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September 4, 2020

Regional Forester (Reviewing Officer)
Pacific Northwest Regional Office
Attn: 1570 Objections
PO Box 3623
Portland OR 97208-3623

Re: OBJECTION to Walton Lake Restoration Project and Project-Specific Forest Plan Amendments, Ochoco National Forest from BMBP; submitted electronically via objections-pnw-regional-office@usda.gov and via Certified U.S. Mail # 7016 2140 0000 3900 3370

Dear Objection Reviewing Officer, Regional Forester:

Earthrise Law Center submits this Objection, pursuant to 36 C.F.R. Part 218, on behalf of Blue Mountains Biodiversity Project¹ whose physical address is 27803 Williams Lane, Fossil, OR 97830, and Marilyn Miller, Miller Conservation Consulting, whose physical address is 60587 Barlow Trail, Bend, OR 97702 (collectively "BMBP") to the U.S. Forest Service ("Forest Service") 2020 *Walton Lake Restoration Project: Revised Environmental Assessment and Project-Specific Forest Plan Amendments* ("Final EA") and the *Draft Decision Notice* including the Finding of No Significant Impact ("FONSI")². Shane Jeffries, Ochoco National Forest Supervisor is the responsible Forest Service Official and the project would be implemented in the Lookout Mountain Ranger District of the Ochoco National Forest.

¹ Blue Mountains Biodiversity Project is the successor in interest to League of Wilderness Defenders/Blue Mountains Biodiversity Project which participated in the prior 2015 and 2017 public commenting and objection processes and the 2016 litigation regarding this project.

² BMBP assumes the Forest Service has all the documents underlying its initial December 2015 Decision and that were included in the Administrative Record that the Forest Service submitted to the district court in *LOWD/BMBP v. Turner*, Case No. 2:16-cv-01648-MO, Dkt. #7-2. BMBP has excerpted some of those documents in this objection but makes no attempt to reproduce all of them. BMBP also assumes the Forest Service has all of the documents from the prior 2017 public commenting and objection processes regarding this project and, although BMBP cites to some of those documents in this objection, BMBP will not resubmit them here.

For purposes of this Objection, BMBP is represented by legal counsel, the Earthrise Law Center, through Tom Buchele, Earthrise's Co-Director, as well as by Willamette Law Group, through attorney Jesse Buss. Mr. Buchele's mailing address, email address, and phone number are set forth above.³ Please direct all correspondence and responses to this Objection to Mr. Buchele.

BMBP has previously submitted timely, written comments regarding this project throughout the periods where public comments were requested. *See, e.g.,* Exhibits A and B.

Notice Published: The public notice regarding the Objection Period for this Project was published in the Bend Bulletin on July 21, 2020 (attached as Exhibit C). Therefore, under 36 C.F.R. § 218.7, this Objection is timely because BMBP submitted it electronically and by U.S. mail on September 4, 2020, which is within 45 days of that publication date.

BMBP is submitting these comments via certified U.S. mail and electronically. The certified mail copy includes a CD with electronic copies of all of the exhibits cited below in this Objection. Those exhibits are too large to submit along with the electronic version of this Objection. A list of those exhibits is included at the end of this Objection.

BMBP requests an objection resolution meeting to address the concerns raised in its Objection which are set forth below.

Issues addressed in this Objection:

The overarching problem with this "restoration project" is the Forest Service's failure to adequately explain and justify what can only be described as a dramatic shift in how it intends to manage the Walton Lake area. The significance of this shift is underscored by the fact that the Forest Service now proposes four different plan amendments in order to allow its proposed "management." As the Final EA admits, the area includes both a developed site and a visual influence area. Final EA at 6. For decades the Forest Service has managed the risks created by dead or dying trees by surveying for such hazard trees and removing them on a regular basis. This management has understandably focused on removing hazard

³ Note the new street mailing address for Earthrise, 10010 S. Terwilliger Blvd. Mr. Buss's contact information is as follows: 411 Fifth Street, Oregon City, Oregon, 97045. jesse@WLGpnw.com. (503) 656-4884

Forest Service has managed the risks created by dead or dying trees by surveying for such hazard trees and removing them on a regular basis. This management has understandably focused on removing hazard trees in the developed site, as is evident from the numerous downed ponderosa pines and firs in and around the campsites, and along the area's roads and trails. Five years ago, the Forest Service shifted its thinking dramatically, and proposed to essentially clearcut a predominantly fir, old growth forest in the visual influence area because some of the firs had laminated root rot ("LRR")(which has been true for decades), and all of the firs were susceptible to that naturally occurring disease (which has also always been true for decades). Suddenly, these old growth firs in the much less developed visual influence area / present an unacceptable risk. Removing all of these firs -- essentially a clearcut --would completely destroy the visual quality provided by an old growth forest which the visual influence area is intended to maintain. The Forest Service has had five years and three consecutive NEPA processes to explain this dramatic shift in management priorities, but it has still not provided a convincing reason for why it suddenly needs to cut down more than 500 old growth firs that provide much of the area's visual quality, provide excellent wildlife habitat, provide a much different recreational experience than the developed site, and significantly enhance the recreation experience in the developed site.

The Forest Service is in fact unjustifiably treating the developed site and the visual influence area as if they should be managed in exactly the same way in terms of identifying and eliminating potential safety hazards. This is not only inconsistent with decades of prior management, but is also inconsistent with the Forest Service Manual:

2332.1 - Public Safety

All outdoor recreational activities on National Forest System (NFS) lands, including activities at recreation sites, have inherent risks due to the natural setting in which they occur. Recreation sites present inherent risks to users in varying degrees depending on the level of site modifications and the activity involved.

In general, the inherent risk at recreation sites decreases as the development scale increases. For example, the recreation sites with a development scale of 0, 1, or 2, which are characterized by uneven, natural terrain and little management control of activities, are likely to have greater inherent risks than developed recreation sites with a development scale of 3, 4 or 5, which are designed and developed for specific public uses, often having hard-surfaced or paved walkways and activity areas and a high degree

of regimentation. In addition, generally the inherent risk at the recreation sites increases as the risk associated with activities at the site increases. For example, a snow play area generally is more likely to have greater inherent risks than a picnic area.

Individuals engaging in outdoor recreational activities on NFS lands assume these inherent risks.⁴

The Forest Service's proposed management simply and improperly ignores the obvious development scale differences between the developed site and the visual influence area and the different levels of acceptable, inherent risk that attaches to those different development levels. The Forest Service responds to BMBP's concern regarding the homogenous management approach to safety between the developed recreation and visual influence areas by stating that they are indeed to be managed in the same way. See Final EA 36. However, the table provided to "clarify" this management approach clearly indicates that the standards and guidelines for management of the developed site and visual influence area *do* differ in highly relevant ways. See FONSI at 36-37, Table C-2. For example, the harvest standards for the developed sites include a safety component (*Harvest Scheduling, Ochoco Forest Plan at 4-213*), while harvest standards for the visual influence area do not, and instead tend to address visual aspects of the area including managing to promote "large trees and...[p]rovide views of scenic features," etc. (*Ochoco Forest Plan at 4-213, 4-214, and 4-215*).

BMBP's following objections address the numerous violations of NEPA and NFMA which flow from this overarching flaw, and BMBP requests that the Forest Service drop this proposal to dramatically shift its management of the Walton Lake area and return to its prior, successful management practices. If the Forest Service insists on proceeding, it must document the significant impacts of such a dramatic change that requires four different plan amendments in an EIS.

Except for issues raised by the delayed FOIA responsive documents and the cumulative impacts discussion with regard to the proposed Eastside Screens amendment, all of which respond to new issues

⁴ Available here: https://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?2300!.. (The wo_2330 amend_2018 link), last checked on August 26, 2020.

raised after BMBP submitted its draft EA comments, all of the objection issues set forth above and below were raised in BMBP's Draft EA comments. Exs. A and B.

All of these objections can be resolved by withdrawing the Final EA and FONSI, and preparing a draft EIS that addresses the specific issues raised by these objections and putting that DEIS out for public comment.

I. The Public Involvement Process for this Project Continues to be Flawed and Illegal

The public participation process for this project has been flawed from its inception. The Forest Service's response to these concerns and flaws, FONSI at 68-69 is cursory and wholly inadequate. The initial 2015 scoping notice was so misleading and incomplete that it violated NEPA and was one of the legal violations supporting the preliminary injunction against implementation of the project issued by a federal court in 2016. When the Forest Service made its second attempt to comply with NEPA in 2017 it failed to re-scope and thereby failed to correct, and merely compounded, the initial flawed scoping process. Now, for its third attempt at conducting a NEPA process for this project, the Forest Service arbitrarily refused a reasonable request to extend the March 2020 Draft EA comment period or to notice a second comment period to accommodate delays caused by national and state emergencies that had been declared during that scoping period.

In violation of NEPA § 1506.6(b)(2), the Forest Service failed to notify BMBP of its plan to restart the NEPA process for this project, in an apparent attempt to avoid BMBP's input or reduce the time available to BMBP to respond to the Service's proposals. The Forest Service knows that BMBP is an interested party because of its history of filing comments on this matter, in addition to the lawsuit it filed against the Forest Service regarding this project. The Final EA specifically notes that the Forest Service in fact began this latest NEPA process in June of 2019 with a "public information meeting." Final EA at 10. Yet, among nearly 200 organizations and individuals who received notification for this meeting, BMBP, its co-directors, its attorneys and one of its members, Marilyn Miller, seem to have been intentionally omitted from an otherwise extensive e-mail notification list. See Ex. D. This is especially telling when

Karen Coulter, BMBP's Director, was specifically identified in internal Forest Service emails as an important person to invite to prior Walton Lake informational gatherings. See Ex. E. When BMBP asked why it had not been invited to the June 2019 "public information meeting," the Forest Service responded by claiming it was already aware of BMBP's views. See Ex. F. This raises serious questions about the neutrality of the Forest Service and its motives in attempting to stifle public participation from interested parties, in violation of NEPA. The fact that BMBP has successfully sued the Forest Service to enjoin this illegal project should not be grounds for the Service to forego its duty to inform BMBP of developments and comment opportunities.

Shortly after receiving notice that the Draft EA was available for public comment, BMBP submitted a FOIA request to the Forest Service seeking the underlying project record. Because of the short 30-day comment period BMBP requested, as it has before, an expedited response to its FOIA request specifically so it would have the project record documents to use when drafting its comment. See Ex. G. BMBP requested the same type of expedited FOIA response when it submitted a FOIA request during the 2017 comment period for that draft EA regarding this same project, and the Forest Service granted that request and produced most of the responsive records well before the comment deadline. See Exs. H & I. Inexplicably, the Forest Service Regional Office denied BMBP's 2020 request for an expedited response. See Ex. J. Although the local NEPA contact for the project was able to provide BMBP with a handful of the records it had requested before comments on the February 2020 Draft EA were due, see Ex. K, BMBP was forced to submit its comments without the benefit of the vast majority of the project records that it requested in February. Although the Forest Service claims that all responsive documents were sent before the close of the comment period, FONSI at 69, these documents did not actually come into BMBP's possession until a much later date, Ex. NN, and thus BMBP was unable to include potential concerns raised by these documents during the March 2020 comment period. All of these errors and irregularities, and especially BMBP's intentional exclusion for the June 2019 public process, significantly prejudiced BMBP's ability to submit complete comments and to fully participate in the required NEPA process, in

violation of NEPA. *See, e.g.,* 40 C.F.R. § 1506.6(f); *League of Wilderness Defs. v. Connaughton*, No. 3:12-cv-02271-HZ, 2014 WL 6977611, at *14-20 (D. Or. Dec. 9, 2014) [hereinafter *Snow Basin*].

