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October 18, 2024 Submitted via Project Website Portal and email to:

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Subject: Sequoia and Sierra NF Prescribed Burning Project Draft EA Comments for SFK, SC, and TRC

Sequoia ForestKeeper (SFK), the Kern-Kaweah Chapter of the Sierra Club (SC), and the Tule River Conservancy (TRC) provide the following comments on the subject proposal with respect to the Forest Service's draft Environmental Assessment (EA). SFK, SC, and TRC have been involved in the protection of the Sequoia National Forest and the Giant Sequoia National Monument for many decades. Moreover, they also have concerns about the protection of the forest ecosystems and protected areas in the adjacent Sierra National Forest. SFK, SC, and TRC submitted scoping comments on November 23, 2023.

COMMENTS

We incorporate our scoping comments into these comments by reference rather than restate them. See Attachment 1, hereto. Even though we may not restate those issues and concerns here, where the Forest Service has not adequately addressed the issues we raised in our scoping comments we reserve the right to raise those issues again in our objection.

Because the proposed action would result in significant adverse effects on soils, wildlife, recreation, aesthetic resources, and proposes to cut trees and burn hundreds of thousands of acres of Inventoried Roadless Areas (IRAs), Proposed and Designated Wilderness, other Special Management Areas, and critical wildlife habitat for proposed, threatened, endangered and sensitive species, it is a major federal action, and the Forest Service must prepare an Environmental Impact Statement (EIS) rather than an EA.

1. The EA Omits the Recommended Moses Wilderness and Associated Map, Located in the Giant Sequoia National Monument, which Should Be Added to Alternative C.

The GSNM Plan record of decision included a recommendation of the proposed Moses Wilderness, which was omitted from the analysis and should be included as an area excluded from the project under Alternative C. Attachment 2, hereto, is Map 15 from the GSNM Plan, which provides the recommended boundaries of the area. Moreover, as discussed below under 3., the Sequoia National Forest has already made a decision to manage the area using managed wildfire and should exclude the area from prescribed burning in all of its alternatives.

1. The EA Fails to Consider a Sufficient Range of Alternatives, and the Project Should Add Alternatives that Exclude Management in Inventoried Roadless Areas (IRAs), Wild and Scenic Rivers (WSRs), and other Special Management Areas.

1. Insufficient Consideration of Alternatives

The draft EA on page 29 presents an insufficient consideration of alternatives. In our scoping comments (Attachment 1, hereto, pp. 3-4, & 6), we presented additional areas that should have been considered for exclusion, but none of those are described in the explanation of "Alternatives Considered but Dismissed from Detailed Study." While the explanation under item 1. on p. 29 of the EA mentions the consideration of an alternative that would exclude Wilderness and Proposed Wilderness, it makes no mention of the other potential alternatives that should have been considered, as suggested in our scoping comments.

In addition to our reasoning below, we suggested explicit alternatives that the Forest Service should consider, but which were not even mentioned, which meet the purpose and need but would be less intensive to protect soils and wildlife habitat and minimize adverse effects to protected areas, including:

- * Alternative with Only Managed Wildfire in Protected Areas []
- * Alternative without Mechanical Equipment in All Zones (hand tools only)
- * Alternative with Prescribed Fire Only in the Wildfire Protection and WUI Defense Zones (Monument) and Managed Wildfire Everywhere Else
- * Alternative with a different combination of the above

Attachment 1, hereto, p. 6.

1. The EA Must Consider and Develop Alternatives to Exclude Actions in IRAs, WSRs, Special Management Areas, and Recently-Burned Areas.

In our scoping comments, Attachment 1, on p. 3, we specifically suggested other areas, in addition to Wilderness and Proposed Wilderness that should be excluded from the project, including "Roadless Areas and Special

Management Areas," referring to another section in our comments, which explicitly listed these areas on p. 5-6. But the Forest Service failed to consider excluding those areas in Alternative C or any other alternative.

Those areas should be considered for exclusion in an Additional Alternative D, which would include not only Wilderness and Proposed Wilderness, but also Inventoried Roadless Areas and Special Management Areas, which all require a higher levels of protection than general forest areas.

Moreover, we also provided maps in an attachment for areas in both forests that have already burned in wildfires. Most of those areas have burned in the last 5 years and already meet the goals of the project because the wildfires have created conditions similar to those proposed in this project. Because the time-frame for implementation of the project is less than 10-15 years, we suggest that the Forest Service consider an alternative that excludes many of the areas that have burned in the last 5 years and already meet the desired conditions of the proposal.

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1. The EA Should Have Considered and Applied a Managed Wildfire Only Prescription in Wilderness, Proposed Wilderness, and other Special Management Areas as Preferred, without Prescribed Burning and Pretreatments.

