UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
UNITED STATES FOREST SERVICE

Before the Regional Forester
Eastern Region

In re Appeal of the Decision Notice And Finding of No Significant Impact for the Upper Greenbrier North Project USDA Forest Service Greenbrier Ranger District Monongahela National Forest Pocahontas County West Virginia	)	
	)	Appeal No. _____
FRIENDS OF BLACKWATER Appellant	)	

NOTICE OF APPEAL AND STATEMENT OF REASONS

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NOTICE OF APPEAL

Pursuant to 36 C.F.R. Part 215, the Friends of Blackwater (FOB) (Appellant) hereby appeals the Decision Notice (DN) and Finding of No Significant Impact (FONSI) for the Upper Greenbrier North (UGN) Project on the Greenbrier Ranger District of the Monongahela National Forest (MNF), USDA Forest Service, in Pocahontas County, West Virginia. The Responsible Official is Jack Tribble, District Ranger for the Greenbrier Ranger District of the Monongahela National Forest who signed the decision on March 5, 2012. The legal notice was published in the newspaper of record, the Pocahontas Times on March 8, 2012, therefore, this appeal is timely under 36 C.F.R. § 215.15.

For the reasons explained below, the Decision Notice (DN) and Finding of No Significant Impact (FONSI) violate the National Environmental Policy Act (NEPA), the Administrative Procedures Act (APA), the Endangered Species Act (ESA), and Forest Service policy as set forth in the agency's Handbook, Manual and other guidance.

The Appellant participates actively in management of the MNF. Appellant specifically participated in the public process surrounding the Upper Greenbrier North Project, including submitting comments during the scoping and 30-day comment periods and discussing the project at length with Forest Service and U.S. Fish and Wildlife Service (FWS) officials.

Friends of Blackwater (FOB) is a not-for-profit West Virginia membership organization devoted to preserving wilderness and wildlife; protecting West Virginia's forests, parks, rivers, wild lands, unique habitats and endangered species; and fostering a West Virginia land preservation ethic. FOB has over 10,000 members and supporters. FOB also has a long-standing interest in the West Virginia northern flying squirrel, Glaucomys sabrinus fuscus. FOB has supported studies of the flying squirrel; staff of FOB has communicated with scientists from a number of states and Canada on the squirrel's natural history and status and collected a large

library of information of this squirrel. FOB also works to protect West Virginia's endangered bats both on and off the Monongahela National Forest. We educate our 10,000 members and supporters about these issues through newsletters, our website and comments to the press.

Appellant's members and supporters are very familiar with the Upper Greenbrier North Project area and with the Monongahela National Forest. Appellant's members and supporters use and appreciate these lands for their scenic beauty and for hiking, camping, hunting, fishing, mountain biking, watching birds and viewing wildflowers and other flora and fauna, photography, spiritual renewal, and other outdoor recreational and educational activities. These lands are also valued for the role they play in water supply, flood control and other ecological functions that play out over the larger landscape. The Upper Greenbrier North Project appealed here would directly and significantly affect Appellant's members and supporters because it would degrade all of these values and uses.

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STATEMENT OF REASONS

I. Introduction

The Upper Greenbrier North Project has suffered from the beginning from procedural mistakes which have resulted in a very confusing process, set of documents, project details, project acreage and a flawed and arbitrary and capricious decision. The public has not been given the opportunity for meaningful public involvement under NEPA. The lack of response to substantive comments at any stage of the process has been a part of this. So too was the decision not to engage in formal consultation with the FWS until after the 30-day comment period had closed, despite claims in the EA that this work had been done and despite the fact that much of the project would have a significant adverse effect on a listed species, the West Virginia northern flying squirrel.

Overall, site-specific locations, correct and accurate acreage numbers and the significance of impacts for UGN Project activities have not been disclosed, rendering the DN/FONSI arbitrary and capricious.

In the pages that follow we detail our specific concerns and the violations of law and policy that we believe the Forest Service has committed in reaching a final decision approving the Upper Greenbrier North Project.

II. The Forest Service Must Prepare an Environmental Impact Statement to Address the Significance of Effects under NEPA

Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) (40 CFR Parts 1500-1508) contain a number of requirements to insure that federal agencies meet their obligations to comply with procedures and achieve the goals of the Act. The Code of Federal Regulations at 36 CFR 220 contains the Forest Service's procedures for complying with both the NEPA and CEQ's regulations. We believe the Forest Service has failed to comply with a number of these requirements and is in violation of the NEPA. The various ways in which the agency has done so are detailed below.

A. An EIS Should Have Been Prepared and Failing That Should Now Be Prepared

We believe the agency should have prepared an EIS. Now that a Final EA has been prepared we believe it is clear that a FONSI should not have been issued and an EIS must be prepared.

