SOUTHERN ENVIRONMENTAL LAW CENTER

48 Patton Avenue, Suite 304
Asheville, NC 28801
southernenvironment.org

T 828 258 2023
F 828 258 2024

James Melonas, Forest Supervisor, National Forests of North Carolina
c/o Jessie Howard, Project Coordinator
5162 Valleypointe Parkway
Roanoke, VA

Dear James,

We appreciate the opportunity to comment on the Southern Appalachian Watershed Resiliency Project. We support the intent to increase the pace and scale of watershed resiliency projects. Severe impacts from recent years' storms presage the importance of doing this work proactively, not reactively. We hope that this innovative and ambitious undertaking makes the Southern Appalachian national forests more competitive for funding.

We also support the use of a programmatic analysis to analyze cumulative effects, prioritize high-consensus work, and adopt expert-recommended sideboards. Our comments are intended to help the Forest Service gain the greatest efficiency from the programmatic approach. Programmatic analyses are a balancing act. On the one hand, there is the potential to resolve issues at the broad scale so that they need not be reanalyzed when applied at the ground-level. On the other hand, however, there is a need to preserve flexibility to address site-level conditions, which may be highly variable and hard to predict. Fortunately, programmatic approaches are adaptable enough to find that balance.

Need for the Project

To begin with, we appreciate the hard work of the Southern Appalachian Aquatic Restoration Technical Advisory Board (SAARTAB) to build consensus around priority actions and sideboards. The Recommendation Report effectively describes the varied needs for watershed restoration on a diverse landscape. We can support, in principle, putting these tools in the toolbox. In addition, we would like to see other tools brought forward as well, such as the ideas listed in Appendix 2 of the Report, which the group did not have time to consider in detail. In particular, we would like to see the proposed action include trail relocation and road decommissioning. Of course, different tools have different risks, and may therefore need varying levels of future analysis during implementation.

We were pleased to see the Report's special attention to infrastructure. Forest roads are the greatest source of sediment to waters on national forest lands, caused by both chronic and acute best management practice (BMP) failures. Roads are also serious impediments to aquatic organism passage. As Poplar-Jeffers et al. reported, almost all culverts are impassable for relevant aquatic species. (Cited in Report at 23.) This conclusion is consistent with our own survey work, which showed that closed-to-motorized-traffic roads were infrequently maintained, had a high incidence of BMP failure, and were blocking aquatic organism passage.[1]

[1] Analysis of Forest Road Conditions and the Impact on Water Quality and Aquatic Organisms in the Nantahala-Pisgah National Forests (2015) (previously provided to NPNF).

In our study, 40% of stream crossing BMPs (127 of 322) on 45 roads had serious failures—i.e., violations of state requirements prohibiting accelerated erosion or visible sediment delivery. (An additional 7 sites (not at stream crossings) were found to have failed BMPs that were contributing visible sediment to perennial or intermittent streams, sometimes through long, well-defined erosion channels.)

In almost all cases, accelerated erosion and visible sediment violations were caused by inadequate BMP installation or maintenance—for example, water eroding the road surface due to a blocked or buried culvert intake or inside ditch. The severity of North Carolina's Forest Practices Guidelines Related to Water Quality (FPG)[2] violations varied dramatically, from relatively minor erosion at a culvert outfall to large slope failures and deep erosion gullies.

In addition, 314 sites (60% of the 505 total) had other BMP failures that were not causing obvious violations of the FPGs when inspected but if left unmaintained, are likely to do so in the future. Many of these BMP failures were causing erosion of the road surface, channeling water in a way that is likely to cause accelerated damage during severe storms. These included inside ditch and road culvert blockages, failures of erosion control features like dips, and BMP installation or location problems.

