UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
UNITED STATES FOREST SERVICE

In re: Objection to Upper Cheat River Project Draft Decision Notice, Environmental Assessment and Finding of No Significant Impact;	)
Monongahela National Forest Cheat-Potomac Ranger District	)
Judy Rodd, Executive Director Friends of Blackwater	)
Jason Totoiu, Senior Attorney Center for Biological Diversity	)
OBJECTORS.	)

NOTICE OF OBJECTION AND STATEMENT OF REASONS

Objection Prepared by:

Elizabeth Lewis, Esq.
Associate Attorney

EUBANKS & ASSOCIATES, PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
(202) 617-1007
lizzie@eubankslegal.com

Date Submitted: September 16, 2022[1]

[1] Submitted electronically to objections-eastern-region@usda.gov, as allowable pursuant to the District Ranger's July 28, 2022 letter concerning the opportunity to object to the Upper Cheat River Project.

OBJECTOR CONTACT INFORMATION

Judy Rodd, Executive Director
Friends of Blackwater
571 Douglas Rd
Thomas, WV 26292

Jason Totoiu, Senior Attorney
Center for Biological Diversity
P.O. Box 2155
St. Petersburg, FL 33731

Pursuant to 36 C.F.R. § 218.8(d)(3), Friends of Blackwater is designated as the lead objector.

Please direct communications regarding this Objection to Elizabeth Lewis at Eubanks & Associates, PLLC at the contact information above.

PROJECT INFORMATION

Pursuant to 36 C.F.R. § 218.8(d)(4), the project at issue in this Objection is the Upper Cheat River Project ("the Project") in the Monongahela National Forest. The Project area is located north of Parsons, West Virginia in the Cheat-Potomac Ranger District. The responsible official is Mr. Jon Morgan, District Ranger, Cheat-Potomac Ranger District.

NOTICE OF OBJECTION

Pursuant to 36 C.F.R. § 218, Friends of Blackwater and the Center for Biological Diversity (collectively, "the Objectors") object to the Final Environmental Assessment ("EA") and its accompanying supplemental analyses, project record, Draft Decision Notice ("DDN"), and Finding of No Significant Impact ("FONSI") for the Project. These decisions fall short of the standards required by the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), and their implementing regulations. The public notice was published in the Grant County Press on August 2, 2022. This Objection is timely.

INTEREST OF THE OBJECTORS

Friends of Blackwater is a non-profit conservation organization working to protect biodiversity in the Mid-Atlantic Appalachian Highlands. Friends of Blackwater has 5,624 members and supporters across West Virginia and in the surrounding states, and works to protect public lands used by our members. During the past 20 years, Friends of Blackwater has moved 4,650 acres of critical endangered species habitat into public ownership at Blackwater Falls State Park and in the Cheat Canyon. Friends of Blackwater has funded research and advocacy for the endangered Indiana bat, Virginia big-eared bat, Cheat Snail in the Cheat River Gorge, the Cheat Mountain salamander, and advocated for federal protections for the West Virginia northern flying squirrel, northern long-eared, and little brown bats. Friends of Blackwater has a

longstanding interest in the conservation of rare, threatened, and endangered species in the Monongahela National Forest, and has a track record of active engagement in Monongahela National Forest planning processes. Friends of Blackwater has a Memorandum of Understanding to work with the Monongahela National Forest on improving water quality, maintaining hiking and biking trails, and interpreting historic sites in Tucker County. Friends of Blackwater has done similar trail work in Blackwater Falls State Park and collaborated with Tucker County and the Town of Hendricks to place roadside markers at historic sites.

The Center for Biological Diversity is a nonprofit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental and administrative law. The Center has over 1.7 million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for over twenty-five years to protect imperiled plants and wildlife, habitat on national forests and other public lands, open space, air and water quality, and overall quality of life. A critical part of the Center's work focuses on protecting endangered and threatened species in the Southeastern United States. Several of these imperiled species occur in West Virginia and within the Monongahela National Forest.

INTRODUCTION

Please accept the following Objection on behalf of Objectors. Objectors have participated in the environmental review process for the Project, including by submitting scoping comments and comments on the Draft EA. Objectors' comments on the Draft EA ("Objectors' Comments") are attached here for reference. *See* Attach. A. Additionally, pursuant to 36 C.F.R. § 219.54(c)(7), each objection is accompanied by a citation to "prior substantive formal comments attributed" to Objectors demonstrating the "link" between those comments and the "content of the objection."

STATEMENT OF REASONS, VIOLATIONS OF LAW, AND SUGGESTED REMEDIES

I. THE FOREST SERVICE'S DECISION FAILS TO CONSIDER A FULL RANGE OF ALTERNATIVES IN VIOLATION OF NEPA

A. The EA Unlawfully Fails to Include A "No Action" Alternative

Although an agency's obligation to discuss alternatives in an EA is less onerous than in an environmental impact statement ("EIS"), the agency must still "give full and meaningful consideration to all reasonable alternatives" in an EA. *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995). The requirement to consider alternatives "guarantee[s] that agency decisionmakers have before them and take into proper account all possible approaches to a particular project (*including total abandonment of the project*) which would alter the environmental impact and the cost-benefit balance." *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988). Accordingly, the "[i]nformed and meaningful consideration of alternatives, including a no-action alternative, is central to the NEPA statutory scheme." *Id.*; *see also Alaska Wilderness*, 67 F.3d at 729. Thus, to be compliant with NEPA, an agency's EA must include a "no action" alternative, *Bob Marshall All.*, 852 F.2d at 1228.

Applying those principles here, it is clear that the Final EA is inconsistent with NEPA and cannot be sustained.[2] The EA meaningfully evaluates only one alternative: an action alternative that is the agency's preferred alternative (i.e., the Project). In a single paragraph, the EA states that under the "no action" alternative, "current conditions and trends would continue." Final EA at 7. The Final EA proceeds to summarily dismiss the no action alternative from detailed consideration as failing to meet the Project's purpose and need. *Id.* At no point does the Final EA or its supplemental analyses meaningfully describe the affected area's current conditions. Nor does the Final EA meaningfully compare those current conditions to the impacts of the Project.

As a practical matter, the Forest Service's failure to consider a no action alternative fatally skews the agency's entire analysis of alternatives. The "no action" alternative "serves as a benchmark" for comparing the other alternatives. *Theodore Roosevelt Conservation P'ship v. Salazar*, 744 F. Supp. 2d 151, 160 (D.D.C. 2010), *aff'd*, 661 F.3d 66 (D.C. Cir. 2011); *see also Ctr. for Biological Diversity v. U.S. Dept. of Interior (*Ctr. for Biological Diversity I*)*, 623 F.3d 633, 642 (9th Cir. 2010) (providing that the no action alternative is intended to "provide a baseline against which the action alternative" is evaluated). However, the Forest Service's analysis of the effects of the Project is devoid of any baseline against which to measure the impacts of the Project and any alternatives. *Ctr. for Biological Diversity I*, 623 F.3d at 642 (providing that "[a] no action alternative . . . allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action"); *cf.* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* 1 (1997) ("The range of alternatives considered [in environmental analyses under NEPA] must include the no action alternative as a baseline against which to evaluate cumulative effects."). Without accurate baseline data, an "informed and meaningful consideration of alternatives", and thus, full compliance with NEPA, is impossible. *Bob Marshall Alliance*, 852 F.2d at 1228.

Likewise, "[w]ithout [accurate baseline] data, [the Forest Service] cannot carefully consider information about significant environment impacts"—including whether those impacts rise to the level of significance that requires evaluation in an EIS—"resulting in an arbitrary and capricious decision." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *see also Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (holding an agency's no action alternative invalid because it improperly defined the baseline); *cf. Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 786 (9th Cir. 2006) (rejecting environmental analysis where "[t]he sole mention of the no action alternative stated that it 'would not meet the purpose and need for the proposed action'").

Objectors' comments on the Draft EA explained that "the Forest Service utterly fails to address the many benefits of a 'no action alternative,' which include the preservation of habitat for listed species like the [Northern long-eared bat] and Indiana bat." Objectors' Comments at 3. In response, the Forest Service offers two rationales for its continued refusal to meaningfully examine a no action alternative—first, that "there is no requirement to analyze a 'no action'

[2] Objectors previously alerted the Forest Service to this deficiency in their comments on the draft EA. *See* Objectors' Comments at 3 (explaining that the Final EA "utterly fails to address . . . a 'no action alternative'").

alternative"; and second, that in any event, "the EA briefly describe[s] conditions should the Forest [Service] take no action." Forest Serv., *Upper Cheat River Project—Response to Comments* at 24-25 [hereinafter *Resp. to Comments*]. Neither of these rationales withstands scrutiny.