Forest Service NEPA regulations at 36 CFR 220.6(c) state,

> "*Scoping*. If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action **may** have a significant environmental effect, prepare an EIS. (emphasis added)

We believe the responsible official should have determined after scoping, and certainly after the 30-day comment report was issued, that preparation of an EIS was warranted. This is based on the size of the project area, the scale and intensity of the project activities, consideration of the significance factors under the CEQ regulations and their role in defining the severity of impacts, the timeframe the agency identified to accomplish these activities and the overall cost for these activities when viewed through the lens of typical MNF budgets.

In order to determine "significance", it is necessary to turn to the CEQ Regulations at 40 CFR 1508.27. Significance under NEPA requires consideration of both context and intensity. In the case of context, "significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant." 40 CFR 1508.27(a). Intensity refers to the severity of the impact.

In the case of the UGN Project, at 69,800 acres, this project would be one of, if not the biggest project(s) ever on the MNF. Other aspects of the project speak to its significance in terms of context and intensity:

- At 69,600 national forest system (NFS) acres, this project area constitutes over 7 ½ % of the entire MNF. The entire project area includes 85,400 acres.
- The UGN Project would occur across five 6th HUC level watersheds.
- Vegetation treatments are proposed in approximately 261 units across 25 different compartments.
- Commercial timber harvest in excess of tens of millions of board feet (mmbf) on thousands of acres is proposed. To further complicate matters, the estimated volume and the exact number of acres involved are with not disclosed at all or are inaccurately calculated as we discuss below.
- Herbicide treatments are proposed for thousands of acres, which are again inaccurately calculated and disclosed..
- These projects are proposed to be carried out over a 10-12 year period, though given the lack of available federal funding and timing considerations for various activities, this timeline is likely to be much longer. (The Forest Service can't possibly disclose impacts across this timeframe as required under NEPA, a topic discussed in more detail below.)
- The project would cost almost $24 million dollars, money unlikely to be appropriated to the Forest for this one project set even over the course of a number of years.

(Exact budget figures are not available, as the Final EA does not reflect the actual alternative chosen, Modified 5; an issue which is also detailed below.)

The fact that the Forest didn't even list the proposed activities in the EA itself, but instead disclosed them in a series of 8 Appendices in order to avoid confusion given the large number of actions, speaks volumes about the size and intensity of this project. We note too that Forest Service NEPA regulations at 36 CFR 220.7(b)(3)(iii) require that the MNF, "shall describe the impacts of the proposed action and any alternatives in terms of context and intensity as described in the definition of "significantly" at 40 CFR 1508.27" when preparing an EA. This does not appear to have been done, except belatedly, and we believe incorrectly, in the DN/FONSI.

Several other elements of the CEQ regulations under intensity come into play. 40 CFR 1508.27(b) lists ten factors that should be considered in evaluating intensity. Almost all of them pertain to the UGN Project and should have been considered and disclosed in evaluating the significance of the proposed action and whether to prepare an EIS. Their examination in the decision notice (DN), after considerable changes to the UGN Project in light of a number of these factors, circumvents NEPA requirements as they should have been carried out. Examination of a few of them is instructive.

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.

This certainly applies to the UGN Project. The Forest Service is arguing that it can create a beneficial effect (increase in the red spruce vegetative component, improvement in stand conditions, etc.), while acknowledging activities to create this habitat will be adverse (an increase in stream sedimentation from forest roads and an increase in nonnative invasive species due to these same project activities).

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique and unknown risks.

A project of this size, scale, complexity and duration is new to this forest. As we discuss below, given Forest Service budgeting procedures and funding trends, the MNF is unlikely to be able to implement these project activities for many decades, let alone the 10 years they stipulate are needed. The effects of herbicide use across such an acreage is unknown and many of these herbicides have been found to have adverse effects on aquatic life.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

> The proposed activities may adversely affect the WVNFS, the Indiana bat and the Virginia big-eared bat and their habitats, as well as a number of regionally sensitive bats that are now candidates for listing. Had the Forest Service followed its own procedures under NEPA and the ESA, the agency would have identified the need for an EIS based on the adverse effect on flying squirrels and listed bats, would have initiated formal consultation with the FWS under the ESA and would have afforded the public the opportunity to provide meaningful comment by being able to read and analyze the FWS Biological Opinion which significantly influenced the decision made. We question the extent to which the Forest Service even incorporated the FWS BO given the couple of days between its receipt and the Forest Service decision.
>
> There also exists new information, which we detail below, wherein the FWS and bat experts have significantly raised the mortality figures for White Nose Syndrome (WNS) in bats, calling into question the analysis of cumulative effects in the UGN Project.

