UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
UNITED STATES FOREST SERVICE

In re Objection to the Draft Decision Notice, Finding of No Significant Impact, and Environmental Assessment for the Cooper Creek Watershed Project, Blue Ridge Ranger District, Chattahoochee-Oconee National Forests	)	
	)	Objection No. _____
Georgia ForestWatch, Georgia Chapter of the Sierra Club, *Objectors*	)	

NOTICE OF OBJECTION AND STATEMENT OF REASONS

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Pursuant to 36 C.F.R. § 218.8(d)(3), Georgia ForestWatch is designated as the lead objector.

NOTICE OF OBJECTION

Pursuant to 36 C.F.R. § 218, Georgia ForestWatch (GFW) and the Sierra Club and its Georgia Chapter object to the Draft Decision Notice and Finding of No Significant Impact (DN and FONSI), selecting Modified Alternative 3 of the Cooper Creek Environmental Assessment (EA) in the Blue Ridge Ranger District of the Chattahoochee-Oconee National Forests (the "Project"). The Decision, FONSI, and underlying EA violate the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and their implementing regulations. The responsible official for this project is Andrew L. Baker, District Ranger, Blue Ridge Ranger District. The public notice was published in the Blue Ridge *News Observer* on January 31, 2018. This objection is timely.

GFW is a non-profit organization with a mission "to promote sustainable management that leads to naturally diverse and healthy forests and watersheds within the more than 867,510 acres of national forest lands in Georgia; to engage and educate the public to join in this effort; and to promote preservation of this legacy for future generations."[1] GFW actively and routinely participates in the management of the Chattahoochee-Oconee National Forests. GFW earnestly participated in the development of the Cooper Creek project. Its members routinely visit the Cooper Creek area for recreation, wildlife viewing, and spiritual renewal among other reasons.

The Sierra Club is a national non-profit organization with 67 chapters and more than 820,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass protecting national forests, including those in Georgia. The Georgia Chapter

[1] http://gafw.org/

of the Sierra Club has approximately 12,000 members in the state of Georgia.[2] The Wildlands & Wildlife Committee of the Georgia Chapter is particularly focused on "advocate[ing] for responsible management and protection of our public lands and wild forests."[3] Like GFW, the Sierra Club has been actively involved in development of the Cooper Creek project and its members use and appreciate the Cooper Creek area for its scenic beauty, for hiking, hunting, fishing, camping, wildlife viewing, and other recreational and educational activities. The Cooper Creek project will affect, directly and significantly, GFW, the Sierra Club, and their members (collectively, the "conservation groups").

The Southern Environmental Law Center, legal counsel to GFW and the Sierra Club, is a regional non-profit organization working to conserve natural resources on public lands throughout the Southern Appalachians.

The conservation groups have been involved with the Cooper Creek project since before it was scoped in May 2014. Over that time the project has been much improved to the credit of the public and the agency. Decisions to eliminate commercial timber harvest within riparian mesic hemlock-white pine, riparian mesic hemlock-hardwood, and headwaters mesic oak-hickory Land type Phases; focus woodlands on only the most xeric of sites; and avoid treatments in old-growth stands, are particularly meaningful. Those decisions will better protect the forest's resources.

Nevertheless, all of the concerns raised in this objection were initially brought to the agency's attention in scoping comments submitted nearly four years ago (and subsequently reiterated in comments on the Draft EA). The conservation groups recommended an alternative that would have avoided these concerns while allowing the agency to conduct timber treatments on nearly 1,400 acres (the conservation groups' "Alternative Four") in April 2016. The conservation groups also submitted expert opinions detailing some of the very concerns that are the subject of this objection, namely, sedimentation of the Bryant Creek watershed, in November 2016. Throughout this process the conservation groups have voiced concerns, and then offered ways to resolve those concerns that would allow the project to move forward without controversy. This feels like a missed opportunity. The problems with the project are not so inherent that they could not have been resolved as part of this process.

For the reasons that follow, GFW and the Sierra Club request that the Forest Service revisit the project decision and correct the legal errors in its analysis. Specifically, the Forest Service must disclose the fact that this project will impact roadless areas and assess the project's impacts on those areas' values and potential for inclusion in the forest's wilderness inventory. The Forest Service must drop timber treatments in Prescription 7.E.1, which is listed as "unsuitable" pursuant to NFMA, if the agency cannot explain why those treatments are necessary in their particular locations. The Forest Service must provide some evidence of the efficacy of mitigation measures if it wishes to rely on a "mitigated FONSI." The agency must reduce the amount of early successional habitat created in Prescription 7.E.1 so that is does not exceed the Forest Plan's 4% limitation on that type of habitat in the prescription. And the agency must

[2] https://www.sierraclub.org/georgia
[3] https://www.sierraclub.org/georgia/wildlands

meaningfully consider other project alternatives, specifically the conservation groups' "Alternative Four."

STATEMENT OF REASONS, VIOLATIONS OF LAW, SUGGESTED REMEDIES

I. THE EA VIOLATES NEPA BY FAILING TO TAKE A HARD LOOK AT IMPACTS TO ROADLESS AREAS

"Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). The "sweeping policy goals announced in § 101 of NEPA are [ ] realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences, and that provide for broad dissemination of relevant environmental information." *Id*. at 350 (citations omitted). Those procedures must be completed "*before* decisions are made in order to ensure that those decisions take environmental consequences into account." *Wilderness Watch & Pub. Employees for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1096 (11th Cir. 2004)(referencing NEPA's "hard look" requirement).

This "hard look" must include "some quantified or detailed information" supporting the conclusions of an EA. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*., 387 F.3d 989, 993 (9th Cir. 2004) (citations omitted). An "agency has satisfied the 'hard look' requirement if it has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 833 F.3d 1274, 1285 (11th Cir. 2016)(citation omitted). The "hard look" requirement is violated when "the agency failed entirely to consider an important aspect of the problem." *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1216 (11th Cir. 2002).

To meet its "hard look" obligations the Forest Service must consider the effects of logging and road building on currently unroaded areas, regardless of whether those areas have been formally designated "inventoried roadless areas" or "potential wilderness areas." *See Sierra Club, Inc. v. Austin*, 82 F. App'x 570, 572 (9th Cir. 2003)(finding Forest Service EIS did not take sufficient hard look at effects of logging on uninventoried roadless area); *Smith v. U.S. Forest Serv*., 33 F.3d 1072 (9th Cir. 1994)(requiring analysis of impacts on roadless area); *Oregon Wild v. United States*, 107 F. Supp. 3d 1102 (D. Or. 2015)(acknowledging requirement to consider impacts on roadless areas); *Ctr. for Biological Diversity v. Gould*, 150 F. Supp. 3d 1170 (E.D. Cal. 2015)(the same).

