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Submitted to:

comments-pacificsouthwest-sequoia-@fs.fed.us

O'Dell Tucker, District Planner
Western Divide Ranger District
32588 Hwy 190
Springville, CA 93265

cc: Ara Marderosian
Eric LaPrice

Re: Durrwood Scoping Comments

Please accept the following comments on behalf of Sequoia ForestKeeper and the Kern-Kaweah Chapter of the Sierra Club.

Please use proper authority, provide sufficient information, and rescope the proposal.

The scoping letter seeks comments regarding renewal of the Durrwood Creekside Lodge Bed and Breakfast resort special use permit (SUP), in which the Forest Service wants to reissue the SUP under “Forest Service Handbook 1909.15, Chapter 30, Section 32.2, Number 15.” That authority, however, has been replaced by 36 C.F.R. § 220.6(e)(15), and we request that the District start using the proper NEPA authorities rather than the FSH.

Section 220.6(e)(15) allows categorical exclusions from analysis in an EA or EIS for:

Issuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are not changes to the authorized facilities or increases in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization.

The Forest Service has provided insufficient information for us to provide meaningful comments. The entirety of the substantive information provided about the subject property is:

The site includes a residence, four motel type rooms, a rental cottage with attached garage, two wooden storage buildings, rock wall, septic systems, a well, and two water systems. The total acreage under special use authorization is 2.95 acres of National Forest System lands in Giant Sequoia National Monument. The resort operates 365 days a year.

First, there is no information provided about the length of the new term for the SUP or how long the previous SUP lasted and when it expires. Please provide this information and re-scope the proposal. Second, although the assumption is that the SUP is simply administrative and would not permit “changes in the authorized facilities or increases in the scope or intensity of the authorized activities,” the Forest Service has not included any information as to the scope or

intensity or whether they will remain the same. Please include a statement about this and re-scope. Third, there is no information provided as to whether the “applicant or holder is in full compliance with the terms and conditions of the special use authorization.” We request a copy of the previous permit and ask for a statement about compliance with the terms and conditions of that permit, and ask that the Forest Service then re-scope the proposal.

The Clean Water Act may require a 401 Certificate for water withdrawals from or discharges into the South Creek, a tributary of the navigable Kern River.

According to the scoping notice, the Durrwood SUP includes “septic systems, a well, and two water systems.” It is unclear whether these water systems include diversions that remove water or result in discharges into South Creek. Given these possibilities, the Forest Service must consider whether a Section 401 Clean Water Act Certificate is required prior to re-issuing the special use permit.

In a 2011 case concerning a tributary to the South Fork of the Kern River (Fay Creek), Judge Lawrence O’Neill of the E.D. of California found that because Fay Creek was a tributary to the navigable South Fork of the Kern, the Forest Service was required to consider whether the Forest Service or the permittee was required to obtain a Section 401 Clean Water Act Certificate from the State of California before issuing the Special Use Permit. *See Forestkeeper v. United States Forest Serv.*, No. CV F 09-392 LJO JLT, 2011 U.S. Dist. LEXIS 26447, at *15 (E.D. Cal. Mar. 14, 2011) (“The USFS was required to determine whether a Section 401 Certification was required prior to issuing the Sellers SUP. 33 U.S.C. §1341(a)(1).”).

And because the Forest Service failed to consider whether a Section 401 Certificate was required prior to re-issuing the Sellers SUP, the USFS “failed to consider an important aspect of the problem.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). Under these circumstances, the Court found that the Forest Service acted arbitrarily and capriciously when it issued the Sellers SUP without considering its obligations under the CWA and without applying for a Section 401 Certificate. *Sequoia ForestKeeper*, 2011 U.S. Dist. LEXIS 26447, at *16. Moreover, the Forest Service also violated NEPA for overlooking this issue.

The same requirement applies to the Durrwood SUP, and the Forest Service must consider whether a Section 401 Certificate is required before re-issuing the SUP because South Creek is a tributary to the Kern River, which is considered a navigable river.

The Kern-Kaweah Chapter of the Sierra Club, Sequoia ForestKeeper, its Board of Directors, staff, and members would be deeply disappointed with the Forest Service decision, if the agency fails to determine whether a 401 Clean Water Act Certificate from the State of California was needed prior to issuing the Durrwood special use permit.