The BMP failures we observed were directly contributing to aquatic resource degradation. In general, state monitoring data show that improperly implemented BMPs cause risk to waters 70% of the time in the mountain region where the Nantahala and Pisgah are located (NC Forestry BMP Implementation Survey Results, 2006-2008). Our investigation similarly showed that BMP failures and FPG violations have had observable adverse impacts on aquatic ecosystem health. Waters downstream of failed BMPs often showed significant sediment accumulation compared to waters immediately upstream, with noticeable effect on the number and diversity of benthic macroinvertebrates. In fact, we failed to find any aquatic organisms whatsoever at 55 of 194 culverted, flowing stream crossings—a failure rate of 28%. These were generally streams with considerable sediment accumulation and embeddedness.

In addition to sediment impacts, we also determined that aquatic organism passage was very poor on these low-standard forest roads. Larger perennial streams provided the best aquatic organism passage, because many were spanned by bridges. Crossings of smaller streams with pipe culverts, however, were nearly all impassable for small fish and/or salamanders. Specifically, of the 22 pipe-culverted perennial stream crossings we surveyed, none were passable for small fish.[3] The passage rate for salamanders was slightly better—14%. Connectivity for trout in designated trout waters was marginally better (at 35%), but still unacceptably low.

Like sediment pollution, connectivity barriers have a negative impact on aquatic ecosystem integrity. Impassable stream crossings cause genetic isolation and decrease the availability of food sources for downstream species. While connectivity for fishable trout streams is important and should be prioritized, connectivity on smaller streams where the trout's food supply originates is also important. Furthermore, some connectivity barriers (such as improperly sized,

[2] 15A N.C. Admin. Code 1I .0100 - .0209

[3] We considered streams to be perennial if they had a summer flow depth of 4 inches or greater.

installed, or maintained culverts) can also increase the risk of sediment pollution by making stream crossings more prone to washouts or surface erosion.

In addition to these system-wide problems, severe storms have led to significant damage to roads impacting aquatic ecosystems. In North Carolina, recent road failures include Neals Creek Road (FS 2074), Mineral Creek Road (FS 63), Craigs Creek Road (FS 982), Newberry Creek Road 9FS 482A), Lickstone Ridge Road (FS 97), Tuni Gap Road (FS 440), Tatham Gap Road (FS 423), and Fires Creek Road (FS 340). Storm-related impacts are likely to become more frequent in the future, with adverse impacts not only to water quality and aquatic organisms, but also to forest visitors who are affected by road closures.

On the Chattahoochee National Forest in north Georgia in the last several years sections of a number of Forest Service roads have experienced slide offs, including Coleman River Road (FS 54), Wildcat Creek Road (FS 26-1), Chattahoochee River Road (FS 44), Grapevine Gap Road (FS 665), Noontootla Creek Road (FS-58), Nimblewill Gap Road (FS 28-2), Devils Den Road (FS 792), Holly Creek Road (FS 18), Potato Patch Road (FS 68), and Watson Gap (FS 64). In some cases, these slide offs dumped sediment directly into streams. In others, long sediment trails eventually found their way into streams. In many cases, the roads affected became impassable until special emergency funds could be obtained. Many other system roads on the Chattahoochee National Forest, while not having experienced slide offs, have degraded to the point that they are difficult or impossible for use by passenger vehicles. As a result, they have become de facto off-road vehicle courses traveled by packs of Jeeps whose spinning rough tread tires create more damage. This creates a cycle of deterioration and a major source of stream sedimentation. Unable to repair these roads, the Agency's only response is to lower the maintenance level.

To sum up, we believe that this project is badly needed, and we are grateful for the agency and stakeholder work that have moved it forward over the past couple of years.