"[T]here are at least two separate reasons why logging in roadless areas is environmentally significant, so that its environmental consequences must be considered. First, roadless areas have certain attributes that must be analyzed. Those attributes, such as water

resources, soils, wildlife habitat, and recreation opportunities, possess independent environmental significance. Second, roadless areas are significant because of their potential for designation as wilderness areas under the Wilderness Act of 1964." *Lands Council v. Martin*, 529 F.3d 1219, 1230 (9th Cir. 2008)(citations omitted); *see also* Special Areas, Roadless Area Conservation, 66 Fed. Reg. 3244,3245 (Jan. 12, 2001)(discussing characteristics of roadless areas). "The possibility of future wilderness classification triggers, *at the very least*, an obligation on the part of the agency to disclose the fact that development will affect a 5,000 acre roadless area or will affect an area of sufficient size as to make practicable its preservation and use in an unimpaired condition." *Id*. at 1231 (emphasis added). This requirement applies to both inventoried and uninventoried roadless areas. *Id*. at 1230-1231.

Public disclosure of the possibility of future wilderness classification for roadless areas is required, in part, because "[t]he choice to commence logging . . . implicates and constrains future decisions regarding the [area]." *Sierra Club, Inc. v. Austin*, 82 F. App'x 570, 573 (9th Cir. 2003). In other words, disclosure is required because actions the Forest Service takes now may affect an area's eligibility for inclusion in the agency's potential wilderness inventory later, and the public should be made aware of that decision as it is made, rather than after an area's values have been degraded and its inclusion in the inventory potentially compromised.

Several cases illustrate the Forest Service's obligations. In *Sierra Club, Inc. v. Austin*, 82 F. App'x 570 (9th Cir. 2003), the Forest Service provided "extensive and detailed" analysis of the effects of logging on Inventoried Roadless Areas but only "superficial and largely conclusory" analysis of the effects on uninventoried roadless areas. *Id*. at 572, 573. While acknowledging that the EIS at least disclosed that the uninventoried roadless areas would be affected, the court found the Forest Service's "cursory" review insufficient to meet the hard look standard. *Id*.

In *Smith v. U.S. Forest Serv*., 33 F.3d 1072 (9th Cir. 1994), the Forest Service was reversed because it "never, in its NEPA documents, [took] into account the fact that the [timber] sale will affect a 5,000 acre roadless area." *Id*. at 1079. The Forest Service argued that the fact that the roadless area was not formally designated in previous roadless or wilderness inventories excused any obligation to consider impacts on the undesignated roadless area. The court disagreed, noting specifically that the area's designation "may be revisited in second-generation Forest Plans." *Id*. at 1078.

Finally, in *Lands Council v. Martin*, 529 F.3d 1219 (9th Cir. 2008), the court found the Forest Service's analysis of impacts to a 4,284-acre uninventoried roadless area, and separate 966-acre uninventoried roadless area that abutted an inventoried roadless area, failed to meet the hard look requirement. The Forest Service argued that additional analysis was not required because the areas were each smaller than 5,000 acres and "uninventoried." But the court found

"that those characteristics do not provide a meaningful legal distinction" for purposes of NEPA analysis. *Id*. at 1230-1231. There the Forest Service included a three-page analysis of "roadless character" but the court found even that analysis insufficient to meet the hard look requirement. *Id*. at 1232.

In all three of those cases plaintiffs challenged the sufficiency of the Forest Service's analysis of the impacts to uninventoried roadless areas and won. Certainly there are other cases where plaintiffs have challenged that analysis and lost. Those cases are also instructive, because they demonstrate a minimum level of analysis that the Forest Service has not undertaken for the Cooper Creek project. For instance, in *Oregon Wild v. United States*, 107 F. Supp. 3d 1102 (D. Or. 2015), the Forest Service disclosed that a timber project would impact roadless areas, produced as part of its NEPA analysis a 33-page appendix specifically addressing impacts to potential wilderness areas, and concluded that the project at issue would not result in "irreversible or irretrievable impacts on wilderness values." *Id*. at 1112; *see also Sierra Club v. Wagner*, 581 F. Supp. 2d 246, 263–64 (D.N.H. 2008), aff'd, 555 F.3d 21 (1st Cir. 2009)(finding analysis of impacts to roadless area sufficient where analysis showed project's effects "would not result in an irreversible or irretrievable change in the condition of the land or its eligibility as potential wilderness"). The court found that level of analysis sufficient.

In *Ctr. for Biological Diversity v. Gould*, 150 F. Supp. 3d 1170 (E.D. Cal. 2015), the "Forest Service issued a draft EA . . . which contained no overt discussion of roadless or wilderness areas." *Id*. at 1179. "In response, plaintiffs submitted a comment letter noting that it had identified two uninventoried roadless areas . . . in the project area, and both ha[d] proposed logging units within them." *Id*. The Forest Service in turn responded by "prepar[ing] a Wilderness Resource Impact Analysis [ ] that analyzed the effects of the Project on future potential wilderness areas." *Id*. at 1179. The court ultimately upheld the adequacy of that analysis. These cases are insightful because they provide a roadmap (albeit, a general one) for how the Forest Service can fulfill its hard look requirement as applied to roadless areas.

The bottom line is this: to meet NEPA's "hard look" obligation, the Forest Service must disclose when its actions will impact roadless areas. The agency must then assess the effect of its action on the area, including its effect on roadless values and its potential for designation as wilderness. If the agency can credibly conclude that roadless values and designation potential will be protected, then it should say so. If it cannot, then those impacts would be significant for NEPA's purposes.

A) The Cooper Creek Project Will Affect Three Roadless Areas

For nearly four years the conservation groups have urged the agency to assess impacts to three roadless areas affected by the Cooper Creek project: the Duncan Ridge roadless area,

Board Camp roadless area, and Cooper Creek scenic area extensions. *See* June 6, 2014 Scoping Comments, p 30, attached as Exhibit A; February 5, 2016 Draft EA Comments, pp 83-86, attached as Exhibit B. The scoping comments included maps of the areas. The Board Camp area was recognized for its roadless values during the RARE II roadless inventory process in the late 1970s and all three areas were recognized for their roadless values during the most recent Forest Plan revision in 2004. *See* The Wilderness Society's "Georgia's Mountain Treasures" (1995).

Recent analysis by Georgia ForestWatch confirms that all three areas currently meet the requirements to be inventoried as potential wilderness during the next Forest Plan revision. *See* Forest Service Handbook (FSH) 1909.12, Ch. 70 (2015)(potential wilderness inventory requirements)(hereafter "Ch."); Draft EA Comments, pp 84-85. Each area is "at least five thousand acres. . . or of sufficient size as to make practicable its preservation and use in an unimpaired condition." Ch. 71.21. The areas do not include maintenance level 3, 4, or 5 roads. Ch. 71.22a. And the areas do not include "other improvements." Ch. 71.22b.

The Duncan Ridge roadless area is approximately 7,119 acres. The area lacks roads but includes extensive hiking opportunities. Unusually rich soils in this area lead to extremely productive growth, including 160-feet-tall tulip poplars, the state champion Fraser magnolia, and many coves with rare yellowwood trees. Rare wildflowers are common and one particular area harbors 14 species of ferns. The area has not seen commercial timber activity in decades.

The Board Camp roadless area is approximately 5,654 acres. This area contains much of the upper watershed for Cooper Creek. Draining an unusual high elevation plateau, the cool, clear waters of Cooper Creek make it one of Georgia's premier trout streams and a popular recreational destination. Its tributaries are biologically significant, because their combination of high elevation and low stream gradient creates a distinct habitat, including some of the best habitat for native brook trout in Georgia.