We believe the scope, scale and impacts of the proposed project are such that an environmental impact statement (EIS) should have been prepared. Given the information presented above and impacts described below, we believe the responsible official had the information necessary to determine that the proposed action may have a significant environmental effect at the conclusion of the scoping process. That the project then increased so much in size and scope between the end of scoping and the EA issuance makes this failure to prepare an EIS all the more problematic.

Forest Service regulations allow the agency to prepare an EA before preparing an EIS:

> "An environmental assessment (EA) shall be prepared for proposals as described in §220.4(a) that are not categorically excluded from documentation (§220.6) and for which the need of an EIS has not been determined (§220.5)."
>
> 36 CFR 220.7(a)

Now that the Final EA has been completed (and does not actually reflect or analyze the decision made), we believe it is clear for the reasons stated in this appeal and the impacts addressed below that a Finding of No Significant Impact (FONSI) should not have been issued and the need for an EIS has been determined and must be prepared.

B. The EA is No Substitute for an EIS

The MNF cannot argue that the EA because of its length is a substitute for an EIS. In fact, its length and complexity should have been a sign to Forest staff that they should have more thoroughly investigated the need for an EIS under 36 CFR 220.6(c). CEQ has instructed that "[i]n most cases…a lengthy EA indicates that an EIS is needed" because at minimum "it is extremely difficult to determine whether the proposal could have significant environmental effects." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations. "An EA and an EIS serve very different purposes" (Sierra Club, 769 F.2d at 875). The courts have in fact held that an EA cannot be accepted "as a *substitute* for an EIS" regardless of the "time, effort and analysis that went into [the EA's] production." Id. at 875 (emphasis in original). EAs help decisionmakers determine whether to prepare an EIS. Consistent with their different legal functions, there are much more stringent requirements on the preparation of EISs. We believe the Forest Service must prepare an EIS in this case.

C. The Timeframe of the Project Is Too Long under NEPA and Direct, Indirect and Cumulative Impacts Cannot Be Known or Disclosed

The Forest Service is proposing a large number of activities that would take place over many years; in fact, too many years. This timeframe is far too long for the agency to adequately analyze and disclose the cumulative impacts of this project. The UGN Project EA states that the projects would take 10-12 years to implement and that many of the activities need to be staged in relationship to each other. The DN reveals a 10-year period is necessary. DN at 19. First of all, not enough information is provided to understand exactly what these staging needs would do to the implementation schedule. Secondly, as addressed in more detail below, the agency failed to take the "hard look" required under NEPA to adequately analyze or disclose whether a ten-year implementation schedule would even be possible in light of agency and Congressional budget procedures and budget history.

What we do know is that even a 10-12 year schedule is too long to adequately disclose impacts. For instance, there is no way that the Forest Service can do species surveys now and trust that they would be accurate for the next decade. In fact we already know that the disclosure of impacts is inaccurate because the agency disclosed that after they conducted field survey in 2008 the Shriver's frilly orchid was described and instead of resurveying for this Regional Foresters Sensitive Species (RFSS) they choose to disclose in the EA all the ways it might be wiped out by the project activities since they have not gone back to look for it. Final EA at 88. This causes us to question how the agency is preventing a trend toward listing under the ESA.

It is also clear from the project description that the MNF intends that this decision cover both stages of a shelterwood harvest despite the fact that these treatments are by their very nature a number of years apart. The Forest Service seems to describe this as 4-5 years (it's a bit unclear) but our experience with the agency's ability to finance and return for the second stage entry is that it could take many times that number before the agency finishes the second stage. Even

leaving aside the shelterwood harvests, the sheer volume of timber harvest involved, and the preparatory activities described make it likely that a number of these sales wouldn't even be proposed until well into the 10-12 year time period. Add in the fact that timber sales can legally be extended up to 10 years and the possibility exists that these project activities could still be being implemented two decades from now. That is longer than the fifteen year period covered by a Forest Plan, and far too long to adequately disclose effects.

Finally, the sheer scale and cost of the proposed project almost guarantees that the effects will be inadequately disclosed over the life of the project. There are many activities in the UGN Project which we support (road decommissioning and aquatic stream restoration), but given current federal budget constraints and the likely size of the budget on the MNF over the next 10-12 years we believe there is very little likelihood that the UGN Project would ever be implemented over that time period, or even one much longer. We also note that the costs of preparing NEPA and conducting field surveys have not been included in the project budget calculations. (This both understates the costs and removes the excuse that NEPA costs drive up project implementation.)

All of this results in the approval of activities many of which in the later stages of the project will almost certainly be based on stale scientific information and have adverse effects. The courts have found that, "Reliance on stale scientific evidence is sufficient to require re-examination of an EIS. Seattle Audubon Society v. Espy, 998 F.2d 699, 704-705 (9th Cir.1993)." City of Carmel-by-the-Sea v. U.S. Dept of Transportation, 95 F.3d 892, 900 (9th Cir. 1995). Lands Council v. Powell, 379 F.3d 738 (9th Cir. 2004), as amended (9th Cir. 01/24/2005) No. 03-35640 - 6-year-old species survey not good enough -- "stale habitat data" -- citing SAS.

