APPEAL TO THE FOREST SUPERVISOR
OF THE UNITED STATES FOREST SERVICE
CARSON NATIONAL FOREST
FROM A DECISION OF THE
CANJILON RANGER DISTRICT

WILDEARTH GUARDIANS	)	
	)	
Appellant,	)	Appeal of the Finding of
	)	No Significant Impact and
v.	)	Environmental Assessment
	)	for the Canjilon Range
JUAN E. SANCHEZ, Forest Supervisor,	)	Improvement Project in the
Carson National Forest	)	Canjilon Ranger District,
	)	Carson National Forest
Deciding Officer.	)	(May 15, 2013)

NOTICE OF APPEAL, STATEMENT OF REASONS, AND REQUEST FOR RELIEF

Submitted via email and certified U.S. Mail
June 21, 2013

DECISION APPEALED

Appeal Deciding Officer, Forest Supervisor Juan E. (Buck) Sanchez
Carson National Forest
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WildEarth Guardians hereby gives notice, pursuant to 36 C.F.R. § 215, that we are appealing the decision issued on May 15, 2013 by Francisco Sanchez, District Ranger for the Canjilon Ranger District of the Carson National Forest, approving the Canjilon Range Improvements Project with a Finding of No Significant Impact ("FONSI"). The project area is located in the Canjilon Ranger District of the Carson National Forest. This appeal is timely filed. 36 C.F.R. § 215.13(a).

The Range Improvements Project is a group of water developments, fence reconstruction, and sagebrush treatment projects across 11 grazing allotments. Environmental Assessment ("EA") at 1-2. The Purpose and Need for the proposed action consists of improvements to accommodate livestock during drought, facilitate grazing management, and benefit range health. *Id*. The Forest Service determined a combination of methods would be used to treat sagebrush: prescribed fire, mechanical methods, and tebuthiuron. *Id*.

The adopted alternative ("alternative 2"), also the proposed action, authorizes construction of fences, water developments, and treatment of approximately 12,000 acres of sagebrush through mechanical methods, fire, and application of tebuthiuron. EA at 7. The Forest Service also considered a no action alternative, where the agency would authorize no new range improvements, maintaining the status quo. *Id*. The Forest Service dismissed without full consideration a no-herbicide alternative that would allow only mechanical and prescribed fire treatment. *Id*. A FONSI selecting the only action alternative was issued May 15, 2013. FONSI at 7.

APPELLANT'S INTERESTS

WildEarth Guardians ("Guardians") is a non-profit corporation with approximately 7,538 members throughout the United States, including New Mexico. Guardians' mission is to protect and restore wildlife, wild rivers, and wild places in the American West, including forests in the Carson National Forest. Members of Guardians engage in outdoor recreation, wildlife viewing, and other activities in the Carson National Forest and intend to continue to do so.

Guardians has a strong interest in ensuring that Forest Service decisions are based on robust, scientifically sound environmental information. Guardians' ability to assess, comment on, and appeal this project and EA is impaired by the Forest Service's failure to properly and legally prepare and make available this information. Guardians has a long history of involvement in forest management decisions on the Carson National Forest.

Guardians brings this appeal on its own behalf and on behalf of its adversely affected members. Guardians' and its members' interests fall within the issues addressed in this appeal and are redressable in the federal courts.

Guardians has standing to appeal the Canjilon Range Improvements Project decision because Guardians provided substantive comments on the EA, including proposing a no-herbicide alternative, before the end of the 30-day comment period. 36 C.F.R. § 215.13(a).

STATEMENT OF REASONS

I. INTRODUCTION

Tebuthiuron is a toxic herbicide. EA at 18. Tebuthiuron poses a variety of risks, including threats to plant and animal life as well as leaching to groundwater. *Id*. As tebuthiuron has an "extremely long" half-life, these hazards compound with each use. EA at 18-19. For its Range Improvements project, the Forest Service proposes use of tebuthiuron across approximately 12,000 acres of grassland, five grazing allotments, and four separate watersheds. EA at 4, 27. Because of the known toxicity of tebuthiuron, the Forest Service should have considered an alternative for range improvements that did not include this toxic herbicide. Yet the Forest Service issued a FONSI without fully considering an alternative excluding herbicide across some or all of the 12,000 affected acres. FONSI at 3.