The Cooper Creek Scenic Area Extensions, when combined with the existing Cooper Creek Scenic Area are nearly 3,000 acres. The designated Cooper Creek Scenic Area is already of sufficient size to make practicable its preservation and use in an unimpaired condition, as exemplified by the current designation and management; increasing its size will only make it more so. The Cooper Creek Scenic Area was the first area set aside on the Chattahoochee National Forest. Many recreational trails in the area traverse the Scenic Area Extensions rather than the designated Scenic Area. The Scenic Area Extensions also contain the main access route to the Valley of the Giants, an old-growth cove forest that provides the only opportunity in north Georgia to see how large trees can grow in moist, fertile soils.

B) The Forest Service Failed to Disclose that Roadless Areas Would be Impacted And What Those Impacts Would Be

Despite the impacts to these three roadless areas, the Forest Service's NEPA analysis is completely devoid of any acknowledgement that these areas will be affected. Far from meeting its obligation to take a hard look at the impacts to these areas, the Forest Service does not even acknowledge that they exist.

At best, in responding to the conservation groups' comments on this issue the Forest Service stated: "The project don't [*sic*] cover any Roadless areas in the forest. The effects of logging and road construction is [*sic*] disclosed in the EA." Response to Comments, p 428. This reference is not only incorrect (the project does impact roadless areas), but it does not even pass the "cursory reference" bar found illegal in *Sierra Club, Inc. v. Austin*. There, the court found that "[s]imply disclosing the fact that the unique qualities of the unroaded areas may be diminished does not suffice" for purposes of NEPA's hard look requirement. 82 F. App'x at 573. Here, the Forest Service has not even disclosed the existence of the unroaded areas, much less assessed the impact to their undeveloped character or their potential for future designation.

Ctr. for Biological Diversity v. Gould provides a path forward here. When confronted with the fact that it failed to disclose and assess impacts to two uninventoried roadless areas, the Forest Service remedied that error by preparing additional analysis of impacts to wilderness resources. The agency has chosen the opposite path so far, ignoring the conservation groups' concerns and failing to acknowledge that roadless areas would be impacted, much less assess what those impacts might be. Absent additional analysis, the agency has not met its requirement to take a hard look at impacts to roadless areas.

II. THE EA VIOLATES NFMA'S REQUIREMENTS RELATED TO LANDS SUITABLE FOR TIMBER PRODUCTION

The National Forest Management Act requires that all projects or activities on national forests be consistent with the forest's land and resource management plan ("forest plan"). 16 U.S.C. § 1604(i); *see, e.g., Sierra Club v. Martin*, 168 F.3d 1, 4-5 (11th Cir. 1999); *Cherokee Forest Voices v. U.S. Forest Serv.*, 182 F. App'x 488 (6th Cir. 2006). The Forest Service bears the burden of demonstrating that consistency. *See Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (Forest Service must support its conclusions that a project meets the requirements of the NFMA and relevant Forest Plan); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1377 (9th Cir. 1998) ("Forest Service must demonstrate that a site-specific project would be consistent with the land resource management plan").

When developing forest plans, the Forest Service must "identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible …." 16 U.S.C. § 1604(k). The agency "shall assure that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands . . ." 16 U.S.C. § 1604(k). Once lands are identified as unsuitable for timber production, NFMA prohibits all timber harvest, of any type, there, except under two narrow circumstances: (1) salvage sales or (2) "sales necessitated to protect other multiple use values." 16 U.S.C. §1604(k).

The Forest Service implements NFMA through regulations. The Chattahoochee-Oconee National Forest's ("CONF") Forest Plan was developed using regulations promulgated in 1982. As required by NFMA, those regulations similarly prohibit "timber harvest" "on lands classified as not suited for timber production . . . except for salvage sales, sales necessary to protect other multiple-use values or activities that meet other objectives on such lands if the forest plan establishes that such actions are appropriate." 36 C.F.R. § 219.27(c)(1)(1982). "Timber production" is defined as the "purposeful growing, tending, harvesting, and regeneration of regulated crops of trees to be cut into logs, bolts, or other round sections for industrial or consumer use." 36 C.F.R. § 219.3 (1982). The 1982 regulations do not define the term "timber harvest" though more recent regulations promulgated in 2012 define "timber harvest" as "[t]he removal of trees for wood fiber use and other multiple-use purposes." 36 C.F.R. § 219.19 (2012) (retaining same definition of "timber production" as 1982 regulation). NFMA, and its implementing regulations, prohibit timber *production* activities "on lands classified as not suited for timber production" always; and only allow timber *harvests* on those lands specifically for salvage or when necessary to protect other multiple-use values or activities.

Fulfilling its NFMA obligations translated through the 1982 regulations, the CONF Forest Plan also provides that "[n]o timber harvesting shall occur on lands classified as not suited for timber production except for salvage sales, harvesting activities necessary to protect other multiple-use values, or harvesting activities needed to meet other (non-timber) desired conditions." Standard FW-085, Forest Plan, 2-25. CONF Management Prescription 7.E.1 is "classified under NFMA as unsuitable for timber production; not appropriate; however, salvage sales, sales necessary to protect other multiple-use values, or activities that meet other Plan goals and objectives are permitted." Standard 7.E.1-008, Forest Plan, 3-125. The Cooper Creek project proposes 95 acres of commercial regeneration harvest, 141 acres of commercial thinning harvest, 57 acres of commercial gap harvest, and 110 acres of noncommercial midstory treatments in Prescription 7.E.1.[4]

[4] The conservation groups raised concerns related to timber harvest on unsuitable lands in their Scoping Comments, pp 15-16, 20-22; and Draft EA Comments pp 22, 35-46.

A) The Midstory Treatments and Regeneration Harvests Violate NFMA's Prohibition Against Using Unsuitable Lands for Timber Production

Timber production, the "purposeful growing, tending, harvesting, and regeneration of regulated crops of trees to be cut into logs, bolts, or other round sections for industrial or consumer use," is *prohibited* in unsuitable prescriptions such as 7.E.1. 36 C.F.R. § 219.3 (1982)(defining timber production); 16 U.S.C. § 1604(k).

The agency originally explained its midstory treatment as "preparation for stand regeneration." May 2, 2014 Scoping Letter. In its Draft Decision Notice it further discloses that the midstory treatments are a "preparatory step toward commercial harvest activity in the future." Draft DN, 3. The treatment is the: (1) purposeful, described as "preparatory" here, (2) growing, (3) tending, via midstory treatment, for a future (4) harvest, and ultimately (5) regeneration. The trees are being managed specifically for a future *commercial* harvest that will lead to them being "cut into logs, bolts, or other round sections for industrial or consumer use." 36 C.F.R. § 219.3(1982). While we appreciate the agency's forthright disclosure, the conclusion is inescapable: this is timber production. Restated, this is not merely timber *harvesting*, this is timber *production* as defined in the 1982 and 2012 regulations. Using 7.E.1 lands for timber production is prohibited by NFMA.