As the CEQ has stated:

> "As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1509.2 compel preparation of an EIS supplement.
>
> If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed ... impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal."
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> 46 Fed. Reg 18026, 18036 (March 23, 1981).

Obviously, this is even more true of an EIS that is over 10 years old. *See Oregon Natural Resources Council Action v. U.S. Forest Service* , 445 F. Supp. 2d 1211, 1232 (D. Or. 2006)

(finding this provision particularly applicable when dealing with EAs over ten years old, *citing, inter alia*, the CEQ language above)*; see also Portland Audubon Society v. Espy*, 998 F.2d 699, 70304 (9th Cir. 1993) (overturning decision which "rests on stale scientific evidence").

Decisions that rest on stale scientific information are one thing. In the case of the UGN Project, the agency is proposing from the beginning to create a project where the information will be known to be out of date halfway through the proposed implementation timeline. This is unacceptable under NEPA and must be corrected. Forest Service regulations and directives provide direction on what to do when new information becomes apparent. These regulations and directives do not contemplate starting out a project knowing that the analysis of effects will soon be invalid.

Questions of staleness are even more of a problem when relying on an EA that was never prepared to the rigor required of an EIS. We strongly urge the Forest Service to review the UGN Project based on a realistic assessment of their likely budget, timing considerations and what can reasonably be accomplished over a shorter time period than 10-12 years and recalibrate the project proposal accordingly. A decision under NEPA can only be thought of as "ripe" when there is a reasonable expectation that the project can be implemented. Anything less certainly violates the letter and spirit of NEPA.

III. The Final Environmental Assessment (Final EA), DN and FONSI are Insufficient under NEPA, Rendering the Decision Arbitrary and Capricious

The UGN Project EA is not a programmatic document. Therefore, NEPA requires the site-specific analysis and disclosure of direct, indirect and cumulative impacts and their significance in order to determine if an EIS should be prepared. In the case of the Final EA, DN and FONSI there are substantial problems and inconsistencies with the documentation prepared such that it is almost impossible to understand exactly what is proposed and approved and where this is so. These problems cumulatively fail to adequately meet the requirements of NEPA and result in an arbitrary and capricious decision. Each of the problems is detailed below.

A. The Final EA Was Not Updated to Reflect the Decision Made

The DN discloses, "Because my Selected Alternative includes changes from the Alternative 5 that was analyzed in the UGN EA, I want to be clear about the activities and modifications to Alternative 5 that will be implemented, and so they are described in detail below." DN at 9. Unfortunately, the explanation that follows that statement is anything but clear as we discuss below.

Even more problematic, the Final EA was never updated to reflect the decision made. The Final EA is listed as having been written in March, 2012. With a March 5th decision date, and no external deadline keeping the Forest Service from ensuring the analysis was clearly and

accurately presented, the details and any additional required analysis (see more on this below) for Alternative 5 Modified should have been disclosed in the Final EA. Without this data, the Final EA is rendered insufficient in disclosing the impacts of the project.

Two problems result. The first is the potential for significant error and violation of the Endangered Species Act (ESA). Should any Forest Service staff rely on the Final EA in setting up timber sale contracts, service contracts or other project elements, they will be using a document that still includes units that were dropped from the decision in order to protect the West Virginia northern flying squirrel (WVNFS or flying squirrel). This could result in harm or take of listed species well outside of the terms and conditions of the U.S. Fish and Wildlife Service (FWS) Biological Opinion issued in March of 2012, and well outside of any incidental take permit the agency has issued to the Forest Service. The chances of this egregious error happening are increased by the fact that the numerous appendices detailing all the project activities were never corrected and presented in the DN, so there exists no updated or corrected list. And the appendices and tables in the Final EA still include these dropped units.

Secondly, the fact that the Final EA was not updated to accurately present the details of the chosen alternative, Modified 5, means that the agency and the public must rely on the DN, and the DN alone, to understand what activities have been approved and where. Unfortunately, the numbers presented in the DN don't add up and significantly increase the confusion. We turn to this discussion now.

B. The Project Acres in the DN and FONSI Don't Add Up to the Decision Stated

The DN discloses,

> With this decision 2,712 acres will be harvested commercially. This includes the restoration cuts for spruce, hardwood, and spruce-hardwood prescriptions. An estimated 3,550 acres will be non-commercially treated for stand improvement. This includes mechanical thinning using chainsaws and herbicide spraying. . . .The breakdown of each activity is listed below.
>
> DN at 9.