Congress, in enacting NEPA, broadly proclaimed a national policy of "[encouraging the] productive and enjoyable harmony between man and his environment" and "[promotion of] efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. To that end, NEPA places procedural requirements on agencies while mandating no specific outcomes. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (noting "NEPA merely prohibits uninformed, rather than unwise, agency action"). These procedures require agencies to take a "hard look" at the environmental consequences of their actions. *Id*; *Utah Envtl. Congress v. Bosworth*, 439 F.3d 1184, 1195 (10th Cir. 2006).

Hard look analyses should provide an assessment of impacts that is pragmatic and useful to both decisionmakers and the public. "By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions." *New Mexico* ex rel. *Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009); *see also Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc*., 462 U.S. 87, 97 (1983) (describing NEPA's "twin aims" of informing the agency and the public). Specifically, NEPA requires that agencies consider, evaluate and disclose to the public "alternatives" to a proposed action. 42 U.S.C. §§ 4332(2)(C)(iii) & (E). A range of alternatives must be developed "fully and impartially" and not "prematurely foreclose options that might protect, restore, and enhance the environment." Forest Service Handbook 1909.15, § 14.2.

The Forest Service failed to meet its statutory, regulatory, and self-imposed mandates by dismissing without fully explaining a viable, reasonable, non-herbicide alternative as suggested by Guardians in its comments on the EA. *See Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (stating "[t]he existence of a viable but unexamined alternative renders an [EIS] inadequate").

Guardians takes issue with the failure to consider an adequate range of alternatives. As pointed out in its April 6, 2012 EA comments, there is evidence that (1) mechanical/burning treatments are more effective than chemical treatments, and (2) Tebuthiuron poses a number of environmental dangers. A "no-herbicide" option is fully within the Purpose and Need of the Project. The Forest Service conceded this in its dismissal of a no-herbicide alternative. *See* EA at 7. Failure to take a hard look at such an option ignores a viable, reasonable alternative to the proposed action. Therefore, by not fully considering a no-herbicide alternative for range improvement, the Forest Service fails to meet one of the most basic requirements of NEPA and its implementing regulations—consideration of a reasonable range of alternatives.

II. THE FOREST SERVICE FAILED TO CONSIDER AN ADAQUATE RANGE OF ALTERENATIVES

While there are no "hard and fast rules" governing an alternatives analysis, agencies are tasked with providing "legitimate consideration [of] alternatives that fall between the obvious extremes" of action and no action. *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999). The Tenth Circuit gauges the reasonableness of a range of alternatives with reference to two general guideposts: an agency's statutory mandates and the objectives of a specific project. *New Mexico* ex rel. *Richardson,* 565 F.3d at 709. Here, the Forest Service violated statutory, regulatory, and self-imposed mandates and provided an unreasonably narrow definition of the project's objectives.

A. The Forest Service Provided Unreasonably Narrow Objectives for the Proposed Action

While the Forest Service may limit study of alternatives to those meeting the Purpose and Need of an action, courts have reprimanded the agency for formulating a Purpose and Need that is so narrow as to exclude reasonable alternatives. *Colorado Envtl. Coalition*, 185 F.3d at 1174 (noting courts "preclude [the Forest Service] from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only one alternative"); *Envtl. Protection Information Center v. U.S. Forest Service*, 234 Fed. Appx. 440, 443 (9th Cir. 2007) ("EPIC") ("[The Forest Service] did not adequately consider alternative courses of action in this case because [the Forest Service] defined the objectives of the project so narrowly that the proposed project was the only alternative that would serve those objectives"); *City of Carmel-by-the-Sea*, 123 F.3d 1142, 1155 (9th Cir. 1997) (stating that the "goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms"). As the Seventh Circuit explained:

> No decision is more important than that delimiting what these "reasonable alternatives" are . . . One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence) . . . If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.

Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 660 (7th Cir. 1997).

Here, the Forest Service proposed treatment by a combination of methods – mechanical methods, prescribed fire, and tebuthiuron – within the Purpose and Need section itself. EA at 1. The agency therefore impermissibly framed the proposed action as the only "reasonable" alternative by defining a Purpose and Need identical to the proposed action. However, the Purpose and Need can be read to allow for an alternative that does not include all of the proposed treatment methods. The plain meaning of the term "combination" does not require use of all proposed methods on all 12,000 acres. This argument has merit given the Forest Service's concession that the proposed no-herbicide alternative is within the Purpose and Need of the project. Therefore, if the purpose and need are not unreasonably narrow, then the Forest Service failed to fully consider a feasible alternative.