Proposed Alternative C, which would completely exclude Wilderness and Proposed Wilderness from the project, does not capture what we suggested in our scoping comments as an alternative (Attachment 1, hereto, p. 3). Instead, the Forest Service should have considered a "managed wildfire only" prescription for these areas, as we suggested, which is different than excluding these areas entirely from the project and, in fact, is mandated as the preferred approach in the forest plans for special management areas.

Our assertion is supported by Forest Plan Standards in the 2023 Sequoia and Sierra National Forest LRMP, under FIRE-FW-STD:

02 If fire management activities are required within designated wilderness areas, research natural areas, botanical areas, giant sequoia groves, or the Pacific Crest National Scenic Trail Management Area.

* Apply minimum impact strategies and tactics to manage wildland fire unless more direct attack is needed to protect life or property.

* When possible, allow naturally ignited wildfires to function in their natural role.

* In cases where fire may damage the ecological values for which a research natural area was established, take measures to exclude fire from the research natural area.

Sequoia LRMP, p. 77 (bold and underline emphasis added).

Failure to follow this standard would violate 16 U.S.C. [sect] 1604(i) as managed wildfire should be the first priority for fire management activities in all alternatives for this project.

1.

1. The EA Should Apply a Different Approach and use Managed Wildfire Only in the "Wildfire Maintenance Zone" as Required by the Forest Plans.

The proposal has failed to consider an alternative approach "to meet resource objectives" than prescribed fire, as required in its revised forest plans. There, the plans have special rules:

Wildfire Maintenance Zone

The wildfire maintenance zone encompasses areas where wildfire poses a low threat to communities in average fire season conditions and where conditions allow natural resources to benefit from wildland fire.

Managing wildfire to meet resource objectives in this zone is the least constrained. Ecological maintenance can be carried out by managing wildland fire under a wide range of weather, fuel moisture, and other environmental conditions. Conditions in this zone are favorable to implementing prescribed fire for ecological restoration, and to meet resource objectives.

Desired Conditions (FIRE-WMZ-DC)

01 Ecosystems are resilient to the impacts of wildfire, and wildland fire has predominantly positive benefits to ecosystems and resources.

02 Lands within this zone are maintained in a predominately low risk with high potential benefit condition relative to wildland fire.

Standards (FIRE-WMZ-STD)

01 Following current wildland fire policy, manage wildfires to meet resource objectives and restore and maintain fire as an ecological process. The responsible line officer must use the current decision support system for wildfire management to document cases when naturally caused wildfires are promptly suppressed.

02 Use natural barriers and features, such as creeks, old fire footprints, ridges, and human-made lines such as roads and trails when managing wildfires to meet resource objectives, unless unsafe or impractical.

Sequoia LRMP, pp. 82-83. This approach is consistent with a wildfire management prescription for Wilderness, Proposed Wilderness, and other Special Management Areas, as discussed in the previous section.

Failure to follow this standard would violate 16 U.S.C. [sect] 1604(i) as managed wildfire should be the first priority for fire management activities in all alternatives for this project.

1. The Proposal Conflicts with a Previous Decision the Exclude Prescribed Burning and Substitute Wildfire Use Only in the recommended Moses Proposed Wilderness.

In its Decision Notice for the Castle Fire Ecological Restoration Project (Attachment 3, hereto), the Forest Service issued the following decision rationale for why it removed its "prescribed burning" prescription from the proposed Moses Proposed Wilderness:

In the EA, approximately 2,056 acres in the Moses Mountain Inventoried Roadless Area (IRA), proposed for designation as wilderness under the 2012 Giant Sequoia National Monument (GSNM) Land Management Plan Record of Decision, were included in the prescribed burning acreage. I am changing the treatment of those acres in that IRA from prescribed burn to managed wildfire to better maintain wilderness characteristics.

DN, p. 3. The new proposal, which would now allow prescribed fire and pretreatments in all areas, including recommended/proposed Wilderness, is inconsistent with that rationale and would violate a promise made to the parties and public who engaged in the NEPA process for the Castle Fire Restoration Project. To be consistent with the promise made in that decision, the Moses Proposed Wilderness should be excluded from prescribed burning in all alternatives.

Moreover, to be consistent, the rationale provided for using managed wildfire in that decision should be applied to

all Wilderness or Proposed Wilderness, as a matter of policy, in all of the alternatives of the project "to better maintain wilderness characteristics." *Id.*

1. The Approach of Consulting with USFWS AFTER the NEPA Decision is Issued Violates NEPA.

The draft EA essentially admits that the Forest Service plans to violate NEPA, stating:

Because the Sequoia and Sierra National Forests Prescribed Fire Project takes a forestwide, systematic approach to plan and implement prescribed fire and associated pre-treatment activities, Endangered Species Act consultation will be phased and occur post-NEPA decision.

