

Bark
PO Box 212065
Portland, OR 97212
503-331-0374
www.bark-out.org
alex@bark-out.org

**APPEAL TO THE REGIONAL FORESTER
OF THE UNITED STATES FOREST SERVICE
REGION 6**

Bark)
)
) 36 CFR § 215 Appeal
) In Re: Appeal of the
APPELLANT vs.) Categorical Exclusion
) and Decision Notice
)
) **Wildcat Thinning Categorical**
) **Exclusion**
)
LINDA GOODMAN, REGIONAL FORESTER,)
DECIDING OFFICER.)
)
_____)

APPELLANT’S: NOTICE OF APPEAL, REQUEST FOR STAY, REQUESTED RELIEF, AND
STATEMENT OF REASONS

Dated this 19th day of January, 2006

NOTICE OF APPEAL

To: Appeal Deciding Officer
Ms. Linda Goodman, Regional Forester
Region 6, U.S. Forest Service
ATTN: 1570 APPEALS
P.O. Box 3623
Portland, Oregon 97208-3623
Email: appeals-pacificnorthwest-regional-office@fs.fed.us

Dear Ms. Goodman

In accordance with 36 CFR 215, I hereby appeal the decision to implement Wildcat Thinning Categorical Exclusion (“Wildcat Thinning CE”), signed by the Mt. Hood National Forest (“MHNF”), posted on December 5, 2005.

Decision Document: Wildcat Thinning Categorical Exclusion and Decision Notice

Decision Date: December 5, 2005.

Responsible Official: Linda Goodman, Regional Forester.

Appeal Period End Date: January 19th, 2006 (see official Notice of Decision).

Description of the Project: 70 acres of logging and 500 feet of road construction

Location: Section 9 and 16 of T. 3 S., R. 6 E., W.M., Clackamas County, Oregon.

Appellant’s Interests:

Bark has a specific interest in this sale, and that interest will be adversely affected by this timber sale. Bark has previously expressed interest in this specific sale, and has standing to appeal this decision according to 36 CFR § 215.11 (a)(2). Bark’s members live near the Mt. Hood National Forest and use the Forest extensively for recreation, viewing wildlife and wildflowers, municipal water, hunting, fishing, overall aesthetic enjoyment, and other purposes. Specifically, Bark has used the Wildcat Thinning project area. The value of the activities Bark members enjoy in the area will be irreparably damaged by this project. Bark has a long-standing interest in the sound management of this area, and the right to request agency compliance with applicable environmental laws.

REQUEST FOR STAY

Although an automatic stay is in effect for this sale as per 36 CFR 215.10(b), I formally request a stay of **all** action on this project, including sale preparation, layout, road planning, any advertising,

offering for bids, auctioning, logging, road construction, or other site preparation by a purchaser pending the final decision on this appeal.

A full stay is essential to prevent unnecessary expenditure of taxpayers' money, an irretrievable commitment of agency resources, and irreversible environmental damage. Without a stay, the federal government may waste taxpayer money preparing a sale that may later be cancelled. Because Bark may pursue a legal challenge to this sale with or without this stay, offering this timber sale may unnecessarily expose the government to liability and the purchaser to financial losses.

REQUESTED RELIEF

1. Declare the Decision Notice invalid.
2. Withdraw the Decision Notice.
3. Modify the sale to meet the objections presented in Appellants' Statement of Reasons and bring into compliance with the National Environmental Policy Act (NEPA), National Forest Management Act, these statutes' implementing regulations, and the Northwest Forest Plan and the Mt. Hood National Forest Land and Resource Management Plan (MHLRMP) as amended by the Northwest Forest Plan (NFP).
4. Comply with the Survey and Manage guidelines of the NFP as amended in 2001.
5. Re-initiate NEPA to allow for public comment and participation.
6. Prepare an Environmental Assessment (EA) that appropriately examines the project plan's extraordinary circumstances.

STATEMENT OF REASONS

INTRODUCTION:

The Wildcat project planning area is approximately 70 acres and is located in the Zigzag Ranger District of Mt. Hood National Forest.

The Appellants believe the Categorical Exclusion and Decision Notice are in error and not in accordance with the legal requirements of the National Environmental Policy Act (NEPA), 42 U.S.C.4321 *et seq.* and its implementing regulations; The National Forest Management Act (NFMA) 16 U.S.C. 1600 *et seq.* and its implementing regulations; the Administrative Procedures Act, 5 U.S.C. § 706; the Mt. Hood Forest Plan (MHLRMP); the Forest Service Manual, The Northwest Forest Plan, and the Survey and Manage Guidelines as amended in 2001.

