

Tennessee Chapter Sierra Club • Tennessee Heartwood • Heartwood
Southern Environmental Law Center • Tennessee Clean Water Network

January 4, 2018

Via First Class U.S. Mail and Electronic Mail

JaSal Morris
Forest Supervisor
Cherokee National Forest
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Re: Notice of Representation in Connection with the Dinkey Project (Tumbling Creek)

Dear Supervisor Morris,

We write to inform you that the Southern Environmental Law Center (SELC) is now representing the Tennessee Chapter of the Sierra Club and the Tennessee Clean Water Network (TCWN) is now representing the Tennessee Chapter of Heartwood and Heartwood in connection with their joint objection to the Dinkey Forest Management Project, which was recently dismissed without review by the Cherokee National Forest. Please direct any further correspondence with the Sierra Club, Tennessee Heartwood, or Heartwood (“Objectors”) in this matter to counsel. In addition, please provide the contact information for any attorney(s) in the Office of General Counsel who will be involved in this matter.

This letter is intended to clarify the respective positions of all involved parties, including commenters who did not participate in the objection, and to identify the remaining opportunities for resolution.

A. Objectors and Other Commenters Share the Same Concerns Over Risk to Soils

As you know, seven separate conservation organizations participated in comments on the Dinkey project, located in the Tumbling Creek watershed. SELC submitted comments along with and on behalf of four other organizations--namely, Cherokee Forest Voices, MountainTrue, The Wilderness Society, and Wild South (“Commenters”). The Sierra Club, Tennessee Heartwood, and Heartwood (“Objectors”) also commented on the project during the formal comment period, and they subsequently submitted a timely objection to the draft decision on grounds they consistently raised throughout the project’s development.

While only three organizations objected to the project, you and your staff will recall that all seven conservation organizations shared the same concerns about soil protection that were expressed by Objectors. Protection of soils has long been a top priority for conservation groups working with the Cherokee National Forest. Ground-disturbing activities create significant risk of erosion, which impacts both the soil resource itself and can lead to sedimentation of downslope waters. Consistent use of forestry

best management practices (BMPs) can reduce that risk but cannot eliminate it. As discussed in connection with the Dinkey project, BMPs are designed to be effective in the ordinary case, not the extraordinary case. Poor location and layout of ground-based logging activities can lead to degradation of soil resources even with the most careful use of BMPs.

The Cherokee National Forest, because of its topography and geology, contains a large number of stands where ground-disturbing activity creates an inordinate risk. Unfortunately, Cherokee National Forest's Revised Land and Resources Management Plan (RLRMP) does not include adequate sideboards to identify and avoid or mitigate risk at those sites. As a result, compliance with the RLRMP does not, by itself, assure protection of soil and water resources, as the RLRMP and its EIS acknowledge. Without additional project-level analysis and mitigation, recent project activities in the same vicinity and with similar soil and slope conditions to the Tumbling Creek watershed have caused significant and unacceptable degradation of soil resources. The expense and difficulty of remediating these impacts underscore the importance of avoiding them in future projects, including any along Tumbling Creek.

B. Objectors Consistently Explained Why the CNF's Analysis Does Not Support its Decision

While all conservation groups shared Objectors' concerns about the potential for erosion and sedimentation in the Tumbling Creek watershed, Commenters were willing to give the District the benefit of the doubt that these concerns would be addressed through careful layout and mitigation measures during implementation. During a field visit, Commenters were assured that site-specific risks would be balanced against ecological need--a framework that was expressly adopted in the Draft Environmental Assessment and Record of Decision.

While the framework was appropriate, the analysis under that framework was not transparent. Objectors were not convinced that the Dinkey EA forthrightly disclosed the risks of the project, the lessons learned from previous projects that necessitated additional mitigation measures, or any explanation of why these new mitigation measures would be adequate to protect soils. Nor did the analysis disclose how the risk of erosion was balanced against the likelihood of achieving the desired ecological outcome (restoration of characteristic species composition) at a site-specific level. This lack of transparency with respect to expected silvicultural outcomes is particularly striking in light of the general failure of oak and shortleaf pine recruitment, documented in Objectors comments and objection, in stands that were harvested for the stated purpose of oak and shortleaf pine restoration. The analysis also failed to weigh the potential costs of remediation at high-risk sites.