The regeneration harvests are unlawful for the same reason: in this instance, as explained by the Cooper Creek NEPA documents, the regeneration harvests are timber production. The Forest Plan is clear that "timber *production* [is] one of the legitimate uses of National Forest System lands." Forest Plan FEIS, App'x G, G-167 (emphasis added). In other words, timber *production* occurs on the Chattahoochee National Forest. But there are no "timber production emphasis prescriptions" on the forest. *Id*. at G-77-78. Instead, timber production occurs through "timber harvest primarily as a tool for managing a variety of wildlife habitats . . ." Forest Plan FEIS, App'x G, G-16. Restated, per the Forest Plan, when the Chattahoochee "grow[s], tend[s], harvest[s], and regenerat[es] . . . trees to be cut into logs, bolts, or other round sections for industrial or consumer use," i.e., timber *production*, it describes the "harvest" aspect of timber production in terms of creating wildlife habitat.

There is nothing objectionable about meeting timber production goals by creating wildlife habitat, but the semantic difference does not allow the agency to escape NFMA's suitability limitations. Timber production is timber production regardless of the name the agency attaches to the "harvest" aspect. As explained further below, unsuitable lands were set aside because they are not appropriate for the impacts of timber production, no matter the title given to the timber production activity; it is the substance of the action that matters, not its agency-given title. *See generally* 36 C.F.R. § 219.14(1982). Timber production by any name is never appropriate on unsuitable lands.

There are instances where creating wildlife habitat may be *the* purpose of a harvest, regardless of whether the trees are "cut into logs, bolts, or other round sections for industrial or consumer use." In that instance, the *harvest* would be strictly for wildlife purposes and would not be timber *production*. But there the Forest Service's justification would show that the harvests were "necessary to meet other multiple-use values," such as creating wildlife habitat, which would comply with NFMA. The Cooper Creek regeneration harvests do not meet that exception; they are timber production, in violation of NFMA's suitability requirements.

B) The Regeneration Harvests Are Not *Necessary* to Meet other Multiple-Use Values

NFMA prohibits timber *harvests* on unsuitable lands unless those harvests are: 1) "salvage sales" or 2) "sales necessitated to protect other multiple-use values." 16 U.S.C. § 1604(k). The 1982 regulation includes this same prohibition though also allows "activities" (i.e., not "sales") "that meet other objectives on such lands if the forest plan establishes that such actions are appropriate." 36 C.F.R. § 219.27(c)(1)(1982). An activity is never "appropriate" if its implementation would violate a statute, such as NFMA. In any event, the regeneration harvests are not "activities," nor "salvage sales," and thus only comply with NFMA's requirements if "necessitated to protect other multiple-use values." 16 U.S.C. § 1604(k). The agency failed to make that showing here.

First, the agency has failed to show why the regeneration treatments are "*necessitated* to protect other multiple use values." *Id*. (emphasis added). A cardinal principle of statutory construction is that one must "give effect, if possible, to every clause and word of a statute" – including necessitated, in this instance. *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). The agency must demonstrate necessity to take advantage of the exception to NFMA's prohibition on harvesting on unsuitable lands. But neither the Final EA nor Draft Decision Notice make any effort to explain why the regeneration harvest is *necessary* in Prescription 7.E.1.

The Draft Decision Notice implies that the agency demonstrates necessity by pointing to Forest Plan Standard 7.E.1-009 which *limits* creation of early successional habitat (ESH) (created by the regeneration harvest) to 0-4% of the prescription. *See* Draft DN, 3. This point cannot be overstated: 0% early successional habitat complies with Forest Plan standards for Prescription 7.E.1. Forest Plan Standard 7.E.1-009 can never show that creation of early successional habitat is *necessary* because *zero ESH is compliant*. There is no need to comply with the standard; the agency is already complying.

Second, the Draft Decision Notice provides that the "primary purpose of generating these stands is to improve habitat conditions for species such as prairie warblers, field sparrows, yellow breasted chats, ruffed grouse, white-tailed deer and other early successional species." Draft DN, 7. While that objective may be admirable in some circumstances, simply asserting it as a general objective here fails to make the necessity showing. Improving habitat conditions is

a general, forest-wide objective. *See, e.g.*, Forest-wide Goal 3, Forest Plan, 2-6 ("create habitats as required for wildlife"); Forest-wide Goal 3, Forest Plan, 2-4 (setting an objective of creating early successional habitat). If forest-wide objectives met the "necessity" burden for purposes of NFMA then "necessity" would be effectively read out of the statute because meeting the forest-wide objective would be "necessary" across the entire forest, regardless of whether an area was suitable or unsuitable for NFMA purposes; the "necessitated to protect other multiple use values" exception would swallow the "no timber harvesting shall occur on such lands" whole. 16 U.S.C. § 1604(k). The Forest Service must show that the timber harvesting is necessary in a specific place to protect another multiple-use value. Here, the agency has made no effort to explain why activities to further general, forest-wide goal are necessary specifically in 7.E.1 as opposed to other locations in the forest, even other locations in suitable prescriptions within the project boundary.

Moreover, the Forest Plan assumes that efforts to create habitat for "early successional species" will be focused in prescriptions suitable for timber production. The Forest Plan is preprogrammed so that "necessary" ESH creation will take place in suitable prescriptions, not unsuitable prescriptions. The Plan relies on harvest methods that will simultaneously provide timber volume and wildlife habitat.

"For the revised CONF Plan, timber harvesting will be used as a tool to achieve goals and objectives that will mainly be . . . forest health related" such as creation of early successional habitat which the agency asserts is lacking. Forest Plan EIS, App'x G, G-218. "There are no timber production quotas, only objectives based on restoration and *provision of habitat*…" *Id.* (emphasis added). "Designation of lands *as suitable* will provide the *necessary* flexibility to manage the *habitats* for plants and animals and to do the necessary restoration work." *Id.* (emphasis added). Restated, habitat work generally *necessary* will occur on *suitable* lands.

The Forest Plan continues: "[t]he Chattahoochee-Oconee Forest Plan does not emphasize timber production." Forest Plan, App'x F, F-31. "Rather timber yield is as a result of providing desired conditions of *wildlife habitat* . . ." *Id.* (emphasis added). Under the 1982 regulations, long-term sustained timber yield is "the highest uniform wood yield from lands being managed for timber production." 36 C.F.R. § 219.3 (1982). Timber yield under the CONF Plan will come from providing desired wildlife habitat on "lands being managed for timber production," i.e., suitable lands.

Acreage distributions on the forest also reflect that understanding. The Forest Plan designated approximately 367,000 acres of the Chattahoochee National Forest as suitable for timber production (about 49% of the Chattahoochee). Forest Plan, App'x F, F-10. Most of the suitable acreage, approximately 270,000 acres (about 73% of the suitable base) was placed within management prescriptions with minimum objectives to create early succession, primarily through timber harvest. *See* Forest Plan FEIS, 3-160. The Plan is designed so that ESH creation through regeneration harvest will occur on these lands, generating timber yield and

simultaneously providing habitat. Creating ESH on unsuitable lands is not prohibited but it cannot be shown to be necessary merely by pointing to broader, forest-wide objectives; the agency must make a specific necessity demonstration: why is the harvest necessitated here as opposed to suitable lands? Is the goal to meet forest-wide habitat and volume goals, or is it to meet a site-specific need consistent with the Plan?

