Friends of the Clearwater

Keeping Idaho's Clearwater Basin Wild

July 12, 2024

Transmitted via online project portal at:
https://cara.fs2c.usda.gov/Public//CommentInput?Project=66480

To Whom It May Concern:

Friends of the Clearwater (FOC), WildEarth Guardians, Native Ecosystems Council, Friends of the Bitterroot and Alliance for the Wild Rockies (AWR) provide these comments on the Nez Perce-Clearwater National Forest (NPCNF) Forestwide Aspen Restoration "Proposed Action for Scoping" (PA) and its accompanying Planning Participant letter dated June 28, 2024. The proposal is to—through the use of a Categorical Exclusion (36 C.F.R. § 220.6(d) or (e), hereafter, "CE")—authorize a variety of treatments including setting fires, building fences, root stimulation, and/or mechanical tree cutting and removal for untold years in unspecified locations in any area that might or even might not have aspen within the NPCNF including within Inventoried Roadless Areas (IRAs).

I. INTRODUCTION

The Planning Participant letter states, "**Please note that this opportunity for comment is primarily for you to provide site specific information for the deciding official to consider**." (Emphasis in the original.) The request for comments to be "site specific" is of course absurd, given the complete absence in the PA of specific locations subject to proposed "restoration" activities.

Based on post-NEPA assessments, "This project will identify the conditions on the ground that will promulgate specific actions meant to stimulate aspen regeneration." (PA.) These comments address our concern that the Forest Service (FS) cannot, by law, approve a "project" of this size and scope, this ill-defined, and impacting such critical resources (including IRAs) using a CE. The proposal appears to be both a black box and a blank check. It is a black box because the agency does not disclose which treatments, or which combination of treatments, will occur where, nor does it disclose conditions on the ground across the vast areas that could be directly affected. It is a blank check because the agency will not define the where, when, and how of the project until after the NEPA process is complete, and will apparently provide no opportunity for public involvement pursuant to NEPA when the agency defines site-specific proposals. Thus, the FS's proposal eliminates the requisite environmental analysis, the consideration of alternatives, and opportunities for meaningful public review and input.

The PA states, "A preliminary review of this proposed action has been conducted in accordance with FSH 1909.15 Chapter 30." Yet no documentation on this alleged review is provided; nothing available to date on the project website documents such a review.

The PA also states "The Idaho Roadless Commission would be briefed prior to treatment in any Idaho Roadless Areas." How this is meaningful is not clear. Such a briefing would be outside the public process, so it appears the FS is recognizing a class of individuals it considers to be more privileged than the general public.

"Compliance with NHPA will be accomplished through a phased approach. Heritage implementation plan (HIP) will be crafted that commits the agency to avoiding adverse effects to historic properties." (PA.) Based on the PA, we don't expect, as members of the public, to be allowed to meaningfully participate in that—or any—subsequent implementation plan.

We urge the agency to ensure that the FS both makes a better case to the public and to ensures compliance with bedrock environmental laws. The FS could address concerns about the project's impact, and potentially increase public support for its actions, by: involving the public in site-specific planning before completing the NEPA process; better explaining the baseline conditions of the areas to be treated and the agency's goals in implementing the treatments; providing information about the specific timing and location of the proposed treatments; describing the impacts of individual proposals and considering alternatives thereto; and preparing an EA or EIS with an opportunity for the public to respond to the appropriateness of treatment in certain areas. We strongly urge the FS to take these steps. Otherwise the FS should place this "project" on hold until it can perform the necessary analysis to comply with its legal mandates.

NEPA regulations mandate that agencies "shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in the decisions which affect the quality of the human environment."[1] "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken . . . . Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."[2] They also provide that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[3]

Here, the FS intends to authorize thousands (or tens or even hundreds of thousands) of acres of vegetation treatments, using a variety of different techniques, over an indefinite period of time. The project would apply across areas with important values and natural resources, including inventoried roadless areas and sensitive wildlife habitat. Despite the obvious potential for impacts that could be significant to sensitive public land resources, the FS is poised to approve this proposal with only this one formal comment period and no NEPA document with analysis of impacts and alternatives.

The PA proposes that the FS will only undertake site-specific analysis after the NEPA process is complete, and contemplates no additional public involvement. In short, the agency will conduct site-specific assessments evaluating local conditions, and undertake internal agency review to select a specific treatment for a given area, only after NEPA is complete, and will do so without providing any opportunity for public review or comment. The PA does not indicate that there will be any future NEPA on the proposal; just internal deliberations insulated from public review.

---

[1] 40 C.F.R. § 1500.2(d).

[2] Id. § 1500.1(b)); see also id. § 1501.4(b) (Agencies must "involve . . . the public, to the extent practicable"); id. § 1506.6 ("Agencies shall: . . . (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures"). See *Citizens for Better Forestry v. U.S. Dep't of Agric*., 341 F.3d 961, 970 (9th Cir. 2003) (quoting NEPA regulations).

[3] 40 C.F.R. § 1500.1(b).

While this might ensure that some information about logging, bulldozing, skidding and the like are available to officials before a site-specific project proceeds, it fails to ensure that "environmental information is available to . . . citizens before decisions are made and before actions are taken," as the law requires.[4] As such, the effect of the agency's proposal is to exempt its future activities under this proposed project's umbrella from the requirements of NEPA moving forward. It is hard to imagine a more opaque process that shuts out the public while upending NEPA's mandate that the agency look before it leaps. Here, the FS will get approval based on a lack of analysis, and do the review later, shielded from public accountability.