On March 18, 2020, BMBP requested an extension of the comment period, or a second comment period, because of the disruptions caused by the national and state emergencies that were declared at that time and the Forest Service's failure to expedite BMBP's FOIA request, which resulted in BMBP not having access to relevant documents until after the close of the comment period. Exs. L, M, N, and NN. Later that day BMBP noted that the link provided by the Forest Service in its February 18, 2020 letter for submitting electronic comments was not working and that several of BMBP's supporters had experienced similar problem when attempting to submit comments using that link on March 16th and 18th and indicated that these problems also supported providing additional time for the public to comment. Exs. O, P, and OO. The Forest Service's characterization of these concerns in its response to comments is misleading and falls to capture their factual basis and nature, especially those raised by Ex. OO. On March 19, 2020 the Forest Service arbitrarily denied this request, Ex. Q, which is inconsistent with its NEPA obligations to facilitate public participation. *See, e.g.,* 40 C.F.R. Secs. 1500.2(d), 1501.4(b), 1506.6, and the actions of many other national forests and federal agencies. Insisting on a "normal" comment period at the very beginning of a completely abnormal and unusually disruptive pandemic is arbitrary and capricious.

This issue was raised by BMBP in comments to the Forest Service. *See* Exhibit A at 4-7.

II. The Purpose and Need Statement is Unreasonably Narrow

The reasonableness of a purpose and need statement is assessed by considering the "statutory context of the federal action." *League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1069-70 (9th Cir. 2012). In this case, the EA defines its objectives in unreasonably narrow terms by ignoring key standards from the Ochoco National Forest Land and Resource Management Plan (Ochoco Forest Plan or Forest Plan). As a result of this unreasonably narrow purpose and need statement the Final EA necessarily considered a narrower range of alternatives than it should have. Both the unreasonably narrow

purpose and need statement and the resulting unreasonably narrow alternatives analysis violate NEPA.

Nat'l Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1070-72 (9th Cir. 2010).

As explained by the court in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997), under NEPA, “the first thing an agency must define is the project purpose.” The court went on to explain the importance of properly defining a project’s purpose:

“The ‘purpose’ of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence). The federal courts cannot condone an agency’s frustration of Congressional will. If the agency constricts the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy [NEPA].”

Id. In this case, each of the four separate purpose and need statements the Forest Service proffers suffers from the exact deficiency the court warned of in *Simmons*. The first purpose and need statement states: “[t]here is a need to curb the laminated root rot infestation where it occurs within the Developed Recreation Management Area around Walton Lake, to develop a healthy stand of vegetation, and provide for public safety.” The second states: “[t]here is a need to reduce stand density within overstocked dry mixed conifer stands, to improve resilience of large ponderosa pine and western larch, and reduce risk of stand-replacing wildfire.” The third states: “[t]here is a need to enhance hardwood species that provide food and habitat for wildlife, visual interest through color and pattern, and shade.” Finally, the fourth states: “[t]here is a need to amend the Ochoco Land and Resource Management Plan.” Final EA at 4. As that language makes clear, the need itself is being defined as the very project the Forest Service is proposing. This violates NEPA because the purpose and need statement dictates the specific actions that must be taken to achieve the purpose.

In 2017, BMBP served the Forest Service with a FOIA request asking for all records used by the Forest Service to determine that falling trees created a significant safety concern outside of the campgrounds in the Project area. The Forest Service produced no records in response to this request, which BMBP interprets as an admission that it had no such records when it originally approved this

project and when it prepared all subsequent EAs regarding this project.⁵ In its response to public comments in 2017 the Forest Service claimed to have conducted a “simple Google search” and to have located two incidents of mortality in dispersed settings away from developed campgrounds. 2017 Resp. to Comments at A-11. Basing a controversial logging project, including multiple forest plan amendments, on the results of a Google search would be, to put it mildly, inappropriate. Indeed, if only two such incidents have occurred in dispersed forest settings throughout the U.S., then it shows that the safety risks are in fact extremely small and the Forest Service is grossly overreacting to the actual safety hazards in the project area. In another response, the Forest Service seems to say that it is obligated to “eliminate the risk of trees falling on people” which is a completely unrealistic and unobtainable goal in any forested setting. See 2017 Resp. to Comments at A-17.

As explained above, the Final EA’s stated “need” to “curb the laminated root rot infestation where it occurs... reduce stand density... enhance hardwood species... [and] amend the Ochoco Land and Resource Management Plan” too narrowly frames the associated project purpose, which clearly is to provide for the public safety from falling trees. However, even stating the project need in “public safety” terms would too narrowly frame the Final EA’s purpose and need statement, the reasonableness of which must be assessed by considering the legal context of the action. See *League of Wilderness Defenders*, 689 F.3d at 1069-70. In this case, the applicable legal context is the Ochoco Forest Plan, which prescribes management direction for an area based on its classification under the Forest Plan. The Walton Lake area is designated under the Ochoco Forest Plan to be managed such that, among other things, (1) it is safe; (2) it is beautiful; (3) it is relatively natural; (4) timber activities will normally not be visually evident, but may be used for safety and visual enhancement; (5) scenic views may be enhanced through harvest or thinning but will appear natural; and (6) “thinning may be done to meet the visual quality objectives and *maintain* healthy stands.” Final EA at 5, 28 (citing the Ochoco Forest Plan) (emphasis added).

⁵ Now, however, the Forest Service insists that such danger is evident “[b]ased on *past* and current monitoring” and best available science. See FONSI at 35. If this danger was truly evident in 2015 when this project was initially proposed, then surely the past monitoring and best available science supporting the project at that time would have been available in 2017 when BMBP sent this FOIA request.

The Forest Service's response to BMBP's initial scoping comment regarding the limited purpose and need statement was that "the purpose and need is based on direction in the [Ochoco National Forest Land and Resource Management] Forest Plan." Ex. R at 8. This response is echoed in the FONSI, and no changes have been made to correct the inappropriately narrow construction of the purpose and need statements. See FONSI at 30, Final EA at 4. The Ochoco Forest Plan, however, provides that the goals within Developed Recreation Management Areas are to "provide safe, healthful, and aesthetic facilities for people to utilize while they are pursuing a variety of recreational experiences within a relatively natural outdoor setting." Final EA at 4. Therefore, BMBP's initial suggested construction of the purpose and need statement is more appropriately tailored to the Forest Plan's goals than the ones adopted by the Draft EA and retained in the Final EA.⁶ Ex. S at 4. By seeking to destroy the current predominantly fir old growth forest, the Forest Service is no longer providing the natural outdoor setting that has defined the area and attracted recreationalists for generations. Units 2 through 4 are primarily within the Visual Influence Area, providing a heightened consideration of its scenic value rather than recreational value. In response to BMBP's concern that the proposed action will adversely impact or destroy qualities that make Walton Lake popular for recreation, which clearly includes scenic values provided by the visual influence area, the FONSI responds merely that "[t]he effects analysis do not indicate that the qualities that make Walton Lake a popular recreation site will be destroyed, in fact, camping and water recreation will not be affected by project activities" except for potential minor delays. Final EA at 30. See also FONSI at 55. This response implies that camping and water recreation alone may account for the popularity of the Walton Lake area, and entirely ignores the importance of the scenic value of the recreational setting in creating a desirable location in which to camp, fish, or hike. This is a conspicuous omission when considering that effects to scenery and visual quality was identified as one of only three "Key Issues" sifted from the myriad concerns raised by the public and which the Forest Service deemed relevant to inform its limited range of selected alternatives. See Final EA at 11. Additionally, the Forest Service itself

⁶ BMBP's proposed purpose and need statement: "protecting public safety without adversely impacting or destroying the qualities that make the area so suitable and popular for recreation."

has admitted the importance of Walton Lake's scenery and its star components – the trees. "Visitors come to Walton Lake to enjoy [the] idyllic lake setting, the fishing opportunities, and surrounding scenery."

Final EA at 53. "The forested vegetation and understory are key components of the recreational experience at Walton Lake. Large old trees, often referred to as legacy trees, are particularly important to the character of the site." Final EA at 54. These characteristics, which the Final EA refers to as "landscape character," help to define the unique sense of place currently enjoyed at Walton Lake.

"Landscape character is an overall visual and cultural impression of landscape attributes – the physical appearance and cultural context of a landscape that gives it a 'sense of place' (USFS 1995d). Landscape character includes all elements that contribute to the identify of a place or ecosystem including aesthetics (perceivable sights, sounds, smells, tastes, and physical contacts); social context (community, cultural, economic, historic, recreational, and spiritual); and biophysical aspects (land, water, vegetation, atmosphere, climate, and wildlife." Final EA at 63. The proposed project would negatively impact the aesthetics, social context, and biophysical aspects of Walton Lake's current and beloved sense of place.

Despite these acknowledgements of the role that current scenic values play in the popularity of Walton Lake as a recreation destination, the Forest Service is completely restructuring the natural integrity of the Walton Lake area. Furthermore, the Forest Service attempts to harmonize its stated purpose and the Forest Plan by amending the Forest Plan. As stated in our prior comments, it is circular reasoning for the Forest Service to argue that it needs to amend the Forest Plan in order to carry out a purpose and need that is itself inconsistent with the current Forest Plan. Additionally, framing the amendment of the Forest Plan as a purpose and need of the project is indicative of the fact that the Forest Service did not intend to give true meaningful consideration to alternatives which did not include a Forest Plan amendment, such as the No-Action alternative or Alternative 4.

In summary, the Final EA continues to unreasonably and impermissibly define the purpose and need of the project such that it ignores numerous Forest Plan management objectives for the Walton Lake area, and then proposes to remedy that issue by adding amending the Plan itself to the purpose and need statement. This violates NEPA and should be corrected.

BMBP raised these issues in its draft EA comments, Ex. A at 7-10.

III. The EA Fails to Analyze an Adequate Range of Alternatives

NEPA mandates that an environmental assessment (EA) “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1; *see also Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (stating that Council on Environmental Quality regulations require an EA to include an alternatives analysis). The alternatives analysis, in which an agency evaluates “all reasonable alternatives” and explains why alternatives eliminated from detailed study were not considered, “is the heart” of the environmental assessment. 40 C.F.R. § 1502.14. An agency may consider *only* the proposed action when there are no “unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E); *see also* 36 C.F.R. § 220.7(b)(2)(i). Unresolved conflicts exist when the agency lacks a consensus about the proposed action based on input from interested parties. National Environmental Policy Act Procedures, 73 Fed. Reg. 43,084, 43,092 (July 24, 2008) (codified at 36 C.F.R. Part 220). Here, as is clear based on comments on the Draft EA and other public input, there are many unresolved conflicts regarding the proposed Walton Lake project, therefore the Forest Service must evaluate all reasonable alternatives.