Instead of answering the questions posed by Objectors, the NEPA documentation merely adds three mitigation measures: ground cover (mulch), a revegetation plan with possible soil testing, and an extended streamside management zone. These measures may be a step in the right direction, but the District's analysis does not provide a basis to conclude that they will support a finding of no significant impact. In other words, the EA failed to connect the dots between known risks (specifically, the risk created by operating ground based equipment on particular soils and slopes) and needed mitigation measures (e.g., limitations on equipment operation, blading, and layout). To be clear, mulching and fertilizing may help to limit the temporal impact of soil disturbance, and an extended streamside management zone may help to limit impacts to waters, but no explanation is given whether those measures would avoid significant impacts to risky soils in the first place. Under what conditions might those measures be effective, and under what conditions would they fail? For example, would mulch and

fertilizer have protected soils during the drought conditions that contributed to the failure of Unit 1 in the Island Creek project? The other eight sites in the Island Creek, Hopper Branch, and Buck Gap sales that the agency acknowledged have created similar problems? (See 2016 Monitoring and Evaluation Report, p. 94-97.)

The incomplete analysis is puzzling because we understand the Cherokee NF has done considerable work to understand the etiology of prior problems and has the benefit of reams of information submitted by Objectors during the project development process. The agency's failure to engage with the public on this significant issue reveals an inclination toward secrecy and defensiveness that is not compatible with its NEPA obligations. This view is strengthened by the Forest's improper withholding of records under FOIA—records that belong to the public and relate to a matter of significant public interest.

C. The CNF Has Not Addressed Soil Risks at the Programmatic or Project Level

We understand that prior projects' lessons were intentionally left out of the Dinkey analysis because the Forest is reluctant to acknowledge any connection between a future project's risks and a past project's failures. Those past failures, however, simply show the inadequacy of the RLRMP and EIS, which simply do not account for the extraordinary impacts that can result from ground-based logging on highly erosive soils and steep slopes, or include components to prevent such impacts. As a result, the impacts (including impacts that are cumulative with other projects like Island Creek) must be addressed in each project's design and analysis. This is not just a problem for the Dinkey project; it is a problem for all projects. Until it is addressed programmatically, not only Dinkey but every individual project must use the best available science to assess, disclose, and avoid potentially significant impacts to soil resources.

Because soil impacts are an important issue for Dinkey and other connected projects, Commenters and Objectors have been supportive of efforts to deal with the problem at a higher or more general level. We were grateful for the opportunity to meet with Forest and District staff over the summer to learn about how the Cherokee National Forest is working to rehabilitate previously degraded sites. Our hope was that a frank and open discussion would lead to the collaborative development of design criteria for future projects (including Dinkey) until the issue could be addressed more fully during the next plan revision. We were optimistic about the meeting's prospects because a similar discussion on the North Zone previously resulted in a new and effective design criterion (namely, to avoid operation of equipment on sustained steep slopes). Disappointingly, although the meeting revealed that layout and equipment choices were responsible for unacceptable soil impacts, we did not make substantial progress in identifying design criteria to address those causes, chiefly because the Forest was unwilling to share information (either in person or pursuant to a related FOIA request).

D. The Forest Unlawfully Dismissed the Objection

The pre-decisional objection process--in the agency's own words, an extension of the collaborative process--was a final opportunity to articulate a strategy to avoid unacceptable and unlawful impacts to soil resources in the Dinkey project. Commenters and Objectors were all shocked to see the "final administrative determination" from the Cherokee National Forest "set[ting] aside" Objectors' thoughtful objection. In that letter, the Cherokee National Forest claimed that the objection does not "demonstrate the connection to prior comments with specific violations of law, regulation, or policy" or

propose specific remedies for consideration. In effect, the Cherokee National Forest claims that it cannot understand Objectors' complaints, despite prior detailed comments on the same focused concerns and two in-person meetings with staff explicitly intended to clarify those concerns. Indeed, to ask stakeholders to take time off work for the stated purpose of "hearing your concerns and to make sure that we fully understand you," then later to claim that the Forest does not understand those concerns, is disingenuous and invites mistrust.