C) The Commercial Timber Harvests are Not Appropriate for Prescription 7.E.1 Because They Adversely Affect the Area's Other Multiple-Use Values in Violation of NFMA and the Forest Plan

During forest planning, NFMA requires the Forest Service to designate lands as not suited for timber production if "[b]ased upon a consideration of multiple-use objectives . . . the land is proposed for resource uses that preclude timber production." 36 C.F.R. § 219.14(c),(d) (1982). Prescription 7.E.1 was identified as "unsuitable" because "a planned, periodic timber harvest would preclude the achievement of other non-timber management objectives." Forest Plan, App'x F, F-12. NFMA requires that the forest also provide for those other, non-timber, multiple-use objectives. *See* 16 U.S.C. § 1604(e). The NFMA-required objectives for 7.E.1 are providing recreation opportunities and scenic views, while protecting and restoring water quality. Forest Plan, 3-123.

To ensure those other multiple-use values are met, NFMA and the Forest Plan prohibit "planned, periodic timber harvest" in prescription 7.E.1. Yet that is exactly what the Forest Service is proposing. Cooper Creek is a "planned, periodic timber harvest" and the discussion of midstory treatment ("preparation for a future commercial harvest") in the draft Decision Notice reveals that the agency anticipates having additional, planned, periodic timber harvests in precisely this same area – even in these same stands. NFMA and the Forest Plan prohibit that approach.

Moreover, timber harvests – planned and periodic, or infrequent – are prohibited if they preclude the achievements of the other NFMA-mandated values 7.E.1 is set aside for: recreation, scenery, and water quality. The Forest Plan reveals that timber harvests preclude achievement of the recreation objectives in 7.E.1:

> Prescriptions are allocated to different areas in order to achieve management objectives for many resources. Prescription 7.E.1 is generally described as management emphasis for Dispersed Recreation Areas and is unsuitable for timber management. Prescription 7.E.2 is generally described as management emphasis for Dispersed Recreation Areas and is suitable for timber management . . . Where Dispersed Recreation emphasis areas have been assigned a prescription that is suitable for timber management, timber management is compatible with the recreation management objectives of the areas.

Forest Plan, FEIS, App'x G, G-152-153. The inverse is also true: where dispersed recreation emphasis areas have been assigned a prescription that is *unsuitable* for timber management, timber management is *incompatible* with the recreation management objectives of the areas. Prescription 7.E.1 is a dispersed recreation area that is unsuitable for timber management because timber harvest is incompatible with achieving its NFMA-mandated recreation objective.

The Final EA also demonstrates that the project will adversely affect scenery and recreational values in the area. The project will affect areas with moderate and high scenic integrity objectives. EA, 158. The Appalachian Trail, Duncan Ridge Trail, Mulky Gap Road, and Duncan Ridge Road will all be impacted. *Id*.

As discussed in depth in our draft EA comments, the project will also adversely affect soil and water quality in Prescription 7.E.1. *See* Draft EA Comments, 40-41, 49-51, 55-73.

Courts have looked to a project's effect on other values when weighing the necessity of timber harvesting in unsuitable prescriptions. In *Native Ecosystems Council v. U.S. Forest Serv*., 428 F.3d 1233 (9th Cir. 2005) the court approved a Forest Service thinning project in an unsuitable prescription necessitated by the need to reduce fire risk in a specific area. *Id*. at 1248. Native Ecosystems Council argued that the even if the substance of the action was necessary, it was not appropriate to meet its objective via commercial timber harvest. Implicitly recognizing that unsuitable lands were set aside because the impacts of timber production may affect their ability to achieve other multiple-use values, the court found the commercial aspect reasonable, specifically pointing to the fact that "whether or not the preferred alternative involved a commercial sale component, the environmental impacts of the project are the same." *Id*. at 1248.

The opposite is true of Cooper Creek, where the impacts of harvesting in prescription 7.E.1 will be intensified because of their commercial nature, to the detriment of the area's other multiple-use values. Temporary roads will be constructed, tractor-trailers will move in and out of the forest, industrial machinery will cut trees, and skidders will move them to pre-built log landings. These types of impacts are not compatible with the other multiple-use values NFMA mandates Prescription 7.E.1 is to be managed for and must be dropped for the project to be NFMA- and Forest Plan-compliant. This is precisely why the Forest Plan concluded that a "planned, periodic harvest would preclude the achievement of non-timber management objectives." Forest Plan, App'x F, F-12.

D) The Forest Service Failed to Demonstrate Compliance with the Forest Plan and NFMA

NFMA requires that all projects or activities on national forests be consistent with forest plans, including suitability determinations. 16 U.S.C. § 1604(i). The Forest Service bears the burden of demonstrating that consistency. *See Lands Council v. McNair*, 537 F.3d 981, 994 (9th

Cir. 2008); *Neighbors of Cuddy Mountain v. U.S. Forest Serv*., 137 F.3d 1372, 1377 (9th Cir. 1998).

To demonstrate compliance with the Forest Plan, the agency must explain why its proposed vegetation management activities are appropriate in Prescription 7.E.1 in light of its designation as unsuitable for timber production under NFMA. We have stressed this requirement for years but the agency still refuses to endeavor to explain why its actions are appropriate. The Final EA does not even disclose that management activities will take place in an unsuitable prescription. The draft Decision Notice acknowledges that Prescription 7.E.1 is unsuitable but then proceeds to treat it equally with any other prescription. There is no justification for harvesting in unsuitable 7.E.1 that the Forest Service does not provide for harvesting in suitable prescriptions. In its response to the many commenters who raised this issue during the NEPA process the Forest Service merely asserted boilerplate language stating that the Cooper Creek project "responds to the goals and objectives of the Forest Plan." *See, e.g*., Response to Comments, 351. The Forest Service can disagree with the commenters but that does not excuse it from having to explain how its actions are consistent with its Forest Plan – more than offering conclusory statements about consistency – as required by NFMA. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)(agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.")(internal quotation omitted). The agency's analysis falls well short of its obligation here.

E) The Agency's Interpretation of the Suitable/Unsuitable Distinction is Inconsistent with NFMA and the 1982 Regulation and Therefore Unlawful

The Forest Service cannot interpret its regulation in a way that is inconsistent with the text of the regulation itself. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Otherwise, the interpretation creates an entirely new and different *de facto* regulation. *Christensen v. Harrison County*, 529 U.S. 576, 588 (2000). In violation of that principle, the agency disregards the suitable/unsuitable distinction required by NFMA and incorporated into the 1982 and 2012 regulations. For that reason alone the agency's application of the suitability determination is indefensible.