REASONS:

I. The use of the Categorical Exclusion is inappropriate for this project

Upon reviewing the project and visiting the planning area, we have serious concerns about this project. We are very concerned about the use of categorical exclusions (CEs) by the Clackamas River Ranger District and do not feel it is the best way to have an informed and participatory public process. CEs should be used for their original intended purpose of conducting “no-brainer” activities such as repairing and replacing infrastructure – not for circumventing public input and avoiding environmental analysis.

In limited circumstances, the NEPA regulations authorize agencies to use a “Categorical Exclusion” for a “category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” 40 C.F.R. §§1508.4, 1500.4(p). Neither an EIS nor an EA is required for categorically excluded actions, but the NEPA regulations require Federal agencies to provide for “extraordinary circumstances” in which otherwise categorically excluded actions require an EA or EIS. 40 C.F.R. §§1507.3(b)(2)(ii), 1508.4. The Forest Service provides that a proposed action may be categorically excluded from documentation in an EA or EIS only if: (i) the action is within a category listed in FSH at Sections 31.1b or 31.2 and (ii) there are no extraordinary circumstances that may result in significant individual or cumulative environmental impacts. FSH 1909.15, 30.3(1)(b) (emphasis added).

The Forest Service plans on categorically excluding the Wildcat Thinning Project from NEPA documentation under Category 12 of Section 31.2, described in Forest Service Handbook 1909.15-2004-3 (July 6, 2004). This category allows the Forest Service to exclude from NEPA documentation the “harvest of live trees not to exceed 70 acres, requiring no more than ½ mile of temporary road construction.” By definition, a project that is categorically excluded cannot individually or cumulatively have a significant impact on the environment. 40 C.F.R. §1508.4. Bark believes that significant impacts both, individually and cumulatively, may result from the Wildcat Thinning Proposal; thus, a complete environmental analysis must be conducted.

A. Inappropriate circumvention of public participation

Both the minimal public documentation and the abbreviated timelines constrain the public and limit both the quantity of public participation (due to the abbreviated timelines) and the quality of public participation (due to the minimal public documentation). The Consideration of Comments (CC) responded to this specific concern with an inappropriately glib “*Several comments were received for this project.*” This response is either intentionally disingenuous or exhibits an inability to appropriately respond to a legitimate public concern since it addresses neither the comparative volume of comments received on logging projects with an expanded timeline vs. logging projects with an abbreviated timeline nor the quality of comments received from logging projects that include more substantive NEPA documentation.

B. Existence of extraordinary circumstances

There are extraordinary circumstances that need more careful evaluation with this project making a CE inappropriate.

1) Complexity of factors in forest ecosystem management

One of the purposes of this initiative is “*because overstocked second-growth stands are experiencing a reduction of growth.*” But this desire for traditional plantation management must be tempered with other aspects of law and regulation that would protect functioning forest ecosystem if followed. This aspect, as noted by the second listed purpose to “[e]nhance biological diversity” is ostensibly to protect and enhance the functioning forest ecosystem, but it is directly at odds with the destruction of legacy features (standing dead trees, coarse woody debris, etc.) that will occur during the logging operations.

According to the Forest Service, “*This action is needed, because overstocked second-growth stands are experiencing a reduction of growth due to overcrowding*” (Wildcat scoping letter, p. 1). However, the Wildcat stands that we observed exhibited a range of stand densities that varied considerably from stand to stand (e.g., unit 3 vs. unit 6) and within a stand (units 1 and 6). Because of this lack of consistency and the significant damage to, and eradication of, legacy features that will come from the logging in units 1, 2, and 6, the proposed thinning project would do little to meet two of the three stated goals of the project: to enhance growth intended to be abated by “overcrowding” and enhance biodiversity (Wildcat scoping letter, p. 1). Field surveys by Bark of the project area found already-existing gaps in the canopy, both natural and potentially from previous thinning, which allow a significant amount of light to reach the forest.

Why are stands with existing canopy gaps slated for thinning to create canopy gaps?