Legal Background

1. NEPA

a. NEPA basics

NEPA famously has "twin aims:"[4] the statute commands each agency (1) to consider the environmental impacts of its proposed actions; and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."[5] Although the Supreme Court has interpreted NEPA's enforceable requirements to be procedural, its goals and its benefits are unambiguously substantive. Environmental analysis and public scrutiny are intended to produce "better decisions,"[6] and, indeed, are "almost certain to affect [an] agency's substantive decision."[7] "Simply by focusing [an] agency's attention on the environmental consequences of a

[4] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).
[5] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
[6] *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 206 (quoting 40 C.F.R. § 1500.1(c) (1978)).
[7] *Robertson,* 490 U.S. at 350.

proposed project, 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."[8]

NEPA's objectives are "realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look'" at the environmental consequences of major federal actions.[9] If an agency concludes that a proposal for major federal action " will or *may*" have significant effect on the quality of the human environment, it must prepare an Environmental Impact Statement ("EIS").[10] This "detailed statement" must disclose the "reasonably foreseeable environmental effects of the proposed agency action" and consider "a reasonable range of alternatives to the proposed agency action," among other things.[11]

If the need for an EIS is unclear—i.e., if it is uncertain whether the major federal action will significantly affect the quality of the human environment—an agency may first prepare an Environmental Assessment ("EA").[12] An EA is also required if the agency decision involves "unresolved conflicts concerning alternative uses of available resources"—i.e., whenever an agency's objective "can be achieved in one of two or more ways that will have differing impacts on the environment."[13] In that case, the EA is required to weigh the alternatives.

If the EA concludes that the proposal is likely to have significant effects, the agency must prepare an EIS.[14] If the EA reveals that the action would not have significant effects, then the action can proceed with a Finding of No Significant Impact.[15] But if the evidence before the agency is inadequate to conclude definitively that a the proposal will not have a significant effect on the environment, the agency must prepare an EIS.[16] 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."[17]

When completing an EA or EIS, agencies are obligated to analyze the "environmental impacts of the proposed action" as well as any "reasonable alternatives."[18] Environmental impacts or effects include reasonably foreseeable direct, indirect, and cumulative effects.[19] "Direct effects . . . are caused by the action and occur at the same time and place."[20] "Indirect effects . . . are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."[21] Cumulative effects "result

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[8] *Id.* at 349.
[9] *Id.* at 350 (citation omitted).
[10] 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.1(b) (emphasis added).
[11] 42 U.S.C. § 4332(C).
[12] 40 C.F.R. § 1501.5(a).
[13] 42 U.S.C. § 4332(2)(E); *Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975).
[14] *Id.* § 1501.3(a)(3).
[15] *Id.* § 1501.6.
[16] *See* 40 C.F.R. § 1508.1(b).
[17] *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (internal citations omitted).
[18] 40 C.F.R. §§ 1501.5(c), 1502.16(a)(1).
[19] *Id.* § 1508.1(g).
[20] *Id.* § 1508.1(g)(1).
[21] *Id.* § 1508.1(g)(2).

from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time."[22]

Finally, an action may be "categorically excluded" from analysis in either an EIS or EA. Categorical exclusions are defined as actions that normally do not have significant effects (i.e., do not have significant effects so long as formally adopted "extraordinary circumstances" are not present) either individually or in the aggregate.[23] CEs may be adopted in an agency's NEPA procedures or, as of July 1, 2024, in a programmatic decision.[24]

b. Programmatic Analysis

The Forest Service's NEPA responsibilities are triggered when the agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated."[25] Such a decision can be site-specific or at a broader, programmatic scale.[26] If an agency undertakes programmatic analysis, it may then "tier" future decisions to the broader-scale analysis.[27]

In a tiered approach, the programmatic document can decide some issues so that they can be "exclude[d] from consideration" in the future, and it can address issues that would otherwise require "repetitive discussions" in smaller-scale decisions. "Effective programmatic NEPA" should explain "which decisions are supported by the programmatic NEPA document and which decisions are deferred for some later time," and which sorts of decisions will trigger further NEPA review.[28] "The programmatic review must be clear when issues are being deferred."[29]

Under CEQ regulations, a programmatic EA may serve as an umbrella for future site-specific EAs.[30] In addition, programmatic documents may now serve as an umbrella for localized categorical exclusions,[31] discussed further below.

c. Categorical Exclusions

The Forest Service already has categorical exclusions ("CEs") that may be useful or relevant to this project, including the following:

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[22] *Id.* § 1508.1(g)(3).
[23] 40 C.F.R. § 1501.4; 89 Fed. Reg. at 35537.
[24] 40 C.F.R. §§ 1501.4; 1507.3.
[25] 36 C.F.R. § 220.4(a)(1).
[26] 40 C.F.R. § 1501.11(a).
[27] 40 C.F.R. § 1501.11(b).
[28] "Effective Use of Programmatic NEPA Reviews," Memorandum from Michael Boots, Acting Director of Council on Env't Quality, to Heads of Fed. Dep'ts and Agencies 5 (Dec. 18, 2014), available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf.
[29] *Id.*
[30] 40 C.F.R. § 1501.11(b)(2)(ii).
[31] 40 C.F.R. § 1501.4(c).

- Road maintenance (e.g., cleaning culverts)[32]
- Removing debris or sediment from streams[33] (so long as natural processes aren't impeded)
- Bank stabilization to reduce erosion, using vegetation, rock, or logs and root wads[34]
- Decommissioning unauthorized roads[35]
- Decommissioning system roads (including removing ditches and culverts)[36]
- Removing, replacing, or modifying drainage structures associated with both unauthorized or system roads[37]
- Replacing culverts for aquatic organism passage[38]
- Removing small dams[39]
- Coarse woody debris additions[40]

Of course, these CEs would not be available if extraordinary circumstances (like effects to species listed under the Endangered Species Act) were present, if unresolved conflicts in the use of agency resources were present, or if there were potentially significant cumulative effects. But absent those circumstances, these are categories of action for which the Forest Service has already determined there will be no significant impact.

The Forest Service may also create localized CEs in a programmatic document, provided that it can substantiate in that programmatic analysis that future applications of the CE, individually and in the aggregate, will not have significant impacts.[41] In order to narrow the CE adequately so that a lack of significant effects can be substantiated, the Forest Service may describe conditions where it will apply (e.g., geography or habitat type), limit its duration, limit the total number of times or frequency with which can be applied, among other limitations.[42]

d. Monitoring and mitigation

Whether future site-specific actions are covered by CEs or by tiered EAs, any mitigation relied on in the programmatic analysis must be subject to monitoring and enforcement.[43] Mitigation

[32] 36 C.F.R. § 220.6(d)(4).
[33] 36 C.F.R. § 220.6(e)(19)(i) and (ii) (allowing removal so long as natural processes are not impaired).
[34] 36 C.F.R. § 220.6(e)(19)(iii).
[35] 36 C.F.R. § 220.6(e)(20) (including "unauthorized" roads as proper subjects of decommissioning or other rehabilitation activities).
[36] 36 C.F.R. § 220.6(e)(20) (including "system" roads as proper subjects of decommissioning or other rehabilitation activities).
[37] 36 C.F.R. § 220.6(e)(20).
[38] 36 C.F.R. § 220.6(e)(18)(ii) and (iii).
[39] 36 C.F.R. § 220.6(e)(18)(iv).
[40] 36 C.F.R. § 220.6(e)(7). This CE provides for "modification … of stream … aquatic habitat improvement structures using native materials or normal practices," and it is used by many forests to authorize CWD additions.
[41] 40 C.F.R. § 1501.4(c) (providing that "agencies may establish categorical exclusions through … a decision document supported by a … programmatic environmental assessment, … so long as the agency … [s]ubstantiates its determination that the category of action normally does not have significant impacts, individually or in the aggregate").
[42] 40 C.F.R. § 1501.4(d).
[43] 40 C.F.R. § 1501.6(a)(2), (d); *id.* § 1501.4(d)(3); *id.* § 1505.3.

means any measure, whether described specifically as mitigation or as a "condition" on the action such as a design criterion, on which the agency's analytical findings are based.[44]

e. "Condition-based management"

The options described above (tiering to site-specific EAs or substantiating new, localized CEs) are flexible and adequate for this project's needs. To be clear, however, the Forest Service lacks authority to use so-called "condition-based" approaches to avoid NEPA-required site-specific analysis of actions. Such an approach is unlawful where it involves writing a blank check to take future actions that may, depending on site-specific factors, have significant impacts.

