



January 19, 2017

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Sent Via Email

NOTICE OF OBJECTION

Board of Directors: Re: Objection to DEA, Draft Decision Notice, and FONSI, Tub Run Ruffed Grouse
Vegetation Project

Dear Supervisor Timm:

Bette Dzamba

Howard Evergreen

Jennifer Lewis

Laurie Miller

Ernie Reed

David Sellers

Deirdre Skogen

Elizabeth Williams

I submit this objection to you, in your role as Reviewing Officer for this project, on behalf of Wild Virginia, Heartwood, and Sherman Bamford (collectively “Wild Virginia”), in accordance with the requirements of 36 C.F.R. Part 218. I have included information below, to satisfy the minimum content requirements specified in §218.8(d). I am the Lead Objector, representing the parties listed above and have included contact information for each party.

Introduction

The Draft Environmental Assessment (“DEA”), upon which the subject draft Decision Notice (“DN”)/Finding of No Significant Impact (“FONSI”) are based, fails to conform to the requirements of the National Environmental Policy Act (“NEPA”) and implementing regulations. The requirements governing the conduct of cumulative impacts analyses have not been met, in regard to the maintenance of early successional habitat and water quality impacts. The DEA must be revised and that revised version must be made available for public review and comment. A consideration of potential significant impacts must be made after the revised DEA is complete. The following describes the bases for our objection and, to support our contentions, we incorporate by-reference the following documents, as permitted under 36 C.F.R. § 218.8:

- The Forest Service *National Environmental Policy Act Handbook*, FSH1909.15, Chapter 10 - Environmental Analyses. Sections 15.1 - Cumulative Effects, 15.2a - Spatial Boundaries, 15.3 - Cumulative Effects Framework are particularly applicable to this objection, as they describe the requirements for temporal and spatial scope and cumulative impacts analyses in EAs.

- The document entitled “Response to Comments, Part 2,” and accessible through the GWJNF web page for Tub Run project. We refer primarily, but not exclusively, to Wild Virginia comments and Forest Service responses on pages 2, 4-6, 9, and 15 of that document.
http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/101337_FSPLT3_3907995.pdf.
- Revised Land and Resources Management Plan, Jefferson National Forest, Management Bulletin R8-MB115A, January 2004. We refer particularly to the section entitled *Successional Forests*, pages 3-106 through 3-144 and the section entitled *Water Quality (Aquatic Ecological Integrity)*, pages 3-27 through 3-42.

Attachments to this letter, which we will submit by email also, include:

- Kolpin, Dana W., E. Michael Thurmanb , Edward A. Leeb , Michael T. Meyerb , Edward T. Furlongc , Susan T. Glassmeyerd, *Urban contributions of glyphosate and its degradate AMPA to streams in the United States*, Science of the Total Environment, 354 (2006) 191-197.
- Battaglin, William A., Dana W. Kolpin, Elizabeth A. Scribner, Kathryn M. Kuivila, and Mark W. Sandstrom, *Glyphosate, Other Herbicides, and Transformation Products in Midwestern Streams*, 2002, Journal of the American Water Resources Association, (2005) USGS Staff -- Published Research. Paper 599.
- Coupe, Richard H., Stephen J Kalkhoff, Paul D Capel. and Caroline Gregoire, *Fate and transport of glyphosate and aminomethylphosphonic acid in surface waters of agricultural basins*, Pest Management Sci., 2011.

Parties

The parties to this objection all submitted comments in response to the scoping notice for this project. The following are descriptions of each party and their contact information.

Wild Virginia is a grassroots, non-profit organization dedicated to preserving wild forest ecosystems in Virginia’s national forests through education and advocacy. Wild Virginia members, directors and staff all are regular users of the Jefferson National Forest through the Wild Virginia outings and forest watch programs. Members of the Wild Virginia staff, board, and membership participated in fieldtrips associated with the Tub Run project.

Heartwood is a cooperative network of grassroots groups, individuals, and businesses working to protect and sustain healthy forests and vital human communities in the nation's heartland and in the central and southern Appalachians. Heartwood, Heartwood members and member groups, including Wild Virginia and Virginia Forest Watch regularly use the Jefferson National Forest and have participated in meetings and fieldtrips associated with this project.

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Sherman Bamford is a long-time user of the Jefferson National Forest and has been active in project reviews on the George Washington and Jefferson National Forest (“GW&JNF”) for several decades.

