



**LOS PADRES
FORESTWATCH**

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June 28, 2005

Supervisor Gloria Brown
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Re: Healthy Forest Projects – Notice of NEPA Violations

Dear Ms. Brown:

On behalf of Los Padres ForestWatch, the Center for Biological Diversity, and Californians for Alternatives to Toxics, we would like to share our concern over several ongoing and proposed “healthy forest” projects on the Los Padres National Forest. While we support the overall purpose of these projects to reduce fire hazards, we believe that there are not sufficient safeguards in place to adequately protect large trees, sensitive wildlife habitat, water quality, and cultural resources.

The Forest Service is currently evaluating nine projects authorizing forest thinning, vegetation clearing, and prescribed burning across nearly 50,000 acres of national forest land. We are concerned that such large-scale manipulation of forest vegetation will have significant impacts on wildlife, water quality, recreation, and cultural resources. These include:

Project Name	Acres	Status
Alamo Mountain II Fuel and Vegetation Treatment	12,960	DM Signed 9/04
Pine Mountain Club Project	1,860	Scoping Closed 11/04
Figueroa Mountain Project	667	Scoping Closed 3/05
Frazier Mountain Project	2,903	Scoping Closed 3/05
Organization Camps Project	700	Scoping Closed 5/05
McGill – Mt. Pinos Project	1,010	Scoping Closed 5/05
Pine Mountain Recreation Area Project	210	Scoping Closes 7/05
Santa Cruz Prescribed Burn	9,500	Scoping Upcoming
Tepusquet Prescribed Burn	20,000	Scoping Upcoming
TOTAL	49,810	

The Forest Service is undertaking these projects under the auspices of a categorical exclusion without conducting the appropriate level of environmental review as required under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* However, projects of this magnitude do not qualify for a categorical exclusion because they will result in significant impacts to large old-growth trees, sensitive species, and cultural resources that must be fully analyzed and mitigated in an EA or EIS. We also believe that the agency is improperly segmenting these projects into smaller components in order to avoid a finding of significance, in violation of NEPA.

By failing to adequately consider the environmental impacts of these projects, the Forest Service is missing an excellent opportunity to explore alternatives and enhance public involvement in the decision-making process. To date, the agency has provided minimal opportunities for public participation. If the agency proceeds to categorically exclude these projects from environmental review under NEPA, then current regulations do not allow for any further public participation.

Our wish is to bring forth our concerns now so that they can be addressed *before* decisions are made, not after, when litigation remains the only option for further public input. To that end, we hope that the agency proceeds with an Environmental Assessment (EA) that would comprehensively address all forest health projects on the Los Padres, analyze alternatives, increase public involvement, and reduce or eliminate impacts to forest resources.

I. Categorical Exclusion 6 Is Not Applicable

The Forest Service has stated its intent to exclude these projects from further environmental review under NEPA. The scoping letters do not state which categorical exclusion (CE) the agency intends to apply to these projects. However, if previous projects are any indication, the Forest Service will likely claim that CE 6 applies.

We believe that these projects do not qualify for exclusion under CE 6. This CE was enacted twenty years ago in 1985 and addresses the following “routine” projects:

Timber stand and/or wildlife habitat improvement activities which do not include the use of herbicides or do not require more than one mile of low standard road construction (Service level D, FSH 7709.56). Examples include but are not limited to:

- a. Girdling trees to create snags.
- b. Thinning or brush control to improve growth or to reduce fire hazard including the opening of an existing road to a dense timber stand.
- c. Prescribed burning to control understory hardwoods in stands of southern pine
- d. Prescribed burning to reduce natural fuel build-up and improve plant vigor.