When the Forest Service can substantiate, on the front end, that there will be no significant impacts from an action, it can create a programmatic CE (PCE) in accordance with 40 C.F.R. § 1501.4(c). For later actions that the agency cannot guarantee will have no significant impacts, the Forest Service can tier future EAs back to this document for portions of the action which align with the CE. This avoids the need to analyze issues already considered or reopen decisions already made. But the Forest Service cannot lawfully give itself broad authority to take actions that *might* have significant impacts, depending on site-specific conditions encountered in the future, without additional tiered NEPA analysis and decision-making. To the extent that the Forest Service is considering a version of condition-based management that would take this latter approach, we caution you in the strongest terms to reconsider.

2. Clean Water Act

The Clean Water Act ("CWA") requires all federal agencies conducting activities "resulting, or which may result, in the discharge or runoff of pollutants" to comply with state water-quality standards.[45] Each of the states involved has its own state-level water quality requirements. For example, North Carolina has a narrative standard for turbidity[46] and a numeric standard limiting the temperature of trout waters.[47] North Carolina also prohibits the delivery of visible sediment to streams and accelerated erosion at stream crossings.[48]

The CWA also generally forbids the discharge of fill material into streams without a permit. This includes the construction of culverted or bridged crossings and hardened fords. Roads used for silvicultural purposes are potentially eligible for the so-called "silvicultural exemption" to the

[44] *See* 40 C.F.R. § 1505.3(c)(1).
[45] 33 U.S.C. § 1323(a) (emphasis added); *see also Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 848 (9th Cir. 1987) (holding that the Clean Water Act "requires all federal agencies to comply with all state requirements").
[46] 15A N.C. Admin. Code 02B .0211(21) ("Turbidity: the turbidity in the receiving water shall not exceed 50 Nephelometric Turbidity Units (NTU) in streams not designated as trout waters and 10 NTU in streams, lakes, or reservoirs designated as trout waters; for lakes and reservoirs not designated as trout waters, the turbidity shall not exceed 25 NTU; if turbidity exceeds these levels due to natural background conditions, the existing turbidity level shall not be increased.").
[47] *Id.* 02B .0211(18) ("Temperature: not to exceed 2.8 degrees C (5.04 degrees F) above the natural water temperature, and in no case to exceed 29 degrees C (84.2 degrees F) for mountain and upper piedmont waters and 32 degrees C (89.6 degrees F) for lower piedmont and coastal plain waters; the temperature for trout waters shall not be increased by more than 0.5 degrees C (0.9 degrees F) due to the discharge of heated liquids, but in no case to exceed 20 degrees C (68 degrees F).")
[48] N.C. Gen. Stat. § 113A-50; .02 N.C.A.C. 60C .0101-.0209

CWA, which eliminates the need for a permit. To be covered under that exemption, however, the Forest Service must comply with several BMP requirements. As most relevant here, a stream crossing is eligible for the silvicultural exemption only if:

- it will not "prevent the restriction of expected flood flows";
- it is "maintained during and following construction to prevent erosion"; and
- it does "not disrupt the migration or other movement of those species of aquatic life inhabiting the water body."[49]

The vast majority of the Forest Service's roads are unpermitted, but most stream crossings are not meeting these requirements. That means that the Forest Service's road system is currently unlawful.