With respect to the Forest Service's assertion that an analysis of a no action alternative is not required, the only authority that the agency cites to support its position is the Forest Service Handbook. Although the Handbook provides that "[t]here is no requirement to include a no action alternative in an EA," Forest Serv. Handbook 1909.15, Ch. 10, § 14.2, "[t]he Forest Service cannot contravene the will of Congress through its reading of administrative regulations" or statutes, *League of Wilderness Defs./Blue Mountains Biodiversity Proj. v. Forsgren*, 309 F.3d 1181, 1186 (9th Cir. 2002). As explained, "[i]nformed and meaningful consideration of alternatives [in an EA]—including the no action alternative—is thus an integral part of the statutory scheme." *Bob Marshall All.*, 852 F.2d at 1228. Accordingly, the Forest Service cannot rely on its Handbook to justify its failure to meaningfully analyze a no action alternative because this result is patently inconsistent with the letter and spirit of NEPA. *See id.* (holding that whether in an EIS or an EA, the agency's alternatives analysis must include a "no action" alternative).

Moreover, the Forest Service's argument disingenuously omits the fact that, far from excusing the agency from examining the no action alternative, the Handbook merely provides that "the effects of a no-action alternative may be documented . . . 'through the effects analysis by contrasting the impacts of the proposed action and any alternatives(s) with the current condition and expected future condition if the proposed action were not implemented.'" Forest Serv. Handbook 1909.15, Ch. 10, § 14.2 (quoting 36 CFR § 220.7(b)(2)(ii)). Thus, read in context, the Handbook does not excuse the Forest Service from examining a no action alternative in an EA. Rather, the Handbook merely parrots the relevant Forest Service regulation permitting the agency to document consideration of the no action alternative by comparing the effects of the proposed action and alternatives to the current and expected future condition of the affected environment. *Cf.* 73 Fed. Reg. 43,084, 43,092 (noting that 36 CFR § 220.7(b)(2)(ii) "would allow consideration of a no-action alternative to be shown by contrasting the impacts of the proposal and alternatives with the current condition and expected future conditions" of the environment"); *accord id.* ("By contrasting the impacts of the proposal and alternatives with the current condition and expected future condition of the environment, the effects of a no-action alternative are considered."). Accordingly, notwithstanding the Forest Service's contrary assertion, both the Handbook and applicable agency regulations *require* consideration of a no action alternative in an EA.[3]

Even if this glaring legal defect could, as suggested by the agency's non-binding Handbook, be cured by an EA's discussion in the effects analysis of current and future conditions if the agency takes no action, *see* Forest Serv. Handbook 1909.15, Ch. 10, § 14.2

[3] As explained below, *see infra* at Section I.C, to the extent that the Forest Service suggests that consideration of alternatives to the Project is not required because there are no "unresolved conflicts concerning alternative uses of available resources," *see* 36 C.F.R. § 220.7(b)(2)(i), such a suggestion is demonstrably wrong and arbitrary and capricious.

(quoting 36 CFR § 220.7(b)(2)(ii)), the Final EA still falls woefully short. For example, although the effects analysis in the Final EA offers a limited discussion of the current timber stand age class distribution as compared to the Project's impacts, *see, e.g.*, Final EA at 37, it does not meaningfully address the relative benefits of maintaining all (or even some) of the mid-late to late successional stands on several resources, including benefits to species threatened by habitat loss and fragmentation, carbon storage, and floodplain and hydrology management. *See* Objectors' Comments at 2 (noting that "[t]he Forest Service does not even discuss the benefits and costs of not acting, other than to say that late successional habitat would increase in the forest if the Forest Service does not pursue the action alternative"). Instead, the Final EA describes the general impacts that might be expected from the Project, and then concludes that those impacts will not be significant. *See, e.g.*, Final EA at 46. By failing to accurately define the baseline, the EA effectively considers the impacts of the Project in a vacuum, in direct contravention of NEPA's "guarantee[] that environmental aspects of a policy are considered, *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1005 (9th Cir. 2011) (citing *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008)). Hence, this discussion neither constitutes the "hard look" that NEPA demands, nor makes a "convincing case" that the impacts of the Project—as judged against the baseline if no action is taken—are insignificant. *Grand Canyon Tr. v. FAA*, 290 F.3d 339, 340–41 (D.C. Cir. 2002).

With respect to the Forest Service's suggestion that the Final EA's "brief[] descri[ption]" of current conditions satisfies its obligation to consider the status quo, *Resp. to Comments* at 24, this cursory discussion does not constitute the "hard look" that NEPA requires. The single paragraph insists that "[s]hould the Forest take no action to move the forest toward the desired conditions, current conditions and trends would continue," Final EA at 7; it does not adequately describe those current conditions and trends, let alone compare them in any meaningful way to the foreseeable impacts of the Project. "Although an EA need only include a 'brief discussion' of alternatives, that discussion must follow 'full and meaningful consideration' of the alternatives by the agency." *Ctr. for Envtl. Law & Policy*, 655 F.3d at 1012 (citation omitted); *see also Ctr. for Biological Diversity v. U.S. BLM (*Ctr. for Biological Diversity II*)*, 746 F. Supp. 2d 1055, (N.D. Cal. 2009) ("To fulfill NEPA's goal of providing the public with information to assess the impact of a proposed action, the 'no action' alternative should be based on the status quo—with a full description of what the status quo is and how it was reached—and should be consistently used as the benchmark by which the various alternatives are compared."). By refusing to seriously consider a no action alternative and by failing even to meaningfully analyze the baseline status quo in the absence of the Project (let alone an objective comparison of that baseline to the Project), the Forest Service has violated NEPA and its implementing regulations

In sum, the Forest Service's refusal to consider a no action alternative deprived the agency and the public of a meaningful opportunity to assess the comparative impacts of the Project to baseline conditions. Thus, the current alternatives analysis for the proposed rule is fundamentally flawed.

Suggested Remedy: To comply with NEPA, the alternatives analysis must be substantially revised to include a true no action alternative that accurately serves as the baseline for the Forest Service's NEPA analysis, and the agency's effects analysis must engage in a more

detailed examination of baseline conditions as compared to the impacts of the Project if implemented. Based on this significantly revised analysis, the agency must also make a new determine as to whether the Project is likely to result in significant impacts such that an EIS is required.

B. The EA Unlawfully Fails To Examine *Any* Alternatives To The Project

"If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives." *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 670 (7th Cir. 1997). Thus, it is well-established that NEPA imposes a clear-cut procedural obligation on the Forest Service to analyze a full range of reasonable alternatives regardless of whether it opts for an EA or an EIS. *See, e.g.*, *Te-Moak Tribe v. U.S. Dep't of Interior*, 608 F.3d 592, 601–02 (9th Cir. 2010) ("Agencies are required to consider alternatives in both EISs and EAs and must give full and meaningful consideration to all reasonable alternatives." (citation omitted)); *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (per curiam) (citations omitted) (noting that NEPA's requirement that agencies "study, develop, and describe appropriate alternatives . . . applies whether an agency is preparing an [EIS] or an [EA]"); *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 960 (7th Cir. 2003) ("The inquiry into consideration of reasonable alternatives is independent of the question of [EISs], and operative even if the agency finds no significant environmental impact."); *see also* 42 U.S.C. § 4332(E) ("[T]o the fullest extent possible" each agency must "study, develop, and describe appropriate alternatives to recommended courses of action"). "The existence of a viable but unexamined alternative renders an [EA] inadequate." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998)).

The Forest Service's Final EA for the Project plainly violates these requirements.[4] "Courts apply a 'rule of reason' standard in reviewing the adequacy of a NEPA document" – asking whether it "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 992 (9th Cir. 2004) (quoting *Churchill Cty v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001)). "[T]he crucial inquiry . . . is whether [the] selection and discussion of alternatives fosters informed decision-making and informed public participation." *W. Watersheds Proj. v. Bernhardt*, 543 F. Supp. 3d 958, 981-82 (D. Idaho 2006) (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)). The Final EA considered only one alternative: conducting the Project. By definition, the consideration of only one alternative is not tantamount to considering a "range" of alternatives, much less a range that is "reasonable." Because the Final EA is devoid of any meaningful consideration of alternatives, it cannot be sustained. *Cf. Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (holding that agencies must "provide legitimate consideration to alternatives that fall between the obvious extremes").