The stated purpose, to “[e]nhance biological diversity,” (p. 1) will be greatly diminished by the logging used to accomplish it. There is no scientific study demonstrating that reducing or removing legacy features such as large standing snags and large downed wood enhances biological diversity. In fact, there is scientific evidence against this claim. The removal of ancient snags and damage to large downed wood has been shown to have adverse consequences for wildlife, hydrology, soil, etc. The damage and eradication of these features prevents or reduces the ability of post disturbance wildlife to return to normal. Timber harvesting in the Wildcat project area, which has already endured disturbance and loss of legacy features from previous logging and fire, will act to further suppress the return of a healthy forest ecosystem. While the CC notes that there will be “*some protection for snags,*” this provides no prescription for how this will be done, any quantifiable measure of how many will be left or of what size (size of a snag is a critical measure for its ability to provide habitat for different snag-dependent species). The significant role played by large snags in the healthy functioning of the forest ecosystem is well documented. Recently both the role of logging on the numbers of large snags and the ineffectiveness of current artificial snag creation has been documented. The impact of logging on large snag density (Science Findings, Issue 42, March 2002) clearly shows that the paucity of large snags across a managed forest landscape relates to the logging of that landscape. Further, the usefulness of artificially-created snags has been thrown into doubt (USDA Forest Service Gen. Tech. Rep. PSW-GTR-181. 2002). Knowing that this project has a strong likelihood of adversely impacting legacy forest features, which in turn will have a significant impact of the healthy functioning of the remaining forest ecosystem, directly contradicts the assertion that the project will enhance biological diversity.

Why does the Forest Service think that further thinning is necessary? With legacy features such as large snags or large downed logs missing or in such reduced numbers that large areas of the Forest ecosystem are currently operating in a suppressed state, thinning mid seral stands to enhance growth at the expense of legacy features is highly controversial and not supported by scientific evidence. Further, much of the surrounding Forest Service land currently consists of recent clearcuts, degrading more forest land of these rare and valuable ecosystem components is not prudent. The public has not been provided clear information about how thinning would meet these two contradictory goals, or more specifically, how meeting the first objective would not significantly degrade its ability to meet the second.

In Wildcat units 1, 2, and 6 the health of the recovered soil was demonstrated by the large number and diversity of fungi found. The ground based logging systems, or tractor logging, that are going to be used will harm soil health through compaction, tearing of topsoil, and breaking trees roots, micro-roots, and fungi's mycorrhiza. It is important to remember that biological diversity that is not seen (i.e., diversity within the soil) is as important as the diversity of a single forest component such as the trees.

The multifaceted components involved in the examination of forest ecosystem health make the use of the CE inappropriate.

2) Northern Spotted Owl Critical Habitat

The singular fact that this is a logging project that will degrade Northern Spotted Owl habitat in a designated Critical Habitat Unit should be reason enough to exclude the use of a CE. CEs are not appropriate where extraordinary circumstances exist, such as adverse effects on threatened and endangered species, their critical habitat, or their federally designated Critical Habitat.

The Purpose and Need document states that the Forest Service has considered recently published new information about NSOs, but it fails to state what information in particular has been considered. Given the potential impact of the project, more thorough and specific analysis is warranted. New information on the threatened NSO indicates that there are significant new uncertainties for the owl that have not been fully considered at the regional or local scale. As recognized by the spotted owl status review, all existing suitable habitat could be critical to the survival of the spotted owl.

Bark members recently visited the Wildcat Thinning Proposal site and found that the forest contains significant areas that appear to have already been thinned (e.g., unit 6) or already have gaps in the canopy (e.g., unit 1). Further thinning would likely degrade an already heavily disturbed forest canopy (units and surrounding adjacent lands) causing degradation of owl habitat

The Forest Service provides justification for the temporary degradation of NSO dispersal habitat with the qualification that "long term benefits will outweigh short term effects" (Scoping letter, p. 3). According to the 2004 status review, this may be an inaccurate justification. Because competition and displacement with the barred owl is "dramatically increasing," any degradation of dispersal habitat can further increase competition over thinned resources, leading to the possible spotted owl displacement. If this scenario unfolds, the NSO

will not only reap no long-term benefits, but also lose valuable dispersal habitat. This possibility is unacceptable and needs to be examined in a complete environmental assessment.

Apparently split between two different watersheds (Eagle Creek and Upper Sandy), the exceedingly sparse NEPA documentation remains insufficient for public analysis or comments. The CC notes that the project “...will only temporarily degrade dispersal habitat,” and that “the stands will continue to function as dispersal habitat.” This appears to be a clear contradiction. Will the degraded dispersal habitat in the Critical Habitat Unit continue to function as dispersal habitat or will it be degraded? This type of confusion and inadequate documentation clearly demonstrate the inadequacies of the CE approach.

