

October 12, 2021

Via Cara Online Portal and E-Mail

Jessie Howard
Sheryl Bryan
National Forests in North Carolina Forest Supervisor's Office
160 Zillicoa St. Suite A
Asheville, NC 28801
Jessie.howard@usda.gov
sheryl.bryan@usda.gov

Cara online portal submittal:

<https://cara.ecosystem-management.org/Public/CommentInput?Project=55310>.

Re: National Forests in North Carolina Wildlife Openings Management Project

The Southern Environmental Law Center and The Center for Biological Diversity submit these comments on behalf of The Wilderness Society and MountainTrue (hereinafter, "Conservation Groups"). We write to express our concerns about the proposal to increase the use of herbicides in the management of existing wildlife openings on North Carolina's National Forests ("NFsNC").

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.

Conservation Groups have watched with concern as the use of herbicides has increased in and around the NFsNC. Herbicide is increasingly relied on by the agency and by third parties to achieve silvicultural, agricultural, and other objectives. For example, broadcast herbicide is becoming de rigueur for maintenance of linear rights of way, displacing manual maintenance. While we understand that sometimes herbicide is a responsible choice, it must not be used without due consideration of its risks and cumulative effects. The proposal here would allow just that. By signing a blank check for herbicide use, herbicides will be a tool of first resort, including in situations where it is more economical than other kinds of treatment, even if mechanical treatment would be better for plant and wildlife communities. The Draft EA does not (and cannot, given the absence of detail in the proposed action) assess the tradeoffs between these important choices.

Although the proposal identifies a number of options for wildlife opening maintenance, these comments focus primarily on the site-specific and cumulative risks associated with herbicide use. To be clear, we do not oppose the maintenance of wildlife openings generally. Our concern is with the details. Just because a specific area is maintained in a grassy or shrubby condition does not mean that it is characteristic for the ecozones where it is located, or that it is contributing to ecological integrity and native species diversity. This proposal would allow management of openings for single species or game species, potentially at the expense of ecological integrity and diversity requirements. As explained below, the Forest Service must provide more detail, especially with respect to expected uses, effects, and limits on herbicide use.

Even when used as instructed, herbicides pose grave risks to people, especially herbicide applicators and children; waterways; wildlife and native plants; and endangered species. Many pesticides are highly persistent, and the full scope of their impacts are largely unknown. The limited studies available for most pesticides focus on their application in industrial agricultural settings, rather than on public lands. Moreover, many of the herbicides included in this proposal have not been studied in more than a decade, so the true risks are unknown. The Environmental Protection Agency has never complied with the Endangered Species Act's mandate to study the potential harms from these chemicals to endangered species, and there is still no nationwide biological opinion on any single pesticide. Thus, public land managers are ill-equipped to deal with the scope of impacts they may have, on resources ranging from rare species to recreation.

In addition to underestimating the known dangers and unknown risks of herbicides in the rich and delicate ecosystems of our public lands, the Draft EA lacks basic information and elements of the analysis required by NEPA. There is no real statement of the "purpose and need" for the project, and there is no articulation of alternatives to the project. These are two of the most fundamental pillars of NEPA's requirements. The Draft EA demonstrates no justification for moving forward with the project, and no real analysis of its environmental impacts in the absence of any comparison to alternative actions or the status quo.

The Draft EA also lacks sufficient detail for the public to understand the scope of the project. It includes no description of the different ecosystems across the State's four National Forests where the herbicides will be used. It includes very few specific examples of plants that will be targeted, and no examples of native species. It also leaves out any estimate of the volume of each type of listed herbicide that might be deployed. In light of the risks posed by herbicides, an EA lacking any real limits or other fundamental details cannot possibly support a Finding of No Significant Impact. Further disclosure and analysis are required under NEPA.

I. The proposed action violates NEPA

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 "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). It is not enough

that agency decisionmakers consider information privately. 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).

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).

NEPA procedures ensure 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). NEPA procedures require the necessary environmental information be available to “public officials and citizens *before* decisions are made and *before* actions are taken.” 40 C.F.R. § 1500.1(b) (emphasis added). Following NEPA’s procedures before deciding is vital because good process is “almost certain” to improve the agency’s decision. *Robertson*, 490 U.S. at 350. In other words, “NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Id.* at 349.