Assuming, *arguendo*, that the EA included a no action alternative, its alternatives analysis would still be deficient under NEPA. Although there is no minimum number of action

[4] Objectors previously raised these issues in comments on the Draft EA. *See* Objectors' Comments at 2-5 (discussing the deficiencies in the draft EA's alternatives analysis).

alternatives that an agency must consider, it still must consider a "full range of reasonable alternatives," including mid-range options between no action and a proposed action. *Simmons*, 120 F.3d at 667; *see also Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1249 (9th Cir. 2005) (noting that in every case, the agency's duty under NEPA remains to consider "all reasonable alternatives"). By failing to consider any reasonable, mid-range alternatives—i.e., alternatives that would have allowed some, but not all, of the environmentally impactful activities of the full Project—the Forest Service impermissibly "executed an end-run around NEPA's core requirement." *Simmons*, 120 F.3d at 670. Because the Forest Service considered a single action alternative, there was no legally required hard look at a reasonable range of alternatives in violation of NEPA. *See Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 989 (D. Colo. 1989) ("Consideration of alternatives which lead to similar results is not sufficient under NEPA[.]"); *Friends of Yosemite*, 520 F.3d at 1038-39 (finding that a NEPA analysis "lacked a reasonable range of action alternatives" because "the [three action] alternatives are essentially identical" and thus "not varied enough to allow for a real, informed choice"); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (finding NEPA violation when the two action alternatives considered in detail were "virtually identical"); *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 577 (D.C. Cir. 2016) ("[B]ecause the Service in these circumstances did not consider any other reasonable alternative that would have taken fewer Indiana bats than Buckeye's plan, it failed to consider a reasonable range of alternatives and violated its obligation under NEPA.").

The Forest Service's failure is especially egregious because the agency disregarded repeated public comments proposing specific mid-range alternatives. *See* 40 C.F.R. § 1500.2(d) (requiring agencies to [e]ncourage and facilitate public involvement" "to the fullest extent possible"). For example, Objectors explained that the Forest Service should consider one or more alternatives that "result in fewer acres of vegetation management, reduce the amount of clearcutting in favor of uneven aged approaches, prohibit the logging of older, mature trees, and further limit [or modify] logging where [Northern long-eared bats] have been documented." Objectors' Comments at 3. Objectors stressed that "[s]ome of these alternatives or a combination thereof may very well achieve the stated purpose of the proposed project but accomplish it a manner that is far less damaging than the approach being proposed." *Id.* The Forest Service refused to consider any alternative other than the Project, insisting that "the suggested alternatives do not meet the purpose and need and move the project towards the desired future conditions." *Resp. to Comments* at 24. However, NEPA "does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multipurpose project." *Town of Matthews v. U.S. Dep't. of Transp.*, 527 F. Supp. 1055 (W.D.N.C. 1981). Nor does "[a] cursory dismissal of a proposed alternative, unsupported by agency analysis, . . . help an agency satisfy its NEPA duty to consider a reasonable range of alternatives. *Envtl. Prot. Information Ctr. v. U.S. Forest Serv.*, 234 Fed. App'x 440, 443 (9th Cir. 2007) (citing *Envtl. Prot. Information Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1016 (9th Cir. 2006)).

While NEPA does not require the Forest Service to "consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives," *Seattle Audubon Soc'yy v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996), it is particularly troubling here that the Forest Service failed to consider any alternatives that "might meet the goals of the agency by using different approaches

which may reduce the environmental impacts of the agency's action." *Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1265 (E.D. Cal. 2006). Broadly stated, the Project's purpose is "to move the project area closer to the desired future conditions of the Forest Plan," including by "[i]mprov[ing] age class distribution of forested stands," "[r]estor[ing], maintain[ing], and enhanc[ing] wildlife habitat," and "[p]romot[ing] oak regeneration and increase forest structure and stand resiliency." Final EA at 7. None of these objectives require the clearcutting of *all* of the Project area. To the contrary, mid-range alternatives that accomplish these goals while preserving at least some areas of wildlife habitat and mid-late or late succession stands are both "is objectively feasible as well as 'reasonable in light of [the agency's] objectives'" and statutory mandate. *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72 (alterations in original) (quoting *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999)); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (holding that an agency's purpose and need, which dictate the range of "reasonable" alternatives, must take into account "the views of Congress, expressed . . . in the agency's statutory authorization to act"). Thus, the Forest Service's failure to rigorously explore a single mid-range action alternative (or more than one) is a flagrant violation of NEPA. *See, e.g.*, *Ctr. for Biological Diversity II*, 746 F. Supp. 2d at 1087-89 (holding agency should have considered alternatives that closed some portion of existing road network in planning area); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 709-11 (10th Cir. 2009) (NEPA analysis should have considered alternatives closing or reducing future oil and gas leasing on public lands).

Moreover, because the EA's alternatives analysis evaluates only the Forest Service's preferred alternative—i.e., the Project—there are grave questions as to whether the Forest Service is merely using this process not to genuinely consider alternatives to the Project, but instead to justify the decision the agency already made. NEPA's effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process. *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000) (citation omitted). Accordingly, an agency's examination of impacts and alternatives "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 629, 712 (10th Cir. 2010) (quoting Metcalf, 214 F.3d at 1142) (internal quotation marks omitted). Utilizing the NEPA process as nothing more than a ruse to justify or rationalize a decision already made is therefore a patent violation of the letter and spirit of NEPA. *See id.* ("[I]f an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously."). The Forest Service must ensure that it fully complies with its obligations under NEPA to give a full and fair evaluation to the Project and a reasonable range of alternatives.

For all of these reasons, and in order to satisfy the obligations of NEPA and its implementing regulations, the Forest Service must consider reasonable mid-range alternatives that mitigate the serious adverse environmental effects of the Project. *See, e.g.*, *Union Neighbors*, 831 F.3d at 577. Without such an analysis that presents the alternatives and their consequences in comparative form, it is impossible to determine whether the Forest Service has taken a "hard look" at the problem, nor can the Forest Service make a "convincing case" for its FONSI. *Grand Canyon Tr.*, 290 F.3d at 340–41.

Suggested Remedy: To comply with NEPA, the alternatives analysis must be substantially revised to include meaningful examination of a full range of alternatives with differing levels of impact to affected resources, which is sufficient to permit a reasoned choice among options.

C. Any Suggestion That Analysis Of Additional Alternatives Is Not Required Does Not Withstand Scrutiny

NEPA section 102(2)(E) requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E); *see also* 36 C.F.R. § 220.7(b)(2). Although the Forest Service did not explicitly invoke this provision in its EA or Response to Comments, its refusal to examine even the no action alternative in detail raises the specter of such a defense. To the extent that the Forest Service justifies its refusal to examine additional alternatives by relying on the purported absence of "conflicts concerning alternative uses of available resources," such reliance is arbitrary and capricious.[5]

In response to comments requesting that the agency consider a no action alternative, the Forest Service insists that "there is no requirement to analyze a 'no action.'" *Resp. to Comments* at 24-15. Likewise, in response to comments requesting that the agency examine mid-range alternatives (or *any* alternative other than the Project to ensure consideration of a range of alternatives), the EA argues that the Project "fulfills the purpose and need of the project[,] whereas the suggested alternatives do not." *Id.* Yet, even if the suggested alternatives could not fulfill the purpose and need (which is false as explained herein), the Forest Service never identifies or analyzes any *other* alternatives to the Project that could satisfy the purpose and need even though the burden is on *the agency*—not the public—to identify and consider feasible alternatives. Moreover, the Forest Service never explains how it arrived at the conclusion that the suggested alternatives do not fulfill the purpose and need—this is just an ipse dixit relieving it of the duty to consider alternatives. On this basis alone, the Forest Service's alternatives analysis must be set aside. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that an agency acts arbitrarily and capriciously where it fails to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"); *Union Neighbors*, 831 F.3d at 577 (rejecting NEPA analysis that ignored proposed alternative as "not necessary" without further explanation).

Moreover, section 102(2)(E) is not an escape clause for agencies that wish to avoid considering alternatives. As the D.C. Circuit has explained, section 102(2)(E) "parallels the general EIS requirement of discussion of 'alternatives to the proposed action.'" *Friends of the River v. FERC*, 720 F.2d 93, 104 (D.C. Cir. 1983). Courts have accordingly held that, regardless of the document's title, "NEPA and the CEQ regulations make it clear that *an agency must always consider alternatives to a proposed action*." *Sierra Club v. Watkins*, 808 F. Supp. 852, 870 (D.D.C. 1991) (emphasis added). Without that analysis, "EA's would not fulfill the mandate

---

[5] Objectors previously raised this issue in their comments on the draft EA. *See* Objectors' Comments at 4-5.

of NEPA nor provide the decisionmaker or the public with information about the choice." *Id.* at 871.