C. Significant Impact

NEPA directs all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. §4332(2)(C). NEPA requires that agencies prepare an Environmental Impact Statement (EIS) when proposing a major federal action that may significantly affect the quality of the environment. 42 U.S.C. §4332(2)(C), 40 C.F.R. §1501.4(a)(1). If an action is not categorically excluded, an agency must prepare an environmental assessment (EA) to determine whether it needs to prepare an EIS. 40 C.F.R. §1501. With respect to the Wildcat project area, a CE is inappropriate due to several factors, including logging a Critical Habitat Unit for northern spotted owls, undocumented/unintentional logging of Riparian Reserves and/or wetlands (which indicate the project may have a significant effect on the environment), lack of cumulative impacts analysis/documentation, and lack of appropriate additional road construction analysis.

The agency implementing the project, not the public, has the burden of demonstrating that significant adverse effects will not result from the proposed project. *Id.* §1508.13. To determine whether a proposed action may significantly affect the environment, agencies must consider both the context and the intensity of the action. 40 C.F.R. § 1508.27. The context of the action includes consideration of the affected region and locale. *Id.* § 1508.27(a). In analyzing “intensity,” the agency must consider such factors as the “unique characteristics of the geographic area such as proximity to ... ecologically critical areas,” a high level of controversy surrounding environmental effects, “the degree to which the action may adversely affect an endangered or threatened species” or its critical habitat, and “whether the action is related to other actions with individually insignificant but cumulatively significant impacts.” *Id.* at §1508.27(b)(3), (b)(4), (b)(9), (b)(7). A CE is inappropriate for the Wildcat project because thinning could pose a serious risk to a Critical Habitat Unit for the northern spotted owl, Riparian Reserves and wetlands, the subwatershed ecosystems as a whole, and due to the impact of more road building to the ecosystem.

1) Impact to Northern Spotted Owl Critical Habitat Unit

See discussion of NSO and CHU in extraordinary circumstances section.

2) Impact to Riparian Reserves and wetlands

The CC clearly states, “*field layout has not yet begun for this project. Streams and riparian reserves are not part of any of the units. Where streams are nearby, measurements will be taken during field layout to ensure that the units do not encroach into riparian reserves.*”

Wetlands are riparian reserves and are excluded from units.” This assertion raises three problems. How can the public examine the project if there isn’t a layout? Since some units do have boundary markers, can these markers be relied upon? If some units do have boundary markers and some don’t, what other portions of the CC and/or the Scoping letter are also only partially accurate? These issues highlight the problems that arise when trying to document complex situations with something as sparse as a CE NEPA document. These issues make the use of the CE inappropriate.

Running small streams were found in early September near the western boundary of unit 2 and southeastern boundary of unit 6. While the project and CC claim no Riparian Reserves will be logged the insufficiency of NEPA documentation and the on the ground markings (the entire SE side of unit 6 remains unmarked) render this statement unverifiable and open for debate. There is no discussion of wetlands under one acre, this omission is not acceptable.

With respect to the Aquatic Conservation Strategy, the Forest Service stated that the project is not in riparian reserves so it is therefore consistent with the Forest Plan as amended by the 2004 Record of Decision to Clarify Provisions Relating to the Aquatic Conservation Strategy (Wildcat proposal, p. 3). It has not noted whether any of the requirements of the 2001 Record of Decision have been met.

3) Cumulative Impact

The regulations implementing NEPA state that cumulative effects result “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future [federal and non-federal] actions.” 40 C.F.R. § 1508.7. “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” *Id.* § 1508.27(b)(7). The Wildcat Thinning document fails to address the possibility of cumulative impacts caused by the thinning proposal, with respect to critical habitat on the watersheds, soils, vegetation and wildlife in concert with recent past logging projects (public and private) in the area. Full disclosure of the cumulative watershed effects analysis for this proposed project; including all past, present and reasonably foreseeable future actions or both public and private land impacting this watershed is needed and not provided. There is no documentation of the current watershed condition, Threshold of Concerns (TOC) and specific soil conditions related to the sensitivity index for this watershed.

4) Roads

One of our main concerns involves potential road building and reconstruction that could be required to log the area. Roads, even if “temporary” by description, have significant affects on the environment. There is abundant science dealing with the adverse affects of roads on wildlife and watersheds. This comes in the form of habitat fragmentation, soil compaction, sedimentation, introduction of invasive weed species, increased likelihood of off road vehicle abuse, and increased risk of fire, to name a few impacts. We strongly oppose any action that would involve building new road or reconstructing old roads that have begun to revegetate. The road density in the planning area is already high. A high priority of the Zigzag Ranger District should be to reduce impacts from roads through decommissioning ripping and restoration, turning more road miles to trail miles, not building new roads.