The Forest Service’s mistaken reliance on CE 6 becomes apparent when compared to language in more recent CEs enacted under the Healthy Forest Initiative (HFI). For example, CE 10 was adopted in 2003 for the following projects:

Hazardous fuels reduction activities using prescribed fire, not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. Such activities:

- a. Shall be limited to areas:
 - (1) In the wildland-urban interface; or
 - (2) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface;
- b. Shall be identified through a collaborative framework as described in “A Collaborative Approach for Reducing Wildland Fire Risks to Communities and Environment 10-Year Comprehensive Strategy Implementation Plan”;
- c. Shall be conducted consistent with agency and Departmental procedures and applicable land and resource management plans;
- d. Shall not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness; and

- e. Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure.

This new CE 10 applies to virtually the same activities as those envisioned under CE 6. The only difference is that CE 10 is more restrictive – it has acreage limits, prohibits pesticides and permanent roads, and requires public collaboration. The Forest Service cannot avoid these more stringent requirements of CE 10 simply by claiming that CE 6 applies to every single project that falls under the rubric of “timber stand and/or wildlife habitat improvement.” Taking this approach, no project would ever qualify for CE 10, rendering meaningless the very clear and specific language in that exclusion. The Forest Service did not intend such a broad application of CE 6, and adopted CE 10 to specifically address these types of projects.

We also note that the Forest Service – on its web site, in public workshops, and elsewhere – has deemed these projects to fall under the HFI. The HFI was enacted in 2002. How can the Forest Service rely on CE 6, which was enacted two decades ago, for projects that fall under the three-year-old HFI? By associating the above-listed projects with the HFI, the Forest Service simply cannot rely on CE 6.

II. These Projects Will Have a Significant Effect on the Environment

We are alarmed that the Forest Service is conducting intensive forest thinning, vegetation clearing, and prescribed burning without conducting at least the minimum amount of environmental review provided for in an EA. Projects of this scope and duration cannot possibly be within a category of actions “which normally do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4.

We recognize that some elements of these projects would benefit forest health if performed properly. However, we also note that NEPA applies to *all* significant effects, even beneficial ones. Specifically, the regulations implementing NEPA state that “effects may also include those resulting from actions which may have both beneficial and detrimental effects, *even if on balance the agency believes that the effect will be beneficial.*” 40 C.F.R. § 1508.8 (emphasis added). Even though these projects are intended to benefit forest health, this does not absolve the Forest Service of its obligation to undertake a legally adequate environmental review.

We also point out that these projects, by their very nature, are designed to have a significant effect on the human environment. The language used in the scoping letters and proposed actions shows that these are not merely “routine” projects, but instead are projects designed to have a lasting and significant impact on forest resources by changing fire behavior, restoring forest health, and protecting at-risk communities.

In adopting CE 10, the Forest Service admitted that certain hazardous fuels projects have the potential for significant environmental effects and thus require preparation of an EA. The agency originally proposed to categorically exclude *all* hazardous fuel reduction projects, without regard for the size of the project areas. 67 Fed. Reg. 77038 (Dec. 16, 2002). However, after considering public comments and reviewing over 3,000 similar projects, the agency ultimately decided to impose strict acreage limitations in its final version of CE 10. 68 Fed. Reg. 33813 (June 5, 2003). **Thus, projects exceeding the strict limitations in CE 10 do have potentially significant effects and do require the preparation of an EA or EIS.**

We are concerned about the following potentially significant impacts caused by these projects. Many of these impacts qualify as “extraordinary circumstances” requiring further analysis:¹