Essentially the agency is asking the public for feedback on a "project" that would greenlight thousands (or hundreds of thousands) of acres of vegetation treatment across the forest without any detail about specific areas that would be affected or potential resource impacts. This subverts one of the key purposes of NEPA's public involvement and disclosure mandates: ensuring "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[5]

And it is not helpful that statements in the Project Design Elements directly conflict with other statements in the PA, allowing the FS to later decide which is true.

The FS fails to comply with public participation requirements under NEPA when it makes so little effort to inform and engage the public, and in fact cuts out the public when site-specific decisions are made. The agency also ignores its obligations when it provides no accurate, reliable, or meaningful information on environmental impacts before making a decision like this one that will impact thousands of acres of public lands for an indefinite number of years, with no additional NEPA analysis or public involvement of any kind.

II. THE FOREST SERVICE FAILS TO DEMONSTRATE A CATEGORICAL EXCLUSION IS APPROPRIATE FOR THIS PROPOSAL.

A. Background: Levels of NEPA Review

NEPA regulations and federal courts require agencies prepare an environmental impact statement (EIS) in those cases where the major federal action has the potential to result in significant impacts.

For example, the Ninth Circuit has established a "relatively low threshold for preparation of an EIS," namely that an EIS must be prepared if there are substantial questions about whether a project will have significant effects.[6] "We have held that an EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation to some human environmental factor.' To trigger this requirement a 'plaintiff need not show that significant effects will in fact occur,' [but instead] raising 'substantial questions whether a project may have a significant effect' is sufficient."[7]

---

[4] 40 C.F.R. § 1500.1(b).
[5] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348-49 (1989).
[6] NRDC v. Duvall, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991).
[7] *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis original). See also *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864- 65 (9th Cir. 2005) ("To trigger this [EIS] requirement a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a project may have a significant effect is sufficient.") (internal

Where an agency has questions as to whether a federal action has the potential to have significant impacts, the agency prepares an environmental assessment (EA) to "determin[e] whether to prepare an environmental impact statement or a finding of no significant impact."(40 C.F.R. § 1508.9.) Even where a proposal will not have significant impacts, NEPA nonetheless requires consideration of alternatives when there are "unresolved conflicts concerning alternative uses of available resources" via an EA. [42 U.S.C. § 4332(2)(E).] If an agency "decides not to prepare an EIS," and instead to prepare an EA, "'it must put forth a convincing statement of reasons' that explains why the project will impact the environment no more than insignificantly. This account proves crucial to evaluating whether the [agency] took the requisite 'hard look.'"[8]

Categorical exclusions are those categories of actions "which do not individually or cumulatively have a significant effect on the human environment." (40 C.F.R. § 1508.4.) Categorical exclusions do not involve the consideration of alternatives; consequently, where unresolved conflicts exist, a CE is the wrong tool. FS regulations state that "[i]f the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS." (36 C.F.R. § 220.6(c).)

B. The Forest Service Fails to Demonstrate it May Utilize a Categorical Exclusion for the Proposal.

As noted, the FS asserts it intends to use the following categorical exclusion to approve this project: "36 CFR 220.6(e)(6): Timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction." The FS may not use this categorical exclusion for a number of reasons. The proposal is too vaguely defined and described to enable the decision-maker or the public to conclude that the project has no potential to have significant impacts. To avail itself of this CE, the FS must first provide the public and the decision-maker with additional information supporting its claims that explain the agency's confidence.

The indefinite scope of the proposal in terms of both time and extent makes it impossible for the FS to conclude that the proposed action cannot possibly have significant impacts. The PA contains virtually no explicit limits on what trees can be removed within a treatment stand. It contains no limit on the acreage that can be logged. The PA mostly provides nonbinding design criteria.

Because the proposal contains no time limit on project implementation, it can continue for years or even decades. And although the project area includes an unspecified number of acres within IRAs,

---

quotations, citations, and alterations omitted); *Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002) ("To prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are "'substantial questions whether a project may have a significant effect' on the environment" is sufficient.") (citations omitted); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

[8] *Ocean Advoc.*, 402 F.3d at 864. See also *Blue Mountains*, 161 F.3d at 1212 (If the agency decides not to prepare an EIS, the agency must supply a "convincing statement of reasons" to explain why the action will not have a significant impact on the environment); *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) ("An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant") (citation and quotations omitted); 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13.

the FS fails to provide any measures to specifically ensure project activities will not degrade roadless or wilderness characteristics.

The PA states, "The final determination of the degree of the potential effect of the proposed action on the resource conditions will be disclosed in the Decision Memo." This conflicts with the assumption inherent in the use of this CE, which is no significant effects. Since the FS seems uncertain, the preparation of at least an Environmental Assessment is called for.

In place of the agency's obligations under NEPA, the PA proposes using a post-CE decision assessment and then selection of potential actions: "This project will identify the conditions on the ground that will promulgate specific actions meant to stimulate aspen regeneration. These conditions will be documented as an assessment guide for treatment prescriptions. …Units may be re-treated as necessary to achieve objectives." The FS's failure to precisely define which treatment methods it will use and where it will use them make it difficult to understand what the project area will look like once the treatments occurs, along with the impacts.

