

November 25, 2024

Via online submission at

<https://cara.fs2c.usda.gov/Public//CommentInput?Project=66727>

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**Re: Scoping comments on 2024 Maintenance of Open and Semi-Open
Lands, Roadside Corridors and Utility Rights-of-Way**

Dear Mr. Timm:

Thank you for the opportunity to comment on the proposed 2024 Forest wide Maintenance of Open and Semi-Open Lands, Roadside Corridors, and Utility Rights-of-Way as it moves into the scoping phase. Please accept the following comments on behalf of The Clinch Coalition, the Virginia Wilderness Committee, and the Southern Environmental Law Center.

Given the large scope of this proposal – clearing vegetation on over 80,000 acres of the George Washington (GW) and Jefferson National Forests (collectively, GWJNF), including with herbicides, for the next 10 years – we are very interested in ensuring adequate National Environmental Policy Act (NEPA) analysis occurs and in making sure that sufficient sideboards, mitigation measures, and monitoring requirements are in place.

Use of a Programmatic EA

We understand the agency's need to meet its NEPA obligations as efficiently as possible. We are not convinced, however, that the proposed environmental review process will comply with NEPA. As you know, NEPA has twin aims: "First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."¹ To achieve these twin aims, NEPA and associated Forest Service regulations require the agency to "[c]omplete [its] environmental document review," consider "public and agency comments" on this document review, and "[c]onsider[] the alternatives" before making a

¹ *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citation and quotation marks omitted).

final decision on a proposed project.² At the project level, this includes completing a “site-specific analysis” of potential effects.³ Agencies cannot avoid the necessity of conducting a site-specific NEPA analysis with public disclosure and comment by promising to consider these effects later in a non-NEPA document.⁴

We believe the agency may need to structure its environmental analysis differently to comply with NEPA’s twin aims “to the fullest extent possible.”⁵ The current proposal seeks to make a finding of no significant impact without providing site-specific analysis, including of sensitive or otherwise special sites and resources within the proposed 80,285 acres of treatments. Nor does this process provide notice to the public at the checklist stage. Thus, the public is never informed of potential site-specific impacts and has no opportunity to provide feedback for the agency to consider before making a decision.

In other words, it seems that the Forest Service is attempting to give itself broad authority to take actions that may have significant impacts, depending on site-specific conditions encountered in the future, without additional tiered NEPA analysis and decision-making. This is not something the Forest Service can lawfully do. We are interested in discussing options that would allow the agency to efficiently carry forward its analysis and comply with NEPA.

If the agency continues to utilize Appendix A in some capacity, it should be expanded to provide site-specific analysis of effects on certain special or sensitive conditions. As proposed, Appendix A would require limited site-specific reviews, using a checklist for resource specialists, *when herbicide use is proposed*. But Appendix A should apply to all maintenance treatments implementing the proposed EA, not just those involving herbicides. Other proposed management, such as prescribed fire and mechanical treatments, may still have significant environmental and social impacts that the agency must review. Some review of each site prior to treatment is essential. If no special or sensitive conditions exist, the review would not take extra time. If special or sensitive conditions exist, it is imperative that they be identified and evaluated by resource specialists before treatment.

Second, Appendix A should include a more detailed, non-exclusive list of special circumstances and sensitive resources that require further consideration, to help prompt

² 36 C.F.R. § 220.4(c); *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005); *see also* 36 C.F.R. § 220.7 (requiring public disclosure and involvement in developing an EA and Decision Notice).

³ *N. Alaska Env’t Ctr. v. U.S. Dep’t of the Interior*, 983 F.3d 1077, 1086 (9th Cir. 2020) (NEPA requires site-specific review when “the agency proposes to make an ‘irreversible and irretrievable commitment of the availability of resources’ to a project at a particular site”).

⁴ *S. Fork Band Council Of W. Shoshone Of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (“A non-NEPA document . . . cannot satisfy a federal agency’s obligations under NEPA.”); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004) (“A NEPA document cannot tier to a non-NEPA document.”).

⁵ 42 U.S.C. § 4332.

identification and consideration of these resources if they exist. A good starting point for such a list can be found in an analogous list in the agency's NEPA regulations – the list of extraordinary circumstances that should be considered and may warrant detailed NEPA analysis and preclude use of categorical exclusions. *See* 36 C.F.R. § 220.6(b). Some, but not all, of these are listed in the current proposed Appendix A.