Unfortunately, the breakdown then presented does not add up to the numbers above. And since the Final EA was never updated to reflect the Modified 5 Alternative, and no additional compartment and stand tables were included in the DN, there exists no documented source to understand exactly what has been approved and where said activities would occur.

i. Timber Harvest

The numbers of acres of timber harvest do not add up; more simply, the math is incorrect. Accordingly, we cannot determine which acres are approved for harvest given the explanation

and faulty math in the DN, and the lack of updated tables and charts that would describe the decision in detail. The decision says that 2,712 acres of timber will be harvested commercially. But the narrative and table that follows describe only 2,308 acres of commercial harvest. There are 591 acres of commercial spruce restoration. DN at 9. There are 1,717 acres of commercial timber harvest and thinning – hardwood emphasis. Table 2 in DN at 10. (The 1,717 acres include 186 acres of clearcut, conventional method; 278 acres clearcut, helicopter method; 937 acres shelterwood, conventional method; and 316 acres commercial thinning in hardwood stands; all from Table 2.) These numbers equal 2,308 acres. If the decision is approving 2,712 acres, as it clearly states, then 404 acres of harvest are missing from the DN and have not been described or disclosed sufficiently to determine which stands and compartments they are.

Similar problems occur with the number of acres of non-commercial treatment. The DN approves "an estimated 3,550 acres" of con-commercial stand improvement by mechanical or herbicide treatment. DN at 9. But the narrative that follows shows far more non-commercial treatment proposed (or approved?; it's not clear which numbers matter). The DN at pages 10-11 details 4,751 acres of non-commercial spruce restoration treatments; 2,125 acres of non-commercial timber and wildlife stand improvement – hardwood emphasis; and 46 acres of herbicide work related to nonnative invasive species. That adds up to 6,922 acres, well over the 3,550 acres approved. In addition, Table 2 includes 1,810 acres of herbicide treatment. These presumably are related to the commercial activity, but no explanation is provided. Herbicide treatment is not a commercial activity (it does not generate revenues), and the description of the non-commercial treatments includes herbicide application, so it is unclear how these 1,810 acres should be counted. If they are added to the 6,922 acres described, the result would be 8,732 acres of non-commercial treatment, well over 5,000 acres more than the decision states.

And since the appendices in the Final EA that list the compartment and stand locations for the proposed activities have not been updated to include the actual decision, there exists no publically disclosed and available method of determining with any reasonable certainty what activities have been approved and where. This must be corrected.

ii. Herbicide Treatments

Problems determining what activities are approved where occur when examining the issue of herbicide application. The DN states, "Methods include mechanical TSI with chainsaws in regeneration units less than 15 years old and chemical TSI with herbicides in regeneration units over 15 years old (879 acres mechanical and 1,246 acres herbicides)." DN at 11.

But these numbers are incorrect as well. The 879 acres mechanical and 1,246 acres herbicides are from Alternative 5, not the modified Alternative 5 of the decision. If units less than 15 years old are to be treated mechanically (as the DN repeatedly states), then an examination of stand ages in Appendix B in the Final EA reveals that 389 acres should be added to the mechanical treatment list and a like number of acres subtracted from the chemical treatment list. The correct numbers should then be 1,268 acres of mechanical treatment and 857

acres of chemical treatment. This then affects the cost of the project; likely as well the timing of activities, none of which have been disclosed.

Here again, the chance of error in project implementation is great because the appendices have not been updated to reflect the selected alternative. The appendices are the only listing of project activities since they were not listed in Chapter 2 of the EA where they are normally presented. Staff working on project implementation will have to modify Appendix B in light of the stand ages and the "under 15 years / over 15 years" direction provided in the DN in order to correctly implement the decision. The chance of error is too great. The Final EA must be updated to reflect the modified 5 alternative decision or failing that the decision itself must provide more exact (and accurate) detail.

C. The Final EA and the Modifications to Alternative 5 Don't Add Up to the Decision Made in the DN/FONSI

Another set of numbers is obtained when applying the modifications outlined in the DN (at pages 7-8) to the numbers as outlined in Alternative 5 of the Final EA (Appendix A). When the modifications are applied, the sum total for Commercial Timber Harvest now becomes 2,681 acres. This is obviously a problem both for the accuracy of the decision disclosed in the DN/FONSI and the assurance that the right units will have the correct treatments applied should the UGN Project go forward.

Overall, the calculations presented here and above result in three distinct, but not matching, totals for Commercial Timber Harvest (the two sets of numbers above and the new set detailed here). There are multiple discrepancies that need to be cleared up before anyone can be certain exactly what would be harvested, where it would be harvested and how it would be harvested. We present this information to show that correcting the problems in the DN is not as simple as applying the specific modifications to Alternative 5.

The discrepancies between Alternative 5 with the modifications applied, and the UGN decision are outlined in the table below.