3. Travel Management

Two features of the Travel Management Rule are of particular relevance to this project. First, the Forest Service must identify and implement the "minimum road system," meaning "the road system determined to be needed to meet resource and other management objectives …, to meet applicable statutory and regulatory requirements, to reflect long-term funding expectations, [and] to ensure that the identified system minimizes adverse environmental impacts."[50] Relatedly, the agency must decommission "unneeded" roads.[51]

Clearly the current road system in the steep Southern Appalachian Mountains is unsustainable with the current level of funding, as evidenced by the examples noted above from North Carolina and Georgia. The 2015 Travel Analysis Report for the George Washington and Jefferson National Forests, which are primarily in Virginia, acknowledged that "the forest has only 57% of the total funding needed to manage the current road system" and identified 237 miles of road to be considered for decommissioning.[52]

Given the current Federal budget deficit, it is unreasonable to expect an increase in funding for road maintenance. Coupling this with the expectations of more violent storms as climate change continues, the Agency has no other alternative but to downsize its road system. The deteriorating Forest Service road system is the main source of sediment in the headwater streams of the Southern Appalachians that are so crucial to the entire South.

Second, the Forest Service cannot close a road that is open to public motorized traffic without a site-specific NEPA process.[53] However, for system roads that are already closed to the public, the physical decommissioning of a road does not require further analysis under the Travel Management Rule and, in the absence of extraordinary circumstances, can be categorically excluded from NEPA analysis under 36 C.F.R. § 220.6(e)(20).

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[49] 36 C.F.R. § 323.4(a)(6)(iii), (iv), (vii).
[50] 36 C.F.R. § 212.5(b)(1).
[51] 36 C.F.R. § 212.5(b)(2).
[52] "George Washington and Jefferson National Forests Transportation Analysis Process (TAP) Report" 5-6 (Sept, 24, 2015), available at https://www fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd537418.pdf.
[53] 36 C.F.R. § 212.52.

Comments

We understand that the programmatic analysis will inform separate proposals in each state, which will vary based on local needs. At this stage, when those proposals have not yet taken shape, it is difficult to provide specific comments. However, we appreciate the opportunity to share early thoughts, and we look forward to working together iteratively through the collaborative process.

1. Actions to Include in the Proposed Action

As noted above, we appreciate the work of the SAARTAB and we support discussion of its recommended actions (including those listed in Appendix 2) as project proposals are developed. We offer the following feedback on the specific actions:

- Instream impacts (stream substrate): In some areas (e.g. Coker Creek on the Cherokee National Forest), gold dredging and rock mining activities (including unlawful dredging) have significantly impacted stream banks and beds. Please consider including remedial action for this degraded condition.
- Large wood installation: In addition to the considerations mentioned by the SAARTAB, we recommend the addition of a sideboard related to the safety of recreational users.
- Decisions related to stocking of invasive species: The SAARTAB was unable to reach consensus on "cessation of stocking non-native aquatic species as a restoration recommendation." We note, however, that whether to stock non-native species on national forest lands is exclusively the decision of the Forest Service, not the state agencies who may have existing policies favoring stocking with non-natives.[54] Forest Service regulations require the restoration of natural species composition in aquatic ecosystems.[55] Cessation of stocking non-natives should be on the table as a restoration action.
- Road closures: As noted above, the Forest Service's road system contains systemic violations of the Clean Water Act because unpermitted discharges at stream crossings do not meet the requirements for the silvicultural exemption. We are hopeful that this project will make progress toward rectifying that situation. Road decommissioning is an essential part of the solution, because the current road system exceeds the "minimum" road system

[54] Federal law controls whenever there is a conflict with state law. Supremacy Clause, U.S. CONST. art. VI, cl. 2. This foundational principle is no less true in the context of public lands. Where NFMA and MUSYA direct federal agency responsibilities over federal lands, those mandates must be enforced over conflicting state laws and regulations. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 585 (1987) (finding that federal law preempted state land use plans as applied to national forests); *Hunt*, 278 U.S. at 100 (upholding a federal decision to remove deer from the Kaibab National Forest to protect the forest from overgrazing, despite objections from the state). Although federal officials may ultimately agree with state objectives for wildlife, they nonetheless must apply their own judgment and follow their own legal requirements first. *See California Coastal Comm'n*, 480 U.S. at 585 (finding that state land management plans could not apply to national forests without running afoul of federal duties under NFMA and the Federal Land Policy and Management Act, even if the documents did not explicitly conflict).
[55] 36 C.F.R. § 219.8.

that the agency can afford to maintain in compliance with law.[56] Physical decommissioning of both system and non-system roads can proceed without public engagement under the Travel Management Rule.