These circumstances include but are not limited to: all inventoried roadless areas, potential wilderness areas (PWAs), research natural areas, areas with federally listed threatened or endangered species or designated critical habitat, areas with species proposed for listing or proposed critical habitat, congressionally designated areas like wilderness study areas or national recreation areas, American Indian religious or cultural sites, archaeological sites or historic areas, and wetlands or municipal watersheds. *Id.* Special biological areas, Key Natural Heritage Community areas, and rare natural communities also seem to warrant additional consideration, as do riparian corridors, which are discussed below.

Third, while this cursory checklist review approach may be adequate in some circumstances, there are some situations where proposed treatment would adversely affect special or sensitive resources, warranting further site-specific NEPA analysis with public input opportunities.

With regard to PWAs, the July 29, 2015 letter of clarification for the GW Revised Plan explains that before a decision is made to conduct activities in a PWA, site-specific analysis must be conducted, including consideration of the effects on the PWA's characteristics and on the status for inventory and evaluation in the future. Similarly, the Forest Supervisor clarified that the characteristics of other “distinctive or high public interest areas,” such as the areas included in The Wilderness Society's *Virginia's Mountain Treasures*, will be considered in project-level planning and analysis. For example, there probably are old roads in remote areas that are not currently maintained, may not even be passable, and are recommended for changes in the TAP or other roads analyses. (See below for further discussion of TAPs.) We would like to ensure these factors are identified and considered during implementation of the proposed EA, rather than having more maintenance dollars thrown at these roads without recognizing the situation.

We recommend that the Forest Service consider removing these special or sensitive areas, requiring additional NEPA analysis from this proposal. It seems that including these more complex areas that likely merit fuller NEPA analysis may interfere with the Forest Service's goal of more efficiently completing NEPA for the maintenance of significant parts of the GWJNF. If the Forest Service removes these areas from consideration, the agency could proceed with many simpler, less complex areas.

Alternatively, the Forest Service could perform NEPA analysis of these sites now. However attempting to consider all sites with these special or sensitive conditions (some of which may be as-yet unidentified in GIS databases, e.g., threatened and endangered species locations, old growth, or rare natural communities) seems difficult and likely less efficient. The agency also could consider performing programmatic analysis now and then tiering the site-specific analysis of these special areas to the programmatic analysis later.

If the agency does not remove PWAs from the proposed EA, we recommend that it clarify that this EA does not apply to any actions would disqualify a PWA from inventory and consideration in a future potential wilderness inventory. The agency should also consider how it will handle review of any previously unidentified special resources or sites that are discovered, e.g., rare natural communities.

Riparian Corridors

The GW and Jefferson Forest Plans provide that permanent wildlife openings in riparian corridors that are identified as causing environmental degradation through concentrated runoff, soil erosion, sediment transport to the channel or water body, will be mitigated or closed and restored. GW Standard 11-013; Jefferson Standard 11-010.

Given the heightened public awareness and concerns about using herbicides near waterways, the agency should consider whether the proposed maintenance in riparian corridors warrants further NEPA analysis, including site-specific analysis. As with the similar areas discussed above, the agency could choose to handle this analysis in a number of ways. At a minimum, the proposed EA should address how and when the agency will identify any such wildlife openings in riparian corridors that are causing environmental degradation and require mitigation or closing and restoration.

The agency should also include additional limitations on herbicide application. First, the agency should prohibit any aerial application of herbicides, even on utility corridors. The risk of herbicide drift is five to eight times higher for aerial application of herbicides than ground application under optimal meteorological conditions.⁶ This could increase the risk of herbicides making their way into waterways, impacting critical species and drinking water resources. When this project was proposed in 2016, the agency explicitly stated no aerial application of herbicides would occur. Given that the scoping for this project is otherwise nearly identical, what has changed about the agency's decisionmaking or the scientific understanding of the risks associated with aerial herbicide application such that the agency would allow it under the 2024 proposal?

⁶ Thomas R. Butts et al., *Herbicide Spray Drift from Ground and Aerial Applications: Implications for Potential Pollinator Foraging Sources*, 12 SCIENTIFIC REPORTS 18017 (2022), <https://doi.org/10.1038/s41598-022-22916-4>.