II. Illegal Avoidance of Survey and Manage Regulations

The appellants believe the proposed action does not follow the 2001 Record of Decision to Amend the Survey and Manage Guidelines of the Northwest Forest Plan. The November 2005 Wildcat Thinning scoping letter provided the following analysis, “There will be no impacts to sensitive species or survey and manage species that would cause a trend to federal listing or loss of viability for any proposed or sensitive species.” In response to a request more information about how this decision was rendered, the Forest Service states in the CC that “*survey and manage standards and guidelines are no longer applicable.*”

In the recent relief ruling in the case of *Northwest Ecosystem Alliance et. al. v. Mark E. Rey*, U.S. District Court Judge Pechman ruled:

- (1) The Record of Decision dated March 22, 2004, entitled “To Remove or Modify the Survey and Manage Mitigation Measure Standards and Guidelines in Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl” (the “2004 ROD”) is hereby set aside, and Defendants shall not rely on it or implement it.
- (2) The Record of Decision dated January 2001, entitled “Record of Decision and Standards and Guidelines for Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measure Standards and Guidelines” (the “2001 ROD”) is hereby reinstated, including any amendments or modifications to the 2001 ROD that were in effect as of March 21, 2004.
- (3) Defendants shall not authorize, allow, or permit to continue any logging or other ground-disturbing activities on projects to which the 2001 ROD applied unless such activities are in compliance with the provisions of the 2001 ROD (as the 2001 ROD was amended or modified as of March 21, 2004).
- (4) No project or activity enjoined under this Order may occur unless and until this Court modifies or vacates this Order.

The National Forest Management Act (NFMA) 16 U.S.C. 1600 *et seq.* and its implementing regulations clearly require the Forest Service to comply with the Northwest Forest Plan and Survey and Manage Standards and Guidelines. The Forest Service provides no documentation to show that this has occurred. In light of Judge Pechman’s ruling, appellants request compliance with the 2001 ROD and for the process to be disclosed to the public through the NEPA process.

III. Recreational Value

The Wildcat CE scoping letter insists that this project is consistent with Forest Plan – Forest Management Goal #19, “maintaining the stability of local and regional economies” (Wildcat scoping letter, p. 6). The Forest Service assumes that maintenance of local and regional economies can only be achieved through wood fiber production without providing any substantiation for this assumption. Contrary to the scoping letter, with the proximity of the Wildcat project area to metro Portland,

recreation is likely a better use of these lands and likely to suffer degradation if the plan as it currently stands is implemented.

IV. Forest Products

The third goal of the project would be “provid[ing] forest products consistent with the Northwest Forest Plan goal of maintaining the stability of local and regional economies now and in the future.” This final goal, however, fails to acknowledge either the role of the surrounding industrial forest lands (lands that by definition provide wood fiber and employment) or the recreational value of this area due to its proximity to the Portland metropolitan area. There is no supporting documentation of this assertion, an assertion that no longer qualifies as *a priori*. While timber is still an important sector of the economy, the community in Clackamas county is no longer exclusively timber-dependant: that is, timber production and milling, while still sources of income, are no longer the primary source of income for most of these localities. PACIFIC NORTHWEST RESEARCH STATION, *County Portraits of Oregon and Northern California* (September 1996), 76-87. Fishing, government support, and tourism now provide greater revenue to these counties than the forest products industry. *Id.* Similarly, in assessing the impact of the agency’s Roadless Area Conservation policy, the Forest Service also concluded that there are no timber dependent communities located within or affected by activities on Mt Hood National Forests. *See generally* United States Forest Service, *Roadless Area Conservation Specialists Reports* (visited May 4, 2001), http://roadless.fs.fed.us/documents/feis/specprep/socioecon_specialist_entire.pdf>.

Given the significantly altered situation in the region (i.e., mill closures and a reduced demand for wood fiber from federal forests), some form of documentation is needed.

CONCLUSION

The brief project notice does not furnish substantive and quantitative evidence showing this project will not cause serious and irreversible damage to soils, snags, downed woody debris, forest productivity, plant diversity, water quality, wildlife habitat and recreation. This project contains both extraordinary circumstances and substantial impact; these factors require a greater level of project examination than found with the use of Categorical Exclusion. The Wildcat Thinning project needs to reinitiate the NEPA process involving the creation of an EA to allow for appropriate public participation.

/s/ Alex P. Brown
Executive Director