There may be cumulative effects from water withdrawals associated with the Durrwood SUP, which the Forest Service must consider.

The Forest Service must consider all existing water resources and water uses, including wells, diversions, withdrawals, and development projects, that could be depriving the forest ecosystem and causing tree mortality.

Is the massive die-off of trees in the Sierra Nevada being caused only by the drought and climate change, or is the die-off being exacerbated by the limited water supply in the Sierra because of the granitic structure of the mountains where water is found in isolated fracture pockets where tree roots must penetrate to reach the needed water supply when surface water flows are intermittent? Fractured rock aquifers drain when connected water resources below the impoundment are removed. Water wells in the Sierra Nevada are located and placed using fracture drilling techniques. Forest managers must consider the anthropogenic uses of water in the forests, including, but not limited to, water wells, water diversions, water withdrawals, and water developments that serve people who have established in forested areas of California. How are these anthropogenic uses of water impacting the available water for growing forests and maintaining the forest species? These human uses of forest water must be identified, their flows determined and totaled, and the cumulative extracted water volume considered along with drought and climate change. Should these extractions be permitted to continue at the expense of the needs of the forest which is California's major location for sequestering carbon?

Global climate change will likely lead to water resource shortfalls. According to the CEC document <http://www.energy.ca.gov/2009publications/CEC-500-2009-014/CEC-500-2009-014-F.PDF>, "there is a disquieting preponderance of simulations that become significantly drier during the twenty-first century." Also, "The incidence of years with very low spring snowpack and associated low soil moisture in late spring and early summer occur much more frequently."

According to the CEC document *Using Future Climate Projections to Support Water Resources Decision Making in California* at <http://www.energy.ca.gov/2009publications/CEC-500-2009-052/CEC-500-2009-052-F.PDF>, "The 30-year trend indicates that the fraction of annual runoff occurring from April through July decreases from about 35% for the historical base scenario (historical conditions with no increase in air temperature) to about 15% for the +4°C scenario."

California's drought and climate change created the massive die-off of trees in the southern Sierra Nevada. Are water diversions and wells contributing to the massive die-off of trees in Sequoia National Forest and in particular in the area surrounding the Durrwood diversions and well?

The Forest Service should provide a comprehensive inventory of surface and groundwater resources of water in the watersheds as a way to establish a baseline for assessing the impacts of the project that propose wells or diversions, withdrawals, or water development. These inventories and an analysis of water resources must be considered in the environmental analysis, especially now that we are in a prolonged drought period in California. This water balance must

be specified in order to be able to determine if sufficient water is available to cope with the increased forest temperatures that would result following tree removal.

The analysis must include an assessment of and documentation to show all water wells, water diversions, water withdrawals, and water developments that utilize water in the watersheds involved in the project area in order to establish a baseline of available water for making a decision as to what can be done to protect the forest ecosystem from drought, and whether commercial thinning would be effective, since there is a drought and there is a die-off of millions of trees in the area.

Congress recognized that managing natural resources in National Forests was “highly complex” and enacted the Forest and Rangeland Renewable Resources Planning Act. The Act requires that the Forest Service develop an inventory of “present and potential renewable resources, and an evaluation of opportunities for improving their yield of tangible and intangible goods and services.” In addition the Act requires that all forest management activities to be preceded by a “comprehensive assessment” of environmental and economic impacts in order to create a management plan that is consistent with MUSYA and NEPA. Congress emphasized the “fundamental need” for the management plans to “protect and, where appropriate, improve the quality of soil, air, and water resources.” Developing an inventory of surface and groundwater resources and an assessment of the environmental impacts on surface and groundwater including potential impacts of groundwater use on surface water resources, is an integral step in ensuring that a management plan protects the water quality in Sequoia National Forest.

An Environmental Assessment is Required

Because there may be cumulative effects from water diversions or well water withdrawals, and because a Section 401 Certificate may be required, the Forest Service must conduct an environmental assessment to determine whether there could be significant effects before for re-issuing the Durrwood SUP. It cannot rely on its categorical exclusion in re-issuing the SUP.

For Sequoia ForestKeeper and the Kern-Kaweah Chapter of the Sierra Club,

Sincerely,

A handwritten signature in blue ink, appearing to read 'René Voss', with a stylized flourish at the end.

René Voss – Attorney at Law