The agency's approach to NEPA for this project reveals that it does not believe the suitable/unsuitable distinction in NFMA is meaningful. Despite the conservation groups' efforts to bring this to the agency's attention, the draft decision still includes substantial timber harvest, including commercial harvest, in Prescription 7.E.1. Far from explaining why those harvests are necessary, the final EA still does not disclose that *any* harvesting will take place in an unsuitable prescription. Even more telling, *neither the Final EA nor Draft Decision Notice disclose in which prescriptions various timber management activities will take place* – the public must reference maps produced with the EA to determine what treatments are located in which prescription and then turn to the Forest Plan to determine whether those prescriptions are suitable

or unsuitable. Surely if the agency believed there were meaningful differences between the prescriptions the EA would at least inform the public of what activities were planned for each prescription.

The agency's response to comments also reveals that the agency does not find the distinction meaningful. Numerous commenters pointed out during the NEPA process that the agency's plans to harvest in an unsuitable prescription did not comply with NFMA. Yet the agency blithely responded that "[t]he purpose of the Cooper Creek Watershed project is to restore native plant communities, enhance wildlife habitat conditions, and improve forest health . . ." Response to Comments, *passim*. The only information to glean from that response is that the agency believes it can further those purposes anywhere in the forest, regardless of whether the area is suitable or unsuitable; in short, that the suitability distinction is inconsequential.

Finally, the draft Decision Notice acknowledges that some harvesting will take place in an unsuitable prescription but its effort to dismiss that concern only further underscores that the agency does not find the distinction meaningful. The agency reduced in 7.E.1 its midstory treatment, "considered a preparatory step toward commercial harvest in the future," to match early successional habitat objectives for the prescription which will be met through a future commercial, regeneration harvest. Draft DN, 3. *The agency is already anticipating a future commercial, regeneration harvest in the unsuitable prescription*. The agency could not have been clearer: it considers unsuitable prescriptions to be equally appropriate for "planned, periodic" timber harvest as suitable prescriptions, despite the Forest Plan's explanation that such activities are incompatible. That interpretation unlawfully creates a *de facto* new regulation that eliminates any distinction between suitable and unsuitable lands in violation of NFMA and the agency's regulations.

III. THE EA'S RELIANCE ON BMPS TO JUSTIFY A NO SIGNIFICANT IMPACT FINDING FOR SEDIMENTATION EFFECTS ON BRYANT CREEK IS UNSUBSTANTIATED, IN VIOLATION OF NEPA.

Under NEPA, an EIS is required when a project "may" have a significant effect on the quality of the human environment. 42 U.S.C. § 4332(2)(c) (include environmental impact statement on proposals for "major Federal actions significantly affecting the quality of the human environment"); 40 C.F.R. § 1508.3 ("'Affecting' means will or may have an effect on."). EA's are completed to "provide sufficient evidence and analysis for determining whether to prepare" an EIS or a finding of no significant impact. 40 C.F.R. § 1508.9. If the EA concludes that the project "may" have a significant effect on the quality of the human environment, the agency *must* prepare an EIS. The agency can only issue a FONSI if it determines the project will not have a significant effect on the quality of the human environment. Agencies can reduce significant effects through mitigation, leading to issuance of a "mitigated FONSI." *See Spiller v. White*, 352 F.3d 235, 241 (5th Cir. 2003)(agencies can "agree[] to employ certain mitigation measures that will lower the otherwise significant impacts of an activity on the environment to a

level of insignificance. In this way, a FONSI could be issued for an activity that otherwise would require the preparation of a full-blown EIS").[5]

The Cooper Creek project will have a significant effect on the Bryant Creek watershed in terms of sedimentation. Suggesting that project activities are "concentrated in a few drainages" is an understatement. EA, 112. In one of the alternatives considered, "[a]pproximately *85%* of the proposed treatments drain into Bryant Creek." *Id*. at 72 (emphasis added). Effects from the chosen alternative "would be similar" though less than 85% of the treatments would drain into Bryant Creek. *Id*. at 113. "[I]t is expected [that] as a result of silvicultural treatments, road reconstruction and temporary road construction sediment would enter" Bryant Creek. *Id*. at 112. And the "Aquatic Habitat and Fauna Analysis indicates that there is the potential for negative cumulative effects to aquatic habitat and associated species" as a result of that sedimentation. Response to Comments, 447.

Studies confirm that concentrating treatments in one watershed risks significant sedimentation impacts. Bolstad and Swank 1997 found that the impacts of watershed wide land use patterns were exaggerated during storm events relative to baseflow. *See* Exhibit C. We know of no reason why that general point would not hold equally true for widespread logging in a particular watershed. Ziemer et al 1991 found that dispersing treatments across a watershed did not reduce overall sedimentation. *See* Exhibit D. That study focused on impacts to main stem creeks and suggests impacts may be more acute where smaller tributaries (such as Bryant Creek) enter the main stem (such as Cooper Creek). These studies underscore the risks of concentrating so much harvest in such a small watershed.

Further, the EA reveals that over 2,000 acres of project activity stands (well over half of the project) are on soils that are "poorly suited" for roads and log landings, moderately or poorly suited for use of harvesting equipment, with general soil erosion hazard ratings of moderate to severe. EA, 42. The conservation groups submitted the expert opinion of Phil Freshley in November 2016. *See* Letter from Conservation Groups to A. Baker and attachments (Nov. 12, 2016), Exhibit E. Mr. Freshley noted that the agency's assessment of impacts from erosion was likely too conservative and that effects were likely to be greater than predicted. While some of the data Mr. Freshley referenced (the 1996 Fannin and Union County Soil Survey) has since been updated (with a 2016 Fannin and Union County Soil Survey), Mr. Freshley's opinions were not based on that data alone, but also his professional experience. Notably, Mr. Freshley concluded that "it is my judgment that there is a significant sedimentation risk to Bryant Creek." *Id*. He found that risk "manageable" but recommended listing specific BMPs as a management technique. *Id*.

[5] The conservation groups raised concerns regarding the adequacy of mitigation measures in their Scoping Comments, p 20, and Draft EA Comments, pp 58-61. Concerns regarding the Bryant Creek watershed specifically were raised in Draft EA Comments, pp 67-73.

Finally, the agency points to a study to suggest that "skid trails" "with the potential to negatively affect . . .water quality" are typically limited to "2 to 10% of a timber harvest area." EA, 43. As a result, the EA asserts those impacts can be adequately mitigated. But past practice casts doubt on the "2 to 10%" estimate. The prevalence of skid trails for the Brawley Mountain Timber Sale seemed to exceed the 10% threshold – understandably so, given the rugged terrain. The photograph below from the Courthouse Creek Timber Sale on the Pisgah Ranger District in North Carolina also shows skid trails exceeding the 10% threshold.

Similarly, recent monitoring from the Ocoee District of the Cherokee National Forest, just across the state line, shows that ground-based regeneration harvest on steep slopes cannot be safely undertaken with merely the ordinary Forest Plan BMPs. Of 9 units reviewed in 2015, six were well above 10% disturbance (13%, 14%, 17%, 17%, 22%, and 27%, respectively). Cherokee National Forest, 2015 Monitoring & Evaluation Report, at 97-98 (September 2016).

Even relying on the EA's conservative assumptions, the Cooper Creek Project will have a significant effect on the quality of the human environment, including via erosion and sedimentation in the Bryant Creek watershed where most of the timber harvests are located. The Forest Service issued a FONSI because, it asserts, those effects "will be greatly reduced through the use of BMPs and mitigation." EA, 113.