- Riparian Buffer Planting: the SAARTAB report recommends that the Forest Service "[c]onsult locally relevant . . . native plant lists and limit plantings to native species." We recommend including consideration of adjacent reaches with more intact vegetation. Additionally, we believe the SAARTAB's recommendation to "consult the most recent guidance and local experts" regarding river cane restoration should be expanded to explicitly include consultation with local Tribes about culturally relevant resources. For example, butternut and sochan may represent other culturally significant riparian species.
- (Riparian) Non-Native Invasive Plant Species Removal (mechanical and chemical): In addition to the SAARTAB's recommendations, we recommend adding the following sideboards: monitor populations for at least three years following any treatment, repeat treatment of residual populations until target species is eliminated from the site, and consider stabilizing populations by top-killing large individuals if there are significant delays before full scale control efforts can be implemented.
- Road Closure: In addition to the considerations mentioned by the SAARTAB, we recommend blocking roads to motorized access and engaging in actions to control non-native invasive species.
- Ecologically Functional/Aquatic Organism Passage Stream Crossings: The Recommendation Report calls for surveys to be conducted prior to stream crossing replacement. We recommend an additional sideboard to ensure restoration of streambanks after a new Aquatic Organism Passage structure is installed.
- Dam Removal: Similarly, we recommend a post-removal sideboard to restore streambanks after dam removal.
- Sediment Catchment Basins: The SAARTAB does not analyze the utility of catchment basins as vernal pools. We share this idea in case the agency is curious about exploring the viability of this option.
- Actions to Address Recreational Uses: We recommend expanding the sideboards to include assessment of whether the recreation access is needed at a location. If not, we recommend considering closure of the access point. If access is necessary, the agency should ensure the access point is included as part of a system trail or is otherwise documented and eligible for maintenance and management.
- Headcut and Grade Stabilization: In addition to the protective measures mentioned in the Recommendation Report, we recommend assessing if these sites are appropriate for beaver restoration.

Beaver Dam Analogs (BDAs) and Post-Assisted Log Structures (PALS): We do not have specific recommendations related to these sideboards but want to note that we appreciate seeing an emphasis on beaver dam analogs and beaver re-introduction as an alternative "where

[56] *See* 36 C.F.R. § 212.5(b)(1).

possible."

2. NEPA considerations

These actions are expected to become part of a "flexible toolbox" approach. This same phrase has been used in the past to describe projects that have been controversial and unlawful. We are concerned that the Forest Service may be tempted to follow an unlawful course here too. The scoping notice indicates that "The Decision Notices would allow for direct implementation of a site-specific project without the need for additional NEPA documentation." It is premature for the Forest Service to take this position before it has even articulated its proposal.

Can the tools in the toolbox be applied without further NEPA analysis? Sometimes yes, and sometimes no. Depending on how narrowly or broadly each of the "tools" is conceived, some of the tools may not require a tiered site-specific analysis, but others will. Indeed, this project would be a missed opportunity if it did *not* result in future tiered analyses. Some watershed restoration needs are complex and implicate difficult tradeoffs, which inherently will require further analysis. Sure, we could avoid that work, but if we only do the easy things, we won't necessarily get optimal results. Programmatic analysis is a chance to look broadly at all the competing needs and prioritize the actions that will make the biggest difference. It is a chance to get out of the pattern of doing only the things that have the least friction.