Draft EA, p. 98 (emphasis added). But NEPA requires that all the necessary environmental information and associated documentation be available to the public and decision-makers prior to the decision. Similarly, the delay of consultation and preparation of design features until the later "implementation planning" phase would also violate NEPA. See *id.* ("For elements of the proposed action that are not addressed within existing programmatic consultations, a biological assessment [BA] would be prepared during implementation planning." (emphasis added)) And according to the proposal, implementation planning would not include any additional NEPA analysis and would not include public involvement. This violates NEPA.

Similarly, the agency's approach to determining Wilderness Act compliance using the Minimum Requirements Analysis (MRA) or MRA Framework after the decision also violates NEPA, since "[t]he MRA would be completed after a decision notice on the project is signed (so long as it includes wilderness) and prior to project implementation." Draft EA, p. 8. This would necessarily exclude public involvement, which would not occur during implementation planning, since the EA states that the agency would only later "notify the public of the completion of the MRA and post the completed MRA to the forest's project website." *Id.*

NEPA and its implementing regulations set forth "action-forcing" procedures designed to (1) ensure agencies take a "hard look" at the environmental effects of an action, and (2) foster meaningful public participation. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

The core principle of NEPA is to ensure that decision-makers and the public have access to all necessary environmental information before making a decision, allowing them to consider the potential impacts on the environment. See 40 C.F.R. [sect] 1500.1 (b) (NEPA procedures "ensure that agencies identify, consider, and disclose to the public relevant environmental information early in the process before decisions are made and before actions are taken." (emphasis added)); see also *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 927 (9th Cir. 2015) (agency violated NEPA where it failed to present detailed information to the public about impacts on wildlife habitat, limiting the public to two-dimensional advocacy).

Under no reading of NEPA and its regulations is the approach, to prepare BAs or MRAs later during implementation planning without public involvement, allowed.

1. The EA Fails to Provide the Necessary "Hard Look" Regarding Site-Specific Effects to Various Resources.

The need for prescribed fire and any pretreatment is very site-specific and differs greatly across the 2.4 million acre action area. Thus there will be very site-specific effects based on those conditions, and a one-size-fits-all approach is not only ill-advised but also would run afoul of the requirement to take a "hard look" at the site-specific effects to various resources affected by the proposal.

An agency must take a "hard look" at the project's "site-specific" impacts. *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). This "hard look" requires consideration of all foreseeable direct, indirect, and cumulative impacts, *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir. 2002), and "should involve a discussion of

adverse impacts that does not improperly minimize negative side effects." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006) abrogated on other grounds, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). An agency is obligated to "consider every significant aspect of the environmental impact of [the Project] ... [and] inform the public that it has indeed considered environmental concerns in its decision- making process." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003).

Rather than take a "hard look" at site-specific effects, however, the EA provides only cursory, coarse-scale analysis of the Projects' direct, indirect, and cumulative effects.

In essence, because there is no site-specific detail about where the project will implement its actions, there can be no site-specific analysis.

This amounts to condition-based management, which the Ninth Circuit has found to be illegal.

1. The Project's Proposal is a "Condition-Based" Management Approach, which has been Held Illegal under NEPA.

The approach taken here, to produce a broad programmatic project without detailed or site- specific analysis and later implementation planning where further analysis will take place, without further public input, has been rejected by the Ninth Circuit as a violation of NEPA.

A recent case, based on the Ninth Circuit's decision in *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th Cir. 1985) is an analogous to the approach being proposed, which was found illegal. In an Alaska case against the Forest Service, the Plaintiffs asserted that the Forest Service's project, with its condition-based analysis, did not contain enough site-specific information or analysis to comply with NEPA. They contended that their case is governed by the Ninth Circuit's decision in *City of Tenakee Springs v. Block*. In that case, the Circuit reversed a district court's decision not to enjoin "construction of an 11-mile road through the Kadashan watershed" in the Tongass. The plaintiffs had challenged the adequacy of an EIS for a five-year operating plan that would defer logging but authorized the construction of roads for future harvest activity. The Ninth Circuit rejected the trial court's conclusion that the Forest Service had discretion to determine the specificity of its environmental review. Instead, it held that "[a]lthough the agency does have the discretion to define the scope of its actions, such discretion does not allow the agency to determine the specificity required by NEPA." The Circuit explained that "[w]here there are large scale plans for regional development, NEPA requires both a programmatic and a site-specific EIS." *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, 413 F. Supp. 3d 973, 981 (D. Alaska 2019) (citing and quoting *City of Tenakee Springs*).

