

Brian Banks
South Platte Ranger District
Pike-San Isabel National Forest
via electronic portal: <https://www.fs.usda.gov/project/psicc/?project=65019>

March 18, 2024

Dear Mr. Banks:

The following are the comments of Rocky Smith et al on the proposed Lower North South Vegetation Management Project as described in the second Purpose and Need and Proposed Action (“PNPA II”) found on the project website beginning in early March, 2024. We previously submitted comments based on the first PNPA for the project. Those comments were dated February 19, 2024 and are hereby incorporated by reference.

We are pleased to see that the Forest Service has reopened the comment period for this project. PNPA II provides some additional detail that is helpful for understanding the proposal. However, our concerns with the project remain as strong as ever.

APPLICATION OF NEPA AND STATUS OF NEPA REGULATIONS. As the Forest Service is likely aware, while this proposal post-dates the enactment of the Trump Administration NEPA regulations, those regulations have been challenged as illegal in no fewer than four pending lawsuits. *See, e.g., Env'tl. Justice Health Alliance v. CEQ*, Case 1:20-cv-06143 (S.D.N.Y. Aug. 6, 2020); *Wild Virginia v. CEQ*, Case 3:20-cv-00045-NKM (W.D. Va. July 29, 2020); *Alaska Community Action on Toxics v. CEQ*, Case 3:20-cv-05199-RS (N.D. Ca. July 29, 2020); *State of California v. Council on Environmental Quality*, Case No. 3:20-cv-06057 (N.D. Cal. Aug. 28, 2020). Soon after assuming office, President Biden issued Executive Order 13,990 directing federal agencies to review and address the promulgation of regulations and other actions taken under the previous administration that conflict with the Nation’s environmental and public health values. The 2020 NEPA rule was specifically identified as subject to the review. The Council of Environmental Quality (“CEQ”) then identified three actions it would undertake: (1) extended the deadline by two years for federal agencies to develop or review proposed procedures for implementing the 2020 Rule; (2) issued a “Phase 1” rulemaking with narrow changes to the 2020 Rule; and (3) issued a “Phase 2” rulemaking proposing broader changes. 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021).

CEQ has concluded its Phase 1 rulemaking, which fully restored analysis of direct, indirect, cumulative effects, 40 C.F.R. § 1508.1(g)(1)-(4), in addition to some other aspects of the 1978 Rule that the previous regulation sought to obscure or otherwise remove. CEQ is currently undergoing its Phase 2 rulemaking. The proposed rule would largely match and restore the 1978 regulations. See 88 Fed. Reg. 49,924 (July 31, 2023). The 1978 regulations, as well as the proposed Phase II rewrite, explicitly require a consideration of effects regardless of what agency or individual undertakes a project or activity.

In short, while the regulatory language may arguably be in flux, the statutory directives, and four-plus decades of caselaw are not. The Biden administration’s direction to ensure agency

NEPA analysis is not fundamentally or substantively altered to become anemic is quite clear. Accordingly, we implore the Forest Service to ensure its analysis is consistent with the letter and intents of NEPA and controlling caselaw.

STAY OUT OF SPRUCE-FIR STANDS. As discussed in our earlier comments, we see no reason to treat any stands dominated by Engelmann spruce and/or subalpine fir. We do not see how any treatment would make these stands more “resilient” (see PNPA II at 9). They burn only under prolonged, very dry conditions, i. e., very infrequently, but usually at high severity. Treatment, other than severe actions that would decimate them, will not make the residual forest more resistant to high-intensity fire.

The high intensity fire regime means that fire in this ecological type cannot be managed, as it would not be safe for firefighters. Prescribed fire cannot be used in this eco-type. Thus, there is no sense in creating fuel breaks there.

Under the proposed action, the following would be implemented:

Large openings (10 to 20 acres in size) would be created in early- and mid-seral stands to mimic natural disturbances such as wind throw or blow-outs that occurred historically with mixed-severity fire.

PNPA II at 10. This is not needed and is not consistent with the disturbance pattern for this forest type. The early and mid-seral areas are themselves probably succeeding from previous disturbances, which should be allowed to continue. There is no need to further disturb them at this time. There is also no reason to create large openings in spruce-fir. Such openings would fragment habitat for various wildlife species such as marten, lynx, boreal owl, and golden-crowned kinglet.