Second, the agency should consider prohibiting herbicide application within at least 100 feet of lakes, wetlands, and perennial or intermittent springs and streams generally. This is the Plan standard for herbicide application near public or domestic water sources, and it seems prudent to extend the same limitation to these other waterbodies.

Maintenance Tree Cutting Inside These Areas

The proposal would cover over 80,000 acres across the GWJNF, including (1) 60,815 acres of maintenance of road corridors, with vegetation clearing of 10 to 60 feet on each side, (2) 14,462 of wildlife openings, fields, pastures, and open areas around scenic trails, recreation sites, administration sites, and reservoirs, and (3) 5,008 acres of gas and powerline utility rights-of-way. Cutting of trees to maintain open or semi-open conditions in these areas is proposed, without limitation on number, age, or size of trees that may be cut.

We are concerned that allowing commercial harvest of the trees in these road corridors could create an incentive for widening or enlarging these areas to the maximum extent possible. These road corridors, open or semi-open areas, or utility corridors should not be available for commercial harvest without additional NEPA analysis and the opportunity for public comment, and a separate decision authorizing the activity (i.e., adhering to the usual NEPA processes for timber projects on the forest). Particularly due to the large scope of the proposed EA, commercial logging to the proposed maximum area would be outside the scope of this forestwide EA and analysis, which addresses maintenance – not timber harvests and their effects on fish, wildlife, soil, water, and aquatic species.

Accordingly, any trees cut for maintenance under the proposed EA should be cut and leave only, i.e., not harvest and removal of timber. Or the agency could consider allowing cut trees to be scattered in the adjacent forest to provide habitat.

Travel Analysis Process and Sustainable Maintenance

We have some concerns that the proposed forestwide EA could lead to continued, or even increased, maintenance of road corridors, wildlife clearings, etc. that are not sustainable and cannot be maintained adequately. This concern is greater since full site-specific NEPA, with the opportunity for public input, would not occur.

With regard to roads, the Forest Service has conducted Travel Analysis Processes (TAPs) to identify the minimum road system necessary to meet management objectives and recommend changes to level of maintenance for roads, as well as potential decommissioning. TAPs are to be implemented “through the extensive use of project

level roads analysis for decisions regarding changes to the road system” and help provide the data upon which managers can make informed decisions. GW Plan FEIS at 3-366.

We would not want this forestwide EA related to maintenance to, in any way, impede or delay the hard and necessary work that this forest and the districts must do to right-size the road network to a sustainable level. Nor would we want the EA to result in an over-investment of forest resources into roads or areas that should be maintained at a reduced level or decommissioned.

The proposed EA should address the TAPs, and make clear that any maintenance performed under the programmatic EA should be consistent with the TAPs. To that end, we recommend adding into Appendix A a requirement for site-specific analysis and discussion of the road system. E.g., “Roads- How are the relevant roads assessed and treated in TAP? Is proposed maintenance consistent with recommendations in the TAP?”

The same concerns apply to other areas of the forest such as wildlife clearings or fields that districts cannot maintain. We understand that some districts are growing mindful of the need to choose, based on budgets and other factors, which wildlife openings they can realistically maintain over the long term and which they let go. The proposed EA should anticipate and address the need for such realistic assessments regarding the ability to maintain these areas. As with roads, we recommend that Appendix A require site-specific analysis of such areas. E.g., Editing to state “Wildlife Biologist Review: Describe any special circumstance including potential impacts to forage and wildlife investments. Identify by name and location any roads or openings that are currently maintained but will no longer be maintained. List all mitigations below.”

Road Corridor Width

The scoping notice provides that the road corridor to be maintained, i.e., cleared of unwanted vegetation, normally ranges from 10 to 60 feet on each side. This is a wide range. If most road corridors were maintained at the upper end of that range, it would be a great deal more vegetation cleared (and possibly herbicide used) than if most were maintained at the lower end.

How is the corridor width determined? Is it a something that is already calculated and remains the same? Or can it change? If so, who decides and what is the criteria used to determine the corridor width? If this number is not fixed already and clear criteria does not exist, we recommend that the agency develop these criteria to help guide those performing maintenance in establishing the proper corridor to meet stated objectives.