Finally, any factual claim of no "unresolved conflicts" is demonstrably wrong. The entire Project is nothing if not an "unresolved conflict[] concerning alternative uses of available resources." Objectors, along with numerous commenters, have expressed serious and consistent objections to the Project's potential impacts on the environment, including carbon emissions, wildlife (including federally protected species and their essential habitat), forest composition and management, and flooding. These ongoing disputes over whether the National Forest's resources should be left undisturbed or, at minimum, should be conserved through innovative Project measures to reduce the adverse impacts, undeniably constitute "unresolved conflicts" with respect to affected resources within the meaning of the statute. *See Bob Marshall All.*, 852 F.2d 1223, 1228 (9th Cir. 1988) (holding that the sale of oil and gas leases "involves conflicts as to the present and future uses of [National Forest lands], because the issuance of the leases may allow or lead to other activities that would" degrade those lands' overall quality).

Suggested Remedy: The Forest Service must fundamentally revise its alternatives analysis to comply with NEPA's requirement that agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal," such as the Project here at issue, "which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E).

II. THE FOREST SERVICE FAILS TO ADEQUATELY ANALYZE THE DIRECT, INDIRECT, AND CUMULATIVE IMPACTS OF ITS ACTION

A. General Objections To The Forest Service's Impacts Analysis

The EA failed to adequately evaluate the impacts of its action as required by NEPA and its implementing regulations. As discussed above, under NEPA, an EA must "take[] a hard look at the problem." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011). "Although the contours of the 'hard look' doctrine may be imprecise," the agency's analysis must, at minimum, be sufficient to demonstrate that it "'has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97-98 (1983)); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 16 (D.D.C. 2009) (noting that to comply with the "hard look" requirement, agencies must "consider all direct, indirect, and cumulative impacts that are foreseeable as a result of the [proposed] rule").[6]

Because the Final EA examines only a single alternative, the EA is devoid of any meaningful comparison of the impacts of alternatives. As a result, the Forest Service's impacts analysis must also fail. *See W. Watersheds Proj. v. Christiansen*, 348 F. Supp. 3d 1204, 1219 (D. Wyo. 2018) (holding that the Forest Service's "failure to consider a reasonable range of

---

[6] Objectors previously explained in their comments that the draft EA's analysis of the direct, indirect, and cumulative impacts was fatally flawed. *See* Objectors' Comments at 5-20.

alternatives" necessarily meant that the Service had also "failed to take a hard look at the alternatives to the proposed action, some of which might mitigate impacts").

The Final EA's impacts analysis is also insufficient under NEPA because it omits meaningful discussion of several significant impacts from its analysis. *See Brady Campaign*, 612 F. Supp. 2d at 21 (providing that "[i]gnoring possible environmental consequences" renders an agency's impact analysis arbitrary and capricious (quoting *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154-55 (D.C. Cir. 1985)). In particular, the Forest Service failed to meaningfully examine the impacts of removing significant acreages of mid-late and late succession stands on the Monongahela National Forest's myriad natural resources. *Accord* Objectors' Comments at 8-10. Despite the fact that the Project will impact areas of high-quality habitats boasting high species diversity and late successional age classes that are (or are trending towards) classification as old growth, the Final EA does not differentiate between the impacts on those areas and impacts on degraded areas or areas with low species and structure diversity. *Accord* Objectors' Comments at 8. Instead, the agency insists that even with the Project, late successional habitat will increase as the forest ages. *See* Final EA at 39. However, this generic statement does not substitute for a meaningful analysis of the impacts of the Project on particular habitats within the Project area. Nor does it suffice for a meaningful consideration of the relative benefits and costs of the agency's decision. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (holding that the hard look requirement "encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail").

The Forest Service's failure to meaningfully evaluate the relative costs and benefits of removing over 3,000 acres of mid-late successional habitat is particularly egregious in light of recent federal directives to facilitate the development of mature and old growth stands. On April 22, 2022, President Biden issued Executive Order 14072 "Strengthening the Nation's Forests, Communities, and Local Economies," which declares a policy of "conserv[ing] America's mature and old-growth forests on Federal lands" and directs the Forest Service to "complete an inventory of old-growth and mature forests on Federal lands" for purposes including "retain[ing] and enhance[ing] carbon storage and "consider[ing] biodiversity." 87 Fed. Reg. 24,851, 24,851-52 (Apr. 22, 2022). The Final EA reports that "[t]he Monongahela National Forest is awaiting guidance regarding this new [Executive Order]." Final EA at 68. The Monongahela Forest Plan likewise directs the Forest Service to identify and manage old growth, *See* U.S. Forest Serv., *Monongahela National Forest Plan* at App'x B (2006), including by "preserv[ing] existing old-growth stands," *id.* at B-7, and "identify[ing] potential old growth areas based on management direction and emphasis," *id.* at II-18.[7] "Existing old growth on the [Monongahela National Forest] is limited to small, scattered patches within a larger landscape of 70- to 90-year-old forests." *Id.* at B-4. With respect to the Project area, the majority of trees (71%) fall into the mid-late successional age class (80-120 years). Final EA at 5, 9-13. Accordingly, there are potential areas of old growth that may be adversely impacted by the Project. Yet, despite directives from the President and the Forest Plan to identify and conserve potential and actual old growth, the Final EA does not meaningfully consider the impacts of the Project on these areas. Instead, the

[7] The Forest Plan additionally provides criteria for identifying future or potential old growth. *See id.* at B-8 to -9.

Final EA sidesteps the issue by insisting that even if the Project is implemented, late-successional stands will increase. *Id.* at 37; *accord* at *Resp. to Comments* at 28. As a result, the EA is "woefully light on reliable data and reasoned analysis and heavy on unsubstantiated inferences and non sequiturs." *Am. Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018). As such, "[t]he record simply does not provide a rational connection between the licensing decision, the record evidence, and the finding of no significant environmental impact." *Id.*

Courts have long held that "general statements about 'possible' effects" as insufficient to satisfy the "hard look" requirement. *See, e.g.*, *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). In comments on the draft EA, Objectors identified several direct, indirect, and cumulative impacts that were inadequately addressed, including: the Project's effects on flooding and erosion; the impacts of natural disturbances and climate change stressors on the achievement of management objectives; the Project's effects on carbon storage and greenhouse gas emissions; and the Project's effects on wildlife and listed species. *See* Objectors' Comments at 5-18. In response, the Forest Service avoided engaging in any meaningful consideration of these impacts by insisting that the Final EA's analysis was adequate and that in any event, the effects will be "negligible" or otherwise insignificant. *See, e.g.*, *Resp. to Comments* at 29-32. The agency's analysis of the Project's effects is thus flawed because it fails to offer any "explanation as to how it reached its conclusions, typically simply describing the impact followed by a conclusion that the impact . . . was not 'significant.'" *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 106 (D.D.C. 2006). Such cursory consideration and generic summaries of the serious direct, indirect, and cumulative impacts of the Project cannot satisfy the agency's obligation under NEPA to take a "hard look" at the consequences of its actions. *See id.* at 100 ("Merely describing an impact and stating a conclusion . . . is insufficient, for this merely sets forth "the facts found" and "the choice made," without revealing the "rational connection."); *Found. on Econ. Trends*, 756 F.2d at 154 (noting that it is well-established that "[i]gnoring possible environmental consequences will not suffice."). Indeed, it is well established that "ignoring possible environmental impacts, or explaining in conclusory form that they are not of concern, is insufficient under NEPA." *Brady Campaign*, 612 F. Supp. 2d at 21. In the absence of "a justification regarding why more definitive information could not be provided" that passes muster, the Forest Service was required to provide "some quantified or detailed information." *Neighbors of Cuddy Mountain*, 137 F.3d at 1379-80. Without such an analysis, the Final EA cannot be said to contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," as required under NEPA. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). Nor can it be said to make a "convincing case" that the impacts—either individually or cumulatively—are not significant. *See Idaho v. ICC*, 35 F.3d 585, 596 (D.C. Cir. 1994) (noting that without the requisite hard look," the Forest Service cannot "ma[ke] a convincing case that the impact[s] w[ere] insignificant").

Accordingly, the Final EA does not "foster both informed decisionmaking and informed public participation," as required by NEPA. *Protect Our Cmtys. Found. v. LaCounte*, 939 F.3d 1029, 1035 (9th Cir. 2019) (citation and internal quotation marks omitted). The Final EA's failure to meaningfully disclose the impacts of its action "preclude[d] meaningful evaluation of the effectiveness of the agency's proposed action in achieving its stated goals, as well as the availability of alternatives," and "belies its claim that it took the 'hard look' required to avoid a

finding that [its EA] was arbitrary, capricious, and contrary to law." *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 227, 229 (D.D.C. 2003).

For all of these reasons, as well as those set forth below, the Forest Service arbitrarily and capriciously ignored the foreseeable environmental impacts that would result from the Project.