Programmatic analysis is well suited for this project because it can reduce the friction for easy and hard actions alike. For the easier actions, it can provide a predictable framework and provide clear expectations for public involvement. For the harder actions, it can provide the contextual and cumulative analysis that allows project designers to focus on the task at hand—in CEQ's words, the "actual issues ripe for decision."[57]

However, we cannot support a condition-based approach in which the Forest Service writes itself a blank check to take actions, without site-specific analysis, that may have significant effects. Rather than merely saying what we cannot support, however, we want to provide constructive feedback. Below we offer a four-part framework, moving from the simplest actions to the most complex:

- Well-understood actions covered by existing CEs

For actions already covered by existing categorical exclusions, this project should adopt sideboards necessary to ensure that extraordinary circumstances are not triggered and that cumulative impacts do not preclude use of the CEs. For example, one culvert replacement upstream of a listed aquatic species might be eligible for coverage under CE (e)(18), but what about multiple culvert replacements? At what point does the "degree of the potential effect" on the listed species become an extraordinary circumstance?[58]

This project should also set clear expectations for future public engagement. How will scoping be conducted so that stakeholders interested in both the big-picture and local effects will be in

[57] 40 C.F.R. § 1501.11(b).
[58] *See* 36 C.F.R. § 220.6(b)(2).

the loop? Will there be differences in the reach and timing of public engagement for actions planned proactively as compared to actions taken in response to storm damage or an emergency?

- Well-understood actions *not* covered by existing CEs but for which the Forest Service can substantiate a lack of significant effects

For simple and uncontroversial actions that the agency is confident will not cause significant impacts no matter where or when the action is taken, the Forest Service should consider developing a localized CE in this programmatic analysis. A PCE would apply based on criteria or conditions that could be confirmed in an implementation checklist. It would also be narrowed by sideboards such as geographic area, total number of uses, or frequency of use.[59] Finally, it would specify any mitigation measures needed to ensure effects are nonsignificant, along with a monitoring process to ensure those measures are being met.[60]

- More complex actions that the Forest Service cannot substantiate will categorically have no significant effects

For some needed watershed restoration actions, it will be impossible to define a category of actions that will definitively lack significant effects no matter where and how they are taken. As the SAARTAB Report recognizes, many of the recommended actions will require further site-specific consideration in coordination with local experts and the public. For example, stream liming has uncertain utility and needs consultation with local experts and the public—the sort of decision that cannot be reduced to a formula. Nevertheless, site-specific analyses should not have to start from scratch. The programmatic analysis should cover the common and cumulative effects of such actions, clearly explaining which issues are being resolved programmatically and which are being deferred to site-specific decisions.[61]

- Highly complex and unique actions

The primary advantage of programmatic analysis is to reduce the need for duplicative analysis so that project designers can focus the "issues ripe for decision." Some actions, however, are so unique that their analyses would not be duplicative with other analyses. In those cases, there is much less benefit in covering the action in a programmatic analysis. We suggest that such actions may be better analyzed in separate NEPA documents without trying to shoehorn them into the programmatic framework.

Note that all four of the approaches above are based on the assumption that we don't currently know where or what actions will be proposed. If the Forest Service had a list of site-specific projects that it wanted to authorize, nothing prevents it from analyzing them together in this or another NEPA document.

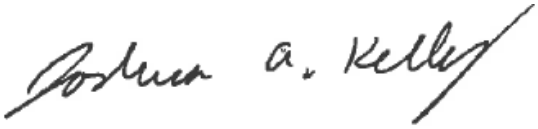
Conclusion

[59] 40 C.F.R. § 1501.4(d).
[60] 40 C.F.R. § 1501.4(d)(3).
[61] Boots Memorandum, *see* note 28 supra.

Thank you again for the opportunity to comment. We would be pleased to discuss these comments further and look forward to engaging in the collaborative process as the effort moves forward.

Sincerely,

Sam Evans
Senior Attorney
Southern Environmental Law Center
sevans@selcnc.org



Josh Kelly
Public Lands Biologist
MountainTrue
josh@mountaintrue.org

Jill Gottesman
Director, Southern Appalachian
Landscape Program
The Wilderness Society
Jill_Gottesman@tws.org

cc
Jessie Howard [jessie.howard@usda.gov]