appreciate the main improvement made since the Draft EA, which responds to our concern that the Draft EA violated NEPA because it lacked any alternatives analysis. The addition of a "no action" alternative allows the Forest Service to weigh the instant proposal to increase chemical management of wildlife openings against the status quo of relying on manual and mechanical maintenance. We also better understand the "purpose and need" for the project thanks to the Response to Comments, which indicate that chemical management is expected to be less costly than the current manual and mechanical means used to maintain wildlife openings, and in some cases is expected to reduce soil disturbance. However, this additional information and alternatives analysis also raises new problems.

While the purpose and need description remains substantially the same between the Draft and Final EA, the Response to Comments notes that limited access for heavy equipment, soil compaction/disturbance risk, and "cost" make chemical management preferable in some cases. Response to Comments at 10. But the EA does not limit chemical management to these scenarios. In fact, there's no requirement that the Forest Service weigh the risks and benefits of chemical versus mechanical or manual management in each application. Thus, the scope of this proposed expansion of herbicide use remains a mystery. Under this proposal, the Forest Service could embrace entirely chemical management of wildlife openings, subject only to design criteria limiting certain types of applications within certain proximities to aquatic environments and rare species. *See* Final EA at 10-11.

Accordingly, the alternatives analysis that was added to the Final EA remains a hollow exercise. Instead of explaining the real tradeoffs between the proposal to increase herbicide use and the status quo, the alternatives analysis is hindered by this more general failure to define the scope of the proposal. Will herbicides be used across the board to maintain all wildlife openings to reduce costs? Will they only be used to avoid the soil disturbance caused by heavy equipment or where equipment access is limited? Moreover, the Final EA still fails to address the question of how habitat conditions created using herbicides are different from those created by manual or mechanical means. By merely generalizing about these tradeoffs between the proposed chemical and existing mechanical and manual management techniques, the EA fails to define the project and therefore cannot make a real comparison between alternatives. The environmentally consequential decisions—when and how often to use herbicides—will be made in the future, without the benefit of NEPA analysis.

NEPA analysis "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.02(g). The heart of this analysis consists of articulating a range of reasonable alternatives. 42 U.S.C. § 4331(2)(E) (requiring agencies to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved

conflicts concerning alternative uses of available resources.”); *see* 40 C.F.R. § 1501.5 (requiring EAs to discuss alternatives to the proposed action). The failure to adequately define how (and how much) the use of herbicides under this proposal will depart from the status quo undermines the direct comparison of the two alternatives required by NEPA.

II. The Final EA Lacks Important Limitations on Herbicide Use and Therefore Does Not Support a FONSI.

NEPA requires the Forest Service to take a “hard look” at the environmental impacts of its proposed actions. *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 184 (4th Cir. 2005). This ensures that decisions are “based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c).¹ An incomplete analysis of environmental effects, or the efficacy of measures to reduce the severity of those effects, “undermine[s] the ‘action-forcing’ function of NEPA,” because “neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (citations omitted).

Courts have held that an Environmental Impact Statement (“EIS”) must be prepared if “substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor.” *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (internal citation omitted) (emphasis in original). It is not necessary to show “that significant effects *will in fact occur*.” *Id.* (internal citation omitted) (emphasis in original). A decision not to prepare an EIS is unreasonable “[i]f substantial questions are raised regarding whether the proposed action may have a significant effect upon the human environment,” or if the agency fails to “supply a convincing statement of reasons why potential effects are insignificant.” *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (internal citations omitted).

The most fundamental problem with the Final EA, which makes it impossible to fulfill NEPA’s requirement to examine environmental impacts and justify the FONSI, is its failure to define the project’s scope. As described above, tradeoffs between chemical and mechanical management are alluded to, but no meaningful limits are placed on the authorized increase in

¹ Citations to 40 C.F.R. Parts 1500 through 1508 refer to the 1978 version of those regulations as modified in 1986, 43 Fed. Reg. 55978; 51 Fed. Reg. 15618. Although these longstanding regulations were revised by CEQ in 2020, 85 Fed. Reg. 43304, CEQ has now disavowed the 2020 regulations and has begun a process to rescind them. 86 Fed. Reg. 55757. The 2020 regulations are also subject to litigation. *Wild Va. v. Council on Env’t Quality*, No. 3:20cv45 (W.D. Va. 2020) (now on appeal to the 4th Circuit); *Env’t. Justice Health All. v. Council on Env’t Quality*, No. 1:20cv06143 (S.D.N.Y. 2020); *Alaska Cmty. Action on Toxics v. Council on Env’t Quality*, No. 3:20cv5199 (N.D. Cal. 2020); *California v. Council on Env’t Quality*, No. 3:20cv06057 (N.D. Cal. 2020); *Iowa Citizens for Cmty. Improvement v. Council on Env’t Quality*, No. 1:20cv02715 (D.D.C. 2020); *The Clinch Coal. v. U.S. Forest Serv.*, No. 2:21cv00003 (W.D. Va. 2020) (as applied challenge).