A. The Draft EA sets forth no discernible “purpose and need” for the project.

As a threshold matter, the Forest Service must establish a purpose or need for the project. A proposal to use herbicides when they are unnecessary would be arbitrary, capricious and

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).

contrary to the law. *See* 5 U.S.C. § 702(2)(A) (a court shall “hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

The statement of purpose and need in the Draft EA is devoid of any justification for the increased herbicide use. The stated purpose is:

- 1) To maintain permanent wildlife openings and associated edge and transitional habitats . . . to benefit native wildlife species, and
- 2) To help prevent the establishment and spread of non-native invasive plant species

Draft EA at 2.

Accordingly, there is extensive discussion of the ecological need for wildlife openings and the importance of wildlife associated with early successional habitat, such as birds, bats, game species, and pollinators. Draft EA at 3-4. But there is no discussion of the need for herbicides in maintaining this type of habitat. As briefly described in the EA, the Forest Service already uses manual and mechanical means, as well as controlled burning, to maintain existing wildlife openings. There is no discussion of the relative benefits of these methods as compared with chemical management. In fact, current management methods are described as “successful in the maintenance of the existing permanent wildlife openings,” and there is no reason provided for “the broader suite of treatment options,” aka herbicides, the project represents. Draft EA at 4. Thus, the first “purpose and need” articulated in the Draft EA bears no relationship to the proposed action, which is to increase herbicide use.

As to the second “purpose and need,” control of non-native invasive species (“NNIS”) in wildlife openings, herbicides are already approved for this use in the Nantahala and Pisgah National Forests. The proposed action would increase the current approved use of herbicides beyond controlling NNIS and target *native* species in these two forests. Thus, the need to control NNIS cannot justify the expansion of herbicide use in the Nantahala and Pisgah.

It is unclear whether this project would change the use of herbicides to treat NNIS in wildlife openings on the Croatan and Uwharrie National Forests. The Draft EA states that “The Environmental Assessment for Non-Native Invasive Plant Control on the Uwharrie and Croatan National Forests Environmental Assessment (USDA 2021) does not include the treatment of non-native invasive plant species in wildlife openings.” Draft EA at 2. However, the document cited actually states that it covers “the potential treatment of NNIP on *all* National Forest Systems lands in *all* management areas on the Uwharrie and Croatan NFs except designated wilderness areas.” USFS, Non-Native Invasive Plant Control on the Uwharrie and Croatan National Forests, Preliminary Environmental Assessment (Jan. 2021) at 2 (emphasis added).

Thus, it would appear that herbicides are already approved for use in treating across the Uwharrie and Croatan National Forests as well.²

Regardless of the confusion over which treatments of NNIS have previously been approved, the Draft EA does not explain why herbicide use should be increased or why it is desirable to target *native* species in any of North Carolina's National Forests with herbicides.³ Thus, the purpose and need for this project is unknown. Without this fundamental piece of the project analysis, the Draft EA violates NEPA.

B. The Draft EA fails to articulate any alternatives to the proposed action.

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."). The regulations governing both an Environmental Assessment and the more extensive Environmental Impact Statement ("EIS") explicitly require a discussion of project alternatives. 40 C.F.R. § 1501.5 (requiring EAs to discuss alternatives to the proposed action); 40 C.F.R. § 1502.14 (describing the detailed alternative analysis required for an EIS).

The Draft EA analyzes only the project proposed, without any comparison to other possible action alternatives. The Draft EA does not even include the baseline, "no action"

² To be clear, we recognize the ecological threats posed by NNIS, and we understand that sometimes the only viable control method involves herbicides. But over-reliance on herbicide means that the Forest Service has failed their mandate to follow Integrated Pest Management protocols ("IPM"). See U.S. Forest Service, "FSM 2100 - Environmental Management Chapter 2150 - Pesticide Management and Coordination," 2014. 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 "...the [Environmental Protection Agency] Administrator in cooperation with the Secretary of Agriculture shall develop approaches to the control of pests based on integrated pest management..." "Federal Insecticide, Fungicide, and Rodenticide Act," 7 U.S. Code § 136w-3 (c) (2012).