Further, several of the design criteria lack site-specific verification actions suggesting the FS lacks adequate monitoring necessary to even achieve its restoration objectives. This makes it impossible to conclude that there is no potential for significant impacts. The FS does not say what criteria it would use to determine one of several treatment options nor what monitoring results, or thresholds would trigger additional management actions. Because the FS fails to explain when, where, or why management actions may occur, it cannot rationally conclude that its actions cannot have significant impacts.

This proposed use of categorical exclusion (e)(6) appears to be an abuse of that provision. The Forestwide Aspen Restoration proposal is one of the largest proposals impacting forest acres on the NPCNF in recent years. The FS, in proposing or analyzing this CE, means to apply it to actions taken across the entire forest for a period longer than the expected life of a forest plan, having direct impacts across an area so huge as the NPCNF. The project is simply too extensive, in location and duration, to conclude that there is no potential for significant impacts.

Roads

The CE authority fails to require the use of only National Forest System roads by using the more general term "existing roads." As such, the FS may try to implement this project by opening existing nonsystem roads, and even use unauthorized roads, per the example provided in the governing regulations. (36 C.F.R. § 220.6(e)(6)(ii).) The number and length of unauthorized roads is highly uncertain and extremely concerning given unauthorized user created routes mainly from motorized use may be increasing, and because increase in unauthorized user created routes increases resource damage. In order to implement this project, it remains uncertain the number of user-created roads the FS may utilize, further exacerbating significant resource damage. The design criteria failed to preclude the use of unauthorized roads to implement this project where in fact, the agency should have directed their removal wherever found.

Our concerns extend beyond utilizing unauthorized roads, but also to utilizing system roads in dire need of repair, reconstruction or relocation. Further, the total annual road maintenance backlog is astounding (*See* the Clearwater National Forest Roads Analysis Report (2003) and the Nez Perce National Forest Roads Analysis Report (2006).) The lack of adequate maintenance means the FS cannot meet its road management objectives, which can cause adverse environmental effects such as increased stream sedimentation due to poor drainage and even mass wasting. This is especially true for high-clearance roads that this project will likely use. The current condition of the agency's

road system suggests any road use associated with this project will require a significant amount of road reconstruction and realignment that could further increase surface erosion, in addition to further resource damage from log hauling traffic.

Note, these effects are uncertain, but not unlikely and apply to the currently open but poorly maintained roads in addition to closed roads. And we anticipate more resource damage to occur if the FS will utilize any of its closed roads since they are often in a stored condition due to resource concerns and require reconstruction. Where roads are in an Management Level 1 status to mitigate resource damage, opening them will further create uncertain conditions, and potential damage to soils, watersheds, and wildlife habitat, requiring the development of at least an EA.

Further, project activities might include the use of new and existing skid trails or other user-created travel ways. No matter the degree of best management practices (BMPs), construction and use of an unknown number, length, and location of skid trails increases the project's potential impacts to the degree that it precludes the use of a CE, because it is likely the skid trails will have significant environmental consequences.

C. Programmatic confusion and ambiguity.

Compounding the fact that the proposal is too vague is that: a) it not tiered to a Forest Plan, and; b) the proposal is itself programmatic in nature. Either of these situations disqualify the use of a CE.

The PA states, "All actions and design elements will be consistent with the forest plan under which this decision is signed." In other words, it doesn't matter what forest plan(s) are providing direction for this "project"—1987 Nez Perce Forest Plan, 1987 Clearwater Forest Plan, or the revised Forest Plan for the administratively combined NPCNF proposed to replace those.

As groups who have been closely following the administration of the Nez Perce National Forest and Clearwater National Forest for decades, as well as the forest plan revision process, we are quite aware of the differences in forest plan content. That the FS believes it's irrelevant which plan or plans the Forestwide Aspen Restoration is tiered to reinforces our groups' observations in our revised forest plan comments and objection that a Need for Change was not adequately established.

The Forestwide Aspen Restoration proposal is programmatic in nature. So the FS must complete all of the steps required under the governing planning rule, which at this date can only be the 2012 version. But now—the only public involvement step under NEPA the FS will undertake for Forestwide Aspen Restoration—no decision has been rendered on the revised forest plan.

The PA states, "The following actions and direction will promulgate aspen restoration…" and then follows with a list of six bullet points. What the PA fails to disclose is that those six bullet points are "Desired Conditions" (DCs) taken verbatim from the latest draft of the revised forest plan—still not authorized by a decision document. The FS must choose which forest plan(s) govern the actions of the PA, which might mean waiting until the NPCNF revised forest plan Decision is signed before re-initiating the public involvement process, in order to eliminate the confusion its procedure is creating.

III. FOURTEEN DAY COMMENT PERIOD IS INADEQUATE

We observe the FS's document label on the PA as 01_240321. We are quite aware of the FS coding scheme for such project documents. This PA was finalized on March 21, 2024. The Planning Participant letter notifying the public of this comment opportunity is dated June 28, 2024, when the comment period was publicly announced. Nothing else on the project website provides any more details for the public to comment on than what was written in the March 21, 2024 PA. The FS deliberately concealed its proposal for more than three months, choosing to allow the public only 14 days to comment on a proposal that could potentially affect any watershed outside of Wilderness, and any IRA, on two entire national forests!