Suggested Remedy: The Forest Service must correct these serious deficiencies to comply with its obligations under NEPA. In particular, the Forest Service must revise its Final EA to include a more robust, objective analysis of the environmental impacts of the Project that allows decisionmakers and the public to "ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002). At the very least, the Forest Service must "provide[] sufficient evidence and analysis" to support its decision not to prepare an EIS. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

B. The EA Impermissibly Relies On A Misleading Analysis Of The Project's Costs And Purported Benefits

The Forest Service's analysis is also flawed in its treatment of the benefits and costs associated with the Project.[8] To serve NEPA's twin goals of ensuring that agencies "consider every significant aspect of the environmental impact of a proposed action," and "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas*, 462 U.S. at 97, "it is essential that the [EA] not be based on misleading economic assumptions," *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996). With respect to the first function, "[m]isleading economic assumptions can . . . impair[] the agency's consideration of the adverse environmental effects of a proposed project." *Id.* (citing *S. La. Envtl. Council, Inc. v. Sand*, 629 F.2d 1005, 1011–12 (5th Cir. 1980)). NEPA requires agencies to balance a project's economic benefits against its adverse environmental effects. *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). Consequently, "[t]he use of inflated economic benefits in this balancing process may result in approval of a project that otherwise would not have been approved because of its adverse environmental effects." *Hughes River*, 81 F.3d at 446. With respect to the second function of NEPA, "misleading economic assumptions can . . . skew[] the public's evaluation of a project." *Id.*

Here, the Final EA relies on misleading economic assumptions that inflate the purported economic benefits of the Project while minimizing its environmental costs. As a result, the Final EA fails to take a hard look at the Projects impacts—particularly those associated with carbon emissions—and as a result, fails to make a convincing case for its FONSI and is arbitrary and capricious.

The Final EA reports that the agency's "economic analysis resulted in an estimated present value (PV) cost of -$7,198,899 . . . and an estimated PV benefit of $5,832,887." Final EA at 41. Thus, the economic analysis "shows a negative present net value (PNV) of -$1,366,012

[8] Objectors previously explained in their comments that the draft EA's analysis of the benefits and costs of the Project was fatally flawed. *See* Objectors' Comments at 3-4.

and a benefit/cost ratio less than one (0.81)," which is attributed to "the higher costs of helicopter logging and costs associated with restoration actions (e.g., skid trail treatment, temporary road treatment, tree planting, and wildlife actions)." *Id.* The agency explains that "[a] negative PNV and benefit/cost ratio less than one indicates a poor economic return for the project." *Id.* Although the Forest Service argues that the "negative PNV and low [benefit/cost] ratio does not take into account the non-monetized ecosystem benefits of those watershed, wildlife, and reforestation activities along with the potential increase in recreation users attracted to these areas, which could in turn also positively impact local economies," the Final EA does not make any attempt to quantify those nonmonetized benefits to allow for an informed evaluation of whether those indirect effects of the Project in fact outweigh the Project's poor economic return. As a result, the Final EA impermissibly minimizes the economic costs of the Project even as it inflates (without evidence) the purported environmental benefits. Consequently, the Final EA impairs fair consideration of the Project's impacts, in violation of NEPA. *See Hughes River*, 81 F.3d at 446.

The Final EA's analysis of the costs and benefits of the Project is additionally undercut by its failure to provide an economic or qualitative analysis of the benefits and costs of doing nothing (i.e., the no action alternative).[9] In fact, in response to Objectors' request that the agency provide such information to ensure compliance with NEPA, the Forest Service insisted that "an economic analysis of a no action alternative was not needed" because it "does not meet the purpose and need of this [P]roject." *Resp. to Comments* at 25.[10] Without an adequate baseline for comparison, the Final EA presents the Project's impacts in a vacuum, "depriv[ing] the agency and the public of the context necessary to evaluate [large-scale timbering projects] before irretrievable committing to that [action]." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 83 (D.D.C. 2019); *see also Grand Canyon Tr.*, 290 F.3d at 342 ("[T]he agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum."). Moreover, the Forest Service's refusal to accurately and objectively present *all* of the benefits and costs associated with the Project "improperly minimize[s] negative side effects." *League of Wilderness Defs./Blue Mountains Biodiversity Proj. v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012). Consequently, the Final EA flagrantly violates NEPA's hard look requirement. *See Brady Campaign*, 612 F. Supp. 2d at 16 (noting that to comply with the "hard look" requirement, agencies must "consider all direct, indirect, and cumulative impacts that are foreseeable as a result of the [proposed] rule"). "Without the requisite hard look," the Forest Service cannot "ma[ke] a convincing case that the impact[s] w[ere] insignificant[.]" *Idaho*, 35 F.3d at 596.

---

[9] There are undeniably monetized and nonmonetized benefits associated with retaining thousands of acres of large mature trees in the landscape, including (but not limited to) carbon sequestration, erosion and flood control, and habitat for wildlife, including listed species. Likewise, there are costs to removing all or some of those same trees, including (but not limited to) greenhouse gas emissions, fragmentation and degradation of habitat, and increased risk of runoff and flooding.

[10] As discussed, *supra* Section I.A, the Forest Service's refusal to examine a true no action alternative skews the Final EA's analysis of impacts and constitutes an independent violation of NEPA that must be remedied.

Suggested Remedy: The Forest Service must revise its impacts analysis to thoroughly describe and meaningfully evaluate the economic and environmental costs and benefits of the Project and alternatives, thereby allowing decisionmakers and the public to thoroughly and fairly balance the Project's purported benefits against its adverse environmental effects as required by NEPA.

C. The EA Fails To Examine The Effects Of Carbon And Greenhouse Gas Emissions

In addition to the broader deficiencies in the Forest Service's impacts analysis identified above, the agency's discussion with respect to the Project's specific impacts on carbon and greenhouse gas emissions and the environmental baseline merits particular attention.

Although the Final EA acknowledges that the Project will contribute to atmospheric carbon concentrations, the Forest Service concludes that "carbon loss would be negligible" in light of the relatively small Project area, and, in any event, will be "balanced and possibly eliminated as the stand recovers and regenerates." Final EA at 37.[11] However, despite peppering its discussion of climate change impacts with "descriptors" such as "'negligible,' 'minor,'" and extremely small, these terms are "largely undefined" and lack "objective bounds." *Mainella*, 459 F. Supp. 2d at 106. At no point does the Forest Service explain the basis for its conclusion that "potentially" negligible or even temporary "impacts could not be significant under NEPA." *Id.* Thus, there is no basis for accepting the agency's conclusion these impacts do not rise to the level of "significance" under NEPA, because there are no determinate criteria offered by the Forest Service for distinguishing between minor and major impacts to affected resources.

The Forest Service's analysis is also flawed in its consideration (or lack thereof) of the costs associated with greenhouse gas emissions from the Project. As explained, *supra* Section II.B, the Final EA reports that the Project has a "poor economic return," but insists that this analysis "does not take into account" the Project's purported "non-monetized ecosystem benefits." Final EA at 41. However, this analysis is meaningless without a baseline against which to compare the Project's impacts. Particularly relevant here, any evaluation of the economic and ecosystem impacts associated with the Project must account for the benefits of retaining thousands of acres of large carbon-sequestering mature trees in the landscape. Put differently, as the Forest Service touts the benefits (economic or otherwise) of the Project, it must also consider the costs of cutting and burning thousands of acres of forest. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D. Col. 2014) (rejecting agency's cost-benefit analysis of carbon emissions where "the agency prepared half of a cost-benefit analysis, incorrectly claimed that it was impossible to quantify the costs, and then relied on the anticipated benefits to approve the project"). The Forest Service's failure to do so here resulted in a Final EA that overstates the economic benefits of the Project while minimizing the environmental costs, thereby skewing the agency and the public's evaluation of the Project. Such a misleading

---

[11] Objectors previously commented on the Forest Service's failure to adequately consider the Project's contributions to climate change and greenhouse gas emissions. *See* Objectors' Comments at 16-18.

economic analysis defeats the twin aims of NEPA and is arbitrary and capricious. *See Hughes River*, 81 F.3d at 446.