The Walton Lake Project EA violates NEPA because it does not analyze all reasonable alternatives and serves only to justify a decision already made. In response to BMBP’s comments, the EA included a very brief analysis of some of the example alternatives BMBP provided in its scoping comment. However, it did not include an alternative that called for posting signage around units 2-4 advising recreationalists of possible hazard trees created by root rot but without a concurrent closure order, which BMBP included in its 2019 scoping comments. Ex. S at 7. Indeed, this alternative was barely acknowledged in the section titled “Alternatives or Project Design Considered but not Analyzed in Detail,” garnering only a one sentence mention, while other proposed alternatives were at least given somewhat detailed explanations for their rejection. See Final EA at 32. The Forest Service’s response to this suggestion was that safety concerns surrounding the impacted area are simply too serious to rely on

signage alone. See FONSI at 32. In reality, the situation is not nearly as dire as the Forest Service makes it out to be.

Root rot has been in the Walton Lake area for decades, possibly millennia; this is nothing new to the Forest Service, and it has admitted as much. FONSI at 44. As long as the Forest Service continues to survey for and remove hazard trees in the campground, it is clear that public safety can be maintained without clearcutting this area and without closing off the area entirely to the public. Further, most of the trees in units 2-4 are not diseased or likely to become diseased for many years and as such they present absolutely no danger to Walton Lake recreationalists in their ordinary activities in the recreation area. Even the trees the Forest Service says it would not be able to identify as hazard trees, but nonetheless may present an invisible danger, are outside the most frequently used parts of the recreation area and are not easily accessible as they do not contain trails. Due to the infrequent travel of these areas, the risk presented to humans is nearly nonexistent. The Forest Service has continually failed to quantify the danger that these trees present, instead saying that only a full sanitation harvest or closing off the area is necessary to protect the public's safety. Given the actual facts on the ground, this is patently false and misleading as to the real nature of the danger. Indeed, as a general matter the EA grossly exaggerates the public safety issues outside of the campgrounds and along roads. Even were a potential hazard tree¹ located near a trail, the hazard presented is transitory in nature and would last only for the brief time that a hiker passed within the fall radius of that tree. This is unlike campgrounds and picnic areas such as those within the developed portion of the site that impliedly invite recreationists to linger under the trees. The Forest Service offers no actual evidence that under the Forest Service's own guidelines trees infested with or susceptible to laminated root rot create real hazards or could be considered "hazard trees" when they are located *away* from the developed campgrounds and roads. Visitors no doubt do engage in activities such as hiking or bird watching in the visual influence area that surrounds the actual campground, but as the Forest Service's own Field Guide acknowledges, visitors who wish to recreate in forested areas "must accept a certain amount of hazard." Ex. T at 13.

The Forest Service has adopted the policy to publicly advise visitors to recreate at their own risk. For example, the Forest Service provides advisories that require visitors to be aware of surrounding hazards and to avoid hazard areas during particularly windy days.⁷ Region 1 has a similar warning on its webpage. Ex. U. The Forest Health report discusses other contributors to hazard trees, including beetles. Beetle infestations have been a hazard in other forests, particularly in the Arapaho and Roosevelt National Forests, where the Forest Service has taken the approach to publicly advise visitors to take responsibility for their own safety.⁸ The Forest Service should adhere to this policy of public warnings at Walton Lake with regard to concerns in the visual influence area by allowing Units 2 through 4 to remain open to recreationists, but with adequate warning signage. Signage should be sufficient for the public, and adequately protect the Forest Service from liability. The EA does not cite a single instance where a hiker or bird watcher, as opposed to a camper in a tent or RV, has been struck, or even almost struck, by a falling tree. In response to BMBP's above concerns, the Forest Service defends its election to oversanitize the visual influence area by noting that the Ochoco Forest Plan policy provides for a "safe environment in the Developed Recreation Management Allocation." See FONSI at 36. "Safe" is a relative term and a number of actions may fall on this spectrum; the issue is deciding when the costs outweigh the benefits of making a space incrementally more "safe." For example, posting signage regarding swimming safety may make the activity safer by reducing the possibility of a visitor drowning. Requiring floatation devices may make this safer yet. However, it is arguably even safer to limit swimming to a confined, shallow area, or further yet to not allow swimming at all, thus eliminating the possibility of a visitor

⁷ *Hazard Trees*, U.S. Forest Service (last visited March 19, 2020), <https://www.fs.usda.gov/visit/know-before-you-go/hazard-trees>. Ex. KK.

⁸ *Hazardous Tree Information: Tips for Recreating or Other Activities in a Beetle-Hit Area*, U.S. Forest Service (last visited September 3, 2020), Ex. LL. https://www.fs.usda.gov/wps/portal/fsinternet/cs/detail/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8zijQwgnNHCwN_DI8zPyBcqYKAfj1VBmA9cQRQx-g1wAEci9eNREIXf-HD9KKxWIPuAkBle-lHpOfJkOByzEsytkjXjypKTUstSi3SKy0CCmeUIBQUW6kaqBqU15frpefnp-ek6iXn56oaYNOSkV9coh-BqIK_IDc0NMlgyzSnzMcRAIRE-zk!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?position=Not%20Yet%20Determined.Html&pname=Arapaho%20&navtype=BROWSEBYSUBJECT&ss=110210&pnavid=13000000000000&navid=130120000000000&ttype=detail&cid=fsm91_058282

drowning. The latter examples are obviously extreme, but this is analogous to the level of safety that the Forest Service is purporting to achieve within the visual influence area with its proposed project alternative. Yes, the Forest Plan instructs the Forest Service to provide for a safe environment, but the Forest Service has already been successfully addressing this requirement by completing its annual hazard tree inspection and removal before opening Walton Lake to the public. The Forest Service has not adequately explained why scenic values, a centrally important component of the Walton Lake area, must be sacrificed for this incremental and unnecessary step toward absolute "safety." In reality, no such sacrifice must be made. The closure imposed on Units 2 through 4 is unnecessary, and only served to exclude the public from an area set aside for them. Forest Service concerns about protecting the public from potential future hazards in these areas can be addressed by simply posting signage warning the public of the inherent risk of recreating in these spaces. This would not be a burden on the Forest Service, since it can simply modify its existing warning signs to omit the closure language and associated unnecessary fine, leaving only details regarding potential hazards in that area. Additionally, as noted by Karen Coulter in her comments on behalf of BMBP, members of BMBP have observed recreationists enter and exit the closure area despite the existing signage and threat of fines, Ex. B at 23, therefore lifting the closure would merely allow the public continued access to an area it is already determined to recreate in.

In addition to the reasons discussed in detail above, the range of alternatives was inadequate because it omitted other viable solutions, such as an alternative that reduces the developed recreation boundary (and thus the area in which ultimate safety must be attained) to within 150 feet of the loop road. This alternative differs significantly from Alternative 3 because, for example, it would not require closure of large currently forested areas that would be outside the developed recreation boundary. This alternative has in fact been recommended by Kent Koeller, a recreation planner for the Ochoco National

Forest, for several years. Ex. V.⁹ Such an alternative would reduce the burden on the Forest Service to maintain an adequately “safe” environment for recreationists by reducing the area it must administer and would spare many acres of the visually desirable LOS areas from unnecessary and untimely “sanitation.” According to Mr. Koeller, doing so would also “automatically” take care of the trail component “as it is only within [the] developed recreation boundary that we address safety. We wouldn’t safe proof a trail otherwise.” *Id.*

With the exception of the proposed alternative in the preceding paragraph, which came to BMBP’s attention only after the close of the comment period (when it received documents from Forest Service in response to the February 2020 FOIA request), BMBP raised these issues in its draft EA comments, Ex. A at 11-13.

IV. The Forest Service’s Continuing Contract with T2 Violates NEPA

NEPA stipulates that an agency “shall not commit resources prejudicing selection of alternatives before making a final decision.” 40 C.F.R. § 1502.2(f). Environmental assessments are meant to analyze the impacts of a proposed action “rather than justify[] decisions already made.” 40 C.F.R. § 1502.2(g); *see also Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1054 (9th Cir. 2007), *aff’d en banc*, 535 F.3d 1058 (9th Cir. 2008) (adopting the opinion of the original three-judge panel regarding consideration of a reasonable range of alternatives); *see also Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (“An assessment must be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.”).

In response to BMBP’s FOIA request, the Forest Service has acknowledged that its “stewardship contract” with a company to log the areas in question is still in place. See Exs. W, X, and Y. This presents a major problem for the Forest Service’s compliance with NEPA because it proves that the Forest Service irreversibly and irretrievably committed resources to the logging contract before beginning the EA

⁹ Koeller notes he has advocated for this alternative since “day one of this project.” See Ex. V. Although BMBP has submitted earlier FOIA requests regarding this project and seen a project record submitted to a court, this is the first time BMBP has seen written documentation of Koeller’s proposed reasonable alternative.

process. *See Metcalf v. Daley*, 214 F.3d at 1143–44 (finding that the National Marine Fisheries Service prepared the EA too late in the decision-making process because the agency had already irreversibly committed resources by contractually agreeing to the proposed action). In his 2016 memo giving direction on the Walton Lake EA, District Ranger Turner states that “[a] stewardship contract was prepared and awarded, and project implementation was scheduled to begin in October 2016” before the preliminary injunction in the *LOWD/BMBP v. Turner* suit was granted. Ex. Z. In October of 2019, Mark Phillipp, a Forest Service contracting officer reiterated that the contract was merely put on hold, elaborating that “[i]f the treatment prescription changes drastically or wood product value continues to decline that contract awarded years ago will be terminated without performance and we will lose those appropriated dollars and likely not have the funds to compete and complete a new project.” Ex. X. *See also* Ex. MM. In this internal email, Mr. Phillipp indicated that “already having an awarded contract and not having the funds is the second part of the scenario that doesn’t meet the good news category that I would prefer not to share with a potentially less than understanding public.” Ex X.

As the contract has not been rescinded and is only on hold, the Forest Service has continued to commit itself to the Proposed Alternative before the completion of the EA in violation of NEPA. Ex. AA. It is clear that the Forest Service is invested in the current terms of the existing contract so as not to lose appropriated funds, and that the EA process serves only to justify the Forest Service’s decision to log this area as it has been planning to do for five years. If the contract were in fact a meaningless, illusory contract that the Forest Service could terminate at will, the Forest Service would in fact have already terminated that contract.

The Forest Service insists that the logging contract does not bind it and that it can modify or terminate the contract. Ex. W. That, of course, is true of almost any contract so long as the breaching party also pays any actual damages. The Forest Service relies on the assertion that a “notice to proceed” has not been issued to support its claim that it is not yet bound by the contract. *Id.* The Forest Service should not be allowed to make such assertions until it produces all documents related to that contract, including any relevant regulations or policies which indicate that such a contract is only binding upon the

issuance of a “notice to proceed.” Indeed, the document provided to BMBP which purports to represent the Forest Service’s contract with T2 makes no mention of relying upon a “notice to proceed” to bind the parties. In fact, it states that “Line Items 1 thru 3 will be awarded *immediately* using timber receipts” with additional sums to be paid at a later date. Ex. AA (emphasis added). Moreover, even if the Forest Service could terminate the contract “at will”, other documents, e.g., Ex. Z, clearly show that the contract’s continuing existence has and continues to “justify or rationalize” a decision already made in 2015, and to greatly influence the Forest Service’s consideration of alternatives, making a mockery of the NEPA process.