- **Threatened, Endangered, Sensitive Species** – The project areas provide actual or suitable habitat for the California Condor, Arroyo Southwestern Toad, Southwestern Willow Flycatcher, California Spotted Owl, Northern Goshawk, Santa Barbara Jewelflower, Mt. Pinos Blue Grouse, Mt. Pinos Lodgepole Chipmunk, and other protected species. The presence of the Condor *alone* requires preparation of an EA or EIS due to the high risk of extinction facing this species.
- **Cultural and Sacred Sites** – These projects do not require avoidance of all cultural sites. In fact, the Frazier Mountain Proposed Action explicitly states that out of 20 sites in the project area, only three would need to be totally avoided, while ten “would require no protection measures” whatsoever. This constitutes a significant impact.
- **Large Old-Growth Trees** – The proposed actions allow the cutting of trees up to 30 inches in diameter (dbh). We are not aware of any science that supports cutting of such large trees to reduce fire risk. In fact, cutting of large trees is generally considered contrary to fuels reduction and forest restoration. Perry et al. (2004) state that “cutting larger trees in a stand is likely to create future problems and *should not be done if long-term landscape health is the primary objective.*” The overwhelming majority of thinning science suggests that removing trees larger than 12 inches can actually *increase* the risk of catastrophic fires by opening up the forest floor and encouraging excessive growth of understory vegetation.² The loss of old growth and an increase in fire risk is certainly a significant impact from a safety, recreation, and ecosystem perspective.
- **Road Construction** – The Forest Service claims that “no new roads would be built” and that “temporary travelways” will be used instead.³ The Forest Service cannot minimize the impacts of roads simply by dubbing them “temporary,” because even temporary roads can have significant impacts. “Accelerated surface erosion from roads is typically greatest within the first years following construction although in most situations sediment production remains elevated over the life of a road. Thus, even ‘temporary’ roads can have enduring aquatic impacts. Moreover, “the assumption that road obliteration or BMPs will offset the negative impacts of new road and landing construction and use is unsound science since road construction has immediate negative impacts and benefits of obliteration accrue slowly.” See Beschta, R.L. et al. 2004.⁴ The State Water Resources Control Board has identified fire

¹ The Forest Service Handbook states, “A proposed action may be categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA) only if there are no extraordinary circumstances related to the proposed action.”

² Mason, C.L., Ceder, K., Rogers, H., Bloxton, T., Connick, J., Lippke, B., McCarter, J., Zobrist, K. 2003. Investigation of alternative strategies for design, layout, and administration of fuel removal projects. Rural Technology Initiative. http://www.ruraltech.org/pubs/reports/fuel_removal .

³ Regardless of what the Forest Service calls them, these roads qualify as “new road construction” under the Forest Service’s own regulations. Specifically, “new road construction” is defined as “activity that results in the addition of forest classified *or temporary* road miles.” 36 C.F.R. § 212.1.

⁴ Beschta, R.L., Rhodes, J.J., Kauffman, J.B., Gresswell, R.E., Minshall, G.W., Karr, J.R., Perry, D.A., Hauer, F.R., Frissell, C.A., 2004. Postfire management on forested public lands of the Western USA. Conservation Biology, 18: 957-67.

management and road construction as the primary causes of water quality problems on the Los Padres.⁵

The Forest Service Handbook states that if “it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA.” FSH 1909.15.30.3.3. We believe that there will unquestionably be significant environmental effects caused by these projects, both individually and cumulatively. We therefore request that the Forest Service adhere to longstanding agency policy and prepare an EA.

III. The Projects Will Result in Significant Cumulative Impacts

The NEPA requires the Forest Service to analyze all impacts of these projects, including cumulative effects. See 40 C.F.R. §§ 1508.9(b), 1508.8. A cumulative impact is “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.” 40 C.F.R. § 1508.7.

We are concerned these projects will result in significant cumulative impacts, and that the agency has not conducted appropriate cumulative impacts analyses. For example, the Decision Memo for the Alamo Mountain project fails to include any analysis of cumulative impacts. This oversight is astonishing, as not only is it a clear violation of NEPA, but at the time the DM was signed, the Forest Service was analyzing at least three other “reasonably foreseeable future actions” with potential cumulative impacts – the Santa Cruz Prescribed Burn project, the Frazier Mountain project, and the Pine Mountain Club project. There is no mention, let alone any analysis, of any of these projects in the Alamo Mountain DM.

