

No. 24-1422

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NORTH CASCADES CONSERVATION COUNCIL,  
Plaintiff–Appellant

v.

UNITED STATES FOREST SERVICE, et al.,  
Defendants–Appellees

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On Appeal from the United States District Court  
for the Eastern District of Washington — Spokane Division  
Case No. 2:22-CV-00293-SAB

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**BRIEF OF AMICUS CURIAE**  
**THE PROPERTY AND ENVIRONMENT RESEARCH CENTER**  
**IN SUPPORT OF DEFENDANTS–APPELLEES/AFFIRMANCE**

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## **Corporate Disclosure Statement**

The Property and Environment Research Center is a nonprofit corporation organized under the laws of Montana, which has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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The Property and Environment Research Center (PERC) respectfully submits this amicus brief supporting Defendants-Appellees United States Forest Service and Kristin Bail and affirmance.<sup>1</sup>

### **Statement of Interest of Amici**

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

Declining forest health and the wildfire crisis it fuels are two of today's most significant conservation challenges. PERC has produced extensive research on the causes of these challenges, including the role

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than PERC, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

of policy and litigation.<sup>2</sup> PERC has participated in cases involving the effect of the National Environmental Policy Act (NEPA) on conservation.<sup>3</sup> And its experts have regularly appeared as witnesses in congressional hearings to share their expertise on how to facilitate more forest restoration.<sup>4</sup> PERC believes that its experience and expertise will aid this Court's resolution of this case.

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<sup>2</sup> See Jonathan Wood & Morgan Varner, *Burn Back Better: How Western States Can Encourage Prescribed Fire on Private Lands*, PERC & Tall Timbers Research Station Rep. (2023), <https://perc.org/wp-content/uploads/2023/05/PERC-BBB-Report-UPDATED-230113-web-2.pdf>; Eric Edwards & Sara Sutherland, *Does Environmental Review Worsen the Wildfire Crisis? How environmental analysis delays fuel treatment projects*, PERC Policy Br. (2022), <https://www.perc.org/wp-content/uploads/2022/06/PERC-PolicyBrief-NEPA-Web.pdf>; Holly Fretwell & Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC Pub. Lands Rep. (2021), <https://www.perc.org/wp-content/uploads/2021/04/fix-americas-forests-restore-national-forests-tackle-wildfire-crisis.pdf>.

<sup>3</sup> See, e.g., *Friends of the Crazy Mountains v. Erickson*, No. 22–35555, 2024 WL 1502507 (9th Cir. 2024) (mem.); *Am. Wild Horse Campaign v. Haaland*, No. 21-cv-2146 (D. Colo. filed Dec. 5, 2022).

<sup>4</sup> See, e.g., Legislative Hearing Before the House Natural Resources Committee, Federal Lands Subcommittee (Apr. 17, 2024) (statement of Hannah Downey), <https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=415848>; Legislative Hearing on H.R. 200, H.R. 1473, H.R. 1567 and H.R. 1586 Before the House Natural Resources Committee, Federal Lands Subcommittee (Mar. 23, 2023) (statement of Jonathan Wood), <https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=412935>.

## Summary of the Argument

Forests are not static but complex and living ecosystems. Planning for forest restoration must be equally dynamic and flexible. In this case, however, North Cascades Conservation Council (NCCC) seeks to impose unnecessary and impractical constraints on the Forest Service's ability to restore forests while complying with NEPA.

NCCC challenges the Twisp Restoration Project, which would restore forest and watershed health, improve wildlife habitat (including for northern spotted owl, lynx, gray wolves, and mule deer), and reduce wildfire risks. 8-ER-1536–39; SER-16. NCCC objects to the Forest Service's use of "condition-based management" to fit the project's restoration activities to forest conditions during implementation.