ASPEN TREATMENT. Specific action to maintain aspen is probably not necessary. Thinning and burning in conifer stands, some of which will include or be adjacent to aspen stands, would likely regenerate some aspen.

Under the proposed action, “decadent” aspen stands would be treated with “[r]egeneration methods (e.g., clearcut)”. PNPA II at 10. Decaying aspen trees should be retained, as they provide excellent future nests for avian species, such as woodpeckers and some secondary cavity-nesting species. See, e. g., Hart and Hart, 2001. Similarly, standing dead trees or snags provide the potential for cavity nesting and roosting.

Clearcutting aspen that is transitioning to conifer should not be done. Cryer and Murray, 1992 stated:

Clearcutting a seral aspen stand, which is on a soil that has aged too far towards a spruce-fir site, will more than likely hasten the spruce-fir intrusion.... Aspen would

have a hard time competing with spruce-fir, because of the lowered pH and low nutrient availability. (Citations omitted)

Burning may avoid this problem by recycling nutrients and raising the soil pH. But burning a stand with larger conifers may be difficult to do because if it is dry enough to burn such stands, the fires would be difficult or impossible to control.

GAMBEL OAK TREATMENT. Gambel oak (*Quercus gambelli*) burns very hot. A fire in this type would be very difficult to extinguish, or even control. Therefore, treatment may be justified in dense oak stands near infrastructure. Where treatment of oak is desirable, the Forest Service should consider making it available for firewood. It is a desirable species for firewood because of its high heat output.

However, treating oak tends to induce vigorous sprouting. See Kaufmann et al, 2016 at 1-2. Thus treating existing oak stands could perpetuate or create future dense stands. Such areas would have to be treated regularly, not just once, to maintain acceptably low fuel levels.

One of the proposed treatments is chemical use. NOPA II at 11. Such use might address the problem of treatment creating dense future oak stands. However, chemical use poisons the whole environment. It could cause death of non-target plant species and spread throughout the food chain as animals ingest plants. Generally, it should not be used.

RIPARIAN AND WETLAND AREAS. As the PNPA II notes, these areas have good growing conditions and infrequent fire, and thus tend to have a higher density of vegetation. Id. at 11-12. Therefore, they do not need treatment, as they are not much if at all departed from the historical range of variability. Fuel levels are naturally high, but this should be acceptable because these areas rarely burn. Structural diversity is also likely high and does not need to be increased.¹

The dense vegetation provides hiding cover and nesting areas for various wildlife species that inhabit or may inhabit the project area. A very high percentage of wildlife species in the project area likely use riparian areas during at least part of their life cycles.

The Forest Plan requires that riparian areas be maintained in at least an upper mid-seral successional stage. Id. at III-50.

The PNPA also notes (p. 11) that conifer trees in the riparian areas tend to be larger due to the good growing conditions. These trees must be retained, as they make good nesting trees (both now and in the future if they develop heart rot). The larger trees also store the most carbon, and should be retained throughout the project area as part of a larger strategy to limit the impacts of climate change.

¹ PNPA II states at p. 11:

“The better growing conditions of these areas can support greater tree densities that (sic) more upland sites and typically have two to three distinct canopy classes.”

A management objective states, in part:

Where possible, prescribed fire should be used to reduce fuel loads, increase structural heterogeneity, and enhance understory herbaceous vegetation.

PNPA II at 12. Burning in riparian areas is not appropriate. Riparian areas burn infrequently and usually at high intensity. Any prescribed burn would probably be done under low-risk conditions of temperature, humidity, and wind. Such a fire would not burn much once it hit the wetter riparian zone, thus it would do very little to alter vegetation. A fire that would alter riparian area vegetation would have to be high intensity, which would be impossible to control or to limit to target areas.

Fires that begin in upland areas could be allowed to burn down to riparian areas under non-severe fire weather, where the fire would likely stop.

The P-SI should encourage the construction of beaver dams and/or analogues. A recent study shows that areas with beaver dams have lower fire intensity. See Fairfax et al, 2024. Use of beaver dams could reduce the need for mechanical thinning.

PROTECT AND RETAIN MEXICAN SPOTTED OWL (MSO) HABITAT. MSO nesting and roosting habitat occurs in multi-storied stands that have: at least 40 percent canopy closure, trees at least 12 inches in diameter, and decadent down logs and snags. MSO critical habitat rule at 69 Fed Reg 53183, August 31, 2004. See also id. at 53232.