³ Additional scrutiny of purpose and need is warranted when it comes to killing native plants. We cannot support the use of herbicides on native plants under the current proposal. The Draft EA fails to disclose which native species will be targeted or evaluate the benefits that could be lost, including wildlife habitat and food, carbon sequestration, and soil stabilization, among other benefits. The proposal mentions only black locust and red maple as possible targets, Draft EA at 7, and perhaps the Forest Service actually intends to use only limited, non-broadcast methods to control stump sprouts. If that is the case, then the proposal should say so. As written, the proposal would allow much broader use of herbicides on native species. The likely costs to water quality, wildlife habitat, and cumulative herbicide use associated with removing these native species from the environment are not worth the cost of performing the proposed maintenance manually. Herbicide use on native plants is not ecological restoration, and is not supported by best available science.

alternative. Without any comparison to alternative courses of action or even the status quo, the Draft EA violates the clear requirements of NEPA and effectively fails to assess the environmental impacts of the project at all. To cure this error, the Forest Service must, at minimum, evaluate the “no action” alternative to assess tradeoffs between continuing its current practice of wildlife opening management versus increasing herbicide use.

C. The Draft EA does not adequately describe the scope of the project or its impacts.

In any NEPA analysis, an agency 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). Thus, the Forest Service must adequately describe the units within the project area where it seeks to deploy herbicides, it must explain the planned herbicide use with specificity, and it must describe the consequences of multiple alternative actions on these many unique areas. In particular, the proposal must include limits on the frequency and volume of herbicide that may be applied, including limits applicable to particular geographies. Without limits, the impact of chemical application is impossible to analyze in accordance with NEPA.

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). Direct effects “are caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(b). 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.* Under NEPA, “effects” and “impacts” are synonymous terms that include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health.” *Id.* § 1508.8 (emphasis added); *see also id.* § 1508.14. The agency’s statements “shall be supported by evidence that the agency has made the necessary environmental analyses.” *Id.* § 1502.1.

The Nantahala and Pisgah National Forests are in the mountainous western part of the state, with primarily hardwood forests on a wide range of elevations. These Southern Appalachian Forests are renowned for their rich biodiversity, scenic elevations, and pristine waters. The smaller Uwharrie National Forest includes part of the lower-elevation Uwharrie Mountains east of Charlotte and is in the Southeastern mixed forests ecoregion; once entirely clear-cut, its three rivers and mixed pine and hardwood forests now provide important wildlife habitat and recreation opportunities in the region. The Croatan National Forest in eastern North

Carolina consists of coastal pine forests, saltwater estuaries, bogs, and swamps. The marine and coastal wildlife include rare carnivorous plants, and provide unique recreational benefits.

These forests—and their associated wildlife openings—contain a vast range of ecosystems and wide variation in wildlife. Simply put, using herbicide to maintain wildlife habitat in the swampy bottomlands of the Croatan requires different considerations than pursuing the same objective in the dry, upland forests of the Pisgah-Nantahala. But the EA fails to take these differences into account, instead assuming that herbicide use will have the same general effect regardless of where it is applied. Indeed, the Draft EA does not describe the ecology of these unique National Forests at all, barely mentioning any of this diverse wildlife beyond a perfunctory listing of rare species located throughout the State.

The Draft EA recognizes that site-specific differences between different wildlife openings matter when it comes to considering the effects of herbicide application. For instance, some herbicides cannot be used “where the water table is shallow” (Draft EA at 9); application in other areas requires further analysis by “the zone biologist and/or botanist” (Draft EA at 10). In fact, the Forest Service appears to defer the bulk of site-specific environmental analysis: sometime in the future the agency will prepare a wildlife opening maintenance plan, with the help of “interdisciplinary specialists in the areas of wildlife biology, botany, aquatics, hydrology, soils, silviculture, and archaeology (as appropriate).” Draft EA at 8. The interdisciplinary assessment of the effects of the proposed action is what NEPA requires the agency to prepare *now*—it cannot satisfy NEPA by committing to prepare an environmental analysis outside of the NEPA process in the future.

Undoubtedly, the agency’s job is complicated here due to the statewide scope of the proposal. But if the proposal is too broad at this point to facilitate meaningful consideration of environmental effects, the agency should more narrowly define it—perhaps forest by forest—instead of simply failing to consider meaningful differences between wildlife opening sites. Few efficiencies in the process would be lost if the agency delayed its NEPA analysis until it prepares interdisciplinary plans for management of each wildlife opening, which it is proposing to do anyway. *See* Draft EA at 8.

The Draft EA also does not adequately describe the nature of the proposed action. The Forest Service attempts to downplay the potential significance of the proposal on the basis that wildlife openings occupy only a small percentage of all NFsNC lands. Draft EA at 15, 21, 22. However, the limited acreage of the project is not the only factor the Forest Service must consider, particularly when those areas are admittedly of outsized importance to the specialized species that occur there. *See* Draft EA at 4 (“While these acreages are small in comparison to the total national forest area, they are vital to wildlife habitat diversity on NFS lands.”).