Finally, and most importantly, the Forest Service response simply ignores the binding holding in *Metcalf*. If anything, the contract as described in that case seems much less binding than the contract at issue here. The point of the holding in *Metcalf* is that by entering into a written, formal contract the Forest Service has manifested a clear intent that is inconsistent with the objective analysis under NEPA of a proposal’s impacts before approving that proposal.

BMBP raised these issues in its prior draft EA comments, Ex. A at 14-15.

V. The Project is “Significant” under NEPA and Requires an EIS

Given the analysis appearing in the Final EA and its supporting documents, the Forest Service will not be able to sustain a finding of no *significant* impact under CEQ regulations at 40 C.F.R. § 1508.27, which illustrates that significance must be determined through analysis of both context and intensity.

A. Context

In terms of context, this must be evaluated in terms of the projects impacts on the Walton Lake area and not the watershed level or the Ochoco National Forest as a whole. Clearcutting 35 acres and removing additional large trees from such a relatively small area and thereby destroying a large part of the current viewshed for the recreation area will have a significant impact and requires an EIS. Moreover, the fact that the Forest Service must propose four plan amendments in order to accomplish this project

underscores how inconsistent the project is with the existing plan and its intent for the area, and the significance of the changes to the area that the Forest Service is proposing. *See Anderson v. Evans*, 371 F.3d 475, 490–492 (9th Cir. 2004) (“In short, the record establishes that there are ‘substantial questions’ as to the significance of the effect on the *local* area... And because the EA simply does not adequately address the local impact of the Tribe's hunt [for whales], an EIS is required.” (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (ordering the Forest Service to prepare an EIS where the EA's treatment of one important environmental factor was “cursory and inconsistent”) (emphasis in original)). In defending its proposed action for the 35-acre sanitation harvest, the Forest Service states that the “effects as disclosed in the EA for the 35 acres of sanitation harvest are minor on the *landscape*[,]” but provides no observations about the scope of the impact on the local area (which would be major). FONSI at 47 (emphasis added). However, it shortly thereafter admits that the proper scale to evaluate effects is “at the *project level*” (adding that cumulative effects are assessed at the watershed and Forest level). FONSI at 48 (emphasis added).

The fact that the Forest Service is proposing four plan amendments for this relatively small area, amendments that essentially completely reverse the original plan intent - the equivalent of saying “white is now black” - also implicates each of the intensity factors addressed below.

B. Intensity

The intensity factor refers to the severity of impact and offers several factors for consideration, several of which are implicated by the Walton Lake Project. *See* 40 C.F.R. § 1508.27(b). Taken together, these factors indicate that the project is indeed significant, meriting an EIS. For example:

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

This non-exhaustive list of unique characteristics almost certainly includes “the most beloved recreation spot” in the Ochoco, a site that contains beautiful old growth trees protected by the Eastside Screens. These old growth trees are part of the draw of the area, as the Forest Service learned during its

initial scoping, and indeed some people with emotional attachment to the area likely will not return after the project's planned clearcutting. *See, e.g., Ex. BB (BMBP 2017 Objection Exhibit W)*. Additionally, the Forest Service notes that Walton Lake is unique in that developed recreation areas with lakes are not common in the Ochoco National Forest. FONSI at 56. This, combined with the fact that the popularity of the site is entangled with its specific silvicultural features surrounding the lake, unique characteristics exist here tipping in favor of significance.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

The Walton Lake Project's effects on the human environment are controversial because treating laminated root rot ("LRR") with heavy logging (and, moreover, replanting with plants such as larch) is likely to be counterproductive. A controversy exists where "a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982); *see also Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) (instructive on the meaning of controversy, despite using outdated reasonableness standard for the decision not to prepare an EIS). Here, the effects of the Forest Service's action are substantially disputed. The Walton Lake Project will not actually treat LRR. Rather, BMBP has pointed out that logging actually *spreads* LRR (*see, e.g., Ex. BB (BMBP 2017 Objection Exhibit W)*), and logging to control LRR would not significantly reduce LRR unless entire root systems of affected trees are removed (though, even then, wood fragments with the disease would likely persist in the soil). Similarly, the project's effects have also been contested by a giant in the field of forest health and ecology, Chad Hanson, Ph.D., who commented during the initial scoping period. *See Ex. CC (BMBP 2017 Objection Exhibit P)* (likewise pointing out that "the project would not reduce LRR occurrence, as claimed, and would likely increase LRR occurrence through logging . . . due to the presence of infected stumps and root systems"). This would be the case under the proposed action, which anticipates leaving the stumps of harvested trees, Final EA at 26, as well as any infected root systems. *Ex.*

Y. Hanson pointed out that “stumps spread or increase LRR and ‘pine trees may be infected when growing mixed with more susceptible conifers’” indicating that the remaining pine themselves could become infected. *Id.* (citing Hanson and Goheen 2000). The Forest Service responds that it reviewed the information provided by Mr. Hanson, but that for this project “[t]here is no evidence that the proposed treatments would exacerbate [LRR][.]” FONSI at 45. This response chooses to ignore the clear scientific controversy regarding the effects of leaving infected stumps and roots in a harvest area.

The scientific controversy is clear and effects of this project are further called into doubt by other studies that the Forest Service has reviewed. *See* Exs. DD and EE, (BMBP 2017 Objection Exhibits X and Y). For example, the two cited documents identify western larch, which the Forest Service intends to replant the area with, as moderately susceptible to LRR (at *iii* and 44, respectively); the former also offers instruction in removing root systems to manage the disease (19-23). Likewise, scientific controversy exists over whether thinning actually reduces bark beetle susceptibility, another listed contributor to hazard conditions. Controversy also exists regarding whether wildfire is a real threat to the project area, because the nearby Canyon timber sale has already theoretically buffered Walton Lake from stand-replacing wildfire.¹⁰ *See* Ex. BB (BMBP 2017 Objection Exhibit W). Taken as a whole, this evidence does not portray the project as a sincere endeavor to treat LRR, but rather indicates that this is merely a vehicle for the Forest Service to log precious, yet monetarily valuable, old growth fir. Combined with the drastic visual impacts this will have on the human environment, e.g., the decimation of a much-loved recreation area, this also tips in favor of significance.

(5) Unique or unknown risks

Because all or most of the four proposed plan amendments are being used in new or different ways, Final EA at 160, this factor supports an EIS.

¹⁰ The Forest Service itself seems confused about whether or not to use the threat of wildfire as one of its rationales for the proposed project. On one hand, the second purpose and need statement states: “[t]here is a need to reduce stand density within overstocked dry mixed conifer stands, to improve resilience of large ponderosa pine and western larch, and *reduce risk of stand-replacing wildfire.*” July EA at 4 (emphasis added). On the other hand, the Forest Service claims that “the EA does not suggest that wildfire suppression is a rationale for treating these units[.]” FONSI at 46.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration

Here the unprecedented use of plan amendments to treat LRR (indeed, the Forest Service itself admits that it has never before used commercial logging to treat LRR in the Ochoco National Forest, *see* Ex. FF (BMBP 2017 Objection Exhibit A) at 1, a response to our FOIA request on the topic) sets a concerning precedent to allow cutting of old growth in other eastern Oregon forests. *See also* Final EA at 160 (emphasizing that these amendments are unprecedented). As BMBP has pointed out before, LRR is a native and necessary natural disturbance agent in our forests which fulfills valuable functions, like soil nutrient cycling and creation of snags and other habitat for wildlife. Unfortunately, BMBP strongly suspects that future project areas seeking to use site-specific forest plan amendments will be drawn to incorporate patches of LRR after this highly unusual departure from Forest Service silvicultural practice. This will lead to cumulative diminishment of old growth and vital habitat – in flat violation of the Eastside Screens, which were meant to protect old growth throughout the eastern Oregon forests. This fear is bolstered by the Forest Service’s own descriptions of how they decided to draw the project parameters at Walton Lake: “This project originated with forest health experts . . . noticing for some time the Laminated Root Rot disease growing around Walton Lake . . . That disease is only about 25 percent of the project, but it was the impetus to go out and look at Walton Lake as a whole . . . and do other types of thinning for general forest health.” Ex. GG (BMBP 2017 Objection Exhibit Z) (quoting Patrick Lair, public affairs specialist with Ochoco National Forest). This factor therefore cuts against the Forest Service’s finding of insignificance, as it opens the door to future circumventions of the Forest Plan.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

The part of the project which purportedly addresses forest health by seeking to reduce “stress” on ponderosa pine is misleading. The Forest Service has used this as justification for several other projects in eastern Oregon and is representative of a silvicultural shift intended to cumulatively move forests towards a more open stand structure favoring pine and larch. This contributes to a significant cumulative loss of large trees and old growth forest over time. The Forest Service cannot avoid addressing the cumulative effects on our eastern forests and applicable wildlife (e.g., PCEs) by breaking down forest restructuring into small component parts and projects. Related to this is the fact that this project is essentially a type-conversion from the natural mature and old growth moist mixed conifer stand to a dry Ponderosa pine/Western larch even-age plantation, which bears on the project’s “intensity” in its own right. BMBP has articulated its concerns with the Forest Service’s inadequate consideration of cumulative impacts elsewhere in this comment, but such inadequacy also weighs in favor of significance under this factor.

Additionally, although the FONSI states that the environmental effects analysis considered the potential for effects of the Walton Lake project to overlap with the effects of ongoing or reasonably foreseeable future actions, FONSI at 17, this is not accurate. The Final EA entirely neglected to address the cumulative impacts of the proposed site-specific Eastside Screens amendments when combined with the pending proposed amendments to the Eastside Screens themselves. The pending proposed amendment to the Eastside Screens was reasonably foreseeable long before the EA for this project was finalized in July. The elimination of the 21” protective standard in the project area combined with the potential elimination of the 21” standard across the entire Ochoco National Forest would invariably result in a cumulative impact to the number and distribution of large trees and LOS across the forest once new management and logging projects are implemented which take advantage of relaxed protections. The Ochoco National Forest team would certainly have been aware of this development, including its specific proposed scope, the outcome of which will impact the whole Ochoco National Forest, because public meetings were already being conducted on this proposal as of May 2020 (with planning likely occurring for weeks or months in advance), Ex. PP at 6, and because Shane Jeffries, the Ochoco National Forest supervisor, is also the deciding official for the Eastside Screens amendments. Ex. HH.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

As explained elsewhere in these comments, the Walton Lake Project violates both NEPA and NFMA, which also implicate these CEQ regulations about significance (violations of federal law bear on whether a project is significant). Other requirements imposed for the protection of the environment are also threatened by this action. BMBP points to the fact that there are eighteen sensitive species with suitable habitat in the project area, such as roughly a dozen sensitive plants listed on the ORBIC list 2, and the sensitive Peck's Mariposa Lily, endemic to the Ochoco National Forest. Yet the Forest Service does not properly acknowledge the damage which logging and likely introduction of invasive plant species (since the project is at high risk of introducing noxious weeds) could wreak on these already sensitive species. This threatens a violation of requirements imposed for the protection of the environment and implies significance of the project.

The Forest Service has not here met its burden to articulate a "convincing statement of reasons to explain why a project's impacts are insignificant" *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (quotation and citation omitted), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157, 130 S. Ct. 2743, 2757, 177 L. Ed. 2d 461 (2010). Instead, BMBP has shown that it has raised substantial questions about whether this project will have a significant effect on the environment, indicating that the Forest Service should prepare an EIS instead of this EA. *See, e.g., Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004). Its decision not to do so is arbitrary and capricious.