Harvest Type	**From DN page 10-11**	**From EA with modifications applied**	**Discrepancy**
Commercial Spruce Restoration	591	910	319
Clearcut with reserve trees, conventional method	186	240	54
Clearcut with reserve trees, helicopter method	278	260	-18
Shelterwood, conventional method	937	955	18
Commercial thinning in hardwood stands	316	316	0
TOTAL ACREAGE	2308	2681	373

Table 1.

D. The Modified Alternative 5 and the Range of Analysis Conducted in the EA: The Requirements of NEPA Have Not Been Met

The DN/FONSI explains that the Final EA was not updated to include the alternative selected because "Many of the modifications to Alternative 5 were developed after consultation with the U.S. Fish and Wildlife Service and U.S. Forest Service Research, and they were designed to reduce the overall potential impacts to WVNFS or its habitat, as well as to soil and water resources. Therefore, I find the effects of clarifying and modifying this alternative are within the scope of the EA analysis and the predicted impacts of all the alternatives considered in detail." DN/FONSI at 7.

First of all, as we detail above, the effect of not updating the Final EA in light of all the modifications to alternative 5 have resulted in a decision where there is no clear and unambiguous listing of the exact project activities approved. The numerous math errors and inconsistencies make it almost impossible to determine that the modified alternative is within the scope of the EA analysis and the predicted impacts.

Secondly, NEPA requires site-specific analysis of the direct, indirect and cumulative impacts of the proposed action and alternatives. Simply creating a range of impacts and saying that the new alternative fits somewhere (as yet undetermined) within that range is insufficient.

The fundamental purpose of preparing an EA or EIS is to ensure that the agency and the public are fully aware of the potential environmental impacts of a proposed action before the agency decides how to proceed. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). An environmental document such as an EA or EIS must contain "sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a *'hard look'* at the environmental factors, and to make a reasoned decision." Izaak Walton League v. Marsh, 655 F.2d 346, 371 (D.C. Cir. 1981) (emphasis added).

NEPA mandates that federal agencies take a "hard look at a decision's environmental consequences." California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). Specifically, an EA or EIS must assess the direct, indirect, and cumulative environmental impacts of the proposed action, performing an analysis commensurate with the scale of the action at issue. See, e.g., id.; 40 C.F.R. §§ 1502.2 (b), 1508.8. The EIS must "contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences." California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." Neighbors of Cuddy Mt. v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998).

In the case of the Upper Greenbrier North Project, the Forest Service failed to take the "hard look" required under NEPA and failed to adequately analyze and disclose the direct, indirect and cumulative effects of the Project. In the case of the economic analysis we do not believe the agency took the hard look required under NEPA and failed to analyze or disclose whether Forest Service budget procedures and funding even make the UGN Project possible as proposed. We examine this issue and others in more detail below.

E. There is No Response to Comments Section as Required under Forest Service Regulations, NEPA, and the APA

The Forest Service notice-comment-appeal regulations provide that "The Responsible Official shall consider all substantive written and oral comments …" 36 CFR § 215.6(b)(1). And "At a minimum, an appeal must include the following: … (8) Why the appellant believes the Responsible Official's decision failed to consider the substantive comments; …" 36 CFR § 215.14 (b).

In order to assure compliance with the requirements to "consider" comments, and if the public can base their appeal on the Forest Service's failure to consider comments, it is only logical that the Forest Service must document in writing its consideration of comments. Without a record of the consideration of comments, administrative and judicial review of these requirements would be impossible rendering these requirements meaningless.

NEPA also requires federal agencies to respond to comments on NEPA documents. "An agency preparing a final environmental impact statement shall assess and consider comments

both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. …" 40 CFR 1503.4(a). This section is addressed to EISs, but the CEQ regs are in fact applicable to EAs as well. "These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements)." 40 CFR 1500.3.

In City of Davis v. Coleman, 521 F.2d 661 (9th Cit., 1975) the court said that in a statute requiring the social and environmental effects of projects be considered — "considered means to investigate and analyze; 'consideration' encompasses an affirmative duty to investigate and compile data, and a further duty to incorporate that data into a detailed reasoned analysis…"

Finally, independent of NEPA, the APA also requires agencies to adequately respond to all significant public comment as a "fundamental tenet of administrative law" *NRDC v. EPA,* 859 F.2d 156, 188 (D.C. Cir. 1988); *see also ACLU v. FCC,* 823 F.2d 1554, 1581 (D.C. Cir. 1987); *Sierra Club v. EPA,* 353 F.3d 976, 986 (D.C. Cir. 2004); *Am. Iron & Steel Inst. V. EPA,* 115 F.3d 979, 1005 (D.C. Cir. 1997). This principle ensures that agencies consider all material points raised by the public. *NRDC,* 859 F.2d at 188. Failure to respond to public comment can be grounds for invalidation of a decision as arbitrary and capricious. *Id.* A comment is "significant" when "if true, [it] raise[s] points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *Home Box Office Inc. v. FCC,* 567 F.2d 9, 35, n.58 (D.C. Cir. 1977). The comment must "step over a threshold requirement of materiality" by explaining why the agency's error is relevant and not "merely stat[ing] that a particular mistake was made." *Portland Cement Ass'n v. Ruckelshaus,* 486 F2d 375, 394 (D.C.Cir. 1973).