IV. CUMULATIVE EFFECTS

The PA doesn't rule out aspen restoration activities within analysis areas for ongoing or foreseeable projects on the NPCNF. Yet no NEPA documents for such projects analyzed the impacts of this current proposal in their project areas. A CE is improper because there would be no document analyzing and disclosing the cumulative effects of this proposal combined with any other projects.

Further, because the PA fails to provide any information about the specific location of treatments, it is impossible for the public and ultimate decision-maker to recognize or comprehend the potential for impacts from other private and public proposals that would interact with this project and that could, cumulatively, significantly impact the landscape. This makes any determination that a CE is warranted arbitrary and capricious.

V. SENSITIVE, THREATENED, ENDANGERED AND MANAGEMENT INDICATOR SPECIES AND SPECIES OF CONSERVATION CONCERN

The PA's Service's "leap first-look later" approach is especially evident in regards to the potential harm this project poses to fish and wildlife species and their habitat. The FS asserts that its proposed design criteria will properly address any negative consequences to the species without providing any supporting evidence. This is insufficient to comply with the agency's legal requirements under the National Forest Management Act to maintain viable populations and maintain biodiversity, or to take a hard look at potential impacts per NEPA. The FS simply provides no analysis at all. Typically, even with CEs the FS places specialists' reports on project websites for public information. Not in this instance.

A Decision Memo on the Aspen Restoration Project would authorize "Large trees cut in the riparian area … ." What Biological Opinion—programmatic or otherwise—reflects the process of consultation on the effects on ESA-listed fish species of such actions in riparian areas?

The species list the FS is (hopefully) now considering in the preparation of its biological evaluations (BEs) varies considerably based on the as yet uncertain forest plan(s) this proposal would be tiered to. For example, when this PA was publicized the westslope cutthroat trout was considered a Sensitive species for which a BE must be prepared. This is because viability of this species is of well-documented concern. Yet under a revised forest plan the species will be ignored in the project BE. Further, the pileated woodpecker is a management indicator species (MIS) under the 1987 Forest Plans. Its need for very large trees for nesting, especially conifers and cottonwood, is well documented in the scientific literature. Yet nothing in the PA prohibits the logging of large, old trees or snags—even aspen—where the FS wants to "restore" aspen, even if

its past or current use by pileated woodpeckers is obvious.

The PA says nothing about old growth. The Forest Plan Final EIS for the Nez Perce NF describes the ecological importance of old growth at p. III-35:

> Habitat diversity is a measure of the variety, distribution, and structure of plant communities as the progress through various stages. Each stage supports different wildlife species. **One of the most critical elements of diversity in a managed forest is old growth. If sufficient old growth is retained, all other vegetative stages from grassland through mature forest will be represented in a managed forest.**

(Emphasis added.) The lack of mention of old growth, and its coincidence with aspen or areas that the FS wants to "restore" aspen, is inexplicable.

We incorporate our organizations' record of participation during the revision of the forest plans, which includes scientific information on numerous species potentially affected by the Forestwide Aspen Restoration proposal, and which discusses the threats the revised forest plan poses for these species.

VI. PURPOSE AND NEED FOR ASPEN RESTORATION IS NOT ESTABLISHED; ALTERNATIVE MANAGEMENT DIRECTION FOR PA'S CLAIMED PROBLEMS IS NOT CONSIDERED.

No coherent rationale to support the "Purpose and Need" is found in the PA. It states, "This work is needed because existing aspen stands are not meeting desired conditions due to heavy conifer encroachment, a lack of recruitment, a lack of diverse age structures, and a lack of disturbance that would favor aspen regeneration. Stands are being lost to competing vegetation." None of this is backed up by data or reports based upon data gathered in the NPCNF. The PA fails to justify the proposal based on scientific inquiry establishing genuine ecological upset or threats to ecosystem components or processes.

"Fire suppression and associated forest succession has likely reduced aspen presence during the last half century." The PA cites no data supporting that statement. The PA suggests the proposal will "Allow fire to play its natural role, where appropriate and desirable, to reduce the risk of uncharacteristic and undesirable wildland fires by managing natural, and unplanned ignitions." This suggests the FS understands that aspen evolved with fire, and so natural processes would be acceptable. Yet the next sentence begins, "This **work** is needed…" (emphasis added). So it's a huge problem that the PA cannot reconcile this conflict and identify the conditions for which natural fire would be the restorer of aspen vs. those circumstances where the FS would start the fires and/or chop down and remove trees, etc.

And if fire suppression has been such a problem for aspen as the PA claims, we note that the FS has no programmatic alternative to ongoing industrial fire suppression to deal with the alleged problem FS management has created. As we point out in our revised forest plan comments and objection, the FS continues to pretend its fire suppression scheme can be a part of sustainable management, which it cannot. To integrate wildland fire into the ecosystem, the FS must take the lead in accepting this native "species"—fire—as belonging in the Forest, which it refuses to do. Instead the FS spreads propaganda and fear to distract from the havoc its management regime wreaks upon the forest. There is no programmatic direction in any future or proposed revised land management plan covering the NPCNF that explains how the FS will decide how it will prioritize

the conflicting ideas of allowing wildland fire as restorer of aspen vs. those circumstances where the FS would initiate active management.