Under condition-based management, the agency authorizes restoration activities in an area but limits their implementation based on local, on-the-ground conditions. See U.S. Forest Serv., *Condition-Based Management: Frequently Asked Questions* (2022).<sup>5</sup> For instance, the Forest Service may authorize mechanical thinning to reduce insect

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<sup>5</sup> [https://www.fs.usda.gov/sites/default/files/2022-04/%27CBM\\_FAQs\\_24JAN22%27%20of%20%27AR-%20Project%20Development%27.pdf](https://www.fs.usda.gov/sites/default/files/2022-04/%27CBM_FAQs_24JAN22%27%20of%20%27AR-%20Project%20Development%27.pdf).



and disease threats in an area vulnerable to such threats, but only allow it to go forward within a certain distance of an outbreak. *See id.* Or it may authorize thinning to address overly dense forest conditions, but limit that activity to areas meeting conditions for slope, density, etc., and, within those areas, limit the extent of thinning based on the degree to which tree density departs from desired conditions. *See Answering Br.* at 36–37. This allows the agency to document and understand the environmental impacts of its restoration work while narrowing implementation in light of on-the-ground conditions.

Condition-based management is “a method to meet NEPA's requirements, not to avoid or shortcut them.” *Id.* NCCC, however, asserts that this approach is never permissible under NEPA. Opening Br. at 28.<sup>6</sup> Instead, it claims the Forest Service must predict exactly “which trees will be cut, how, [and] when,” Opening Br. at 11, which would demand of the Service an impracticable level of foresight that is contrary to this Court’s cases. *See Earth Island Inst. v. U.S. Forest Serv.*, 87 F.4th 1054, 1068 (9th Cir. 2023); *Te-Moak Tribe of W.*

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<sup>6</sup> NCCC also asserts other NEPA claims not addressed in this brief.

*Shoshone of Nev. v. Dep't of the Interior*, 608 F.3d 592, 599–01 (9th Cir. 2010).

Forest conditions vary even within a single unit of analysis and, further, may change during the years that pass between an environmental analysis and on-the-ground work. Therefore, condition-based management provides necessary but limited flexibility to meet the Forest Service's obligations to conserve forests while also complying with NEPA. The consequences of taking away this flexibility would extend far beyond this case, undermining the Forest Service's ability to address an 80-million-acre backlog in forest restoration and tackle the wildfire crisis. See U.S. Forest Serv., *Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America's Forests* (2022);<sup>7</sup> Fretwell & Wood, *supra*. n.2. The district court's holding that condition-based management is a lawful way for the Forest Service to comply with NEPA should be affirmed.

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<sup>7</sup> [https://www.fs.usda.gov/sites/default/files/fs\\_media/fs\\_document/Confronting-the-Wildfire-Crisis.pdf](https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/Confronting-the-Wildfire-Crisis.pdf).

**I. This Court has recognized agency flexibility to adapt NEPA analysis to address uncertainty**

NEPA is governed by a “rule of reason” that gives agencies needed flexibility to balance their substantive missions with their procedural obligations. *See Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir. 2004). Under this rule, agencies “are ‘not require[d] to do the impractical.’” *Id.* at 992 (quoting *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 (9th Cir.1996)) (alteration in original). This principle is especially important to agencies that must plan around uncertainty.

Litigants have frequently challenged the degree of site-specificity agencies used in analyzing project activities under NEPA. *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1117 (9th Cir. 2002), abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). And this Court has repeatedly upheld agency analyses that reasonably adjust the level of site-specificity based on the needs and uncertainties involved in a project. *See, e.g., Earth Island Inst.*, 87 F.4th at 1068 (9th Cir. 2023) (upholding a NEPA analysis authorizing mechanical thinning across 10,000 acres while conditioning the extent and type of mechanical thinning on the

“basal area,” an acre-specific measure of tree density); *N. Alaska Env’t Ctr. v. U.S. Dept. of the Interior*, 983 F.3d 1077, 1088–90 (9th Cir. 2020) (distinguishing whether site-specificity is required from the degree of site-specificity required and concluding that a plaintiff failed to show that the degree required was “clearly greater” than that used by the agency); *Te-Moak Tribe*, 608 F.3d at 600–01 (holding that analyzing the entire project area for a mineral exploration project satisfies NEPA when the exact locations of the drill sites are not yet known).<sup>8</sup> In these cases, this Court has taken a practical approach to NEPA, recognizing that site-specificity is necessarily a question of degree and that the environmental review process must be flexible enough to work in complex, uncertain, and changing circumstances.