To utilize a "mitigated FONSI" as the Forest Service does here, the agency must show the mitigation measures' efficacy is "supported by substantial evidence. . . ." *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2nd Cir. 1997). Restated, the agency must analyze mitigation

measures in detail and explain how effective the measures would be. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir.1986), rev'd on other grounds, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). "Without analytical data to support the proposed mitigation measures" they do not "amount to anything more than a 'mere listing' of good management practices" which is insufficient for NEPA purposes. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998), overruled on other grounds by *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). The agency falls far short of its obligation here.

The agency relies on several common sense measures to justify its mitigated FONSI. For instance, the agency repeatedly points to "pre-operation" measures as sufficient mitigation. *See* EA, 41 (relying on "pre-operation location and design of access routes" to avoid sedimentation impacts); EA, 42 (mitigating erosion hazards requires "pre-operation planning"); EA, 43 (log "[l]andings will need to be planned prior to construction"). The agency also commits to "[t]emporally staggering treatments" to avoid a "worst case scenario." EA, 76. But that is nothing more than business as usual; these are only a "mere listing" of good management practices. Restated, we expect the agency to always consider action "pre-operation" regardless of whether they result in significant impacts. The commitment is insufficient to show the impacts of concentrating harvest in the Bryant Creek watershed will be mitigated to the point of insignificance.

Again, past practice on this District casts doubt on this approach. Presumably the agency utilized pre-operation planning to mitigate impacts as part of the Brawley Mountain timber sale but impacts far exceeded the "light hand on the land" approach promised by the agency. Many parts of the Brawley sale remain unvegetated even 3-5 years after treatment, particularly temporary roads, skid trails, and log landings.

Similarly, the commitment to rely on "the skill and experience of project managers" as a mitigation measure is insufficient. The public should be able to safely assume that the Forest Service will always employ highly-skilled staff and contractors so it is unclear what this specific commitment is adding.

The agency offers several general references to employing BMPs: "Well-designed and effective implementation of Best Management Practices (BMPs) during, and post-operation would minimize adverse impacts to soils and water quality," EA, 45; "Best management practices require the installation of erosion control measures as work is completed," EA, 76. But does not explain what those BMPs are nor support there efficacy with any evidence. *See National Audubon Soc'y,*132 F.3d at 17. Again, this is only a "mere listing."

The most detailed explanation of BMPs in the EA appears to be this:

> Best Management Practices such as broad-based dips, lead-out ditches, aggregate surfacing on road surfaces, and maintaining road conditions to BMP standards,

> have been installed on these roads to mitigate impacts. These practices have been shown to be effective at mitigating erosion from road surfaces and protecting water quality (Burroughs and King 1989).

EA, 51.

The Burroughs and King study was limited to analysis of roads and many of the studies it relied on were completed in different parts of the country almost 40 years ago when the size of typical logging trucks and machinery was smaller. Nevertheless, we agree with its basic finding – that BMPs help reduce sediment delivery from roads. But that is not the question before the agency. The question is: do the mitigation measures planned for the Cooper Creek project reduce the impacts of sedimentation in the Bryant Creek watershed so they are insignificant? The EA does not answer that question because it fails to disclose what mitigation measures will be employed (beyond general commitments to use undisclosed BMPs) and any evidence that those mitigation measures can be successful *as part of this project*.

The EA does not include any analysis of the effectiveness of BMPs generally, though its reliance on use of BMPs as a mitigation measure suggests the agency believes they will be effective most if not all of the time. Evidence before the agency belies that reliance. An audit of the Etowah North Timber Sale on the Chattahoochee found that BMPs were only being complied with 76% of the time. *See* Forest Plan Monitoring and Evaluation Report (2012), 64.

And the EA does not explain how general BMPs will mitigate impacts in non-general, above-average situations. For instance, some soils in the project area have a "very severe" erosion hazard rating. EA, 43. For those soils, "significant erosion is expected, loss of soil productivity and off-site damage are likely, and erosion-control measures are costly and *generally impractical*." *Id.* (emphasis added). Even if the EA's vague commitment to rely on general BMPs was sufficient, the EA offers no explanation of how impacts in these above-average situations will be mitigated. This is particularly important as above-average weather events are increasing as climate change drives more intense storm events which more easily overwhelm BMPs and other infrastructure as evidenced by the numerous road collapses on the CONF in the last few years.

O'Reilly v. U.S. Army Corps of Engineers, 477 F.3d 225 (5th Cir. 2007), illustrates the error the agency has made. In *O'Reilly,* plaintiffs challenged the Army Corps of Engineers' ("Corps") mitigated FONSI on the grounds that it failed to sufficiently explain the proposed mitigation measures. To mitigate erosion and sedimentation impacts the Corps pointed to a "100–foot vegetated buffer." *Id*. at 232. The Corps also asserted that "Best Management Practices will be incorporated into project construction and inclusion of vegetated drainage swales and greenspaces will filter run-off and that [c]ompliance with the recommendations/ requirements of local ordinances and/or 'Best Management Practices' should limit the volume of sediments entering local waterways." *Id*. (internal quotations omitted). But the Corps "neither

describe[d] what these practices may include nor how they will work." *Id*. Because the "EA provide[d] only cursory detail as to what those measures are and how they serve to reduce those impacts to a less-than-significant level" the Court found the mitigated FONSI insufficient and arbitrary.

The Forest Service is on the same footing here. It generally points to streamside management zones and BMPs as sufficient to justify a mitigated FONSI but the agency only provides "cursory detail" and "neither describes what these practices may include nor how they will work" as part of this project. *Id*. This violates NEPA and is insufficient to justify the mitigated FONSI.

IV. THE REGENERATION HARVESTS IN PRESCRIPTION 7.E.1 EXCEEDS FOREST PLAN LIMITS FOR EARLY SUCCESSIONAL HABITAT

As explained above, timber production via regeneration harvests, thereby creating ESH, is never appropriate for unsuitable lands. However, ESH may be created as a byproduct of other appropriate management activities in Prescription 7.E.1. Restated, creating ESH as a byproduct of timber production is never allowed, but creating ESH as a byproduct of timber harvests necessary to protect other multiple-use values, is allowed. The Forest Service has not met that exception here, thus the regeneration harvests in Prescription 7.E.1 violate NFMA. But even if the forest was meeting the "necessary to protect" exception, its proposed timber harvests exceed the strict limits on ESH in 7.E.1, violating the Forest Plan.