chemical management. The Response to Comments points to design criteria that will be used at the project level, and these are improved from the Draft. But these design criteria are limited to the protection of specific resources such as rare and endangered species, and do not require mechanical or manual maintenance be continued where such methods would be better for plant and animal communities. Final EA at 10-12. Similarly, the effects analysis assumes “low-volume herbicide applications,” Final EA at 17, but there are no volume limits in this EA nor is there any requirement that volume limits be imposed in the deferred site-specific wildlife opening maintenance plans.

The design criteria in the Final EA are solely focused on the protection of specific rare and endangered species, rather than generally limiting the use of herbicides for the benefit of all species. As Conservation Groups noted in our comments on the Draft EA, there is a fundamental tension between the project’s goal of maintaining permanent wildlife openings for the benefit of certain wildlife, including pollinators, and accomplishing that maintenance using herbicides. We have continually brought similar concerns about pesticide use in North Carolina’s National Forests to agency attention. For example, the recently published Revised Forest Plan for the Nantahala and Pisgah National Forests notes in its Final Environmental Impact Statement that “pesticide use” is an existential threat to pollinators, especially for rare and imperiled species like the Rusty-patched Bumble Bee (RPBB). FEIS at 3-294; *see* 82 FR 3186, 3189-90 (Endangered Species Status for Rusty Patched Bumble Bee, noting that herbicides are a risk factor for the species). Objectors noted that, despite acknowledging the risk of pesticide use on the RPBB and relying on the future presence on RPBB on the Forests as a rationale for creation of more early successional habitat (FEIS at 3-120), the Forest Plan did not create clear enough spatial and temporal limits on pesticide use to actually support populations of the pesticide-sensitive pollinator. Here, the Wildlife Openings Management Project falls into the same pattern.

In short, the scope of the project and any mitigation is too ill-defined to support a FONSI, because it allows much greater impact than has been analyzed in accordance with NEPA. Additional limits must be imposed so that these consequential decisions (under what circumstances and with what upper limit will herbicides be used) are made now, rather than deferred to the future with no NEPA analysis. And, of course, those limits must be supported by actual analysis tied to specific limitations.

A. Additional Limits Are Required at the Programmatic Scale.

The proposal covers a vast and largely undefined number of activities, including not only different chemicals, but different environments and target pest species, and presumably including everything from aerial spraying to ground spraying to granular application. Thus, it is certainly a challenge to craft generally applicable limitations or even best management practices. We appreciate the Design Criteria, “Guidelines for Herbicide Use,” appearing in the Final EA, and we support these measures to minimize drift and protect aquatic habitat and rare species. *See* Final EA at 10-11. However, we believe more must be done to limit herbicide use in light of the dangers summarized in our previous comments.

As we noted in our comments on the Draft EA, over-reliance on herbicide means that the Forest Service has failed their mandate to follow Integrated Pest Management protocols (“IPM”).² IPM has become the standard framework for using pesticide on public lands across the Federal government and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) states that “[T]he [Environmental Protection Agency] Administrator in cooperation with the Secretary of Agriculture shall develop approaches to the control of pests based on integrated pest management” 7 U.S.C. § 136w-3 (c) (2012). The expansion of herbicide use in this EA should therefore be revised to reflect limits derived from IPM.