The PA states, "As canopy density of conifers has increased and shifted from seral conifer components to climax conifer components the presence of aspen has declined. (Revised LMP EIS, p. 130)." Our groups challenged such claims in the context of forest plan revision, and to date the FS has made no fact-based, reasonable response.

We urge the FS to analyze the proposed activities via an EA or EIS. A properly drafted EA or EIS requires the agency to discuss appropriate alternatives to the proposed project.[9] Even where impacts are "insignificant," the FS must still consider alternatives.[10] The agency's treatment of alternatives must also be measured against the standards in 42 U.S.C. § 4332(2)(E) and 40 C.F.R. § 1508.9(b) (requiring the agency to study, develop and discuss appropriate alternatives and to briefly describe those alternatives in environmental assessments).[11]

Consideration of a range of reasonable alternatives is necessary to ensure that the agency has before it and takes into account all possible approaches to, and potential environmental impacts of, a particular project. Importantly, NEPA's alternatives requirement ensures that the "most intelligent, optimally beneficial decision will ultimately be made."[12]

As federal courts have recognized, "[c]learly, it is pointless to 'consider' environmental costs without also seriously considering action to avoid them."[13] "[T]he heart" of an environmental analysis under NEPA is the analysis of alternatives to the proposed project, and agencies must evaluate all reasonable alternatives to a proposed action.[14] An agency must gather "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned."[15] Thus, agencies must "ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors, and to make a reasoned decision."[16] Informed and meaningful consideration of alternatives is critical to the NEPA statutory scheme, ensuring that agency decisionmakers assess a project's costs, benefits, and environmental impacts in the correct context.[17] This requirement also ensures that decisionmakers "have before them and take into proper account all

---

[9] *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002), citing 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b).

[10] *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) (agency's duty to consider alternatives "is both independent of, and broader than," its duty to complete an environmental analysis); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) (duty to consider alternatives "is operative even if the agency finds no significant environmental impact").

[11] *Davis*, 302 F.3d at 1120.

[12] *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

[13] *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

[14] *Colo. Envt'l Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999), quoting 40 C.F.R. § 1502.14.

[15] *Greater Yellowstone,* 359 F.3d at 1277, citing Colo. Envt'l Coalition, 185 F.3d at 1174; see also Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1528 (10th Cir. 1992).

[16] *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 371 (D.C. Cir.1981) citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

[17] See *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729-30 (9th Cir. 1995).

possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance."[18]

To comply with these NEPA mandates, the FS must "rigorously explore and objectively evaluate all reasonable alternatives" to a proposed action.[19] "Section 102(2)(E) of NEPA requires that agencies 'study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.' 42 U.S.C. § 4332(2)(E) (emphasis added). . . . While a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities. 42 U.S.C. § 4332(2)(E)."[20]

Here, the FS must rigorously explore and objectively evaluate alternatives including, but not limited to: (1) excluding roadless forests (and potential wilderness areas) from mechanized logging; (2) implementing a minimum road system and removes unauthorized roads and trails; (3) a substantially smaller proposal the FS can support through site-specific analysis; and (4) alternatives that identify with precision which proposed treatment options will be applied to which specific areas, including no action. The agency should also consider applying proposed treatments on an annual basis, after treatment areas have been identified, mapped, and disclosed to the public in a more robust environmental document like a programmatic EA or EIS, rather than the proposed action, which appears to grant carte blanche to FS to undertake projects indefinitely at undisclosed locations and with little information on what effects may result.

VII. EXTRAORDINARY CIRCUMSTANCES

The FS also fails to ensure that the project will not involve "extraordinary circumstances," which, under NEPA regulations, mandate that the FS cannot utilize a CE and must prepare at least an EA. Forest Service regulations (36 C.F.R. § 220.6(b)(1).) state that:

> Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS are:
>
> (i) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;
> (ii) Flood plains, wetlands, or municipal watersheds;
> (iii) Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas;
> (iv) Inventoried roadless area or potential wilderness area;
> (v) Research natural areas;
> (vi) American Indians and Alaska Native religious or cultural sites; and
> (vii) Archaeological sites, or historic properties or areas.

The lack of information in the PA makes it impossible to tell whether the FS can ensure that the project will not impact the defined resource conditions or invoke these extraordinary circumstances. The PA fails to identify whether the project area may contain many of the resources/situations which would trigger extraordinary circumstances. For example, the PA fails to

[18] *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988)
[19] 40 C.F.R. § 1502.14(a); accord 42 U.S.C. § 4332(2)(C)(iii).
[20] *Ayers v. Espy*, 873 F. Supp. 455, 473 (D. Colo. 1994).

address the likelihood of presence of Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or FS Sensitive species.

Further, the PA fails to adequately assure no impacts to flood plains, wetlands, or municipal watersheds, any Congressionally designated areas, or research natural areas (RNAs). The PA does not determine the degree the project will impact these resources. The PA does not prohibit treatments in RNAs, municipal watersheds or the other areas except Wilderness. The FS does not evaluate or demonstrate the effectiveness of the BMPs to prevent impacts to hydrology or soils.

The proposal will almost certainly impact roadless areas due to the "treatments" such as burning, construction of landings, operation of mechanized equipment, etc., that can occur in IRAs with this proposal.

CEQ regulations state that "[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time." The PA does not acknowledge the potential for such impacts, nor cumulative impacts.