The Circuit then ordered the entry of a preliminary injunction, in part due to its conclusion that the plaintiffs had raised serious questions about the merits of their NEPA claim. It explained that the challenged EIS did not "g[ive] any indication of its overall plan for timber harvesting" in the project area and that "it is impossible to determine where and when harvesting will occur on the 750,000 acres of land." The Circuit held that the EIS was inadequate, reasoning that the location and timing of logging would affect "the locating, routing, construction techniques, and other aspects of the road, or even the need for its construction." *Id.*

In SEACC's follow-up challenge to logging, the plaintiffs argued that the Project EIS was 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 allowed 23,269 acres of old-growth harvest, but did 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 there did not include a determination of when and where the 23,269 acres of old-growth harvest will occur. As a result, the EIS also did

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." *Id.*

The court explained that an EIS must be specific enough to ensure informed decision-making and meaningful public participation. It found that the Project EIS did not identify individual harvest units; by only identifying broad areas within which harvest may occur, it did not fully explain to the public how or where actual timber activities will affect localized habitats. Plaintiffs contended that more detailed information about the location of timber harvest under the Project was necessary to properly assess its ecological and subsistence impacts. *Id.*

Based on the foregoing, the Court found that Plaintiffs had shown that there are at least serious questions going to the merits of its NEPA claim, and it enjoined the project. *Id.* at 986.

The parallels here are uncanny. Here, similarly, in considering the 2.4 million acre project area, the Forest Service states:

The proposed action would be implemented incrementally and non-contiguously over time on up to 32,000 acres across portions of the Sequoia National Forest (including the Giant Sequoia National Monument) and up to 50,000 acres across portions of the Sierra National Forest within each 5-year implementation period.

Draft EA at 9. But there are no specifics on where in the 2.4 million-acre analysis area the burning or pre-treatment implementation will take place, where temporary roads would be built in support of the mechanical treatments, or what the site-specific impacts would be. This analysis would take place later, after the decision has been made, with "Implementation Plans" that would then consider impacts to ESA-listed or proposed species (EA at 7), cultural and historic resources (EA at 8), or Wilderness via MRAs (EA at 20). See also EA Appendix D - Implementation Process (EA at 177 et seq.). In fact, the process explicitly states that areas would be selected for implementation after the decision is issued (EA at 178), meaning after an incomplete NEPA analysis, which does not disclose or analyze site-specific impacts. Although the Alaska case involved logging, the burning project could have similar adverse effects from pre-burning mechanical treatments, temporary road construction, and even the burning itself. In effect and procedure, there is little distinction between the process proposed here when compared to the condition-based management approach rejected by the court in Alaska.

The EA even notes our concern "that the use of a condition-based design for the proposed action does not allow for sufficient detail in analysis." *Id.* at 29. That concern should also be borne by the Forest Service because it flies in the face of the NEPA caselaw and has been held illegal against the Forest Service by the Ninth Circuit and subsequent decisions in its district courts. See *SE Alaska Conservation Council v. U.S. Forest Serv.*, 443 F. Supp. 3d 995, 1014-15 (D. Alaska 2020) ("The Forest Service's plan for condition-based analysis may very well streamline management []; however, it does not comply with the procedural requirements of NEPA, which are binding on the agency. 'NEPA favors 'coherent and comprehensive up-front environmental analysis to ensure ... that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.' ")

1. The Forest Service must prepare an Environmental Impact Statement (EIS) because the proposal is likely to have significant impacts.

As we stated in our scoping comments, we urge the Forest Service to prepare a programmatic EIS for these proposed actions and then follow those up with site-specific EAs and/or CEs, and always include the public in the planning of those site-specific proposals. Otherwise, we expect that these actions will generate unneeded controversy and opposition and insufficient oversight. Moreover, public involvement always improves project analysis and makes for better decisions.

The Forest Service must prepare an EIS because the proposed action are likely to cause significant impacts,

including cumulative effects on endangered Pacific fishers, California spotted owls, and it could exacerbate climate change. Together, these potential adverse impacts suggest that the proposed actions may cause significant effects on the environment, requiring preparation of an EIS.

For these reasons as well as the cumulative effects on these endangered or proposed species, NEPA requires that the Forest Service prepare an EIS.

For Sequoia ForestKeeper, the Kern-Kaweah Chapter of the Sierra Club, and the Tule River Conservancy,

Sincerely,

Ren[eacute] Voss - Attorney at Law

Attachments:

SFK-SC-TRC Sequoia-Sierra Burning Project EA Comments.pdf

Attach. 1 Scoping Comments & Attachment.pdf

Attach. 2 - Moses Proposed Wilderness.pdf

Attach. 3 - Castle Project DN.pdf