Recognizing that regeneration harvest are rarely appropriate for Prescription 7.E.1 (only when meeting the "necessary to protect" exception) the Forest Plan strictly limits the amount of ESH in the prescription to "4 percent" "created both naturally and through management." Forest Plan, 3-123. Four percent is a ceiling: to comply with the Forest Plan the agency cannot create additional ESH if it would exceed the four percent threshold though any lower percentage of ESH is compliant. These limits must be met at local and landscape scales and specifically "percentage objectives apply to blocks of over 1,000 acres of contiguous prescriptions with the same successional objectives." Forest Plan, App'x F, F-31.[6]

The agency has not disclosed how much of the project area is within each prescription, but based on GIS data it appears that approximately 2,565 acres of the project are located in Prescription 7.E.1 (compartments 398 and 399). Four percent of 2,565 acres is approximately 103 acres – the upper limit of ESH allowed in the Prescription. According to the agency approximately 0.8% of the project area currently exists as early successional forest. EA, 93. There is no information in the agency record suggesting that percentage differs by prescription. As a result, we assume approximately 20 acres of ESH currently exists in Prescription 7.E.1, limiting the agency to creating no more than 83 acres of ESH in 7.E.1.

[6] The conservation groups raised concerns related to ESH in excess of Forest Plan limits in their Scoping Comments, p 22, and Draft EA Comments pp 46-47.

The maps attached to the Final EA disclose that 95 acres of ESH will be created through regeneration harvests in Prescription 7.E.1. Additional ESH will be created through canopy gap harvests and prescribed fire. *See, e.g.*, EA, 94. The regeneration harvests alone will cause the Prescription's ESH limits to be exceeded by 12 acres, violating the Forest Plan.

V. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO ADEQUATELY CONSIDER PROJECT ALTERNATIVES

NEPA requires federal agencies to "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(E). "This provision applies whether an agency is preparing an EIS or an EA." *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012); *see also Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988)("the consideration of alternatives requirement is of wider scope than the EIS requirement"). "[A]gencies need not consider every possible alternative to a proposed action, only 'reasonable' alternatives." *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013). Agencies must "briefly discuss the reasons for eliminating any alternatives that were not developed in detail." EA, 27.

"The purpose of the Cooper Creek Watershed project is to restore native plant communities, enhance wildlife habitat conditions, and improve forest health." EA, 2. Reasonable alternatives that meet that project purpose must "be given full and meaningful consideration." *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988).

Given the "unresolved conflicts concerning alternative uses of available resources" the conservation groups developed and shared a project "Alternative Four" with the agency in April 2016. *See* Letter from Conservation Groups to Andrew L. Baker and attachments (April 14, 2016), Exhibit F.[7] Alternative Four involved the same management activities (e.g., thinning, canopy gap creation, ESH, etc) as the preferred project alternative but in different quantities and locations in the project area. Proposed management activities were identified by stand. The conservation groups did not propose specific woodland creation activities, which are not necessary to meet the project purpose and are detrimental to the project purpose in some instances, but disclosed where in the watershed they thought those actions could be appropriate and expressed a willingness to work with the agency to identify suitable woodland sites. *Id.* The alternative met the project purpose of restoring native plant communities, enhancing wildlife habitat conditions, and improving forest health because it sought to implement the same activities the agency was proposing, just in different locations and proportions. The majority of stands included for management activities in Alternative Four were also considered for treatment in the agency's preferred alternative.

[7] The conservation groups addressed the agency's obligation to consider alternatives in their Scoping Comments pp 21, 25, 29, 32; and Draft EA Comments pp 52-55.

We are not aware of any meaningful consideration of Alternative Four. Subsequent NEPA documents did not address it. At best, the agency offered general, conclusory explanations of why it rejected alternatives from detailed study but those do not appear to apply to Alternative Four.

Some alternatives were rejected because "eliminating the cutting of mature oaks would limit the ability to provide early successional forest habitat and create young oaks stands for the future." EA, 28. Exactly what that statement means is unclear but nevertheless Alternative Four did not propose eliminating the cutting of mature oaks, and in fact proposed using commercial timber harvest to create 225 acres of early successional habitat.

Alternatives were also not given full consideration because "[c]ommercial logging and non-commercial activities are permitted in Management Prescriptions 7.E.1 [ ] and 11." EA, 28. Because of their unsuitable designation under NFMA any timber harvests in those prescriptions must be necessitated to meet other multiple-use values. Regardless, Alternative Four still sought to "restore native plant communities, enhance wildlife habitat conditions, and improve forest health," just not in Prescriptions 7.E.1 and 11. Nothing about the project's purpose is specific to those prescriptions; Alternative Four still met the project purpose.

Finally, alternatives that recommended creating early successional habitat in younger stands were rejected as not meeting the project's purpose assuming such harvests would be noncommercial resulting in: 1) leaving significant material on site, impeding the site's ability to regenerate and 2) the material would also restrict the site's utility to wildlife. EA, 28. As we demonstrated in our Draft EA Comments: "Th[o]se claims rest on a false premise, and are inconsistent with research on temperate forest regeneration." *See* Draft EA Comments, 23-25. In its Response to Comments related to this issue the agency simply asserted that: "The Forest Service has looked at the many [*sic*] of these stands for management opportunities. Some are feasible to propose a treatment and were, [*sic*] while others will simply not [*sic*] feasible for this entry." Response to Comments, 316. That explanation fails to provide any evidence beyond conclusory statements, appears to be unrelated to the question of whether leaving boles and slash on site inhibits wildlife, and fails to respond to any of the numerous studies presented that show the agency's analysis is flawed. Instead of fixing the flaw, the agency has simply doubled-down on its conclusion.

Moreover, other portions of the EA contradict the assertions related to leaving material on site when creating ESH non-commercially. Leaving woody debris on site is expected to benefit soil health which in turn will assist regeneration. EA, 48. And "[d]owned woody debris provides cover and feeding sites for amphibians, reptiles, small mammals, and invertebrates, as well as unique uses such as drumming logs for ruffed grouse." EA, 100. Because the Cooper Creek project is not focused on any one wildlife species it appears that leaving woody material on site would, in fact, meet the project purpose. *See* EA, 2 (general project purpose of

"enhance[ing] wildlife habitat conditions"). In any event, most of the early successional habitat creation in Alternative Four was proposed to be commercial.

In *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 F. App'x 440 (9th Cir. 2007), groups challenged the adequacy of the Forest Service's alternatives analysis for a timber sale implemented through an EA. The plaintiffs proposed an alternative to the preferred action that "USFS rejected . . . stating only that [the] proposal was 'not consistent with Purpose & Need.'" *Id*. at 443. The court found that "[a] cursory dismissal of a proposed alternative, unsupported by agency analysis, does not help an agency satisfy its NEPA duty to consider a reasonable range of alternatives" and remanded the agency's decision for further consideration. *Id*.

The same is true here. The conservation groups proposed a specific alternative which the Forest Service rejected in a cursory fashion unsupported by agency analysis and in fact contradicting the evidence put before the agency in Draft EA comments submitted by the conservation groups. As discussed above, the conclusory explanation of why the Forest Service refused to consider other proposed alternatives appears to have limited application to Alternative Four and contradicts other sections of the EA. To meet its NEPA obligations, the agency must give Alternative Four full and meaningful consideration.

REQUEST FOR RELIEF

For the reasons stated, the Forest Service's EA, Decision Notice, and FONSI violate NEPA and NFMA. Accordingly, the Forest Service should withdraw this project. If the Forest Service nonetheless intends to proceed with this project, it must supplement its analysis to satisfy its legal obligations as noted throughout this objection.

Date: March 19, 2018

Signed for Objectors

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