In *Te-Moak Tribe*, for instance, this Court considered whether an agency’s analysis of a mining plan of operations violated NEPA because the agency did not know “the precise locations of the project’s activities, such as drill sites, access roads, and support facilities.” 608 F.3d at 599.

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<sup>8</sup> PERC also participated as amicus in this Court’s most recent such case, *Friends of the Crazy Mountains*, 2024 WL 1502507 (holding that the Forest Service can rely on a NEPA analysis that considered the general area of a proposed trail where the precise location depended on future negotiation with a neighboring landowner).

The Court acknowledged that some degree of uncertainty may be inherent in some projects. *Id.* at 600. And it rejected the argument that this uncertainty poses a problem under NEPA, holding instead that the law gives agencies’ flexibility to “balance these uncertainties with its duty under NEPA to analyze possible environmental impacts.” *Id.* In that case, NEPA was satisfied because the agency reasonably defined the project area, identified the types of activities that would occur, and considered the impacts of those activities occurring anywhere within the project area. *Id.*

## **II. Condition-based management is a reasonable solution to the uncertainties of restoring forest ecosystems**

NCCC asserts that condition-based management “is antithetical to NEPA.” Opening Br. at 2, 11, 27–28. In its view, the only way the Service can meet its NEPA obligations is to explain precisely when, where, and how activities will occur. *Id.* at 27–28.<sup>9</sup> This would require the Service to predict, with great precision, future forest conditions and numerous other criteria outside the agency’s control. For this

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<sup>9</sup> While NCCC asserts that more site-specificity is required, it never clearly explains how much more. *See* Opening Br. at 11 (implying that it must be done at the individual-tree level).

proposition, NCCC cites only a single distinguishable and unpersuasive district court decision. *Id.* at 30 (citing *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 443 F.Supp.3d 995 (D. Alaska 2020)). *See* Ans. Br. at 41–43 (distinguishing *Se. Alaska* and suggesting that *Se. Alaska* at most casts doubt on a particular application of condition-based management not its use across-the-board).

Condition-based management has been explicitly upheld by the Tenth Circuit. *See WildEarth Guardians v. Conner*, 920 F.3d 1245, 1258 (10th Cir. 2019). That holding was based on three principles. First, the level of site-specificity required by NEPA “depends on the circumstances[,]” especially uncertainty. *Id.* at 1257. Second, NEPA permits an agency to address uncertainty by analyzing the effects of the full range of activities that may occur under a project and their potential locations, *i.e.* a maximum potential effect approach. *Id.* at 1258. And, third, an agency can further address uncertainty by setting conditions on project implementation to minimize or mitigate environmental impacts. *Id.*

This Court should reach the same result on condition-based management because it has already embraced all three of these

principles. *Te-Moak Tribe*, 608 F.3d at 600–01 (1. An agency “may adapt its assessment of environmental impacts when the specific location of . . . activities cannot reasonably be ascertained.” 2. In such cases, an agency can comply with NEPA by analyzing the “impact of . . . activities in all parts of the project area . . .” 3. And an agency can impose “measures [to] compensate for [its] inability to identify the locations” of activities.). Consequently, the Tenth Circuit’s decision in *WildEarth Guardians* is fully in accord with this Court’s precedent.<sup>10</sup>

Moreover, forest restoration involves the sort of inherent uncertainties that, under *Te-Moak Tribe*, demand the Forest Service strike an appropriate balance between NEPA's procedural obligations and its need to restore forests. *Id.* at 600 (“NEPA's ultimate focus is on the assessment of environmental impacts and a project's details are usually a means to that end” but some projects, “however, inherently involve[] uncertainties[.]”). Forest conditions may change in response to

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<sup>10</sup> *Bark v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020), does not conflict with *WildEarth Guardians* or *Te-Moak Tribe*. That case did not concern an agency adjusting its analysis based on a project’s uncertainty but, instead, whether it can ignore scientific evidence that contradicts its view. *See id.* at 870–71. *See also* Opening Br. at 40–41 (acknowledging that NCCC’s interpretation of *Bark* conflicts with *Earth Island Institute*).

drought, insect or disease outbreaks, or wildfire. *See Condition-based management, supra n.5; see also* Cong. Res. Serv., *National Forest System Management: Overview and Issues for Congress*, R43872 (2023) (discussing significant threats to forest health);<sup>11</sup> Fretwell & Wood, *supra* n.2. This case shows that this concern is no mere hypothetical. Two years into the NEPA process for this project, part of the project area was severely burned in the 55,000 acre Cedar Creek Fire. *See* Ans. Br. at 14.