B. The Forest Service Unreasonably Omitted A No-Herbicide Alternative

Even if the objectives of the project are not defined too narrowly, the EA is fatally flawed because the Forest Service failed to consider a no-herbicide alternative. The agency dismissed the no-herbicide alternative, stating:

> This alternative requested that only mechanical treatment and prescribed fire be used to treat sagebrush. However, most sagebrush treatment areas have already been cleared for burning and/or mechanical treatment through other analyses. Therefore, this alternative is already considered as part of the no action alternative (alternative 1).

EA at 7. Notably, the Forest Service dismissal is not the result of the alternative falling outside the Purpose and Need of the project or outside the realm of feasibility; rather, the agency dismissed the alternative because it determined a no-herbicide alternative to be identical to the no action alternative. *Id*.; *see New Mexico* ex rel. *Richardson*, 565 F.3d at 711 (holding agencies may dismiss viable alternatives which are not "significantly distinguishable" from other alternatives); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978) (observing the range alternatives is limited "by some notion of feasibility").

It is not clear how a no action alterative, where "no new range improvements would be constructed," equates to an alternative permitting most improvements except for application of a toxic herbicide. EA at 7. Additionally, the Forest Service states that "most" areas to be treated have been cleared by unidentified "other analyses," without explaining

or listing the previous environmental analyses and/or decisions that considered non-herbicide treatments.[1] *Id*. If the Forest Service did previously consider non-herbicide range improvements, then the agency must present this as an alternative in the EA and compare the environmental impacts of the herbicide and no-herbicide alternatives. At a minimum, if the agency previously considered a no-herbicide alternative in a different environmental document, the agency must include a reference to that document since it forms a basis for the agency's decision.

Case law defines a no action alternative as a comparison of "the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo." *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001); *Center for Biological Diversity v. DOI*, 623 F.3d 633, 642 (9th Cir. 2010)(describing a no action alternative as a "baseline" against which agency action is measured). Courts have found analysis of a proposed action and a no action alternative alone sufficient where there were, truly, no other feasible alternatives. For example, consideration of a proposed, commercial timber sale and a no action alternative was a reasonable range of alternatives where the Forest Service's goals could not be achieved through any other means. *Utah Envtl. Congress v. Bosworth*, 439 F.3d at 1195 (finding a non-commercial alternative beyond the objectives of the project). The Forest Service has no similar excuse here. Achievement of the Forest Service's goals of benefiting range health, accommodating livestock during drought, and facilitating grazing management can be accomplished through a no-herbicide alternative. EA at 1-2. Therefore, the Forest Service must consider a no-herbicide alternative as an alternative to the proposed action.

In a similar case, the Ninth Circuit held that the Forest Service's analysis of only a no action alternative and the preferred alternative in an EA was insufficient to comply with NEPA. *EPIC*, 234 Fed. Appx. at 442. Similar to the instant case, the conservation organization there proposed an action alternative excluding proposed methods: removal of trees of a certain size, use of a commercial timber sale, and road construction. *Id* at 443. The Forest Service rejected the proposed alternative, stating it was not consistent with the project's Purpose and Need. *Id*. The court held that "[a] cursory dismissal of a proposed alternative, unsupported by agency analysis, does not help an agency satisfy its NEPA duty to consider a reasonable range of alternatives." *Id*. Furthermore, "the EA's analysis of a no action alternative and [the Forest Service's] preferred action alternative did not amount to the 'full and meaningful consideration' of alternatives that NEPA requires." *Id*. Likewise, here, the Forest Service cannot dismiss a reasonable alternative, concededly within the project's Purpose and Need, without fully explaining its reasoning.

Because the Forest Service failed to take the requisite hard look at a no-herbicide alternative, it prematurely foreclosed a reasonable alternative to the proposed action in violation of NEPA.

[1] Guardians' repeated attempts to contact the Forest Service by phone and e-mail for clarification regarding the statement in the EA's alternatives section about "other analyses" have gone unanswered.

REQUEST FOR RELIEF

1. Withdrawal of the Decision Notice and Finding of No Significant Impact authorizing range improvements on 12,000 acres in the Canjilon Ranger District.

2. If the Forest Service intends to authorize range improvements to the 12,000 acres on the Canjilon Ranger District of the Carson National Forest, that the Forest Supervisor be instructed to prepare a legally adequate alternatives analysis that includes a no-herbicide alternative.

Respectfully submitted this 21st day of June, 2013,

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Please direct all subsequent submissions, including interested party comments, decisions, actions, or other communications regarding this appeal to Mr. Bryan Bird [address above].