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Legal Background

The National Environmental Policy Act obligates the Forest Service to conduct a process that includes information gathering, analysis, and public involvement before issuing approval. Where an agency has not determined whether the project will result in “significant impacts,” as that term is defined by NEPA, the agency may prepare an Environmental Assessment (“EA”) to determine whether such impacts may result from the action. The agency may issue a Finding of No Significant Impact (“FONSI”) or, if a FONSI is inappropriate, the agency must prepare and Environmental Impact Statement (“EIS”) and conduct a public participation process for that EIS. The FONSI may be accompanied by a Final EA and a final decision on the project by the responsible official.

The determination as to whether significant impacts will result from a project must account for cumulative impacts. As federal regulations note, “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(b)(7).

The analysis of cumulative impacts must consider both temporal and spatial aspects. Any conditions or actions that would have a reasonably-foreseeable nexus in time with the proposed action so that they would combine with the project to contribute to impacts on humans or the environment must be examined in combination with the proposed action. Likewise, any conditions or activities that may have a reasonably close relation on an area affected by the project must be discussed in relation to the proposed action.

Council on Environmental Quality (“CEQ”) regulations, which govern the implementation of NEPA by federal agencies, are contained at 40 C.F.R. Parts 1500 - 1508. At 40 C.F.R. § 1508.7, cumulative impacts are defined as:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Federal courts have reviewed the sufficiency of cumulative impact assessments in EAs on many occasions and have stressed the importance of including information about conditions and activities that may produce impacts on the environment in combination with an agency’s proposals. The fact that a project under review in an EA may be deemed to have only minor or “incremental” effects does not excuse a failure to look at those possible impacts in the wider context. The D.C. Circuit noted that while an agency’s review of a factor “may, in fact, be a splendid incremental analysis,” if that analysis is too closely-focused, the EA may fail to address “what is crucial if the EA is to serve its function. *Grand Canyon Trust v. Federal Aviation Administration, Petitioner*, 290 F.3d 339, 345 (DC Cir. 2002).

Another court noted that “even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant.” *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir.1972). Thus, a FONSI determination may not be made unless a properly inclusive cumulative impacts analysis is made.

The Forest Service’s own National Environmental Policy Act Handbook (“FSH”) makes clear that the cumulative impacts analysis is vital to the finding on significance and the need for an EIS, stating that “[s]coping should also reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects. FSH 1909.15, section 31.3.

Argument

In comments responding to the scoping notice for this proposal, Wild Virginia asserted that the cumulative impacts of the project must be assessed, as those impacts relate to a number of specific environmental factors. Without adequate cumulative impacts analyses for these resources at the correct spatial and temporal scopes, the FONSI and draft DN cannot be upheld. As stated previously, we assert that a revised DEA that includes complete cumulative impacts reviews must be prepared and that it must be available for public review and comment before the Forest Service moves ahead to prepare a final EA.

The resource areas pertinent to this objection and the Forest Service’s responses to comments on them are discussed below:

Maintenance or Creation of Early Successional Habitat

In its scoping comments, Wild Virginia asserted that the existence of early successional habitat areas outside the project area must be discussed in the EA. Because the occurrence of various habitat types is an issue that bears on the health of the forests and the human interests affected by those forests throughout the region, and certainly throughout the areas within the GWJNF, the spatial scope of analysis for this issue must go far beyond the boundaries of the project area. That scope must be defined to include activities on both public and private lands in the past, present, and reasonably foreseeable future, to the extent that those effects may have significant impacts on the environment, in combination with the effects from this project.

The existence of such areas on private lands or on lands maintained by other government entities are pertinent to the populations of ruffed grouse and other species for which early successional forest areas are preferred. In terms of the timing of impacts on these resources, the occurrence of both natural processes and human-induced landscape alterations is of importance.

In response to our comments, the Forest Service stated “[t]he proposed analysis is outside of the scope of this project. Please refer to the Final Environmental Impact Statement for the Revised Land and Resource Management Plan of the Jefferson National Forest.” *Response to Comments*, page 2. Thus, the Forest Service refused to recognize or describe the occurrence and impacts of activities and conditions outside the project area or to discuss this project in the context of the larger area that is pertinent to this issue in the Tub Run EA.