VIII. LIVESTOCK GRAZING

Livestock present a significant threat to healthy aspen regeneration. A recent FS technical report (Kitchen, et al., 2019[21]) concluded that "excessive browsing by wild or domestic ungulates" represents one of the "few root causes for aspen decline in Utah" and "Heavy browse pressure on regeneration after aspen canopy removal (i.e., fire or clearcut) can result in depletion of root reserves and permanent loss of aspen in a matter of a few years." That report also concluded that overuse by livestock was likely to worsen as the climate heats up: "The extent and severity of this driver [that is, excessive browsing] of aspen instability are likely to expand in the future as average snowpack decreases (longer grazing season) and the frequency and severity of drought increase with changing climate." Studies of the Pando clone of aspen in Utah demonstrate that livestock threaten regeneration far more than wild ungulates. (Ratner et al., 2019[22])

IX. HERBICIDES

Ground disturbance–caused by the use of heavy equipment, scraping of skid trails and landings, and fire–across the potentially vast area envisioned by the PA is likely to create conditions conducive to the spread of noxious weeds. To address this fact, the PA requires "treatment" of noxious weeds through undefined means.

Although the FS purports to rely on the categorical exclusion that involves "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require

---

[21] Available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.fs.usda.gov/rm/pubs_series/rmrs/gtr/rmrs_gtr390.pdf&ved=2ahUKEwjH16Px15qHAxXZxuYEHY_1A_MQFnoECB0QAQ&usg=AOvVaw387DvUgcp4j-HgVV46n3gO

[22] Available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.westernwatersheds.org/wp-content/uploads/2019/06/Whats-eating-the-Pando-Clone-opt.pdf&ved=2ahUKEwisldSF25qHAxW0OzQIHUzvCGsQFnoECBEQAw&usg=AOvVaw1HKLoYCvgFXyzVqW14jS2y

more than 1 mile of low standard road construction," the PA suggests the agency will use herbicides: "New and existing populations of noxious weeds within and adjacent to treatment areas would be treated prior to and following implementation in accordance with **the applicable noxious weed management direction**." (Emphasis added.)

The FS must make clear whether "treatments" of noxious weeds will require herbicides, and if not, the agency must disclose the effectiveness and impacts of non-herbicide noxious weed treatments.

X. THE FOREST SERVICE VIOLATES NEPA BECAUSE IT FAILS TO ANALYZE SITE-SPECIFIC IMPACTS, OR DESIGN A SITE-SPECIFIC PROJECT.

A. NEPA Requires Agencies to Take a Hard Look at Site-Specific Impacts.[23]

NEPA is "'our basic national charter for protection of the environment.'" In enacting NEPA, Congress recognized the "profound impact" of human activities, including "resource exploitation," on the environment and declared a national policy "to create and maintain conditions under which man and nature can exist in productive harmony."

The statute has two fundamental two goals: "(1) to ensure that the agency will have detailed information on significant environmental impacts when it makes decisions; and (2) to guarantee that this information will be available to a larger audience." "NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing Government and public attention on the environmental effects of proposed agency action." Stated more directly, NEPA's "'action-forcing' procedures . . . require the [Forest Service] to take a 'hard look' at environmental consequences" before the agency approves an action. "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." To ensure that the agency has taken the required "hard look," courts hold that the agency must utilize "public comment and the best available scientific information."

NEPA's review obligations are more stringent and detailed at the project level, or "implementation stage," given the nature of "individual site specific projects." "[G]eneral statements about possible effects and some risk do not constitute a hard look, absent a justification regarding why more definitive information could not be provided."

NEPA requires site-specificity to fulfill two basic purposes: 1) to ensure agencies are making informed decisions prior to acting and 2) to ensure the public is given a meaningful opportunity to participate in those decision-making processes. Federal courts apply these touchstone criteria when evaluating whether a NEPA document is adequately site-specific.

Analyzing and disclosing site-specific impacts is critical because where (and when and how) activities occur on a landscape strongly determines the nature of the impact. As the Tenth Circuit Court of Appeals has explained, the actual "location of development greatly influences the likelihood and extent of habitat preservation. Disturbances on the same total surface area may produce wildly different impacts on plants and wildlife depending on the amount of contiguous habitat between them." The Court used the example of "building a dirt road along the edge of an ecosystem" and "building a four-lane highway straight down the middle" to explain how those activities may have similar types of impacts, but the extent of those impacts – in particular on habitat disturbance – is different. Indeed, "location, not merely total surface disturbance, affects habitat fragmentation,"[101] and therefore location data is critical to the site-specific

[23] Quotes in this section are from federal court cases unless otherwise indicated.

analysis NEPA requires. Merely disclosing the existence of particular geographic or biological features is inadequate – agencies must discuss their importance and substantiate their findings as to the impacts.

Courts in the Ninth Circuit have taken a similar approach. For example, in September the U.S. District Court for the District of Alaska issued a preliminary injunction in the case Southeast Alaska Conservation Council v. U.S. Forest Service, halting implementation of the Tongass National Forest's Prince of Wales Landscape Level Analysis Project.103 The court did so because the FS's failure to disclose the site-specific impacts of that logging proposal raised "serious questions" about whether that approach violated the National Environmental Policy Act (NEPA).