Many of the activities used to restore forests present additional uncertainty. The Forest Service has noted that condition-based management is especially appropriate for mechanical thinning to prevent disease or insect spread, which must be applied where an outbreak is at the time of implementation, not where it occurred years earlier and the damage has been done. *See Condition-based management, supra n.5.* This flexibility is also critical to prescribed fire, which depends not only on forest conditions but also the weather, air quality, and fire-management resources. *See* U.S. Forest Serv.,

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<sup>11</sup> <https://crsreports.congress.gov/product/pdf/R/R43872>.



*Prescribed Fire*;<sup>12</sup> Wood & Varner, *supra* n.2 (discussing the many factors that may delay or affect implementation of a prescribed fire). Likewise, thinning to reduce tree density and improve forest health requires flexibility to adjust the intensity of thinning based on the extent to which local tree density is outside the desired range. *See Earth Island Inst.*, 87 F.4th at 1068.

The process of approving and carrying out a forest restoration project adds to the uncertainty too. It takes an average of 3-5 years from the time a forest restoration project is initiated to when on-the-ground work begins, depending on whether the project includes prescribed fire. *See* Edwards & Sutherland, *supra*. n.2, at 3. And this average increases with the level of NEPA analysis required, exceeding 7 years for a prescribed burn that undergoes the most extensive level of analysis. *See id.*

These are precisely the sort of uncertainties that demand a degree of flexibility under *Te-Moak Tribe*. Of course, upholding condition-based management does not mean that site-specificity is irrelevant. *See* Ans. Br. at 41–43. Instead, the level of specificity chosen by the agency must

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<sup>12</sup> <https://www.fs.usda.gov/managing-land/prescribed-fire>.

be reasonable considering the uncertainty. *See Te-Moak Tribe*, 608 F.3d at 600.

As this case shows, condition-based management can involve a high degree of site-specificity and produce robust environmental analysis. Contra NCCC's brief, the Forest Service did not vaguely declare that condition-based management would be used across a vast area. *See* Opening Br. at 10–11. Instead, the Forest Service broke the project area down into smaller units, identified the activities that would be authorized in each unit, and set the conditions that would determine whether those activities went forward. *See* Ans. Br. at 10–19, 36. And it analyzed the environmental impacts of all the authorized activities taking place throughout the relevant unit. *See id.* at 38.

The project also spent nearly 1,000 days in the NEPA process, significantly above the average for an environmental assessment and targets set by Congress. *See* Ans. Br. at 19–20; *see also* 42 U.S.C. § 4336a(g) (setting a one-year deadline for environmental assessments); Edwards & Sutherland, *supra* n.2 at 6 (finding that the average environmental assessment takes nearly 600 days). And the Forest Service produced an extensive environmental assessment that exceeds

the page-limit target set by Congress, supported by hundreds of additional pages of appendices and supporting analysis. *See* 42 U.S.C. § 4336a(e)(2).<sup>13</sup>

Thus, this case demonstrates that condition-based management can be “a method to meet NEPA's requirements, not to avoid or shortcut them.” *See Condition-Based Management, supra.* n.5.

### **III. Analysis-paralysis can cause the very environmental harms NEPA is intended to protect against**

Were the Court to accept NCCC's arguments and hold that condition-based management is never permissible, the consequences would extend far beyond this case. The Forest Service faces an estimated 80-million-acre backlog in needed forest restoration, covering more than 40 percent of national forest land. *See* U.S. Forest Serv., 84 Fed. Reg. 27,544, 27,544 (June 13, 2019). Without restoration, these lands will remain vulnerable to wildfire, insect and disease outbreaks,

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<sup>13</sup> Congress adopted deadlines and page limits for environmental assessments after this environmental assessment was completed. *See* Ans. Br. at 5 n.1 (describing several amendments to NEPA and its implementing regulations during the course of this project). They are, nonetheless, helpful in assessing whether condition-based management is consistent with Congress' expectations about the appropriate level of specificity and exhaustiveness for an environmental assessment.

and other threats. *See Confronting the Wildfire Crisis, supra* n. 7, at 20. And, without an effective and efficient NEPA process, the clear result will be unhealthy forests, degraded wildlife habitat, and reduced water quality.