Referring to the Forest Plan EIS does not justify this failure. That document explicitly states that “actions on private lands, and results of insect and disease outbreaks and storms that serve to create relatively large patches of canopy tree mortality,” and thus contribute to the existence of early successional habitats, “would be considered in site specific planning.” Forest Plan EIS, page 3-113. The Forest Plan EIS goes on to note that

Early successional forests created by outbreaks or storms would be included in calculations of existing conditions, which would be used to determine whether management actions are needed to meet early successional forest objectives. If objectives are met through these unplanned events, creation of additional early successional forest by management action would not be planned. Presence of quality successional forest habitats on surrounding private lands, to the extent they can be known, *would be considered during site-specific planning to determine where within the range of successional forest objectives is most desirable for national forest system lands.*

Id. (emphasis added).

Despite the clear intent of the Forest Plan EIS that cumulative impacts be assessed on a project-specific level, the EA for this project contains no such analysis in this resource area.

Water Quality Impacts

Wild Virginia's scoping comments also included a number of points addressing the need to look at the potential water quality impacts that may result from the Tub Run project along with those of past, present, and anticipated actions in the larger drainages in which this project area lies. As we noted in our comments the need to account for "[c]umulative impacts of this Proposed Action on downstream waters in combination with land use and activities outside the management area, including those on Tub Run and on Johns Creek. These include land use and activities on both upstream and downstream sections of Johns Creek." *Response to Comments, Part 2, page 2*. In fact, in our comments we noted that the incremental contribution from this project needed to be discussed, in relation to inputs of sediment, in the very large Chesapeake Bay drainage.

By contrast the Tub Run EA, at page 49, states:

With regards to impacts to the aquatic ecosystem, the geographic scope of this analysis will be identical to that analyzed for the water quality and sedimentation aspect of the water resource. The boundary of the analysis will be the watershed of Tub Run down to its confluence with Johns Creek. This analysis area was chosen because it is estimated that effects below this point would be insignificant and immeasurable. The time periods used for the cumulative analysis will be similar to those used for analyzing sedimentation effects to the water resources.

This stated choice of the scope for an analysis of water quality impacts is without basis in science or in regulation. It is not only foreseeable that any pollution that Tub Run or its tributaries contribute to Johns Creek will combine with other inputs of pollution, to waters upstream and downstream from this project area, it is certain. And, even if the contributions of pollutants or any changes in temperature or other characteristics in these streams are small, they may still contribute to "significant" impacts downstream - which must be assessed in the EA.

The EA acknowledges that some sediment pollution has been contributed to Tub Run and the smaller streams but maintains that modeling demonstrates that future problems will not occur. While we believe that road improvements undertaken through this project can and should decrease sediment loads, we are unconvinced that sediment inputs will be so well controlled as to uphold legal antidegradation standards. However, even if future loads are very small, the inputs modeled by the Forest Service cannot be looked at in isolation and the analysis may not stop at the point where Tub Run collides with Johns Creek.

Farming, residential and commercial land uses, construction, wastewater and industrial discharges and any number of other activities, past, present, and predictable, on Johns Creek, Craigs Creek, and the James River, may well contribute herbicides and sediments like those that can be contributed by this project. Therefore, current high water quality in this segment of the forest is particularly important and must be maintained without diminution or, preferably, improved. These headwater streams provide a vital reservoir of clean water wherever they are protected by forested stands. The absence of water quality standard violations in these streams is not the measure of proper protection of these environments or of the best contribution to downstream environments. The very least impacted water quality, from sediments, herbicides, or any other pollutant is a goal that should be sought.

The Forest Service response to our comments, in its separate document, was dismissive and merely illustrates our contention that a proper cumulative impacts analysis was neither planned nor completed for this resource area. First, the Forest Service response noted that water quality and pollutants are regulated by the Virginia Department of Environmental Quality (“DEQ”). The import of this statement as a response to our assertions is unclear but it certainly does not obviate the need for an adequate analysis of possible cumulative water quality impacts in the EA. While the DEQ does have authorities under the Clean Water Act and state law to regulate point sources, it has little if any power to control the use of herbicides or their deposition into water bodies from treatments on the land.

The second part of the Forest Service’s response to our points regarding water quality threats and the need to do cumulative impact reviews stated “[w]hatever pollutants present on the forest or in the streams prior to management practices tend to be considered outside the scope of the analysis, unless VDEQ has listed the waterbody as impaired.” To dismiss from consideration pollutants that are already in waterbodies or that are on the land and available for transport to waterbodies in a cumulative review with those that might be contributed by this proposed action is a startlingly bold refusal to follow NEPA’s commands. There is simply no reasoned basis to trigger such a consideration of existing pollution only when the DEQ has designated the waterbody as impaired for a particular pollutant. The fact that a water body has not been so designated “impaired” is just as likely due to the fact that it has collected no data as to a finding that no water quality standards violations have occurred. Further, the Clean Water Act and state standards mandate that high quality waters not be degraded by increases in pollutant concentrations or loads, even incremental ones, - not that we wait until problems have been created before action is taken.