The district court explained the approach the FS took in the Prince of Wales EIS:

> each alternative considered in the EIS "describe[d] the conditions being targeted for treatments and what conditions cannot be exceeded in an area, or place[d] limits on the intensity of specific activities such as timber harvest." But the EIS provides that "site-specific locations and methods will be determined during implementation based on defined conditions in the alternative selected in the . . . ROD . . . in conjunction with the . . . and Implementation Plan . . . ." The Forest Service has termed this approach "condition-based analysis."

The Prince of Wales EIS made assumptions "in order to consider the 'maximum effects' of the Project."[105] It also identified larger areas within which smaller areas of logging would later be identified, and approved the construction of 164 miles of road, but "did not identify the specific sites where the harvest or road construction would occur."

The Court found the FS's approach contradicted Ninth Circuit precedent including *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th 1995), concerning logging on the Tongass National Forest. In *City of Tenakee Springs*, the appellate court set aside the FS's decision to authorize pre-roading in the Kadashan Watershed, without specifically evaluating where and when on approximately 750,000 acres it intended to authorize logging to occur. The district court evaluating the Prince of Wales project found the FS's approach was equivalent to the deficient analysis set aside in *City of Tenakee Springs*:

> Plaintiffs argue that the Project EIS is similarly deficient and that by engaging in condition-based analysis, the Forest Service impermissibly limited the specificity of its environmental review. The EIS identified which areas within the roughly 1.8-million-acre project area could potentially be harvested over the Project's 15-year period, but expressly left site-specific determinations for the future. For example, the selected alternative allows 23,269 acres of old-growth harvest, but does not specify where this will be located within the 48,140 acres of old growth identified as suitable for harvest in the project area. Similar to the EIS found inadequate in City of Tenakee Springs, the EIS here does not include a determination of when and where the 23,269 acres of old-growth harvest will occur. As a result, the EIS also does not provide specific information about the amount and location of actual road construction under each alternative, stating instead that "[t]he total road miles needed will be determined by the specific harvest units offered and the needed transportation network."

The district court concluded that plaintiffs in the case raised "serious questions" about whether the Prince of Wales EIS condition-based management approach violated NEPA because "the

Project EIS does not identify individual harvest units; by only identifying broad areas within which harvest may occur, it does not fully explain to the public how or where actual timber activities will affect localized habitats." After finding the plaintiffs also met the other factors for preliminary injunction, the Court enjoined all logging until a decision on the merits.

NEPA further mandates that the agency provide the public "'the underlying environmental data' from which the Forest Service develop[ed] its opinions and arrive[d] at its decisions." "The agency must explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable." In the end, "vague and conclusory statements, without any supporting data, do not constitute a 'hard look' at the environmental consequences of the action as required by NEPA."

CEQ's regulations establish specific ways agencies must analyze proposed actions, including project-level decisions, including a detailed discussion of direct, indirect, and cumulative impacts and their significance; and an analysis of reasonable alternatives to the proposed action. Such analysis is required for both environmental assessments and EISs.

B. The PA's Condition-Based Approach Violates NEPA.

Although NEPA requires that analysis disclose specific information about the when, where, and how of any agency action, so that the impacts (and alternatives) can be described and weighed, the CE anticipates that none of that information will be gathered before the FS makes a decision. The FS intends to postpone gathering important information about values present at specific sites, and proposing components of site-specific project design, only after the NEPA process is complete. This upends NEPA's central purpose that agencies analyze and disclose such information before they leap, as the Court concluded in Southeast Alaska Conservation Council.

C. The Forest Service Cannot Escape Site-Specific Review.

The FS's approach is to undertake step-down analysis after the analysis of this programmatic proposal is complete, and when the agency proposes site-specific actions. The FS proposes to "analyze" a programmatic approach but to never review the site-specific details of either the proposal or its impacts. The FS's approach contradicts agency guidance on programmatic NEPA documents.

In a 2014 memo to all agencies, CEQ discussed the fact that programmatic NEPA documentation must usually be followed by a further NEPA document disclosing site-specific impacts. As the courts have found, "[a]gencies cannot rely on a general discussion in a programmatic EIS or other document to satisfy its NEPA obligations for a site-specific action." CEQ recognized that in some cases no further NEPA document would be necessary, but only where the agency disclosed both the programmatic and site-specific impacts in the same document:

> Agencies may prepare a single NEPA document to support both programmatic and project-specific proposals. Such an approach may be appropriate when an agency plans to make a broad program decision, as well as timely decisions to implement one or more specific projects under the program. Such a programmatic NEPA review should address both the broad impacts of the proposed broad Federal action *and provide sufficiently detailed environmental analyses for specific decisions, such as determining the locations and designs of one or more*

> *proposals to implement the broad Federal action*. If subsequent actions remain to be analyzed and decided upon, that would be explained in the programmatic document and left to a subsequent tiered NEPA review.[24]

Here, the FS's approach does not attempt to determine the specific location or design of any proposal to implement its decision, it simply pushes off that decision and analysis until later, without providing for later NEPA review. The FS's approach therefore conflicts with CEQ guidance and violates NEPA.

XI. THE PROPOSAL THREATENS TO VIOLATE THE IDAHO ROADLESS RULE.

The Idaho Roadless Rule generally prohibits the cutting, sale or removal of timber from National Forest inventoried roadless areas in Idaho. The PA nonetheless asserts that the cutting, and removal and/or burning of an unspecified amount of timber from unspecified locations would be consistent with the Idaho Roadless Rule.