With the exception of the discussion surrounding the cumulative impacts significance of the proposed amendments to the Eastside Screens, which arose after the close of the March 2020 comment period, BMBP raised these issues in its comments on the Draft EA. See Ex. A at 15-20.

VI. The Geographic Scope of the Cumulative Impacts Analysis is Improperly Limited

The Forest Service is required to analyze “cumulatively significant impacts” in an EA. 40 C.F.R. § 1508.27(b)(7); *see also* 40 C.F.R. § 1508.25(c)(3). Cumulative impact “results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such actions.” 40 C.F.R. § 1508.7. Agencies may limit the geographic scope of the cumulative effect analysis; however, a court recently held that agencies must provide support in the record for their choice of analysis area. *Snow Basin*, 2014 WL 6977611, at *9. In *Snow Basin*, the court held that it could not defer to the Forest Service regarding the scope of the cumulative impacts analysis because the agency “failed to provide any explanation in the record as to why it chose a small area . . . instead of the [national forest level] to analyze the cumulative impacts of the [p]roject.” *Id.*

In the Wildlife Report prepared in support of the Final EA, the Forest Service provides a cursory and superficial explanation as to the geographic scope of the cumulative impact analysis:

“A single subwatershed (HUC 12) which overlaps the Walton Lake Restoration project in space was considered for cumulative effects for a majority of the species analyzed because this subwatershed encompasses habitat and territory size for a number of wildlife species. An additional subwatershed was included for some species in order to account for known territories, designated habitat, or home ranges for these wildlife species. While these boundar[ies] may encompass more habitat than is necessary to properly evaluate effects to some species, it represents the most logical boundary as incorporating the watersheds (HUC 10) that overlap with project effects would not refine the analysis enough to discern actual impacts. This boundary allows for the proper consideration of cumulative effects to certain wide-ranging species from past, present, and reasonably foreseeable future actions adjacent to the project area.”

U.S. Forest Serv., *Resource Report and Biological Evaluation for Wildlife: Walton Lake Restoration Project 6* (2020) [hereinafter *Wildlife Report*]. In the Final EA, the Forest Service merely identifies the geographic scope of the cumulative effect analysis for most species analyzed. *See, e.g.*, Final EA at 86 (“The cumulative effects boundary [for the bald eagle] includes the one subwatershed that the Walton Lake project boundary falls within . . .”). For a few of the species, the geographic scope is more detailed. *See, e.g., id.* at 107, 112, 120 (The cumulative effects boundary includes the one subwatershed that the Walton Lake Project boundary falls within, and an additional subwatershed immediately adjacent to the project boundary to incorporate designated habitat for this species that occurs within close enough

proximity to be within the potential home range of dispersing individuals outside of the project boundary . . .”). Yet, the explanation for the geographic scope is identical for these species though they are entirely different animals with different life histories (e.g., the explanations for the geographic scope of the Rocky Mountain Elk and the pileated woodpecker are the same). Moreover, a geographic scope of two subwatersheds is far too limited for species found throughout the entire national forest. That is especially true now that the Forest Service has now proposed to eliminate forest-wide the current mandatory Eastside Screens protections for large trees that provide essential habitat for some of these species.

Despite that, the Forest Service stated that the “[s]patial and temporal bounding for cumulative effects were determined for each wildlife species individually” (*Wildlife Report* at 6), the agency does not provide any individualized, species-specific explanation for the geographic scope of the cumulative impact analysis as required by *Snow Basin*. In addition, the agency only developed a rationale for the geographic scope after the cumulative impact analysis was already completed. *See* Exhibit II (email from Forest Service silviculturist, to Marcelle Anderson, Forest Service Environmental Coordinator, stating that he would “try and come up with some kind of rationale” for the boundaries of the already completed cumulative effect analysis “that would make sense”). Lastly, even though the Forest Service claims that the geographic scope of its cumulative impacts analysis is limited to one or two subwatersheds (depending on the species), the agency claims to justify its finding of no adverse effect for several species by referencing the impact at the scale of the national forest. *See, e.g.*, Final EA at 105 (stating that the cumulative effects of the loss of habitat “would be negligible at the scale of the Forest” for primary cavity excavators, such as the pileated woodpecker and black-backed woodpecker), *id.* at 108 (stating that the cumulative effects of the loss of habitat “would be insignificant at the scale of the Forest, and thus continued viability of the pileated woodpecker is expected on the Ochoco National Forest”), *id.* at 113 (stating all alternatives present “continued viability of Rocky Mountain elk and mule deer is expected on the Ochoco National Forest.”). Significantly, none of these assertions about forest-wide impacts take into account the reasonably foreseeable cumulative impact of the Forest Service’s current proposal to eliminate forest-wide the mandatory Eastside Screens protections for the large trees that provide essential

habitat for primary cavity excavators, elk and deer. Moreover, even though the Forest Service claims that there is no impact to primary cavity excavators at the Forest level, the Final EA actually acknowledges impacts to this MIS at the watershed level. Final EA at 99. The stated scope of analysis for pileated woodpeckers is also inconsistent, with Figure 35 indicating that analysis would be conducted at the dual-watershed level, while analysis appears to be on a forest scale. Final EA at 76, 106.

BMBP raised these issues in its Draft EA comments. See Ex. A at 21-23.

VII. The Proposed Site-Specific Forest Plan Amendments Violate NFMA

Instead of working within the existing Forest Plan, for expediency's sake the Forest Service prefers to eliminate those Forest Plan provisions that are barriers to its preferred action alternative.

Removing those barriers requires four site-specific Forest Plan amendments:

1. Eliminating the Eastside Screens provision requiring retention of late and old structural (LOS) stages in areas that are below the historical range of variability (HRV);
2. Eliminating the Eastside Screens requirement "to maintain all remnant late and old seral and/or structural live trees \geq 21 inches DBH that currently exist within stands proposed for harvest activities.";
3. Eliminating the strict visual quality standard that applies to the Walton Lake recreation area;¹¹
and
4. Removing the 5-acre limit on clearcutting ("regeneration harvest").¹²

¹¹ The Forest Service plans to ruin the visual integrity of the Walton Lake area for many years to come. It objectively violates its own standards in proposing a "sanitation harvest," also known as clearcutting, for units 2-4. Whether using the language of the Ochoco Forest Plan's Visual Quality Objectives (VMS), or the EA's Scenic Integrity Levels (SMS), the proposed action goes far beyond any action the Forest Plan currently allows. Under the current "retention" Visual Quality Objective the Forest Service is tasked with ensuring that "human activities are not evident to the casual forest visitor." Clearcutting 35 acres of large and old trees within the Visual Influence Area of the most popular developed campground in the Ochoco National Forest would be exceedingly evident to all but the blind forest visitor. Amending the forest plan to accommodate this project serves only to justify a decision that was made years ago.

Final EA at 29-30. To comply with the APA and NFMA, the Forest Service must “adequately articulate a rational connection between the characteristics of the project area and the choice to adopt site-specific, rather than forest-wide, amendments.” *Snow Basin*, 2014 WL 6977611, at *50. The Final EA does not adequately articulate such a rational connection for the proposed Walton Lake Project, and it therefore violates NFMA.

In *Snow Basin*, the court noted that “a close reading of *Lands Council v. Martin*[], 529 F.3d 1219 (9th Cir. 2008),] indicates there must be at least some characteristics *unique to a site* to support a site-specific amendment.” *Id.* at 54 (citing *Lands Council* at 1228) (emphasis added). In that case the Forest Service “fail[ed] to point to any characteristics unique to the Project area to support the site-specific amendment,” so the court found that the decision to enact a site-specific amendment was arbitrary and capricious. *Id.* at 55. In its analysis the *Snow Basin* court noted that the lack of project area uniqueness was underscored in the challenged Record of Decision itself, which admitted that “the Project area is representative of western forest landscapes that are at risk due to past fire suppression and logging activities,” which the Forest Service alleged as justifications for the site-specific Forest Plan amendments. *Id.* at 53 (internal quotation marks omitted).

As explained in *Snow Basin*, site-specific Forest Plan amendments may be used *only* to address unique site-specific conditions. Because the forest conditions addressed by the proposed Forest Plan amendments are commonly found throughout the Ochoco National Forest, they are not unique to the site and cannot support site-specific amendments. Previous EA’s for this same project have admitted that laminated root rot is widespread throughout the Ochoco National Forest. *See, e.g.*, 2017 Draft EA at 1 (“The moist mixed conifer stands are infested with laminated root disease (also called laminated root rot), a native condition in this forest type.”); *id.* at 84 (“Laminated root rot exists within and adjacent to the

¹² The proposed amendment plans to increase the allowable harvest patch size seven-fold from 5 acres to at least 35 acres. But the current limit is adequate to maintain forest health and protect public safety because the Forest Service’s longstanding treatment practices already address root rot. The current Forest Plan calls for marking and closing potentially dangerous sections and falling hazard trees as they are identified.

project area.”); *id.* at 85 (Even if units 2-4 are clearcut under the sole action alternative, “laminated root rot and other diseases within and adjacent to the project area [will] continue to provide a consistent and long-term source of fir snags suitable for [pileated woodpecker] in the vicinity.”).

The Forest Service argues in the EA that “[l]aminated root rot within the Developed Recreation Management Area has created an unacceptable level of risk to human safety in an area specifically set aside for recreation purposes.” Final EA at 158. Furthermore, it argues that this site is unique because “[t]here are no other known Developed Recreation area that have a laminated root rot problem.” Final EA at 160. In other words, the Forest Service argues that the proposed project area is unique because, although laminated root rot is common throughout the Ochoco National Forest, the presence of laminated root rot in *MA-13 management areas* (i.e. “Developed Recreation” management areas) is rare. There are two problems with that argument.

First, there is no evidence in the record to support the Forest Service’s argument that laminated root rot is rarely found in MA-13 “Developed Recreation” management areas. Indeed, the Forest Service acknowledged a history of laminated root rot within federal campgrounds in parts of Oregon, Washington, and Idaho, Forest Health Report at 6 and FONSI at 39-40, and identified specific actions they have used to address laminated root rot in Developed Recreation Management Areas throughout the Pacific Northwest, Final EA at 13, fn. 2. As explained elsewhere in these comments, the record shows that laminated root rot is common throughout the Ochoco National Forest. There are 1,810 acres of MA-13 “Developed Recreation” management area in the Ochoco National Forest. FONSI at 16. There are only 199 acres of forest in the Walton Lake project area. 2017 EA at 2, fn 1. There is nothing in the record that discusses the incidence of laminated root rot in the other approximately 1,600 acres of the MA-13 “Developed Recreation” management areas. Unless it has supporting evidence that was considered during the preparation of the Final EA, and which should therefore be in the record, the Forest Service cannot simply conclude that the presence of laminated root rot in the Ochoco National Forest’s MA-13 management areas is “unique.” The Forest Service cannot rely on the *absence* of knowledge to

support a finding of uniqueness. Affirmative inquiry into uniqueness is necessary. In any event, even if the Walton Lake area *does* represent the only MA-13 designated area with LRR infestation, that is not enough to support a uniqueness finding justifying a site-specific forest plan amendment because LRR (especially in the Visual Impact Area) still represents a non-unique forest condition. As discussed above, the Forest Service has already admitted that such combinations of location and condition are not unique, and in fact provided a list of instances where LRR impacted other developed recreation management areas. FONSI at 39-40.