The Draft EA does not begin to describe which herbicides are approved for use in which places, or how much herbicide will be applied. The design criteria outlined should help to minimize any negative impacts of herbicide use, but these are far too brief and vague to satisfy the agency’s obligations under NEPA. They do not explain the appropriate uses and mitigation measures for each listed herbicide in each of the varied regions encompassed by the project.

The lack of specificity regarding which herbicides may be used, which species will be targeted, and the volume of herbicide to be used makes it impossible to opine on the appropriate use of any of the herbicides covered by this project. In order to ensure the Forest Service has access to the best available science regarding the risks posed by herbicides to wildlife, water, and ecosystems (as required by NEPA and Forest Planning regulations), we have reviewed essential information regarding some of the herbicides proposed for use in this project. *See Appendix: Pesticide Review.* The best available science reviewed here must be incorporated into any analyses of herbicide use on the National Forests of North Carolina.

After describing the relevant environments and the proposed action, the Forest Service must look at the direct, indirect and cumulative effects of that action. As described above, the descriptions of the project area and the project itself are too vague to provide a basis for a meaningful evaluation of environmental effects. Perhaps unsurprisingly, therefore, no evaluation of impacts is attempted. For example, pollinator health is cited as a reason for maintaining wildlife openings. But there should be an acknowledgement of potential effects on pollinators from herbicides, which may kill the flowering plants they rely on. There should then be an analysis of the indirect effects of reduced forage for pollinators. For example, how might this affect the rare and imperiled plants in North Carolina's National Forests? Finally, there must be a cumulative effects analysis of herbicide use with all the other impacts that are directly foreseeable including climate change. There must also be a cumulative effects analysis of herbicide use occurring for other purposes, from site prep to linear right-of-way management.

In addition, the Draft EA does not disclose or analyze the risk to humans using the Forests for recreation. As shown on the maps associated with the proposal, herbicides will be used to maintain linear wildlife openings that are also used as roads and trails. National Forest users largely assume that public lands are safe places to recreate and forage, and they often access those activities using such linear features. Under the proposal, the Forest Service will increase the risk of harmful exposure for berry pickers, mushroom foragers, and recreational users generally. This risk must be quantified and analyzed.

The agency also does not appear to have grappled with the question of whether wildlife—imperiled or otherwise—respond differently to habitat conditions created through the use of herbicides as opposed to other methods. An opening maintained through repeated herbicide application will provide very different conditions (both compositional and structural) than an opening maintained through intermittent manual means.

The Draft EA relies in large part on EPA's registration of pesticides and the instructions on manufacturer labels as a substitute for the direct, indirect and cumulative effects analysis that NEPA demands of it. As described in further detail below, EPA's analysis is very limited and takes place in an entirely different context. EPA does not do any NEPA analysis on pesticides, and it certainly does not do any analysis tailored to a specific National Forest environment.

D. EPA's registration of a pesticide does not relieve the Forest Service of its responsibilities to ensure safety and compliance with federal laws.

The Forest Service cannot rely on the EPA's registration of pesticides for NEPA purposes, because the EPA simply does not do a NEPA-like analysis. Neither EPA nor the Forest Service has made any determination, supported by analysis, that compliance with labeling requirements will prevent significant impacts for any volume or location of application.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is the federal statutory scheme regulating all pesticides. 7 U.S.C. § 136 et seq. The statute is administered by EPA, *id.* § 136a(a), with robust roles for states in regulation and enforcement, *id.* § 136w-1. 40. The main mechanism EPA uses to regulate pesticides is registration. 7 U.S.C. § 136a(a). Before a pesticide can be sold or used in the United States, EPA must register the pesticide, i.e. provide a license that establishes the terms and conditions under which the pesticide may be used within the United States. *Id.* § 136a(c). The terms and conditions of the registration include what pesticides can be sold and used, and for what uses, and how it can be used (e.g., what crops it can be sprayed on and how). 40 C.F.R. §§ 152.115, 156.10.

In registering pesticides, the baseline statutory standard EPA applies is the “unreasonable adverse effects” standard. Registration of a pesticide is not an indication that a pesticide is safe, and FIFRA is not a statute that establishes any robust protections for human health or the environment. It simply states that EPA “to the extent necessary to prevent unreasonable adverse effects on the environment,” can deny a pesticide's registration. 7 U.S.C. § 136a(a). Thus, FIFRA applies a cost-benefit analysis “to ensure that there is no unreasonable risk created for people or the environment from a pesticide.” *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 522-23 (9th Cir. 2015).