The bullet points at the top of PNPA II p. 13 appear to be desired conditions for MSO habitat. Two of them call for reduced tree density. Reduction of ladder fuels via thinning may be appropriate in some stands in the project area; however, such treatment should not be done in MSO habitat, especially not in or near protected activity centers, which are 600-acre areas surrounding nests. Stand density, including that provided by small trees, is often valuable for MSO as areas to hunt prey.

Parts of the project area that are not in PACs may be recovery habitat for MSO. This habitat is described in the species' recovery plan as follows:

This habitat is primarily ponderosa pine-Gambel oak, mixed-conifer, and riparian forest that either currently is, or has the potential for becoming, nest/roost habitat or does or could provide foraging, dispersal, or wintering habitats.

FWS, 2012 at VIII. Treatment in any such habitat, if any occurs, must be light; i. e., it must not reduce or eliminate the possibility of the treated land and surrounding area becoming future nesting/roosting habitat for MSO.

The MSO critical habitat rule further states:

Owls use areas that contain a number of large trees of different types including mixed-conifer and pine-oak with smaller trees under the canopy of the larger trees. These types of areas provide vertical structure and high plant species richness that are important to owls.

69 Fed Reg 53183, August 31, 2004; citations omitted. The “pine-oak” stands, usually composed of ponderosa pine and gambel oak, are used as habitat. *Ibid.* This type of MSO habitat may occur in the project area.

PROTECT AND RETAIN THE CHARACTER OF ROADLESS AREAS. The sale, cutting, and removal of trees in Colorado Roadless Areas (CRAs) is prohibited with some exceptions. One exception especially applicable to the Lower North South Project allows treatment which must:

focus on cutting and removing generally small diameter trees to create fuel conditions that modify fire behavior while retaining large trees to the maximum extent practical as appropriate to the forest type.

Colorado Roadless Rule (CRR) at 294.42(c)(1)(iii) and (d)(1)(ii). Projects of this type “are expected to be infrequent”. *Id.* at (d)(1)(ii).

As discussed in our earlier comments (section II C therein), it is important to retain large trees for wildlife habitat. It is also important to retain them for carbon storage (because larger trees store the most carbon), and to comply with Executive Order 14072. See 87 Fed Reg 24851 et seq., April 27, 2022.² Large and/or mature trees are also the most fire-resistant trees, underscoring their importance for forest health and resiliency. They also store the most carbon, which is needed to reduce climate change. See also our earlier comments at section II C for further discussion concerning older, larger trees.

PNPA II states that prescribed fire would be implemented in upper tier roadless areas, and that “[f]ireline construction will be necessary to control prescribed fire in both non-upper tier and upper tier roadless acres.” *Id.* at 15.

Fire control lines can become roads if they are constructed with bulldozers or other heavy equipment and not immediately obliterated after project completion. The control lines would likely be connected to temporary roads and existing system roads to facilitate access for workers. Many of the control lines could thus become open to public motor vehicle use after project completion, leading to motorized use in roadless areas. To minimize this possibility, any fire control lines must be constructed by hand. Any lines constructed by any method must be obliterated and revegetated as soon as possible after work is completed.

PNPA II at 15 states that “[t]emporary roads located within the roadless areas would be limited to 0.5 mile beyond the Community Protection Zone boundary”. However, the CRR states that any temporary roads shall be limited to locations “within the first one-half mile of the community

² The Forest Plan at III-12 requires that 10 percent or more of forested areas in each 5000 to 20,000-acre diversity unit be in old growth.

protection zone”. 36 CFR 294.43(c)(1)(vi); emphasis added. The Forest Service must clarify that roads will not be constructed in roadless areas outside the community protection zone.

PNPA II also states that any temporary roads would be “decommissioned”. Ibid. Decommissioning must be more than merely blocking the entrance to a road. The possible methods listed on PNPA II at 16 are good and should all be applied as applicable in each location. To minimize subsequent public motorized use of any roads that access roadless areas, we recommend that roads be completely obliterated and revegetated as soon as possible after work is completed. While the areas are revegetating, law enforcement patrols should be conducted regularly to thwart any illegal public motor vehicle use.

Note the following mandates for decommissioning roads under the CRR:

Design decommissioning to stabilize, restore, and revegetate unneeded roads to a more natural state to protect resources and enhance roadless area characteristics. Examples include obliteration, denial of use, elimination of travelway functionality, and removal of the road prism (restoration of the road corridor to the original contour and hydrologic function).