Second, even assuming that laminated root rot has “created an unacceptable level of risk to human safety in an area specifically set aside for recreation purposes,” Final EA at 158, only a portion of the proposed project area is actually “set aside for recreation purposes.” That is, much of the area subject to the proposed forest plan amendments is in the Visual Influence Area *outside* the developed campground area. The MA-13 Developed Recreation management areas (including the Walton Lake area) are composed of two distinct sub-management areas: (1) the Developed Site Area and (2) the Visual Influence Area. Final EA at 6. The Developed Site Area and the Visual Influence Area a subject to different management standards. In a nutshell, the Developed Site Area is the actually-developed campground area around Walton Lake, where visitors are encouraged to recreate, while the Visual Influence Area surrounds the Developed Site Area for the purpose of retaining visual quality. Visitors are not specifically invited to recreate in the Visual Influence Area. Because the Visual Influence Area portions of MA-13 are designed not for recreation, but for maintaining visual quality, there is no rational connection between the non-unique conditions in the Visual Influence Area and the proposed site-specific forest plan amendments. So, despite the Forest Service’s contention, it doesn’t matter that “[v]isitors at [Walton Lake] expect a higher degree of management attention” or that “the Walton Lake site has a higher degree of development and more visitation than any other fee site on the Forest.” Final EA at 160. Those visitors, within the developed site, don’t need these proposed amendments to protect their interests, because the developed site area is already exempted from the Eastside Screens. Further, the proposed

visual quality and clearcut patch size amendments would *negatively* impact those visitors by degrading the visual influence area outside the developed site. In other words, there is no rational connection between the popularity of Walton Lake and these proposed amendments.

Further, the amendments also target large firs, in other parts of the project area, not because of LRR but because those large firs supposedly threaten the health of large ponderosa pine. The Forest Service has admitted, however, that “[o]verstocked stand conditions that elevate the risk of mortality of large, legacy ponderosa pine *are not unique* to this site[.]” 2017 EA at 133 (emphasis added). Thus, any overstocked stand conditions cannot support a site-specific forest plan amendment. In response to BMBP’s above comments, the Forest Service merely responded that the combination of location (Developed Recreation Management Area) and condition (the presence of LRR) create a unique characteristic. FONSI at 71. This response fails in any way to support the uniqueness of the supposed risk to ponderosa pine.

The other supposedly “unique” features cited by the Forest Service, Final EA at 160, are irrelevant to the analysis. As explained above, the proper standard under *Snow Basin* is that site-specific amendments must be justified by “characteristics unique *to a site*.” 2014 WL 6977611, at *54 (emphasis added). But here the Forest Service is primarily citing characteristics unique *to its planning process*. That doesn’t meet the *Snow Basin* standard. For example, the Forest Service says this project is unique because “[n]one of the [proposed forest plan] amendments have ever been used on the Ochoco National Forest for the purpose of treating laminated root rot in any management allocation.” Final EA at 160. So what? We know that laminated root rot is found throughout the Ochoco National Forest. What does it matter that the Forest Service hasn’t used a site-specific amendment to address it before? It is unique *site* characteristics that justify the use of site-specific amendments, not whether or not the Forest Service has used this type of site-specific amendment before. If that were the correct standard, then *any* novel, never-before-used site-specific amendment would pass muster under *Snow Basin*.

The same problem applies to the other “unique” factors cited by the Forest Service: “The proposed amendments are not commonly used on the Ochoco National Forest[,]” and “There have been zero projects in the last 20 years that amended the [Forest Plan] scenic quality standard in a Developed Recreation Management Area.” Final EA at 160. Again, who cares? The fact that similar Forest Plan amendments are not regularly used elsewhere is meaningless to the *Snow Basin* analysis because it has nothing to do with unique *site* conditions. Besides, the obvious reason similar Forest Plan amendments are not used elsewhere is because they are unnecessary, just like they are unnecessary for this project.

Finally, the relatively small size of the project area, Final EA at 160, and the fact that the project area includes a lake, Final EA at 160, do not demonstrate uniqueness under *Snow Basin*, because there is no “rational connection” between those characteristics and the choice to adopt site-specific, rather than forest-wide, amendments. *Snow Basin*, 2014 WL 6977611 at *50.

BMBP raised these issues in its Draft EA comments. See Ex. A at 23-28.

VIII. The Forest Plan Amendments are Significant Under NFMA and Require Additional Procedures, Including an EIS

When the Forest Service amends a forest plan, any amendment that results in a “significant change” in the plan requires compliance with a number of additional NFMA requirements, including a much longer comment period and public meetings. 16 U.S.C. § 1604 (d) and (f)(4); *see also Native Ecosystems*, 304 F.3d at 898 *citing* 16 U.S.C. § 1604(f)(4) (2000). Significant amendments must also be analyzed in an EIS. *See Snow Basin*, 2014 WL 6977611, *27. The four amendments proposed for the Walton Lake Project are significant changes, individually and cumulatively, because they would fundamentally change the management prescription for the Walton Lake area and result in long-term negative impacts. “Significance is determined ‘based on an analysis of the objectives, guidelines, and other contents of the forest plan.’” *Id.* Based on the objectives, guidelines, and contents of the Ochoco Forest Plan, these site-specific amendments are significant and require additional procedures under NFMA and must be supported by a full EIS.

The Ninth Circuit discussed when a forest plan amendment is significant in *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9th Cir. 2002). In that case, the Forest Service created a site-specific amendment that they claimed was not significant to the forest plan's road density requirement. *Id.* at 898. The Ninth Circuit held that the Forest Service's amendment to the Forest Plan was not significant because the amendment "does not alter multiple-use goals or objectives for long-term land and resource management, nor significantly change the planned annual outputs for the forest." *Id.* at 900.

Unlike the amendment in *Dombeck*, the amendments proposed here *do* alter long-term goals and objectives of the plan, and will result in long-term negative effects.

A. The Eastside Screens amendments

First, unlike in *Dombeck*, in which the amendment was to road-use requirements, the Eastside Screens amendments here allow logging of trees 21 inches dbh and larger and allow logging in LOS. Final EA at 29-30. Indeed, the EA admits that, in direct contradiction of the Eastside Screens' core purpose and objectives, the amendments would result in a net loss of LOS acreage. *Id.* at 29. The admitted negative impacts in *Dombeck* were temporary because after logging, the Forest Service would close the roads. Here, however, the negative impacts of the East Screens amendments will be *permanent*, and will therefore have significant, long-term ramifications on forest management in the Walton Lake area due to the drastically altered natural environment. Further, even though the Forest Service claims that the actual amendments themselves will only be temporary, Final EA at 29, the effects of these "temporary" amendments will be permanent - once logging of trees 21 inches dbh and larger and logging in LOS occurs for this project, those large and old-growth trees will be gone forever. Many of the trees targeted for this particular project are more than four feet in diameter and those trees must be hundreds of years old. Such trees are extremely rare on the Ochoco and could not be replaced or "restored" for hundreds of years. Indeed, the Forest Service admits that it will take roughly 120-150 for these areas to start converting back to LOS, Final EA at 45, and it will likely take even longer to replace larger trees which

will be removed by this project. The permanence of the actions these amendments authorize makes them much more significant.

Second, the Eastside Screens amendments here clearly contradict the long-term goals of the Ochoco Forest Plan's adoption of the Eastside Screens. The EA for the Eastside Screens establishes that "there is a need to maintain the abundance and distribution of old forest structure and to protect riparian areas for wildlife and fish species that are showing population declines as these habitat components are reduced." Exhibit JJ at AR2668. Further, it asserts that "[t]he purpose is to preserve those components of the landscape—old forest abundance, wildlife habitat in late and old structural stages, and riparian areas—which new information suggests is vitally important to certain species of wildlife and fish and to the overall vegetative structure of the forest." *Id.* at AR2669. Last, the EA found that timber harvesting "in LOS stands could threaten the ecosystem balance ... [and] undermine needed habitat protection for old forest associated with wildlife species." *Id.* at AR2676. The reasoning for the Eastside Screens, which the Ochoco Forest Plan adopted, shows the importance of retaining the LOS and large trees that still exist because without these structures the ecosystem is off-balance. Allowing this logging to occur around Walton Lake fundamentally contradicts the long-term goals and objectives of the Ochoco Forest Plan, both because of the permanence of the actions and the undercutting of the goals of the Eastside Screens.

Several cases have explained that the Forest Service Handbook ("Handbook") "outlines factors the Supervisor *must* consider when assessing the significance of a proposed amendment" including the long-term significance of the project relative to the goals and objectives of the Forest Plan. *Wyoming Sawmills v. USFS*, 383 F.3d 1241, 1251 (10th Cir. 2004) (emphasis added). In these cases, the USFS cited the Handbook and provided an explicit analysis of each Handbook factor. *See id.* at 1251–52; *see also Prairie Wood Products v. Glickman*, 971 F. Supp. 457, 463–64 (D. Or. 1997). The current analysis regarding these amendments does not address their significance under NFMA or the Handbook factors.

Regarding the amendments' consistency with the Ochoco Forest Plan's long-term objectives, a primary reason for adopting the Eastside Screens was to correct the harms to the ecosystem that occurred from over-logging throughout Eastside Forests. The Screens do this by preserving both the old forest and

large tree components of the forest that still exist and future planning options regarding those critical resources. Exhibit JJ at AR2668–69, 2674–76. When the purpose of the Eastside Screens is to preserve the old forest and large trees until more comprehensive regional planning can address these issues, the Forest Service cannot credibly argue that site-specific amendments allowing logging of these forests and trees are consistent with the long-term goals and objectives of the Eastside Screens.¹³

The FONSI claims that “[t]he cumulative effects of the Eastside Screens amendments are negligible at the watershed and Forest level.” FONSI at 74. This assertion presupposes that the only the project area will be exempted from the 21” dbh logging restriction, and thus on a Forest scale, the impact will be minor. As discussed above in Section V(B), this ignores the impact of the pending amendment to the Eastside Screens at large regarding the 21” protective standard, which would impact the entire Ochoco National Forest. Such cumulative impacts were not discussed in the Final EA, nor was the pending change to the Eastside Screens themselves even mentioned.

B. The Visual Quality Objective amendment

The EA calls for amending the Forest Plan to eliminate the “retention” visual quality objective for “approximately ten years.” Final EA at 30. But it might as well eliminate it for 200 years, because that’s the minimum amount of time it will take for the visual quality of the clearcut areas to recover in any meaningful sense. That is a significant plan amendment.

The Forest Service is proposing this amendment because, it admits, this project would otherwise violate the Forest Plan. *Id.* The Forest Service even admits that “enhancement of scenic views” is a “focus” of the management prescription at Walton Lake. *Id.* at 28. So the elimination of that standard to facilitate a clearcut is, almost by definition, a “significant” amendment under NFMA.

¹³ In contrast, in *Native Ecosystems*, 304 F.3d at 900, the Forest Service planned to mitigate the harm of the amendment at issue by closing all roads used in accordance with the amendment within two years of the sale. *Id.* at 890. Limiting the harm to a two-year time period meant that the amendment did not significantly alter the *long-term* land management goals. Here, however, the harm will last for decades, if not centuries.