We believe road corridors should be just wide enough to meet the stated goals of clearing corridors (improving driver safety and allowing sunlight to hit the roads). While

the agency may need to treat NNIS a wider width than that, the agency should not clear non-harmful vegetation outside the necessary corridor width to meet goals. We would not want the boundary of a maintained road corridor to creep wider simply because the agency is treating NNIS in the same area. Diagrams in the proposed EA might be helpful guidance to reflect that a NNIS treatment zone may extend past the cleared road corridor.

Use of Herbicides

Concerns exist related to the widespread use of some herbicides and potential effects – especially cumulative effects – on important species like pollinators, insects, and bats, as well as on water quality. In light of uncertainties in scientific knowledge about some herbicides, their cumulative impacts, and resulting concerns, we urge the agency to provide as much clarification as possible regarding its intended use of herbicides, the science supporting these decisions, and limitations on usage. Regarding limitations, we again urge the agency to prohibit aerial application of herbicides under the proposed EA, even on utility corridors, due to the risks of herbicide drift that could drastically increase potential impacts on surrounding resources and human health. We do not believe the agency can make a Finding of No Significant Impact while allowing aerial herbicide application on up to 5,000 acres of openlands.

The agency should provide more site-specific information and analysis with opportunity for public comment before determining where to apply herbicides as part of the project, including time of year determinations. Chemical treatments can cause impacts to important pollinator species and other wildlife that use forestland openings at different times of the year, and an herbicide application during one time of year may have significantly more impacts than the same application at another time. For example, applying herbicides when plants are flowering can increase exposure for bees and other pollinators.⁷ Exposure can even vary based on the time of day that chemical treatments are applied.⁸ This is especially critical in light of collaborative efforts between the Forest Service and public and private partners to create pollinator-friendly habitat in wildlife openings via native plant restoration. The Forest Service must conduct site-specific analysis of the potential impacts of herbicide use on pollinators and other species, inform the public, and receive feedback before making a decision about where and how to use herbicides. Without site-specific information on where *and when* herbicides will be applied, the public is in the dark about what the Forest Service is planning for this project.

⁷ Helen M. Andrews & Mary Ann Rose, *Protecting Pollinators While Using Pesticides*, OHIO STATE UNIV. EXTENSION (Dec. 28, 2018), <https://ohioline.osu.edu/factsheet/anr-68>.

⁸ See Arrian Karbassioon & Darah A. Stanley, *Exploring relationships between time of day and pollinator activity in the context of pesticide use*, 72 BASIC & APPLIED ECOLOGY 74 (2023), <https://doi.org/10.1016/j.baae.2023.06.001>.

Further, the proposed EA should discuss any criteria that guides when use of herbicides may be suitable or unsuitable, as well as develop and/or identify any limitations on herbicide usage. Does the agency prefer to use manual or mechanical methods and use herbicides only when necessary? Does the agency seek to minimize the amount of herbicides used? Which herbicides will be used near water? Does it make sense for the agency to set an annual cap on acres treated with herbicides, particularly during the first 5 years before the comprehensive review is completed?

Connection with the GWJNF's Forest-wide Non-Native Invasive Plant Control EA and Decision Notice

To improve efficiency and reduce the number of treatments in an area, the agency proposes to combine maintenance activities with treatment of non-native invasive species (NNIS) wherever possible. We are glad the agency is looking for on-the-ground efficiencies like this and understand how doing so could improve planning and implementation of these activities.

Before combining treatments under this proposal and the 2010 Forest-Wide Non-Native Invasive Plant Control EA, we recommend the agency revisit the NEPA analysis from 2010 to account for new scientific understandings and on-the-ground conditions. NEPA analyses do not have an explicit expiration date. But at some point, all NEPA analyses become “too stale to carry the weight assigned to [them].”⁹ For that reason, the Council on Environmental Quality has explained that “[a]s a rule of thumb,” NEPA studies “that are more than 5 years old should be carefully reexamined to determine if the criteria in [40 C.F.R. §] 1502.9 compel preparation of an [EA or] EIS supplement.”¹⁰

We appreciate that the agency is planning to conduct a comprehensive review of this project after 5 years to ensure it remains consistent with the Forest Plans, relevant federal laws and regulations, and the most recent scientific understanding of on-the-ground conditions. To our knowledge, the Forest Service has not conducted such an update to the 2010 Forest-Wide Non-Native Invasive Plant Control EA. We suggest the agency conduct a comprehensive review of that EA and determine whether a supplemental EA or EIS is necessary before continuing management under that EA or before approving management under the currently proposed project. Updated analysis is particularly important before combining treatments under this project and the 2010

⁹ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011).