The Final EA's limited discussion of the Project's impacts on carbon emissions underscores the practical value of a full analysis that takes the required "hard look" at the impacts of the Project. For example, as Objectors explained, the EA unlawfully fails to include any "discussion of the effect of the proposed logging on the actual ongoing, current carbon sequestration of the existing trees in the proposed project area – taken alone and taken in combination and in cumulative impact with other similar projects." Objectors' Comments at 16. In response, the Forest Service reiterated that "it is difficult and highly uncertain to ascertain the indirect effects from . . . projects of this size on global climate" emissions. *Resp. to Comments* at 31. However, NEPA requires the Forest Service to evaluate the indirect effects of a proposed action, including the Project's reasonably foreseeable contributions to downstream greenhouse gas emissions. Quantification of those impacts "would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals." *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Indeed, "[w]ithout such comparisons, it is difficult to see how FERC could engage in "informed decision making" with respect to the greenhouse-gas effects of this project, or how "informed public comment" could be possible. *Id.* Accordingly, the Forest Service should have "either given a quantitative estimate of the . . . greenhouse emissions" expected from the harvesting of timber and associated forest management activities proposed by the Project, or "explained more specifically why it could not have done so." *Id.*

The agency's bare assertion that a particular quantitative estimate is "difficult" or "speculative," *Resp. to Comments* at 31, is insufficient to satisfy its obligations under NEPA. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). As an initial matter, the Forest Service's assertion that a quantitative analysis of the Project's impacts on greenhouse gases is factually inaccurate. The Forest Service has "several tools and data sources to help estimate carbon stocks and stock changes in" National Forests. Maria Janowiak, et al., U.S. Forest Serv., *Considering Forest and Grassland Carbon in Land Management* (June 2017) (Attach. B). In fact, the agency created the Forest Vegetation Simulator Carbon Reports in order to assist forest managers in understanding "the effects of planned management activities on forest carbon stocks." U.S. Forest Serv., *Forest Vegetation Simulator (FVS) Carbon Reports*, https://tinyurl.com/yc3fcu7a (Attach. C). Because a tool to perform the requested analysis in fact exists, the Forest Service's justification for its failure to examine the Project's impacts on carbon emissions could not be conducted "runs counter to the evidence before the agency [and] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *High Country Conservation Advocates*, 52 F. Supp. 3d at 1191 (quoting *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009). It is quintessentially "arbitrary and capricious" for the Forest Service "to quantify the benefits of the [Project] and then explain that a similar analysis of the costs was impossible when such an analysis was in fact possible." *Id.*

Moreover, even if the *extent* of the emissions resulting from the Project is not foreseeable, the *nature* of the effect is. Under such circumstances, it is well established that either "estimation or explanation" is required under NEPA. Although the agency "need not

consider potential effects that are highly speculative or indefinite, . . . [it] should not attempt to travel the easy path and hastily label the impact of the [action] as too speculative and not worthy of agency review." *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1091 (D. Mont. 2017). Yet, that is precisely what the Forest Service did here. Moreover, the Forest Service fails to offer "a justification regarding why more definitive information could not be provided" that passes muster. *Neighbors of Cuddy Mountain*, 137 F.3d at 1380. The agency does not deny that such analyses are possible—indeed, agencies frequently examine the impacts of their decisions on greenhouse gas emissions, *see, e.g.*, *Sierra Club*, 867 F.3d at 1374; *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 63-77 (D.D.C. 2019)—nor does it explain why it did not contact those who may have the requisite expertise to inform the agency's analysis. This refusal to explain why information concerning a reasonably foreseeable impact—i.e., greenhouse gas emissions—that is essential to a reasoned choice among alternatives could not be obtained when such information indisputably exists violates NEPA (and is also unexplained, arbitrary, and capricious).

This deficiency extends to the Forest Service's discussion of cumulative impacts, or more appropriately, its lack thereof. At no point does the Forest Service attempt to quantify the Project's effects on carbon emissions cumulatively with the impacts of other ongoing or planned greenhouse gas emitting activities—including timber harvests or proscribed burn activities occurring elsewhere in the National Forest or on adjoining lands—despite such information being readily available. Indeed, the Forest Service's own website reports that seven logging projects are ongoing in the Monongahela National Forest, with additional timber sales slated to occur in the near future. *See* Forest Serv., *Monongahela National Forest Current and Recent Projects*, https://tinyurl.com/te3e63w7; Forest Serv., *Schedule of Proposed Actions for the Monongahela National Forest*, https://tinyurl.com/4m9hkx72. Timber sales in the Monongahela National Forest have increased, escalating and intensifying impacts to forest resources, including old-growth dependent wildlife species and ESA-listed species, soils, water quality, and slope stability.[12] Yet, rather than engage in a meaningful evaluation of the impacts of timber sales and other management activities in the Project area, the Forest Service blindly insists that "because the direct and indirect effects would be negligible, the proposed action's contribution to cumulative effects on global Greenhouse Gases and climate change would also be negligible." *Resp. to Comments* at 31. Not only does the Forest Service offer no evidence for this bold assertion, it also undercuts the entire purpose of a cumulative impacts analysis: to ensure that the effects "result[ing] from individually minor but collectively significant actions taking place over a period of time" receive proper consideration. 40 C.F.R. § 1508.1.

Climate change is, by its very nature, death by a thousand cuts. A single proposed activity may not, by itself, exceed climate goals. Rather, it is a problem defined by cumulative impacts. Hence, the Forest Service's "restricted analysis" of the impacts of the Project on carbon and

[12] Past, ongoing, and reasonably foreseeable forest management projects impacting the Project area and adjacent areas include Cranberry Spring Creek, the Gauley Healthy Forest Restoration Project, Deer Creek, the Upper Elk Ecological Restoration Project, Grassy Ridge, Greenbriar Southeast, Panther Ridge Wildlife Enhancement, and the Spruce Mountain Grouse Management Area. *See* U.S. Forest Serv., *Monongahela National Forest Current and Recent Projects*, https://www.fs.usda.gov/projects/mnf/landmanagement/projects.

greenhouse gas emissions "impermissibly subject[ed] the decisionmaking process contemplated by NEPA to the tyranny of small decisions." *Kern v. U.S. BLM.*, 284 F.3d 1062, 1078 (9th Cir. 2002) (citation and internal quotation marks omitted). Accordingly, the agency's failure to include in its NEPA analysis a meaningful evaluation of the cumulative impacts of timber sales and forest management activities in the Project area, and other reasonably foreseeable future activities, on carbon and greenhouse gas emissions is arbitrary and capricious. *See id.*

Suggested Remedy: The Forest Service must revise its impacts analysis to fully and meaningfully consider the Project's impacts on regional, national, and global greenhouse gas emissions, as well as the short- and long-term consequences of widespread logging on carbon storage and uptake, as well as greenhouse gas emissions.

D. The EA Fails To Identify Baseline Conditions

"NEPA requires that the agency provide the data on which it bases its environmental analysis." *N. Plains Res. Council*, 668 F.3d at 1083. "Such analyses must occur before the proposed action is approved" because "'once a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effects becomes simply impossible.'" *Id.* (quoting *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988)). Thus, "[e]stablishing appropriate baseline conditions is critical to any NEPA analysis." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016). "Without establishing the baseline conditions which exist ... before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA." *Id.*

Here, the EA utterly fails to establish any meaningful baseline against which the impacts of the project can be measured.[13] As explained, the EA declines to examine a no action alternative and as a result, lacks a benchmark against which the Project (or any other action alternatives) can be measured. *See Theodore Roosevelt Conservation P'ship*, 744 F. Supp. 2d at 160; *see also Ctr. for Biological Diversity I*, 623 F.3d at 642 (providing that the no action alternative is intended to "provide a baseline against which the action alternative" is evaluated). Similarly, the EA's limited discussion of the Project's environmental consequences fails to describe—much less *analyze*—the *current* baseline conditions, as required by NEPA. *See W. Watersheds Proj. v. Bernhardt*, 543 F. Supp. 3d 958, 986 (D. Idaho 2021) (holding that an agency's EA failed to provide an actual analysis of the baseline conditions where the EA provided only general information about the amount of available sage grouse habitat (as opposed to an examination of population trends, habitat function, and existing conditions) and programmatic land use plan EIS provided only general information that could not be "distilled down to represent up-to-date baseline conditions of greater sage-grouse populations and habitat in each lease sale area"). For example, as Objectors explained, although the Final EA "makes the general assertion that older forests do not provide adequate habitat for wildlife," it "does not explain how the current conditions are affecting specific species." Objectors' Comments at 11. Nor does the Final EA "provide[] [any] estimates for the current population of any species, [] data on trends in either in the population of any individual species or the overall diversity of

[13] Objectors raised this issue with the Forest Service in their comments on the Draft EA. *See* Objectors' Comments at 11.

species, or [] quantifiable population goals that could be used to evaluate whether or not the project is successful." *Id.* As a result, the EA fails to contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996).

Suggested Remedy: "Without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA." *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Accordingly, the Forest Service must revise its EA to accurately present both the baseline conditions and a no action alternative to provide decisionmakers and the public with a benchmark against which to measure the impacts of the Project and its alternatives.