EPA's cost-benefit analysis under FIFRA is designed for chemicals that are, by definition, fatal to certain plants and animals considered pests, mainly in industrial agricultural settings. Thus, it should come as no surprise that EPA routinely registers chemicals with serious off-target impacts such as human illness; mass die-offs of non-target species, particularly pollinators; water pollution; and overwhelming the toxic load of whole ecosystems, especially in agricultural settings. On the benefit side, EPA primarily considers the economic benefits of protecting high-value crops. The EPA has never completed a cost-benefit analysis for a pesticide registration that balances the costs of these pesticides against the maintenance benefits the Forest Service hopes to obtain in the proposed action.

In short, the fact that a pesticide is registered by EPA in no way bears on the question of whether the Forest Service should approve the herbicides listed in the Draft EA for use in National Forest wildlife openings. EPA does not do any cost-benefit analysis specific to public lands. Moreover, EPA's baseline assumptions that some off-target impacts are acceptable in an agricultural setting contravene the mission of the Forest Service and the purpose of wildlife openings. Further, EPA does not analyze how different pesticides interact, and whether synergistic interactions may cause significant harm. Thus, the Forest Service must complete its

own separate analysis that fully considers the effects of these pesticides in accordance with NEPA. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984) (Forest Service unlawfully relied on registration and should have analyzed herbicide risk under NEPA).

II. The Forest Service's assessment of effects to threatened and endangered species is insufficient to satisfy the ESA and NEPA.

The Endangered Species Act was enacted to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. §§ 1531-1544; 16 U.S.C. § 1531(b). The ESA’s “language, history and structure” make it “beyond doubt” that “Congress intended endangered species to be afforded the highest of priorities,” and endangered species should be given “priority over the ‘primary missions’ of federal agencies.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-75 (1978). Simply put, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* At 184. The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).

To fulfill the substantive purposes of the ESA, each federal agency is required to engage in Section 7 consultation with either the Fish and Wildlife Service or National Marine Fisheries Services (depending on the species) to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical” *Id.* § 1536(a)(2). The obligation to “insure” against a likelihood of jeopardy or adverse modification requires the agency to give the “benefit of the doubt” to endangered species and to place the burden of risk and uncertainty on the agency taking the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376 1385 (9th Cir. 1987).

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” means “all activities or programs of any kind authorized, funded or carried out in whole or in part by Federal agencies.” *Id.* at § 402.02. This definition is meant to be expansive and includes the proposal here. *See id.* (defining agency action to include “actions directly or indirectly causing modifications to the land, water, or air”).

We are pleased that the Forest Service has recognized this obligation here and is undergoing Section 7 consultation with the Fish and Wildlife Service for at least nine species. *See* Draft EA at 13 (“Consultation with the U.S. Fish and Wildlife Service is ongoing”). In looking at the impacts of the various herbicides to be proposed, the Forest Service must recognize that the EPA has never completed and implemented a single nationwide Section 7 consultation under the ESA for any pesticide. Indeed, absent litigation forcing the EPA to comply with the law, the EPA has never voluntarily consulted on the impacts of any pesticide or

pesticide product on any species.⁴ Thus, EPA's registration of a pesticide is not a substitute for ESA consultation and may not be used as such. Unfortunately, the ongoing consultation process is unlikely to comply with the ESA. The Forest Service has not provided FWS with the information it needs to evaluate whether the project will ensure no jeopardy and no adverse effect to critical habitat. ESA § 7(a)(2). As noted above, the Forest Service intends to develop a specific maintenance plan in the future, but no such plan is available now. Without fleshing out the proposal, the Fish and Wildlife Service cannot lawfully concur that a blank check for herbicide use is not likely, based on the best available scientific and commercial information, to adversely affect listed species. *See id.*

This lack of information also calls into question the "no effect" determinations made by the Forest Service under the ESA. Appendix D suggests that effects to all threatened and endangered species except white fringeless orchid are evaluated in the project's biological assessment. As explained more below, the conclusory analysis in Appendix D is inadequate to fulfill the agency's obligations to consider impacts to listed (and other) species. To the extent the agency's no effect determination is based on this same analysis (which is unclear because the biological assessment is not publicly available), and assuming the Forest Service is seeking the Fish and Wildlife Service's concurrence in that determination, the Fish and Wildlife Service should withhold concurrence absent a more substantive analysis from the Forest Service.