36 CFR 294.43(d)(2).

Roads to be decommissioned should include existing non-system roads, whether they are used for the project or not.

MINIMIZE GROUND DISTURBANCE. Revegetation of areas disturbed by heavy equipment may be difficult. Soils would be compacted or displaced, making it difficult for native vegetation to become established. Many portions of the project area have soils that are primarily comprised of decomposed granite. These soils lack organic matter, erode easily, and are quite unproductive. Ground disturbance should thus be minimized to avoid soil erosion and difficult revegetation. Minimizing ground disturbance would also reduce the introduction and spread of non-native vegetation, i. e. weeds.

LIMIT OR PROHIBIT MASTICATION. Under the proposed action, mastication would be used in parts of roadless areas (PNPA II at 15). I. e., trees would be cut and then ground up into chunks. Any material left on the ground would decay very slowly, preventing any ground vegetation from establishing and growing for a long time. The slow decay would also provide an acid pulse into the soil, retarding, if not preventing, the growth of anything other than conifer trees.

Mastication should generally not be implemented for the above reasons. If it is used, it must be limited to no more than 20 percent or so of any treatment unit, and the depth of chunks must be minimized. The same would apply for chipping if that method of disposal is used.

FOREST PLAN REQUIREMENTS. The Forest Plan (“Plan”) has numerous requirements that are applicable to the proposed project. It is not clear if the project would meet these provisions of the Plan.

As mentioned earlier, the Plan requires at least 10 percent of each diversity unit to be in old growth. *Id.* at III-12

Snags are very important for wildlife. The Plan requirements for snags are minimal; they must be met and preferably exceeded. See *id.* at III-12, -13.

Disturbed soils are to be revegetated by the first growing season after project completion. *Id.* at III-19. This might be difficult on steep slopes, especially since the project area has many areas of unproductive soils lacking organic matter. The Plan further states: “[l]imit intensive ground disturbing activities on unstable slopes and highly erodible sites”. *Id.* at III-72.

See our earlier comments at section V concerning soils in addition to discussion above in these comments.

The Plan requires that dense clumps of large ponderosa pine with interlocking crowns be retained. *Id.* at III-29. This is probably inadequate. See our previous comments at section IV, p. 8. It is not clear if even the weak Plan provision would be met with the project.

To maintain viable populations of all native species, habitat capability must be maintained to at least 40 percent of potential. *Id.* at III-32.

Parts of the project area are under management area (MA) 5B, where protection of big game winter range is emphasized. In these areas, 90 percent habitat effectiveness must be maintained during winter, and habitat capability must be at least 80 percent of potential year-round. *Id.* at III-153. There are also requirements for maintaining hiding cover and thermal cover. *Ibid.* Finally, it is especially important to close roads and limit human use in winter. See *id.* at III-159-160.

PREPARE AN ENVIRONMENTAL IMPACT STATEMENT. We again strongly implore that an EIS be prepared for this project and note that 16 U.S.C. § 6592c.(c) (from the Infrastructure, Investment, and Jobs Act) identifies an EIS as a potentially appropriate NEPA documentation for projects proposed under this statute. This statute also did not alter the well-known touchstones that drive the need for analysis in an EIS instead of an EA.

The proposed project spans over a hundred thousand acres and would result in actions over an unknown period of duration. There are undisclosed miles of roads that would be created for the project as well as no information as to the location of such disturbances. There are undisclosed locations and sizes of fuel breaks. There are thousands of acres in roadless forests that are proposed to be subjected to mechanical, manual, and/or prescribed fire treatments. Similarly, there are thousands of acres that have high erosion risk, i. e., 40-60% slopes that are proposed for the same types of actions. The impacts of these areas must be fully disclosed and analyzed, especially given that alleged purpose of the project is, in part, to protect watersheds. Steep

slopes, such as these are high risk of erosion and stand to have negative impacts on soil and watershed health, as we discussed in our previous comments.

In short, there is a dearth of information to inform the decisionmaker and the public about direct, indirect, and cumulative impacts, and there are numerous sensitive resources as well as federally listed species that would be impacted by the proposed project. It is thus inappropriate for the Forest Service to discount the significance of impacts and seek to approve the project with an EA/FONSI/DN.