A recent report states that courts are most likely to invalidate agency decisions when they are based on inadequate cumulative impacts analyses.⁶ For example, in Blue Mountains Biodiversity Project v. Blackwood, the Ninth Circuit Court of Appeals ruled that five timber sales in the same watershed were “cumulative actions” that should have been considered in a single EIS. 161 F.3d 1208. Like the projects in the Blue Mountains case, the projects listed above are part of a comprehensive forest recovery strategy, and thus should be analyzed in a single environmental document.

Moreover, we note that the Forest Service cannot segment its “forest health” projects into smaller, individual projects in order to avoid a finding of significant impacts. “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). However, this is exactly what the Forest Service is doing with the projects listed above. Two of these projects – the McGill/Mt. Pinos and the Organizational Camps projects – are virtually adjacent to one another. By dividing the forest’s

⁵ State Water Resources Control Board and Environmental Protection Agency. 1994. *Water Quality Control Plan – Central Coast Basin*. Pg. IV-70.

⁶ Smith, Michael D. “Recent Trends in Cumulative Impact Case Law.” Paper presented at the National Association of Environmental Professionals Annual Conference, April 16-19, 2005. The paper states that “the most common challenge to the cumulative impacts analyses of agency NEPA documents was that the document contained an inadequate analysis of other past, present, and reasonably foreseeable future actions within the analysis area.... If agencies lost a court case, this was the most common reason for the Court to rule the cumulative impacts analysis inadequate, which they did in 13 of the 15 analysis (87%) they ruled as inadequate.”

hazardous fuel reduction program into smaller component parts, the Forest Service is improperly segmenting these projects in order to avoid a finding of significance under NEPA.

IV. The Forest Service Should Prepare an Environmental Assessment

In order to remedy several of the violations listed above, we recommend that the Forest Service proceed with all of the projects listed above under a single environmental analysis. Assuming the Forest Service would proceed under the Healthy Forest Restoration Act, we believe that such an approach would increase public involvement and understanding of the issues, result in a comprehensive environmental analysis that adequately accounts for cumulative impacts, and will ultimately result in a better project with fewer impacts.

This process would encourage development of community wildfire protection plans, and would encourage these communities to identify where protection is needed most in the wildland-urban interface. See 16 U.S.C. § 6513(b)(1). It would facilitate public meetings and encourage meaningful public participation during preparation of the project. See 16 U.S.C. §§ 6514(e),(f). There would be an opportunity for public comment during the preparation of any EA, and an informal predisciplinary review process to resolve any outstanding disputes. See 36 C.F.R. § 218.

It would also provide a means for the forest to achieve compliance with the administration's Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy Implementation Plan.

V. The Forest Service Should Increase Opportunities for Public Involvement

Reducing wildfire threat and restoring forest health require a unified effort and a collaborative approach that fosters public involvement by Tribal representatives, local governments, landowners and other stakeholders, and community-based groups.

The Forest Service's current approach of categorically excluding projects of this scope and magnitude effectively cuts the public out of the decision-making process. Public participation lies at the heart of the NEPA process. Regulations implementing NEPA emphasize the importance of involving the public, stating that agencies "must ensure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken*." 40 C.F.R. § 1500.1(b) (emphasis added).

In addition, "public scrutiny [is] *essential* to implementing NEPA" and "Federal agencies shall *to the fullest extent possible*...encourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. §§ 1500.1(b), 1500.2(c). Consistent with these broad mandates, the regulations require the Forest Service to "[m]ake *diligent* efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a).

The Forest Service has not adhered to these broad mandates with respect to the projects listed above. The agency has not been forthcoming in releasing anything about these projects other than the minimal details provided in the scoping letters and proposed actions. To try to better understand these projects, we have requested several underlying documents, including watershed

reports and biological evaluations, but your agency has refused to provide us with these until *after* the agency issues its final decisions, despite NEPA's mandate that this information be made available *before* decisions are made.⁷ Surprisingly, the agency has even refused to release existing documents that were incorporated by reference into the scoping letters.