C. The Clearcut Patch Limit Amendment

The final proposed Forest Plan amendment would exempt the Walton Lake area from the 5-acre logging restriction that currently applies. Final EA at 30. This would allow a 35 acre “patch” of clearcutting at Walton Lake for this project alone. A seven-fold increase in clearcut size is a significant change under NFMA. Additionally, even though the Forest Service claims that the amendments will only apply for the duration of the Walton Lake Restoration Project, if *this* “temporary” amendment is allowed to proceed, it will drastically increase the chances that other such “temporary amendments” will be undertaken to accommodate future logging projects which also violate relevant provisions of the Forest Plan or Eastside Screens. This would set a dangerous precedent that would allow forest managers to easily circumvent and frustrate the long-term goals and objectives of these plans, and is also a significant change under NFMA that must be analyzed.

D. The cumulative changes of the four proposed amendments are significant

Even if each of the four proposed Forest Plan amendments are not individually “significant” under NFMA, cumulatively they are. Combined, and in a nutshell, the proposed amendments would exempt the Walton Lake area from the Eastside Screens and the 5-acre clearcut patch size restriction, and the negative impacts of these amendments would be felt for decades to come, frustrating long-term goals and objectives of both the Forest Plan and the Eastside screens. That is significant by any standard. Throw in the “ten year” elimination of the visual quality retention standard, the effects of which will be felt for hundreds of years, and what you have is a Forest Plan amendment package that is way out of scale for needs of this project, which is supposedly focused on public safety. So, as the proposed plan amendments are not narrowly tailored to the true purpose and need of this project (i.e. public safety), the amendments are “significant” under NFMA.

Further, the size of this project area does not mean that these are non-significant plan amendments. The size of a project is just one of many factors, and must be considered in the context of the management unit and site. Here the relatively small size of the project is more than offset by its

location — in and around the Ochoco’s most popular recreation site — and the great number of large trees that would be cut, including many, huge old-growth fir trees that are hundreds of years old. *See American Wildlands v. USFS*, 1999 U.S. Dist. LEXIS 22243, 17-18 (April 14, 1999) (finding a proposed forest plan amendment was “significant” under NFMA where the proposed amendment would affect a “specialized unit emphasizing wildlife preservation,” even though the project area was small compared to the forest as a whole). Considered in their proper context (in and around the most popular recreation site in the Ochoco National Forest), the proposed forest plan amendments would drastically impact one of Walton Lake’s most popular and special features: the large old-growth trees.

Both individually and collectively, the four proposed amendments are significant in nature and will have a significant impact on the Walton Lake area, as such, they are required to follow the heightened amendment procedure standards under NFMA, including the completion of an EIS.

BMBP raised these issues in its Draft EA comments. See Ex. A at 29-34.

IX. The EA does not give proper consideration to the applicable 2012 Planning Rule factors.

In Appendix B, the Final EA considers the 2012 Planning Rule factors, as it is required to do for any proposed Forest Plan amendment. Final EA at 185-94. However, just like the prior February 2020 Draft EA and 2017 EA, that analysis does not give proper consideration to the most pertinent factors, namely: “aesthetics values,” “recreation settings,” “scenery,” and “viewsheds.”

36 CFR 219.10(a) requires the Forest Service to consider certain factors “to the extent relevant to the plan area.” Because the majority of the proposed logging around Walton Lake would occur in the designated Visual Influence Area, the factors related to visual resources should be given particular attention. *See, e.g., id.* at 219.10(a)(1) (listing, among other factors to be considered, “[a]esthetic values,” “recreation settings,” “scenery,” and “viewsheds.”). However, like the February 2020 EA and the 2017 EA, this Final EA only gives cursory consideration to these factors and draws arbitrary conclusions from the analysis it does undertake. That is, in response to the above-described factors, the Final EA states that “[t]he actions, including the Forest Plan amendments, are proposed to protect human health and safety

and preserve an important scenic component (legacy ponderosa pine trees) in the Developed Recreation Area around Walton Lake.” Final EA at 187 (emphasis added). That cursory and conclusory statement (and others like it in Appendix B, e.g. Final EA at 185) does not recognize that the proposed amendments would facilitate the nearly complete destruction of the viewshed currently created by units 2-4, which contain mostly large and old fir. That is not “preservation” or proper consideration of aesthetic values and scenic viewsheds, which is particularly important in a designated Visual Influence Area surrounding the most popular developed campsite in the Ochoco National Forest. This project calls for a type-conversion via a near-complete destruction of the southern viewshed.

As the Final EA admits in Appendix B, the proposed logging in units 2-4 would be a “regeneration harvest,” also known as clearcutting. Final EA at 194. That kind of logging has an obvious destructive influence on aesthetics, scenery, and viewsheds. Accordingly, the EA should give proper consideration to the 2012 Planning Rule factors that address impacts to aesthetic and visual resources in the designated Visual Influence Area. It currently does not.

Furthermore, under section 219.9(a) in Appendix B, the EA states that “[t]he scale of the Walton Lake Restoration project is extremely small and not relevant to maintaining ecosystem integrity... ecosystem diversity... [or] diversity of native tree species in the plan area.” Final EA at 186-187. Each of these assertions is arbitrary and patently false. As to the size of the project, clearly the Forest Plan as it stands considers clearcutting 35 acres a large project, so large that the proposed amendment is required that would increase the maximum patch size sevenfold. As to its relevance in maintaining diversity of native tree species in the area, the project literally plans to eliminate two entire species of fir from a major portion of the Walton Lake area. The Final EA admits that for Units 2, 3, and 4, “the majority of trees within these units are grand fir or Douglas-fir[;]” the trees which it intends to eliminate. Final EA at 21. 16 U.S.C. § 1604(g)(3)(B) requires the forest service, in amending forest plans, to “preserve the diversity of tree species similar to that existing in the region controlled by the plan.” The Final EA states that ponderosa pine will *add* to the visual diversity of the recreation area. Final EA at 21. In fact, it will do no such thing. Since the trees on the north side of the lake are *already* ponderosa pine, removing the majority

of the firs around the south side of the lake will do nothing but reduce the diversity of trees in the recreation area. The Forest Service cannot seriously claim that this project maintains ecosystem integrity, ecosystem diversity, or diversity of native tree species, when it is actually undertaking a type-conversion and reducing species diversity in the project area. As the Final EA takes pains to emphasize, “[t]he existing condition at Walton Lake project is also unique because it is the only Developed Recreation Management Area that has a lake with the combination of moist mixed conifer and dry mixed conifer forest surrounding it.” Final EA at 160. Via the type-conversion contemplated by this project, that unique and existing diversity would be destroyed. Moreover, the potential cumulative impacts of this type conversion along with the Forest Service’s recent proposal to eliminate the Eastside Screens mandatory protection for all large trees, is very relevant to maintaining ecosystem integrity... ecosystem diversity... [or] diversity of native tree species in the plan area.”

BMBP raised these issues in its Draft EA comments. See Ex. A at 34-36.

X. The Draft EA Downplays the Project’s Negative Side Effects in Units 1 and 5

Preparation of an environmental assessment requires the agency to take a hard look at the environmental impacts. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21; See also *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988). A “hard look” requires a consideration of “all foreseeable direct and indirect impacts” and a full assessment of the cumulative impacts of the proposed action. *Ctr. For Biological Diversity v. Salazar*, 695 F.3d 893, 916–17 (9th Cir. 2012). An agency cannot improperly minimize negative side effects when evaluating direct impacts. *W. Watersheds Project v. Salazar*, 993 F. Supp. 2d 1126, 1134 (C.D. Cal. 2012), *aff’d sub nom. W. Watersheds Project v. Jewell*, 601 Fed. Appx. 586 (9th Cir. 2015)(unpublished)(citing *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir.2006)). While the Final EA appropriately relies on the Silvicultural Report for its proposed action justification, the Report lacks the complete analysis for the Forest Service to rely on. Modeling results given in the Silvicultural Report indicate that Units 1 and 5 would continue to meet the criteria for Late and Old Structure after harvest and noncommercial thinning. Silvicultural Report at 12; Figure 2 at 7.

However, the Final EA provides for commercial thinning in those units in addition to harvesting and noncommercial thinning. Final EA at 20. Therefore, the proposed activity in these units has not been fully evaluated as to whether it would continue to meet the criteria for Late and Old Structure following commercial thinning.

BMBP raised these issues in its Draft EA comments. See Ex. A at 36.

XI. The Soils Analysis was Improper

BMBP is very concerned that the lack of structural development of the deep ash soils throughout the project area “makes them susceptible to erosion when erosion water is channeled on compacted soil surfaces such as skid roads, water bar outlets, or road drainage structures and directed as overland flow.” Final EA at 126, referencing Ash Soil Guidelines for OR/WA 1985.

The Final EA does not incorporate the Soils Specialist Report so that Report cannot be used to comply with NEPA. The EA’s overall’s soils analysis is poorly written, incomplete and confusing, with the most important conclusions buried in long, dense paragraphs of text. The language of PDC 27, FONSI at 24, is incomprehensible to the public.

In its March 2020 comments, Ex. B at 13, BMBP pointed out that it was not clear whether or not *existing* detrimental soil disturbance in the proposed sale units had been added to the estimated detrimental soil compaction percentage of each sale unit that would be affected in Table 25. *See* Draft EA at 120, Table 25, now included in Final EA at 127, Table 26. The analysis acknowledged that “all proposed treatment blocks are estimated to have less than 5% existing detrimental disturbance,” yet the percentage of existing detrimental soil disturbance was not specified for each sale unit. In its response to the comment, the Forest Service merely stated that some of the existing disturbed ground would be used as part of the logging process, and thus would not be additive to the total disturbance percentage. FONSI at 61. This fails, however, to address the underlying issue that the total disturbance per unit was not actually calculated if this figure is omitted, leaving at least one variable unknown in the determination of

whether or not the 20% disturbance threshold will be exceeded. This disturbance threshold, set forth in the Ochoco Forest Plan, states that:

In order to maintain site productivity; all project activities *will be* planned to reduce soil compaction and displacement to the lowest reasonable level... The minimum *will be* 80 percent of the total activity area. The threshold level of detrimental compaction is defined as... 20% or more for ash soils[.] These values are critical changes over the natural state in the top 12 inches.

Ochoco Forest Plan at 4-196 (emphasis added). This compaction and detrimental soil standard is mandatory. If 80% is the minimum area that must remain undisturbed, this means that 20% is the maximum disturbance allowed. The proposed project clearly anticipates violating this standard, noting in Table 26 that projected disturbance is up to 22% in Units 2 through 4. Final EA at 127, Table 26. And this is without including existing soil disturbance, as discussed above, and off-trail disturbance and other forms of disturbance such as erosion, discussed below. Nothing in the standard itself even suggests that a project can “initially” exceed the standard so long as there is restoration and language from the mandatory Forest Service manual cannot amend the Plan standard to do that. Such an interpretation of the Plan is wholly unreasonable. This failure to demonstrate compliance with a mandatory Forest Plan standard is in clear violation of the NFMA 1604(i) consistency requirement. The current project plan, as proposed, could seriously impact the ability of the area to regenerate. Additionally, the current analysis in the Final EA fails to even include the relevant Forest Plan standard. Without providing information regarding where the 20% threshold comes from, the Final EA does not contain the information necessary for a reviewing public to fully understand and evaluate the content of the soils analysis.