The Forest's dismissal of the objection is legally and factually flawed. The letter's rationale is not consistent with the cited regulations and creates a much higher bar than intended or allowed by law. Objectors, moreover, have cleared even this unlawfully stringent bar. The agency has bent and broken its own rules to exclude public participation, leaving us with the clear impression that the Cherokee National Forest is not interested in engaging or collaborating with stakeholders but would instead prefer to hide its mistakes, even at the likely cost of making those same mistakes again. By setting aside the objection, the Cherokee National Forest has squandered the good will of its stakeholders and multiplied the legal errors that it could have addressed collaboratively during the objection period. As a result, the project remains ineligible for a finding of no significant impact (FONSI).

E. The Forest Service Must Remedy its Unlawful Action

Objectors and Commenters alike are convinced that this error must be corrected in order to protect the integrity of the project development process. Objection is not intended to be adversarial, but is instead an opportunity to collaborate, to clarify, and to refine project activities and sideboards. It is unfortunate that the Cherokee National Forest has chosen to waste this opportunity to improve its project and build public trust.

Objectors invite the Cherokee National Forest reconsider this ill-advised decision. The Forest has so far engaged in a shell game, evading accountability with respect to Objectors' concerns at either the project or programmatic level. Those same two possibilities remain, but the Cherokee National Forest must choose one and pursue it transparently. We believe there are a few potential ways forward. First, the District can drop the stands in which the risk to soils clearly exceeds any realistic benefit of harvest: Compartment 362, Stands 31, 34, 35, 37, and 39, and Compartment 365, Stand 7. Second, the District can add appropriate design criteria and limitations on layout, in a transparent process that will inform future projects, to wit:

1. The final Decision Notice and FONSI for the project forbids the operation of ground-based equipment on sustained slopes (over two chains) greater than 40%, and commit to avoid or leave non-commercial inclusions on transversely concave slopes over 35%;
2. The Cherokee NF initiates a public process, accompanied by a press release, to share what it has learned about soil risk from previous South Zone projects with interested stakeholders and inviting public comment on how potentially significant impacts will be avoided in future projects;
3. The Cherokee NF commits to identify and fully disclose public records related to the subject of this objection, which have heretofore been withheld or redacted, and commits to provide records consistent with the Presidential Memorandum found at 74 Fed. Reg. 4683 (2009);

And, third, if the District intends to move forward with this project as is, the District issue a supplemental Environmental Analysis and new FONSI, initiating a new objection period. The supplemental analysis must:

1. Acknowledges the role of citizen science in increasing the Forest's understanding of (a) soil risk and (b) the failure of silvicultural treatments to achieve desired future conditions;
2. Explains what the Forest has learned from previous projects on the South Zone, including the role of layout and equipment;
3. Includes mitigation measures that respond directly to those lessons, including limitations on layout and equipment; and
4. Explicitly balances the likelihood of soil impacts against the likelihood of achieving desired future conditions in the particular stands highlighted by the objection, and account for potential remediation costs. We expect that the balance will tip clearly away from harvest in the stands mentioned above, but the District must address them specifically.

Although we understand that these next steps may take some time, Counsel will expect to hear from the Cherokee National Forest before January 31, 2018, with a suggested timeline for resolving this matter as described above. After January 31, we will assume the Forest Service views its decision on this project to be final and proceed accordingly. In the meantime, we are reaching out to members of the press in an effort to keep the public informed, and we will be sending additional requests for public records under FOIA.

Despite our deep disappointment in this decision, Commenters and Objectors alike will continue participating in good faith in collaborative processes and other project discussions with the Cherokee National Forest. We hope that this decision is an anomaly and will be corrected quickly so that we can continue working together without distraction to improve the ecological outcomes of Cherokee NF management.

Sincerely,



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