The Forest Service must limit herbicide use to the minimum necessary after a rigorous, written consideration of alternative management methods.³ Importantly, the Forest Service Handbook embracing IPM requires “site-specific, or project-specific analyses” that comport with NEPA,⁴ and it further requires monitoring sites after pesticide applications⁵ as well as recordkeeping and reporting of all applications of pesticides by the Forest Service.⁶

B. The Proposal Should Require the Imposition of Site-Specific Limits for Individual Projects.

While this programmatic proposal arguably does not lend itself to specific volume or frequency limits broken down by site and by chemical, it should at least provide a framework for site-specific limits to be imposed at the appropriate time. Right now, there is no requirement that herbicide applications be limited or documented at the project level. Instead, the Final EA assumes that the proposal only applies to “low-volume” applications of herbicides without limiting or even tracking the volume of herbicides in any way. Final EA at 17. Such unfounded assumptions cannot form the basis of the required “hard look” at environmental impacts under NEPA, and they further indicate that the agency’s decision is arbitrary and capricious under the

² See U.S. Forest Service, “FSM 2100 - Environmental Management Chapter 2150 - Pesticide Management and Coordination,” 2014, [wo 2150.doc \(live.com\)](#), Attachment 3.

³ See EPA, 2021 NPDES Pesticide General Permit, [Regulations.gov](#), Attachment 4. EPA’s NPDES General Permit for pesticide discharges suffers from overbreadth similar to this project by authorizing the use of a diverse range of pesticides in different environments; at the same time, the General Permit demonstrates that it is possible to impose limits covering such a broad array of chemicals and target species. Specifically, EPA’s General Permit requires that pesticide applicators “use only the amount of pesticide and frequency of pesticide application necessary to control the target pest.” *Id.* at 2-1. EPA elucidates this requirement by mandating a rigorous, written consideration of alternatives, including identification and assessment of the pest problem, and a detailed analysis of alternative control measures including no action, prevention, mechanical or physical methods, cultural methods, and biological control agents. *Id.* at 2-2 – 2-6. If the pesticide control option is selected, the dischargers must monitor pest activity and a pre-determined pest “action threshold” must be met before any pesticides are used. *Id.*

⁴ Attachment 3 at 15.

⁵ *Id.* at 16.

⁶ *Id.* at 17.

Administrative Procedure Act because they undermine a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

This operates as a blank check to manage wildlife openings using primarily herbicides and cannot support a FONSI. The EA should instead require that the site-specific maintenance plans to be developed later include specific limitations on herbicide types, volumes, and frequencies; as well as monitoring and reporting requirements for before and after treatments, so that the impacts of increased herbicide use targeting native species can be measured and disclosed to the public.

Because this proposal does not impose meaningful limits on the authorization to increase herbicide use across the NFsNC, it is impossible to analyze its effects with the requisite specificity. It is also impossible to justify the agency’s conclusion that the project will have no significant impact on the environment. Requirements that site-specific maintenance plans must weigh alternative maintenance methods, set volume and frequency limits, and monitor and report herbicide applications would better define the project’s scope and therefore allow the meaningful analysis of environmental impacts required by NEPA.

III. The Final EA Does Not Adequately Disclose the Risks Posed by Herbicides.

NEPA analysis must adequately describe the affected environment and disclose the environmental consequences of the proposed action and each of the alternatives to the proposed action. 40 C.F.R. § 1502.1. It is not enough to make general statements about “possible effects” and “some risk.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). “[P]erfunctory references do not constitute analysis useful to a decisionmaker.” *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988).

As Conservation Groups explained in our previous comments, herbicide use is fraught with both known and under-studied risks. Existing regulation by the EPA is focused on their use in industrial agricultural settings and does not translate well to the sustainable, multiple-use values that must be upheld on our public lands. *See* 16 U.S.C. § 1604(e)(1) (requiring forest planning to balance “outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.”); 36 C.F.R. § 219.10 (requiring forest planning to “provide for ecosystem services and multiple uses, including outdoor recreation, range, timber, watershed, wildlife, and fish”). These risks are even more grave when it comes to native plants, which we cannot support under the current proposal.

Like the Draft, the Final EA still lacks sufficient detail to evaluate the risks posed by this project. This is in part due to the failure to define the scope of the project as described above, and this error is compounded by the agency’s reliance on theoretical site-specific planning, without NEPA analysis, that has yet to be performed. Instead of analyzing this project’s impacts “all the way to the ground,” both for direct and cumulative impacts, most environmental analysis is deferred for later “wildlife opening maintenance plans” and “implementation workflow

guides.” Final EA at 10. This deferred analysis is problematic for two main reasons under NEPA.