D. The Forest Service Fails To Examine The Impacts Of The Project On Listed And Candidate Bat Species In Violation Of NEPA And The ESA

Currently classified as threatened, the Northern long-eared bat has showed consistent population loss and is in the process of being re-classified from threatened to endangered. 87 Fed. Reg. 16,442 (Mar. 23, 2022). The Indiana bat was listed as endangered in 1973. The populations of both species have continued to decline; the Northern long-eared bat's abundance is projected to decline by 95% by 2030, 87 Fed. Reg. at 16,446, and the Indiana bat population has declined by 50% compared to when the species was listed as endangered, FWS, *Indiana bat*, https://www.fws.gov/species/indiana-bat-myotis-sodalis. These declines are primarily driven by the spread of white-nose syndrome and habitat loss. For these two species to have any chance of survival and recovery, every federal agency must fully comply with their legal obligation under the ESA to "insure" against jeopardy. 16 U.S.C. § 1536(a)(2).

Surveys have detected the extensive presence of Northern long-eared bats in the Project area, including pregnant and lactating females. Biological Assessment ("BA") at 47. Additionally, the Forest Service determined that the Project area "contains [72%] suitable habitat" for the species. *Id.* at 52. Accordingly, the Forest Service determined that the Project is "likely to adversely affect" the species and engaged in the streamlined consultation process provided by the 4(d) rule. *See id.* at 47-48. The agency reported that the Project will involve tree cutting within 150 feet of a known Northern long-eared bat maternity roost tree. *Id.* at 47. Additionally, impacts "are likely to occur as a result of harvesting trees" greater than 5 in in diameter. *Id.* The agency reports that "[t]hese impacts are associated with 3,795 acres of vegetation management and associated activities, 920 acres of prescribed burning, and 6 acres of road construction and/or reconstruction." *Id.* at 48. Moreover, although the Forest Service insists that riparian planting will have "long-term beneficial effects on the suitability of foraging habitat along riparian corridors," the agency does not explain how "increas[ing] shade and cover to portions of the stream that currently have reduced cover" equates to benefits to the Northern long-eared bat. Final EA at 25. The Forest Service also reported that herbicide application has "known impacts" on the Northern long-eared bat's primary food sources, yet insists that "based on the scope and scale of these activities these impacts are minimal within the [Project] Area." *Id.* The agency declines to further define its use of the term "minimal." Although the Forest Service reports that the Northern long-eared bat has declined in the Project area (and indeed,

throughout its range) due to the onset of white-nose syndrome, Final EA at 23, the agency does not mention—much less meaningfully examine—the cumulative impacts that factors other than white-nose syndrome, including habitat degradation and destruction due to forest management activities, may have on local and regional populations. Ultimately, the Forest Service concludes that the Project "will not cause prohibited take as described in the [4(d) Rule]." *Id.*

Surveys have likewise detected the "probable presence" of the Indiana bat. *Id.* at 23. Approximately 37% of the Project area contains suitable habitat for the species. BA at 52. The Forest Service insisted that many of the Project's effects had already undergone analysis in the 2006 Forest Plan and accompanying BiOp. BA at 11. With respect to those aspects of the Project that required additional examination, the Forest Service generally listed potential impacts to the species before concluding that such effects would be minimal. *See, e.g.*, BA at 12-13. As with the Northern long-eared bat, the Forest Service acknowledges that the Indiana bat has experienced population-level declines due to the onset of white-nose syndrome, BA at 50; however, the agency does not mention—much less meaningfully examine—the cumulative impacts of forest management activities on populations affected by white-nose syndrome. The Forest Service has initiated formal consultation with Fish and Wildlife Service ("FWS") and "[t]he final decision notice will not be signed until consultation is completed and any recommendations from [FWS] are incorporated." Final EA at 66-67.

Finally, surveys have detected the presence of the tri-colored bat in the Project area. The tri-colored bat was proposed for listing as an endangered species on September 14, 2022. 87 Fed. Reg. 56,381 (Sept. 14, 2022). The tri-colored bat faces many stressors, the primary of which is white-nose syndrome. *Id.* at 56,385. However, habitat loss and degradation resulting in the loss of suitable roosting or foraging habitat, including from tree removal and forest management activities, "may compound the impacts from [white-nose syndrome]." *Id.* The impacts to the tri-colored bat from the Project were not examined in the BA. However, the Forest Service also produced a Biological Evaluation ("BE") to evaluate the impacts of the Project on key management indicator species, including the tri-colored bat. The agency's cursory examination of those effects reports simply that "[s]hort-term impacts to individuals associated with timber harvest and prescribed burning harvest may occur due to the potential loss of roost trees." BE at 14. The BE insists without meaningful explanation that the Project will have "long-term beneficial effects," but does not meaningfully describe those impacts in relation to the current or expected future conditions in the absence of the project. Nor does the BE mention—much less meaningfully examine—the cumulative impacts of white-nose syndrome with past and reasonably foreseeable future forest management actions. Ultimately, the Forest Service concludes that the Project "may impact individuals or habitat but will not likely contribute to a trend towards federal listing or loss of viability to the population or species." BE at 14.

Although the Final EA acknowledges that some impacts on the three bat species are likely to occur as a result of the Project, neither the Final EA, nor the BA, nor the BE elaborate on what those impacts are or how they compare with current conditions. This is especially disappointing considering the declining populations of these species. The Forest Service's discussions of impacts to the Northern long-eared bat and the Indiana bat are therefore grossly inadequate as they fail to demonstrate that the Forest Service "'has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and

capricious.'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (quoting *Balt. Gas*, 462 U.S. at 97–98); *see also Brady Campaign*, 612 F. Supp. 2d at 16 (noting that to comply with the "hard look" requirement, agencies must "consider all direct, indirect, and cumulative impacts that are foreseeable as a result of the [proposed] rule").

Perhaps most glaringly, the Final EA and BA fail to meaningfully analyze the cumulative impacts on the three bat species stemming from the habitat destruction and degradation resulting from the Project and the ongoing devastating impacts of white-nose syndrome. As explained, "NEPA requires an agency to consider" cumulative effects, which "result[ ] from the incremental impact of the action when added to other past, present and reasonably foreseeable actions regardless of what agency ... or person undertakes such other actions." *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 814 (9th Cir. 2005) (internal quotation marks omitted); *see also* 40 C.F.R. § 1508.1 (defining cumulative impacts). "Consideration of cumulative impacts requires some quantified or detailed information" that results in a "useful analysis," even when the agency is preparing an EA and not an EIS. *See Kern*, 284 F.3d at 1075 (internal quotation marks omitted). "[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Id.* (internal quotation marks omitted). Yet, that is precisely what the Forest Service did here. Although the agency acknowledged that each of the bat species is impacted by white-nose syndrome and that the Project may impact roosting and foraging habitat, at no point in the Final EA, BA, or BE does the Forest Service meaningfully analyze the cumulative impacts of past, present, and reasonably foreseeable projects and environmental conditions, including the continued spread of white-nose syndrome and other forest management activities. To the contrary, the Forest Service's "consideration" of impacts on bat species includes nothing more than the general and vague statements reporting "possible effects" and "some risk" that have been repeatedly struck down by courts as violating NEPA's "hard look" requirement. *See, e.g.*, *Neighbors of Cuddy Mountain*, 137 F.3d at 1379; *Kern*, 284 F.3d at 1075. Likewise, such superficial statements devoid of any meaningful data or analysis simply cannot fulfill the Forest Service's substantive obligation under the ESA to insure against jeopardy.

With respect to the Northern long-eared bat, the Forest Service's BA repeats the same error that resulted in the remand of the threatened listing for the Northern long-eared bat to FWS. In its listing rule, FWS stated that "in areas with [white-nose syndrome], we believe [the Bats] are likely less resilient to stressors and maternity colonies are smaller," and further, that "[g]iven the low inherent reproductive potential of [the Bat] (max of one pup per female), death of adult females or pups or both during tree felling reduces the long-term viability of those colonies." 80 Fed. Reg. 17,974, 17,993 (Apr. 2, 2015). Yet, despite acknowledging these factors and the cumulative effects on the species, FWS based its listing determination solely on the impacts of white-nose syndrome. *See Ctr. for Biological Diversity v. Everson*, 435 F. Supp. 3d 69, 82 (D.D.C. 2020). Accordingly, in *Center for Biological Diversity v. Everson*, the District Court for the District of Columbia held that by "disregard[ing] the cumulative effects that factors other than [white-nose syndrome] may have on the species when explaining the rationale for the threatened determination," FWS "failed to articulate a rational connection between its own analysis and its determination." *Id.* at 83. Unsurprisingly, the 4(d) Rule relies on much of the same flawed rationale in determining that forest management activities will not "adversely affect conservation and recovery efforts for the species." *Compare, e.g.*, 80 Fed. Reg. at 17,993, *with*

81 Fed. Reg. 1,900, 1,909 (Jan. 14, 2016). Accordingly, actions taken in reliance on the 4(d) Rule and its underlying BiOp—like the Project here—likewise fail to adequately consider the effects of the action on listed species, including cumulative effects, as required by the ESA. By the same token, the Final EA's failure to adequately consider the effects to this species violates NEPA and its implementing regulations.