As to why we believe the Responsible Official's decision failed to consider the substantive comments; …" [36 CFR § 215.14 (b)], the UGN Final EA does not contain any responses to the comments submitted, unlike most other EAs in Region 9 and across the Forest Service. Nor did the 30-day comment EA contain any response to comments. While one can guess that our comments may have had an impact on the decision or actions taken (likely in pushing the agency to engage in formal consultation with the FWS under the ESA), the Forest Service has not in this case provided any evidence that our substantive comments were considered. This must be corrected.

IV. Certain Activities within the Upper Greenbrier North Project Cannot Be Implemented without Regional Forester Approval; the Responsible Official Cannot Approve Said Activities

The UGN Project was signed by District Ranger Jack Tribble. But the UGN Project contains project activities for which only the Regional Forester has authority to decide. The DN and FONSI acknowledge this,

> A small portion of the roads to be maintained or decommissioned are in the 2001 East Fork Greenbrier Inventoried Roadless Area (IRA). Road maintenance and decommissioning would be consistent with the Roadless Area Conservation Rule (RACR), which specifically allows road maintenance and prohibits most road construction or reconstruction in IRAs to improve or maintain watershed conditions. The proposed roads would not be maintained or decommissioned unless or until these activities are approved by the Regional Forester or allowed by the Forest Service following RACR litigation resolution.
>
> Some of the large woody debris recruitment and riparian restoration would occur within the 2001 East Fork Greenbrier IRA to provide for ecosystem restoration. Ecosystem restoration activities are consistent with the RACR, and these would not involve road construction or timber harvest. These activities would not be implemented unless or until they are approved by the Regional Forester or allowed by the Forest Service following RACR litigation resolution.
>
> DN/FONSI at 11-12.

The RACR litigation has been resolved. It is clear that only the Regional Forester can approve activities in an IRA. The Responsible Official in this case has left this issue hanging in a sense: seeming to approve the activities pending decision by the Regional Forester, but then indicating nothing about how this needed decision might move forward or in what format. We believe these activities either need to be dropped so the UGN decision is wholly one which the District Ranger can make or that the Regional Forester decision be moved forward in the EIS which we argue above must be prepared.

V. The Upper Greenbrier North Project Fails to Comply with NEPA: Economic Effects

The Forest Service presented a number of cost and revenue projections in the Final EA, but failed to take the "hard look" required under NEPA. A "hard look" would have analyzed and disclosed a) the project activities and their costs in relation to the specific acres to be treated; b) the overall project timeline, FS budgeting procedures and history and the likelihood that the timeline could be met; and c) what that would do to project implementation, NEPA requirements for information that is not stale, the purpose and need for the project, and overall disclosure of the significance of cumulative impacts.

First of all, despite the fact that a number of cost and revenue figures are presented in the Final EA, not enough data is presented on the number of acres costs and revenues should be applied on to be able to replicate the results presented. For instance, costs are presented for fence installation, fence maintenance and fence removal. It's not clear if any of those numbers includes the actual cost of the fence itself. Then numbers are presented for the total cost of

fencing per alternative, but there is no indication how many acres are being treated under each of the fencing categories with their variable costs. This makes it impossible to then apply these costs and revenues to the Modified 5 alternative chosen in order to understand how much this Project would cost. (And the actual cost of the chosen alternative is never presented.)

What is clear is that the economic impacts for the Modified 5 alternative are outside "the scope of the EA analysis and the predicted impacts." DN/FONSI at 7. This is because the Modified 5 Alternative removes a number of harvest units (resulting in less revenue), while seemingly keeping most, if not all, of the costs. (Incorrect numbers discussed above aside, the concept of greater cost is correct even if the exact dollar amount cannot be known given the data presented.)

We would also note that net costs (cost – revenue) are meaningless for the UGN Project. Unless stewardship contracting is to be used, which has not been disclosed, the revenues will go to the US Treasury and the costs will come from appropriated funds in specific budget line items to the Forest.