First, it is unclear whether these site-specific “wildlife opening maintenance plans” will be subject to any additional NEPA analysis or even public disclosure. *Id.* Thus, it is unclear whether the Forests will ever fulfill their NEPA obligations on the individual, site-specific level. NEPA’s “hard look” ensures that (1) the agency will carefully consider the effects of its actions on the environment, and (2) the public and other agencies will be able to analyze and comment meaningfully on the proposal and its impacts. *Id.*; *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (citations omitted). NEPA requires that the hard look be made with the input of an interdisciplinary team and in the light of public disclosure and informed comment. 42 U.S.C. § 4332 (“utilize a systematic, interdisciplinary approach”); *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983) (explaining that NEPA’s twin aims include both agency consideration of relevant information and public disclosure and scrutiny).

Under the Final EA, the interdisciplinary and site-specific approach required by NEPA is deferred until after the public NEPA process, sidestepping NEPA’s twin aims of analysis and disclosure. Instead, the agency relies on a so-called “programmatic” EA, which includes (a) no description of effects in the different ecosystems across the State’s four National Forests where the herbicides will be used and (b) no explanation of how deferred decisions will be analyzed in the future. If the NFsNC want to make one decision now to authorize herbicide use in the future, then they must resolve the issues that may otherwise lead to direct and cumulative significant impacts. This project does not do so. It includes very few specific examples of plants that will be targeted and does not even attempt to estimate the volume of each type of listed herbicide that might be deployed and at what frequencies. The Final EA must either support a decision, with specific limits, that gets all the way to the ground, or it must explain how NEPA requirements will be fulfilled with respect to the site-specific maintenance plans, including the imposition of limits on herbicide use as well as the public notice and accountability components of NEPA. A “programmatic” analysis is only as useful as the framework it provides for later project-level analysis and disclosure to tier to. As it stands, without a clear commitment for future site-specific NEPA analysis, this project is not programmatic at all, but is instead an unlawful “condition-based” project.⁷

Second, the failure to perform a full programmatic analysis that analyzes the specific impacts of various herbicides on specific species and ecosystems means that the Forests have not evaluated the cumulative effects of their proposal. The Forest Service is required to consider three types of effects: those that are direct, indirect, and cumulative. 40 C.F.R. § 1508.25(c). A cumulative impact results from the incremental impact of the proposed action “when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions.” *Id.* § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* Courts have recognized that the cumulative impacts of multiple projects may be significant and must be analyzed under NEPA:

⁷ See SELC, et al., letter to CEQ, Attachment 5.

Cumulative impacts of multiple projects can be significant in different ways. The most obvious way is that the greater total magnitude of the environmental effects—such as the total number of acres affected . . . —may demonstrate by itself that the environmental impact will be significant. Sometimes the total impact from a set of actions may be greater than the sum of the parts. For example, the addition of a small amount of sediment to a creek may have only a limited impact on salmon survival, or perhaps no impact at all. But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean that *no* salmon survive.

Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 994 (9th Cir. 2004).

In sum, even if NEPA analysis is undertaken later at the project level, there will be no further opportunity to examine the effects on the landscape scale. While many site-specific considerations are appropriately deferred to the project level, the time to analyze the potential impacts to ecosystems and species across the entire NFsNC is now. Considering the risks posed by herbicides, an EA lacking these fundamental details cannot possibly support a FONSI. Further disclosure and analysis are required under NEPA.

IV. Conclusion

The Final EA improves upon the Draft by including a perfunctory alternatives analysis and additional design criteria, and the Response to Comments clarifies the purpose and need for the project. However, the failure to define the scope of the project and impose meaningful limits on herbicide use hampers the full alternatives analysis that is required by NEPA. The Final EA also continues to defer most detailed planning and analysis to site-specific maintenance plans, without a programmatic cumulative impacts analysis and commitment to tiered NEPA analysis at the project level, and without any serious effort to take the analysis and decision all the way to the ground. Like the Draft, the Final EA continues to lack any detail regarding the variety of affected environments, the nature of the herbicides themselves, and the scope of their intended applications.

We urge the Forest Service to take a step back and choose between a programmatic approach (in which case there must be a clear commitment to further NEPA analysis at the site-specific level) or to resolve environmentally consequential issues now (in which case this analysis and decision are fundamentally inadequate and lacking in detail and limitation). Either way, the Forest Service must complete a thorough review of its plans for maintaining wildlife openings, including the tradeoffs between expanding herbicide use and use of other non-chemical means, before proceeding with applications. We look forward to discussing this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Susannah Knox", enclosed within a thin black rectangular border.

Susannah Knox
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On behalf of the Objectors