Furthermore, effects to listed and other rare species are relevant not only to ESA considerations, but to NEPA and to the Forest Service's obligations to protect species' viability under NFMA. These effects must be considered to satisfy the agency's "hard look" obligation and to evaluate the significance of effects. *See, e.g.,* 40 C.F.R. § 1508.27(b)(9). The Draft EA indicates that the project "may affect" nine federally-listed species, Draft EA at 13, but provides no analysis of *how* those species will be affected or ways to mitigate those effects. The agency has determined that the project will have "no effect" on the other 145 rare species in the project area, but that conclusion is not supported. *See* Draft EA at 13-14, App. D at 41-53.

The bulk of the information regarding effects to protected species is contained in Appendix D, which consists of a table assigning each rare species to one or more of three generic potential effects. In summary, the species is either 1) known to be present in wildlife openings but effects will be "very low, practically immeasurable, with adherence to project design criteria;" 2) known to be present in adjacent forest or aquatic habitat rather than the openings themselves, so would not be affected; or 3) not expected to be affected by the project. Draft EA, App. D at 53. These statements are generic and conclusory, and are not supported by any analysis or data, including survey data. Moreover, the assumption that pesticides do not affect species in adjacent habitat is belied by the data that does exist regarding many of the pesticides listed in the project; the Draft EA itself acknowledges that adjacent areas are affected. Draft EA

⁴ EPA has voluntarily implemented conservation measures for four listed species over the past 50 years: (1) measures to protect Attwater's prairie chicken from thiram, (2) measures to protect the Delmarva fox squirrel from carboxin, (3) measures to protect the Karner blue butterfly from methoxyfenozide, and (4) measures to protect the Hine's emerald dragonfly from methoxyfenozide.

at 13 (“[T]his analysis includes an assessment of potential effects on existing permanent wildlife openings plus 300 feet surrounding the opening. This analysis area is based on the potential for direct effects to edge vegetation as well as herbicide drift and non-native invasive plant spread.”); *see also* Appendix: Review of Pesticides.⁵ The analysis contained in Appendix D is insufficient to meet the agency’s obligations under both NEPA and the ESA.

If the Forest Service allows any herbicide use prior to completing formal consultation with the U.S. Fish and Wildlife Service, it will violate the ESA. The analysis supporting consultation should also be disclosed in a revised EA, along with additional detail about the scope and limits of herbicide use under the proposal, in order to satisfy the agency’s NEPA obligations.

III. Conclusion

The 27-page Draft EA contains no real explanation of the need for broad authority to use herbicides as proposed, or the analysis of alternatives that is the bedrock of NEPA. It also lacks any meaningful level of detail regarding the variety of affected environments, the nature of the herbicides themselves, and the scope of their intended applications. Particularly concerning is the failure to adequately assess and disclose effects on listed and rare species.

As the Draft EA itself notes, these wildlife openings are of outsized importance to specialized wildlife communities. We urge the Forest Service to provide enough detail about its plans for maintaining such openings so that it can complete a thorough review of this project under its legal obligations as outlined above, including the tradeoffs between expanding herbicide use and use of other non-chemical means.

Sincerely,

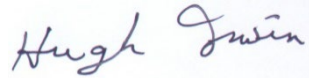


Susannah Knox
Senior Attorney
Southern Environmental Law Center
sknox@selcnc.org

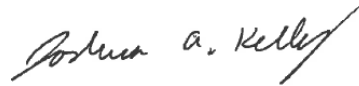
⁵ EPA’s recent draft biological evaluation prepared for glyphosate—one of the herbicides proposed for approval in the proposed action—also suggests that herbicides have widespread and substantial impacts on protected species, including several present on national forest lands in North Carolina. *See* EPA, Draft National Level Listed Species Biological Evaluation for Glyphosate (Nov. 2020), <https://www.epa.gov/endangered-species/draft-national-level-listed-species-biological-evaluation-glyphosate#chap4>.



Lori Ann Burd
Environmental Health Director and Senior
Attorney
Center for Biological Diversity
laburd@biologicaldiversity.org
971-717-6405



Hugh Irwin
Senior Conservation Specialist
The Wilderness Society
hugh_irwin@twc.org
828-357-5187



Josh Kelly
Public Lands Biologist
MountainTrue
josh@mountaintrue.org
828-258-8737