First, the Idaho Roadless Rule expects that logging in roadless areas for any purpose will be infrequent. The PA does not limit the frequency of logging in roadless areas, and the agency fails to provide the amount of IRA acres within the project area that will be subject to the proposed treatments. Logging over a period of untold decades across the entire NPCNF is not infrequent; in fact, under the proposal, such logging could be constant and ubiquitous over a vast swath of forest. It is hard to imagine a more flagrant violation of the Rule's limits on the infrequency of roadless logging.

Second, the PA invokes the exception for logging of generally small diameter timber. But it does not sufficiently describe the trees to be logged in any way–their species or stand characteristics, for example, let alone their size–making it impossible to tell whether the FS intends to log generally small diameter timber, or indeed whether it has identified what it considers to be small diameter timber. Failing to include design elements that limit logging to generally small diameter trees violates the Idaho Roadless Rule.

Because the PA would approve numerous, indeterminate logging actions across numerous, un-named and un-mapped roadless areas over decades, the FS cannot ensure compliance with Idaho Roadless Rule exceptions.

Further, the proposed projects will likely degrade, or at least are unlikely to maintain or improve, most of the roadless area characteristics. For example, the use of heavy equipment and the use of pile burning, which can scarify soil, is incompatible with maintaining or improving high quality or undisturbed soil, water, and air. Further, the PA does not address the certain damage caused by logging, mechanized equipment (presumably, motor vehicles operating off-road) and pile burning in roadless areas.

The PA does not address the existence or nature of plant and animal communities within the IRAs in the project area, or the diversity of those communities, or how the project may impact those values. Similarly, the PA does not address habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land within potentially impacted roadless areas, despite the fact the logging, burning, and the use of motorized

---

[24] CEQ, Memorandum for Heads of Federal Departments and Agencies, Effective Use of Programmatic NEPA Reviews (Dec. 18, 2014) at 15 (emphasis added)

equipment will eliminate habitat by removing trees. How logging might "maintain or improve" such habitat is neither explained nor alleged.

Similarly, the PA fails to disclose the nature of non-motorized recreation, reference landscape, or natural appearing landscapes with high scenic quality within the project's roadless areas, or to assert whether or how the use of heavy equipment and presence of stumps and remains of scarred areas left by skid trails or pile burning over tens of thousands of acres will maintain or improve such values. As noted below, the FS does not make any provision to identify and protect aspen reference landscapes.

The PA does not appear to treat the unique values of roadless areas in any way differently than any other area of the forest. There are no best management practices, distinct mitigation measures, or design features to protect roadless areas. The fact that the FS apparently intends to treat roadless areas the same as every other part of the forest suggests that the agency is neither considering nor protecting those unique values.

Unless and until the FS undertakes a specific analysis of each specific treatment within each specific roadless area, it cannot ensure that it will comply with the Idaho Roadless Rule. Because the PA does not provide such analysis–which would best accompany an EA or EIS–the FS will violate the Idaho Roadless Rule if it proceeds with this categorical exclusion as proposed.

Fourth, the FS may undertake logging project under the chosen Idaho Roadless Rule exception only if the project will: improve threatened, endangered, proposed, or sensitive species habitat; or maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period. The PA does not appear to allege that logging an undefined amount within un-named roadless areas over an indeterminate length of time will improve threatened, endangered, proposed, or sensitive species habitat. If the agency intends to invoke this reason for the proposed logging, it should explicitly state so and provide evidence to support its contentions.

The PA also fails to demonstrate that its undefined treatments will maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period. The FS does not disclose the ecosystem composition and structure of any particular roadless area, does not disclose what an uncharacteristic wildfire would entail in such an ecosystem, nor does it analyze the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period for any or all of the roadless areas at issue. Because the FS fails to provide the necessary information, it cannot avail itself of this exception to the Idaho Roadless Rule. Further, because the proposed action may violate the Idaho Roadless Rule, the impacts are likely to be significant, requiring preparation of an EIS.

Roadless areas are beloved and staunchly protected by forest advocates because they include the last remnants of undisturbed forests, pure water, critical wildlife habitat and quiet recreation. The FS should tread particularly carefully when proposing management in these areas.

XII. CONCLUSION

If the FS is serious about implementing such a proposal consistent with environmental laws and policy, it needs to conduct proper NEPA, which we believe means an EIS.

We incorporate our participation during revision of the NPCNF forest plan, to date not yet complete, because the issues discussed overlap substantially with what might pop out of this Forestwide Aspen Restoration black box. A data disk will be mailed to the Forest Supervisor by the date on this letter, which will contain that record of participation.

Sincerely submitted,

Jeff Juel, Forest Policy Director
Friends of the Clearwater
jeffjuel@wildrockies.org
509-688-5956

Mike Garrity, Executive Director
Alliance for the Wild Rockies
PO Box 505
Helena, MT 59624
406-459-5936
wildrockies@gmail.com

Sara Johnson
Native Ecosystems Council
P.O. Box 125
Willow Creek, MT 59760
406-579-3286

Adam Rissien, ReWilding Manager
WildEarth Guardians
PO Box 7516
Missoula, MT
arissien@wildearthguardians.org

Michele Dieterich
Friends of the Bitterroot
telechele@hotmail.com