¹⁰ Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981). According to the Council of Environmental Quality, this guidance is still current except to the extent it conflicts with regulations promulgated on September 14, 2020. *See also Friends of Animals v. U.S. Bureau of Land Mgmt.*, No. 3:15-CV-0057-LRH-WGC, 2015 WL 555980, at *3 (D. Nev. Feb. 11, 2015) (rejecting agency reliance on a 5-year-old EA after circumstances changed); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 936 (D. Or. 2016) (“Notably, the Council of Environmental Quality, which promulgates the NEPA regulations, has emphasized that NEPA documents more than 5 years old should be ‘carefully reexamined’ for supplementation.”).

Non-Native Invasive Plant Control EA because one herbicide listed for the former—Fluazifop-P-Butyl—is not included in the latter.

The agency should include the relevant mitigation measures included in that EA as a starting point here, and update them to reflect the current best available scientific information. At the same time, we urge the agency to keep in mind that simply carrying over provisions of that EA to this one will not be adequate, in part because the different goals of maintenance versus treating NNIS may well require different activities.

Identification of Existing Areas Subject to the Proposed EA

The proposed action is to maintain conditions in “existing permanent open and semi-open lands, roadside corridors and utility rights of way.” The proposed EA should clarify that this includes maintenance along only Forest Service system roads or documented openings. For example, it is our understanding that unofficial roads, such as non-system user-created roads or old temporary roadbeds, would not be covered by this proposal.

In another example, old roads or wildlife openings may exist on a paper inventory but may be unmaintained, overgrown, and non-existent travelways or openings in any practical sense “on the ground.” If any of these places are so overgrown that re-opening them would not fall within a reasonable interpretation of “maintenance,” but would rather constitute reconstruction, re-opening them probably should not fall within the activities covered by this proposed EA. Rather, that should be considered separately.

The proposed EA should ensure that the staff performing the maintenance confirm whether (1) a road or opening is documented on the system and (2) still exists on the ground. We suggest adding to Appendix A “Are all roads or openings proposed for maintenance documented on the system and existing on the ground? If not, identify by name and location any roads or openings areas that will no longer be maintained.”

Monitoring and Tracking

Given the large scope of this proposal - in both acreage involved and the duration - and the widespread use of herbicides that could occur across the GWJNF, the agency should include a robust plan to monitor implementation, treatment effectiveness, and environmental effects.

Implementation monitoring should evaluate whether the agency did what it said it would do and ensure that all herbicide label requirements and mitigation measures are followed. Treatment effectiveness monitoring should help clarify when the different treatment options should be used or avoided, based on effectiveness, as well as how often they should occur. And environmental effects monitoring should help ensure treatments are having the anticipated effects as analyzed in the EA. As stated in the NNIS EA, we

suggest that if any new information is published regarding the environmental effects of the proposed chemicals, treatments will be modified accordingly, with the appropriate level of environmental analysis.

The proposed EA should also provide how the districts and forest will track the maintenance done. This is particularly true where maintenance changes the habitat or structural condition of an area. For example, if a section of a utility corridor is opened and provides new early succession habitat or shrubland habitat, this acreage should be tracked and recorded. It would then be critical to track this data in order to assess how this work has helped move the forest toward desired conditions.

The proposed EA should explain how and when this monitoring and tracking will occur. The proposed EA should also explain if and how this relates to the comprehensive review of treatments to occur 5 years into this 10-year proposal. The proposed EA should also explain how treatments will be modified where needed. We recommend the agency develop a monitoring and tracking framework to be included as an Appendix to the proposed EA.

Conclusion

Thank you for your consideration of these comments. Please let us know if you have any questions and we look forward to continuing to work with you during this process.

Sincerely,

A handwritten signature in dark ink, appearing to read 'K. Davis'.

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