It is in this last complication that the economic analysis is most deficient and must be corrected. The UGN Project costs are well beyond what the Monongahela NF can expect to receive. This is especially true when considering that 1) funds are appropriated in specific budget line items with little agency ability to move funds between line items; 2) a large percentage of Forest Service funding goes to pay fixed costs such as salary, overhead, etc. leaving very little funding to pay for project materials, service contracts or non-volunteer monitoring. These cost categories are precisely the ones that make up a large percentage of the UGN Project costs.

A "hard look" as required under NEPA demands that the agency calculate how far likely and predicted funding would go in accomplishing project activities and the length of the time period that would be necessary to complete the UGN Project. This is especially true in that the length of the UGN Project was one of the identified issues in the DN/FONSI and EA. Our knowledge of Forest Service budgeting is such that we fear the UGN Project would take far longer than even the ten years predicted, would cost more than predicted and would result in many of the timber harvest activities being completed and very little of the non-harvest activities. This would be especially troubling in that the agency acknowledges that the harvest activities have effects which the other activities are meant to mitigate (increased risk of NNIS spread, increased sedimentation into streams, decrease in quality of aquatic habitat, etc.).

Funding problems often result in local community unhappiness with the Forest Service's lack of ability to get things done on the ground. Unfortunately, barriers to accomplishment often get blamed on appeals and litigation when funding is the real culprit. Given the limited funds, a hard look under NEPA would help to assess whether the UGN Project should be scaled back to a more reasonable size given time and funding constraints, and for those project elements that

remain would serve to help the agency and area partners prioritize the most important work. The economic analysis must be revised.

VI. The Analysis of the Impacts of the Upper Greenbrier North Project on Plants and Wildlife is Insufficient under the ESA and Violates NEPA

The analysis of cumulative effects in the EA is flawed. NEPA requires that the Forest Service evaluate "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 [ ] or person undertakes such other actions." 40 C.F.R. § 1508.7. The required "hard look" is missing in a few important instances.

A. The Forest Service Must Consider New Information in Its Assessment of Impacts to Bats Affected by White Nose Syndrome

New information concerning the impacts of white nose syndrome requires that the Forest Service reinitiate ESA consultation. *See* 50 C.F.R. § 402.16 ("Reinitiation of formal consultation is required . . . [i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered."). In January of this year, Senator Patrick Leahy of Vermont requested of the FWS updated information on the mortality of bats due to white nose syndrome (WNS). The previously accepted mortality figure was approximately 1.5 million bats. Upon further consideration the FWS, in consultation with leading bat scientists has revised their estimate significantly upwards. Specifically, on January 17, 2012, the USFWS released a significantly higher estimate showing that at least 5.7 to 6.7 million bats have now died from white-nose syndrome. (See the USFWS hosted blog at http://whitenosebats.wordpress.com/2012/02/14/estimating-mortality/.) When the Forest Service prepared the EA it failed to take into account this estimate and its impact on the cumulative effects to bats.

This much higher fatality rate—more than five to six time higher than the agency believed when MNF staff prepared the EA—represents "new information" under the ESA, as well as "changed circumstances" under NEPA: "[W]here changed circumstances affect the factors relevant to the development and evaluation of alternatives, USFS 'must account for such change in the alternatives it considers.'" Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009), citing Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 813–14 (9th Cir.2005); see also Oregon Natural Res. Council Action v. U.S. Forest Serv., 445 F. Supp. 2d 1211, 1224 (D. Or. 2006) (same). The Forest Service should postpone the project decision until the FWS report is issued and then should reinitiate formal consultation under Section 7 of the ESA in order to determine the effect of its UGN decision on listed bats.

B. The Impacts of the UGN Project on the Newly Discovered Greenbrier Crayfish, *Cambarus smilax*, Have Not Been Analyzed or Disclosed

The UGN Final EA fails to mention, analyze or take the required "hard look" at the impacts of the project on the Greenbrier crayfish, Cambarus smilax, recently found to exist in the UGN Project Area. See *Cambarus (Puncticambarus) smilax, a new species of crayfish (Crustacea: Decapoda: Cambaridae) from the Greenbrier River basin of West Virginia*, Zachary J. Loughman, Thomas P. Simon and Stuart A. Welsh, from Proceedings of the Biological Society of Washington, 124(2):99-111. 2011 (attached).

REQUEST FOR RELIEF

For the forgoing reasons, Appellant requests that the Forest Service:

1. Withdraw the Record of Decision for the Upper Greenbrier North Project.

2. If the Forest Service is determined to proceed with this project, Appellant requests that the agency prepare an Environmental Impact Statement to correct the inadequacies in the analysis discussed in the above Statement of Reasons, and provide legal notice and the opportunity for public review and comment under NEPA before making another decision on this project.

3. Appellants request that the MNF prepare the required Response to Comments in response to the substantive issues we have raised.

4. Appellant requests a stay of the Record of Decision for the duration of this appeal and for any other period appropriate under 36 C.F.R. § 215.