The most prominent symptom of this forest restoration backlog is the wildfire crisis plaguing the west. *See id.* at 10–14. Wildfires have grown larger and more destructive over the last two decades, threatening communities, forests, watersheds, and wildlife to a degree not seen before. *See id.* at 3. Indeed, for part of its argument that more analysis is required, NCCC relied not on environmental harm but the substantial environmental benefits of reducing wildfire risks. *See* Opening Br. at 37–38 (suggesting that agencies pursuing environmentally beneficial projects should be penalized for those benefits with more red tape).

A business-as-usual approach is insufficient to tackle this crisis. The Forest Service has set a goal to approximately double the amount of forest restoration on National Forest System land, while also increasing its work on other federal land, state land, and private land. *See Confronting the Wildfire Crisis, supra* n.7, at 4. Two of the biggest

obstacles to that goal are red tape and litigation. See U.S. Dep’t of Ag., *On Fire: The Report of the Wildland Fire Mitigation and Management Commission* 78–80 (2023)<sup>14</sup> (“[F]ederal land management planning efforts and requisite environmental analyses are often not completed at a pace commensurate with the increasing impacts of wildfire.”); U.S. Forest Serv., *National Prescribed Fire Review* App. A 21–22 (2022)<sup>15</sup> (citing the need for “a more efficient environmental analysis and regulatory process”).

These burdens are uniquely heavy for the Forest Service. According to Environmental Protection Agency data, the Forest Service has prepared more environmental impact statements during the last decade than any other federal agency, exceeding the second-place agency by more than 50%. See U.S. Env’t Prot. Agency, *Environmental Impact Statements Database*.<sup>16</sup> Forest management projects are also the most common subject of NEPA litigation. See Nikki Chiappi, et al.,

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<sup>14</sup> <https://www.usda.gov/sites/default/files/documents/wfmmc-final-report-09-2023.pdf>.

<sup>15</sup> [https://www.frames.gov/documents/usfs/USFS\\_20220908\\_National-Prescribed-Fire-Program-Review.pdf](https://www.frames.gov/documents/usfs/USFS_20220908_National-Prescribed-Fire-Program-Review.pdf)

<sup>16</sup> <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search/>.

*Understanding NEPA Litigation: A Systematic Review of Recent NEPA-Related Appellate Court Cases*, Breakthrough Institute 9–11 (2024).<sup>17</sup>

Taking condition-based management out of the Forest Service’s toolbox will only exacerbate these challenges, by extending the environmental review process, requiring it to be redone frequently as conditions change, and encouraging disruptive litigation. The predictable result of this analysis-paralysis will be more destructive wildfires and more insect and disease outbreaks. *Cf.* Jan G. Laitos & Christopher Ainscough, *The Paralysis Paradox and the Untapped Role of Science in Solving “Big” Environmental Problems*, 30 *Georgetown Env’t. L. Rev.* 409, 429 (2018) (discussing how inflexible approaches to NEPA can produce analysis-paralysis). That will mean less healthy forests, degraded wildlife habitat, and reduced water quality. *See Confronting the Wildfire Crisis*, *supra* n.7, at 17; Fretwell & Wood, *supra* n.2. Such an outcome undermines, rather than further, NEPA’s purposes.

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<sup>17</sup> <https://thebreakthrough.imgix.net/Understanding-NEPA-Litigation-v4.pdf>.

## Conclusion

NEPA is intended to ensure informed decision-making by agencies, not to grind their core functions to a halt. Here, the Forest Service has developed an approach, condition-based management, that can satisfy its obligations under NEPA while also giving it reasonable flexibility to meet the challenges of restoring forests. NCCC's broad challenge to that important tool should be rejected.

Dated: August 9, 2024

Respectfully submitted,

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s/ Jonathan Wood  
Jonathan Wood



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s/ Jonathan Wood  
Jonathan Wood