BMBP also expressed concern regarding the very high potential for detrimental soil impacts from logging skid trails, landings, and “temporary” roads in sale units 1, 2, 3, and 4. Final EA at 127, Table 26. The detrimental soil compaction figures for these sale units are based on the assumption that all project design criteria (PDCs) and Best Management Practices (BMPs) are applied and are 100% successful. Even working under this assumption, and while still excluding *existing* detrimental soil disturbance figures, the total potential disturbance for Units 1 through 5 each already easily reach, or have

the potential to exceed, the 20% disturbance threshold. PDCs and BMPs are not always applied as planned and are not always completely effective, so it is not unreasonable to conclude that one or more units will ultimately end up exceeding this threshold. For example, a PDC may fail to be implemented if a contractor neglects to implement a project design criteria or follow a Best Management Practice. The Forest Service responds that they do assume that PDCs and BMPs will be completed and effective, and support this by noting that these requirements are included in the timber sale contract. FONSI at 61. These terms do not appear on any documentation provided to BMBP between T2 and the Forest Service, and without providing a copy of a contract with these requirements in place, the Forest Service asks BMBP and the public to go on faith that such protections are in place. Even if such requirements are part of an undisclosed contract, this does not guarantee that such mitigation measures will be effectively implemented.

Additionally, although compaction is the center of much of the soils discussion, compaction is not the only detrimental soil impact that would be caused. The high level of compaction in all of the commercial sale units (including unit 5) of combined .4 acre to 1.3 acres of skid trails for each sale unit, 3 acres of landings, plus .1 to .3 acres of “temporary” road compaction per sale unit for units 1, 2, 3, and 4 would just be the starting point for further detrimental soil impacts of erosion and sediment travel when water is channeled on these compacted surfaces. Displacement of easily displaced ash soil would first displace the organic top horizon layer (Horizon A), which is also not taken into account throughout the sale units in Table 26. Final EA at 127. All of these detrimental soil impacts not accounted for in Table 26 combined means that detrimental soil impacts are likely to exceed the Forest Plan standard for detrimental soil impacts even more than already anticipated. The Forest Service itself admits several times that the proposed plan may exceed the 20% disturbance threshold for at least Units 2, 3, and 4. See Final EA at 130, FONSI at 62, 63, 66. Additionally, the Forest Service is inconsistent with regard to whether or not Units 1 and 5 will might exceed the allowed threshold, first stating that “the sum of all proposed activities within these units would not incrementally increase the levels of soil disturbance

above the 20% threshold[.]” but also stating that such treatment was only “likely” to meet the 20% disturbance threshold. 2020 Soils Report at 10.

The soil effects analysis clarifies that detrimental soil impacts are not limited to compaction (which is the only form of detrimental soil impact in Table 26):

“Direct effects to the soil resource as a result of proposed ground-based mechanical harvest and yarding activities would include detrimental disturbance of mineral soil in the form of compaction, displacement or puddling. Indirect effects could include erosion losses from disturbed sites as a result of mechanical traffic and compaction[.]”

Final EA at 127. Despite this acknowledgement, the Final EA does not include non-compaction soil disturbance figures when calculating its total for potential disturbance in each unit.¹⁴ This failure continues to hide from the public the true extent of impacts to the soil, and is not tempered by the fact that PDC are offered to correct the inevitable exceedance of the 20% disturbance threshold. Disturbed soils, whether or not treated to mitigate disturbance, inevitably lead to increased potential for spread of invasive plant species due to increased area for seed reception (“typically an area where disturbance has created a bare or sparsely vegetated soil surface,” Final EA at 156), as well as other potential detrimental effects. Additionally, even where soils are treated after disturbance, visual impacts of the disturbance will remain for a number of years until plants grow back enough for the area to appear relatively natural instead of an overgrown road or trail.

Karen Coulter, Director of BMBP, raised these issues in her Draft EA comments on behalf of BMBP. See Ex. B at 13-17.

* The Forest Service attempts to assure the public that erosion will still be adequately dealt with by stating “an erosion control plan *would be included* in the Timber Sale contract to address all disturbed areas.” FONSI at 63 (emphasis added). Not only does this statement fail to provide necessary disclosures to the public of the combined potential threshold exceedance when erosion is taken into account, it also implies that the current contract with T2, which is “on hold,” does not contain such a requirement and such protection is currently not in place.

XII. The Final EA analysis violates INFISH

The Final EA acknowledges that the project area includes two Class 3 and two Class 4 streams under INFISH. Final EA at 126. The June 2020 Fisheries Specialist Report identifies the proper Riparian Habitat Conservation Area ("RCHA") boundaries for these types of streams as 150' (for Class 3) and 50' (for Class 4), respectively. Fisheries Specialist Report at 4. The Final EA admits that logging will occur within these RHCAs. Final EA at 26.

As noted by the Forest Service, the INFISH timber management standards and guidelines state that timber harvest is prohibited in RHCAs with an exception to:

Apply silvicultural practices for [RHCAs] to acquire desired vegetation characteristics where needed to attain Riparian Management Objectives. Apply silvicultural practices in a manner that does not retard attainment of Riparian Management Objectives and that avoids adverse effects on inland native fish.

Fisheries Specialist Report at 15, referencing standard TM-1(b) from INFISH at E-7. The Fisheries Expert Report attempts to justify logging in this area by describing the logging/thinning in terms of how the proposed project goals will be attained, Fisheries Specialist Report at 16, but does not discuss how such actions are needed to attain Riparian Management Objectives ("RMOs"), as the exception requires. As noted by Karen Coulter in her comments on behalf of BMBP, INFISH standards are not being met if the "no logging" buffers are being violated. Logging in RHCAs must be by the terms of the exception permitted by INFISH. The Final EA and special report, however, fail to analyze or explain current deficiencies in the subject RHCAs and how this project is needed to attain current RMOs. Without such an explanation, proposed logging in these areas is, on its face, a violation of INFISH standards.

Karen Coulter, Director of BMBP, raised these issues in her Draft EA comments on behalf of BMBP. See Ex. B at 15.

CONCLUSION

In order to resolve these objections BMBP requests that the Forest Service withdraw its Final EA and FONSI for the Walton Lake Restoration Project and conduct a new scoping process that

involves BMBP from the beginning of that process. BMBP also asks that the Forest Service correct all of the other legal and factual flaws identified by these objections and resubmit its NEPA analysis as a draft EIS for further public comment.

Sincerely,



Tom Buchele
Earthrise Law Center

s/ Jesse A. Buss

Jesse A. Buss
Willamette Law Group

Counsel and designated representatives for Blue Mountains Biodiversity Project

List of Exhibits on CD submitted with hard copy of Comments sent via certified U.S. Mail:

**Exhibit A: Blue Mountains Biodiversity Project (BMBP) Comments submitted by Earthrise Law Center
Dated March 19, 2020**

Exhibit B: Blue Mountains Biodiversity Project (BMBP) Comments submitted by Karen Coulter Dated March 18, 2020

Exhibit C: Bend Bulletin legal notice dated July 21, 2020

Exhibit D: Distribution List for Walton Lake Project scoping meeting held June 25, 2019

Exhibit E: Email exchange between Forest Service personnel regarding inviting Karen Coulter to a site visit dated May 24, 2018

Exhibit F: Email exchange between BMBP and the Forest Service (USFS) regarding lack of public notification for the USFS scoping meeting held June 25, 2019

Exhibit G: BMBP's signed FOIA request regarding the Walton Lake Restoration Project's revised Environmental Assessment dated February 25, 2020

Exhibit H: BMBP's signed FOIA request regarding the Walton Lake Restoration Project's 2017 Environmental Assessment dated March 17, 2017

Exhibit I: USFS final FOIA response to BMBP's March 2017 FOIA Request dated April 4, 2017

Exhibit J: USFS expedited processing denial letter regarding BMBP's 2020 FOIA request

Exhibit K: Email exchange dated March 4, 2020 with first partial response to BMBP's 2020 FOIA request

Exhibit L: March 18, 2020 BMBP's Request for Extension of Comment Period for the Walton Lake Restoration Project Revised Environmental Assessment

Exhibit M: 9th Circuit COVID-19 Notice

Exhibit N: Email exchange with USFS clarifying Request by BMBP to extend comment period for Walton Lake Revised EA

Exhibit O: Email regarding Walton Lake Restoration Project Comment link for Walton Lake dated March 18, 2020

Exhibit P: Email regarding Comment link for Walton Lake Restoration Project dated March 19, 2020

Exhibit Q: March 19, 2020 Jeffries Response to Earthrise Law Center's request for Comment Extension

Exhibit R: Walton Lake Project Scoping Report dated September 2019

Exhibit S: BMBP Scoping Comments dated September 5, 2019

Exhibit T: 2014 Field Guide for Hazard-Tree Identification and Mitigation on Developed

Sites in Oregon and Washington Forests

Exhibit U: USFS Region 1 Hazard Tree Warning Poster

Exhibit V: Email exchange between Beth Peer (Forest Service) and Kent Koeller (Forest Service) dated August 27, 2019

Exhibit W: USFS June 26, 2018 email exchange regarding related language for Lake Stewardship Integrated Resource Service Contract (IRSC)

Exhibit X: Email exchange between Forest Service personnel regarding existing logging contract dated October 11, 2019

Exhibit Y: Email exchange between Forest Service personnel and reporter Michael Kohn regarding existing logging contract and article being written dated October 23, 2019

Exhibit Z: October 21, 2016 Walton Lake Restoration Project Updated Direction Letter from Slater Turner

Exhibit AA: Signed contract for Walton Lake Commercial logging dated May 3, 2016

Exhibit BB: Comments from Karen Coulter on behalf of BMBP for 2017 draft EA (handwritten)

Exhibit CC: Comments from Chad Hanson, Ph.D., on 2015 proposed project dated July 2, 2015

Exhibit DD: Laminated Root Rot in Western North America dated April 1995

Exhibit EE: Managing Insects and Diseases of Oregon Conifers dated June 2009

Exhibit FF: USFS response to 2017 FOIA request noting similar projects have not been undertaken, dated March 9, 2017

Exhibit GG: "Restoring Walton Lake" article quoting Patrick Lair, dated January 5, 2016

Exhibit HH: USDA News Release announcing comment period for Eastside Screens amendments dated August 11, 2020

Exhibit II: USFS Feb. 6, 2017 email exchange regarding Silviculturalist reliance on Forest health report

Exhibit JJ: USFS 1994 Decision Notice for the Continuation of Interim Management Direction Establishing Riparian, Ecosystem and Wildlife Standards for Timber Sales – Eastside Screens Environmental Assessment

Exhibit KK: USFS Hazard Trees Safety Tips

Exhibit LL: USFS Idaho Hazard Tree Warning Poster

Exhibit MM: USFS Oct. 24, 2019 email exchange regarding Walton Lake; FOIA request email from Mark Phillipp

Exhibit NN: Email exchange between Beth Peer (Forest Service) and Tom Buchele (Earthrise/BMBP) regarding second FOIA response

Exhibit OO: Draft EA Comment from Margaret (Mac) Chappel dated 3/19/20

Exhibit PP: Eastside Screens Amendment preliminary EA dated August 2020 (see page 6 for May 2020 meetings info)