The Forest Service should analyze significance in accordance with the NEPA Phase II framework, which states that agencies shall analyze the significance in several contexts, including proximity to unique or sensitive resources as well as the intensity of effects. There is no question that the wide breadth of actions proposed under this project would have sweeping impacts across over a hundred thousand acres. Informed and transparent agency decision making and a transparent public participation process are thus critically important for a project of this size, scale, and expected impacts on sensitive resources. It clearly warrants an EIS.

Should the agency decline to conduct an EIS, it is imperative that the EA be provided to the public allowing for public comment prior to approval. This is especially critical given that the information provided during this comment period fails to discuss the actual impacts of the proposed action and does not provide baseline information for the forests, waters, and other resources within the proposed action area.³ The agency needs to provide an analysis that explains how it is reaching conclusions about impacts, both positive and negative, from the proposed action and ensure this information is available to the public for review and comment.

MITIGATION AND COMPLIANCE WITH THE FOREST PLAN. The agency is required to mitigate foreseeable adverse environmental effects to the extent practicable, thus the Forest Service must analysis and disclose mitigation that would be deployed as part of this proposed action. Mitigation measures we propose for consideration include:

- Exclusion of Mexican spotted owl habitat, roadless forests, and stands with large, old, and/or mature trees, and forest types that have not evolved with frequent, low intensity fire (such as spruce-fir).
- A higher basal area retention and openings no larger than an acre.
- Restoration-focused activities that instead of proposing widespread, mechanical fuel reduction and fire breaks implement measures such as beaver dam analogue restoration.
- Prioritize and undertake activities within 30 meters around homes and infrastructure, including egresses and ingresses. Activities would focus on lower elevation areas dominated or formerly dominated by ponderosa pine, generally below 7,200 feet in elevation, where human fire suppression and other factors may have caused stands to become denser than they were historically.

³ Baseline info important for determining specific management actions and their potential impacts would include, but not be limited to: stand data on the composition and structure of forests versus historic conditions, presence or absence of various wildlife species, and a description of soil types and their erodibility. See further discussion below.

Additionally, the Forest Service needs to ensure that the proposal is consistent with the Plan. 16 U.S.C. § 6592c.(b)(3) states that “[a]ny authorized emergency action carried out under [this authority] on National Forest System land shall be conducted consistent with the applicable land and resource management plan”. As discussed above, it is unclear at best whether numerous Plan provisions will be met. The Agency must ensure that its proposal is consistent with the Plan.

BASELINE INFORMATION, HISTORICAL RANGE OF VARIATION, COMMON STAND EXAM DATA NEED TO BE PROVIDED. The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process, because an inadequate environmental baseline precludes an accurate assessment of project impacts. *Oregon Nat. Desert Ass’n v. Jewell*, 823 F.3d 1258 (9th Cir. 2016) (without accurate baseline information the agency cannot accurately assess project impacts); *N. Plains Resource Council v. Surface Transp. Board*, 668 F.3d 1067 (9th Cir. 2011) (reversing decision due to inadequate baseline information). Agencies are not allowed to conduct post-NEPA analysis of baseline information as this impedes NEPA’s goal of giving the public a role to play in the decisionmaking process. *Oregon Natural Desert Association v. Rose*, 921 F.3d 1185, 1192 (9th Cir. 2019). This information is required to be in the NEPA document, whether it be an EA or an EIS.

Current baseline information that must be disclosed includes but is not limited to: potentially affected water resources; wildlife populations and habitat quality and quantity (includes federally-listed species and state-listed species); existing road and trail densities and locations; site-specific information about stand conditions (especially species composition and structure versus historic conditions); soil types and their erodibility and mass wasting potential; and invasive and noxious weed prevalence. The historical range of variation for all habitat types that would be subjected to proposed activities need to be disclosed as well. We also request that common stand exam data be provided in the EA that depicts the diameter range of trees across the proposed project area in a meaningful way, such as for proposed treatment units. The Forest Service needs to disclose where there are large, old, and/or mature trees within the proposed project area. This baseline information is imperative because without these established conditions of the affected environment it is impossible for there to be an accurate assessment of project impacts.

CONCLUSION. The proposed project must be redesigned to retain roadless area character; maintain forested habitat, especially for MSO; and minimize ground disturbance. Spruce-fir stands must not be entered. Openings larger than an acre or so must not be created. Larger and older trees must be retained throughout the project area.

The public must have an opportunity to comment on the analysis of potential impacts from the project, preferably in an EIS. The NEPA document must provide important baseline information and a thorough analysis of potential impacts.

Sincerely,

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