The requirement that an agency involve the public in the NEPA process is not limited to proposals that require an EIS, but also applies to proposals that individually or cumulatively have the potential for significant impacts. See 40 C.F.R. § 1501.4(b); *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 970 (9th Cir. 2003) (“Th[e] wholesale neglect of the regulations’ mandatory inclusion of the public in the process results in procedural injury. Moreover, it undermines the very purpose of NEPA, which is to ‘ensure that federal agencies are informed of environmental consequences before making decisions and that the information is available to the public.’”) See also *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (holding that because “NEPA is primarily a procedural statute...agency action taken without observance of the procedure required by law will be set aside.”)

The scoping letters are correct in stating that projects proceeding under a CE are not subject to administrative appeal. Unfortunately, recent changes to the Forest Service appeal regulations have greatly reduced the public's ability to comment on, and participate in, decisions affecting our national forests. Under the current regulatory scheme, the only opportunity for public involvement is at the scoping stage. However, the scoping letters for these projects have shed little light on what the agency is actually proposing, and are couched in vague terms that are not helpful in assisting the public in providing the agency with meaningful comments.

Therefore, in projects like these where the agency affords minimal public involvement, and the public is not satisfied with the ultimate decision, then the public is left with no choice but to engage in costly litigation in an attempt to compel the agency to comply with laws designed to protect forest resources. Thus, the Forest Service has replaced a collaborative public involvement process with a costly litigation process that could actually increase instead of reduce administrative delays. Conducting a more detailed EA will provide an opportunity for the agency to maximize public involvement and improve the decision-making process.

VI. Our Recommendations

We hope that the Forest Service realizes the need and importance of conducting appropriate, and legally adequate, environmental review of existing and future “forest health” projects. Our goal in writing this letter is to work with the agency to address our concerns early in the process. By doing so, it is our hope that existing and future “forest health” projects are improved so that they result in fewer impacts to forest resources.

To this end, we recommend that the Forest Service take the following actions:

⁷ In response to our request under the Freedom of Information Act dated April 15, 2005 for various reports regarding the Figueroa and Frazier Mountain Projects, the agency responded that the requested reports “are not finalized at this time. Upon completion of the project, final specialist reports will be forwarded to the requestor.” Moreover, several scoping letters refer to “Specific BMPs related to this project are identified in the project file, Appendix A of the Watershed Specialist Report.” Even though the proposed action referred to this document as “an integrated part of the proposed action” and incorporated it by reference, your agency refused to make it available to the public until *after* project completion.

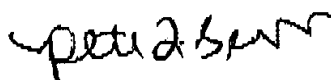
1. Provide for increased public input and more thorough and transparent environmental review by proceeding with a comprehensive EA or EIS for all projects;
2. Prohibit thinning of any trees greater than 12" dbh, since scientific evidence shows that thinning trees any larger than this could actually increase fire hazards and will not achieve project objectives;
3. Provide adequate protections for all endangered, threatened, and sensitive species potentially affected by these projects;
4. Enhance community input on these proposals through a collaborative process involving all relevant stakeholders that is consistent with the framework in the 10-Year Comprehensive Strategy Implementation Plan;
5. Require vehicles to remain on existing roads; prohibit any new road construction, temporary or otherwise, especially in roadless areas;
6. Evaluate and implement alternatives for control of annosus root rot disease, including non-borax options and differing application rates/criteria. Include project-specific borax risk analyses (human health/safety and environmental effects) as would be done for any pesticide used within the forest; and
7. Prohibit any disturbance of Native American cultural or sacred sites, and require monitors to be present at all times during ground-disturbing activities.

We look forward to working with the Forest Service to see that these recommendations are implemented in a way that protects communities from wildfires, enhances forest health, and provides adequate protections for forest resources. Not only would this be legally prudent, but it would also give the Forest Service an opportunity to explain the use of fire as a management tool, while at the same time giving the public an opportunity to contribute potentially valuable information to help you improve the projects and reduce impacts.


Sincerely,



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