We also noted in our comments that “[t]he fate and transport, persistence in both terrestrial, groundwater and vadose zone water, and aquatic environments, and cumulative effects when combined with occurrence of these chemicals outside the management area must be accounted for” and that herbicides like those proposed for use here are very widely used and measured in water bodies. The Forest Service response stated, in part, “[t]he use and effects of such chemicals on USFS land has been previously analyzed and documented in the Forest-Wide Non-Native Invasive Plant Control EA, dated Dec. 2010, and tiered to in the Tub Run EA.” In the apparent action to “tier to” that wider plan, the EA for Tub Run states that “[g]iven design criteria and mitigation measures contained in this environmental assessment and the herbicides proposed for use, no detrimental cumulative effects are anticipated to the fisheries or aquatic resources.” Tub Run EA, pg. 53. This conclusion is supported in the EA by the statement that “Glyphosate and triclopyr are not soil active substances, meaning the herbicides do not adhere to soil particles once applied and therefore, it is not expected that water quality could be impacted if erosional processes do create paths to water bodies.”

The fact is that we do not know whether or in what amounts glyphosate, other herbicides, or their degradation products are in the soils in the Tub Run project area or which may be transmitted to groundwater and surface water if applied as planned. A very cursory review of the scientific literature reveals that much greater care is warranted and a more thorough analysis required in the Tub Run area but, even more crucially, in the larger watersheds to which Tub Run contributes. As one paper states: [t]he use of glyphosate has increased rapidly, and there is limited understanding of its environmental

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fate.” Battaglin et al. 2005. The research into the presence of glyphosate and its degradation products show that it is quite widespread in water bodies in the U.S. and around the world, due to the fact that it is “the most widely used herbicide in the world, being routinely applied to control weeds in both agricultural and urban settings.” Kolpin et al. 2006. Given the wide distribution of these chemicals in the environment, there is little reason to doubt that they may be found in Johns Creek, Craigs Creek, and beyond. Also given the lack of knowledge about the ways these chemicals travel through the environment, it is irresponsible to assume that applications of glyphosate and other herbicides won’t contribute to water quality problems downstream - and no way to assess the possible significance of any such contributions without a cumulative effects analysis using a properly-wide spatial scope.

One very large proposed action, which the Forest Service is currently reviewing under NEPA and other regulations, that could have very great impacts on streams in the Craigs Creek watershed is the Mountain Valley Pipeline. This huge construction project would cross very steep slopes, many with highly erodible soils and landslide potentials, would contribute sediments and other pollutants directly to Craigs Creek and its tributaries. There would be at least one and maybe more crossings of Craigs Creek by the pipeline.

Given that two sensitive species, the James Spiney Mussell and the Atlantic Pigtoe mussel, live in Craigs Creek, a very high level of protection is necessary and a robust cumulative impacts assessment is needed. As demonstrated in the EA for this project, the Forest Service did recognize that the actions on the Tubb Run area could impact James Spiney Mussell habitat. The EA prohibits all operations on certain management areas in Tubb Run during the mussels’ breeding periods, “without exception,” clearly acknowledging that even the relatively small amounts of sediment they predict would be contributed could affect these species. The fact that these potential impacts have been recognized show that a wider scope and more inclusive cumulative impacts analysis for water quality impacts is required.

Remedy Requested

The Forest Service must perform the required cumulative impacts analysis in relation to the maintenance and creation of early successional habitat and protection of water quality. This analyses must be included in a revised DEA and the public must have the opportunity to comment on the project, in light of the Forest Service’s findings on these issues. Improvements to the final EA, though necessary, will not be sufficient to meet NEPA. The fuller, more inclusive analysis must be made available to the public to inform its comments on the DEA.

We ask that we be allowed to meet with you, as allowed at 36 C.F.R. § 218.11(b), to discuss our concerns and answer any questions you may have. Thank you for the chance to comment on this project and for your consideration of the issues we have raised.

Sincerely,

/s/ David Sligh
David Sligh
Conservation Director
Wild Virginia

cc: Dan McKeague - USFS
Nick Redifer - USFS

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Karen Overcash - USFS
Ernie Reed
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