Suggested Remedy: The Forest Service must engage in an analysis of the direct, indirect, and cumulative impacts of the Project on listed and candidate species that comports with the requirements of NEPA and the ESA. Additionally, the Forest Service should delay its final decision until the issuance of the final rules designating the Northern long-eared bat and tri-colored bat as endangered. Because a final decision on the listing status of the species is expected before the end of the year, a minor delay in the Forest Service's decision would facilitate administrative efficiency, as the up-listing of the bat will require the Forest Service to reinitiate consultation. At the very least, the Forest Service must update its consultation with the FWS for the Northern long-eared bat, which should lead to additional protective measures in the Project.

III. THE FOREST SERVICE MUST PREPARE AN EIS TO EXAMINE THE PROJECT'S SIGNIFICANT IMPACTS

Under NEPA, an agency proposing a "major Federal action [] significantly affecting the quality of the human environment" must prepare an EIS giving thorough consideration to, among other things, the ecological impacts of the action and any available alternatives to the proposal. 42 U.S.C. § 4332(2)(C). "'If *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared before agency action is taken.'" *Grand Canyon Tr.*, 290 F.3d at 340 (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original)). To determine whether the effects of the proposed action meet the threshold for significance, "agencies shall analyze the potentially affected environment and degree of the effects of the action." 40 C.F.R. § 1501.3. "In considering the potentially affected environment, agencies should consider . . . the affected area (national, regional, or local) and its resources," including species listed under the ESA. *Id.* Consideration of the "degree of the effects" of the action requires evaluation of "[b]oth short- and long-term effects"; "[b]oth beneficial and adverse effects"; "[e]ffects on public health and safety"; "[and] [e]ffects that would violate Federal, State, Tribal, or local law protecting the environment." *Id.*

The Northern long-eared bat has been decimated by the onset of white-nose syndrome, which "has caused estimated northern long-eared bat population declines of 97-100 percent across 79 percent of the species' range." 87 Fed. Reg. at 16,448. The species' condition is only expected to worsen; "[r]angewide abundance is projected to decline by 95 percent and the spatial extent is projected to decline by 75 percent from historical conditions by 2030." *Id.* Although the primary driver of the Northern long-eared bat's decline is white-nose syndrome, the direct and indirect impacts of forest management activities, including direct injury or mortality, disturbance, and habitat loss and fragmentation of maternity colonies, exacerbate population declines. *Id.* at 16,446-49. As a result, the species' viability and resiliency is greatly compromised, making it vulnerable to catastrophic events. *Id.* at 16,449. All of these factors have resulted in low abundance, which will likely accelerate a loss of genetic diversity. *Id.*

Consequently, "even without further [white-nose syndrome] spread and additional pressure from other stressors, the northern long-eared bat's viability has declined substantially and is expected to continue to rapidly decline over the near term." *Id.* In light of the precarious status of the Northern long-eared bat, agency activities that may impact populations—particularly populations struck by white-nose-syndrome—may have significant consequences for the viability and persistence of local populations, and thus for the species as a whole. These potentially significant consequences demand a robust evaluation in an EIS. *See* 40 C.F.R. § 1501.3 (defining significance to require consideration of the affected environment, including ESA-listed species).[14]

An EIS is also required to address the "substantial question" of whether the Project's impacts—in particular, the cumulative impacts of the Project, other forest management activities in the Project area, and white-nose-syndrome—will "cause significant degradation" of the Northern long-eared bat's habitat and population. *Ocean Advocates v. U.S. Army Corps. of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). The Final EA reports that white-nose syndrome has dramatically impacted the Northern long-eared bat population in the Project area. Final EA at 23. The Final EA also reports that significant timber harvesting has occurred in the Project area over the past fifteen years (over 2,000 acres). *Id.* at 25. "[D]isturbance[s] associated with these activities [have] reduce[d] federally-listed bat habitat," most of which is classified as roosting habitat. *Id.* Although rejuvenation may eventually mitigate habitat losses, such habitat will not become suitable for approximately forty years. *Id.* In the interim, the loss of adequate roosting habitat may adversely affect breeding and reproduction due to the species' "high philopatry (tending to return to a particular area)" and "low reproduction output." 87 Fed. Reg. at 16,447. Indeed, since female bats "produce a maximum of one pup per year[,] [the] loss of one pup results in missing one year of recruitment." *Id.* at 16,443-44. When considered over the forty-year time-scale required for rejuvenation, the impacts from the diminished recruitment caused by the loss of roosting habitat may reduce the population past the point at which recovery is possible. *See id.* at 16,444 (noting that the Northern long-eared bat's "inherent life-history traits limit the ability of populations to recover from low abundances" and that at such "low population sizes, colonies are vulnerable to extirpation from stochastic events and the deleterious effects of reduced population size"). The Project will only exacerbate these effects by harvesting over 3,000 additional acres, 72% of which is suitable habitat for the species. BA at 52. Moreover, the total Project area is expansive, encompassing over 86,000 acres, including nearly 34,000 acres of National Forest System land. Final EA at 5. The sheer size of the affected area, coupled with the high site fidelity to summer roosting sites exhibited by the species, *see* FWS, *Species Status Assessment Report for the Northern long-eared bat (*Myotis septentrionalis*)* 68 (Mar. 22, 2022), suggest that the Project's impacts on the local population may be significant. Yet, the Forest Service fails to appreciate that the Project will lead to increased pressure on an already stressed population and may even hasten its extirpation. As a result of this fundamental error, the Final EA fails to demonstrate that the degree of the Project's short and long-term adverse impacts does not rise to the level of significance requiring analysis in an EIS. *See* 40 C.F.R. § 1501.3; *Barnes v. U.S. Dept. of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) ("In reviewing an agency's decision not to prepare an EIS, . . . a court [is required] 'to determine whether the agency has

[14] Objectors raised this issue with the Forest Service in their comments on the Draft EA. *See* Objectors' Comments at 15.

taken a 'hard look' at the consequences of its actions, based [its decision] on a consideration of the relevant factors,' and provided a 'convincing statement of reasons to explain why a project's impacts are insignificant.'" (quoting *Envtl. Prot. Info. Ctr.*, 451 F.3d at 1009 (second alteration in original)))."

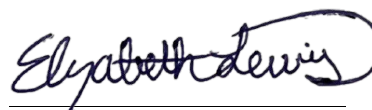
"Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential . . . effects." *Native Ecosys. Council*, 428 F.3d at 1240 (alteration in original). As explained, the Final EA, BE, and BA all fail to take the requisite hard look at the direct, indirect, and cumulative impacts of the Project on the Northern long-eared bat. Indeed, the Forest Service's unsupported assertion that the Project's impacts on the species will be minimal is the type of general and vague statement reporting "possible effects" and "some risk" that has been repeatedly struck down by courts as violating NEPA's "hard look" requirement. *See, e.g.*, *Neighbors of Cuddy Mountain*, 137 F.3d at 1379; *Kern*, 284 F.3d at 1075. The illogical conclusion that the Project will have minimal impacts on the Northern long-eared bat does not resolve the uncertainty surrounding the degree of the short and long-term adverse impacts of increasing timber harvest activities in habitat occupied by a population already in steep decline. *See Mont. Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1104 (holding that an agency's decision not to prepare an EIS was arbitrary and capricious where the impacts were uncertain and additional information could resolve the uncertainty). Analysis in an EIS would "obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action." *Native Ecosys. Council*, 428 F.3d at 1240

Suggested Remedy: The Forest Service must prepare a full EIS to address the significant direct, indirect, and cumulative impacts of the Project on the Northern long-eared bat.

CONCLUSION

For the foregoing reasons, we find many substantive and procedural violations in this process and object to the Project. We believe the best remedy is for the Forest Service to prepare and solicit public comment on an EIS that addresses these violations that have fundamentally undermined the objectivity and accuracy of the NEPA process conducted to date. At the very least, the Forest Service must prepare and circulate for public comment a legally adequate draft EA that meaningfully examines and rigorously explores the impacts of the Project and its alternatives, including a true no action alternative. We look forward to hearing from the agency regarding its plans to discuss the resolution of these objections.

Respectfully,



Elizabeth L. Lewis
Associate Attorney
Eubanks & Associates, PLLC

Counsel for Objectors

Enclosures:

Attachment A	Objectors' Comments on the Draft EA
Attachment B	Maria Janowiak, et al., U.S. Forest Serv., *Considering Forest and Grassland Carbon in Land Management* (June 2017)
Attachment C	U.S. Forest Serv., *Forest Vegetation Simulator (FVS) Carbon Reports*, https://tinyurl.com/yc3fcu7a