

**SOUTHEAST ALASKA CONSERVATION COUNCIL • CENTER FOR BIOLOGICAL DIVERSITY
ALASKA RAINFOREST DEFENDERS • EARTHJUSTICE • DEFENDERS OF WILDLIFE**

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Lucy Aragon

Thorne Bay Ranger District, Tongass National Forest

PO Box 19001

Thorne Bay, AK 99919

Email: lucy.aragon@usda.gov

Submitted via web portal:

<https://cara.ecosystemmanagement.org/Public//CommentInput?Project=58424>

Re: Forest Service Should Deny, or Prepare at Least an Environmental Assessment on, the Prince of Wales Road Access Project

Dear Ms. Aragon:

Thank you for this opportunity to comment on the Prince of Wales 2021 Road Access Project, Project #58424, pursuant to which the Tongass National Forest is responding to two applications from the State of Alaska seeking special use permits (SUPs) to access agency roads and construct segments of new road on agency land to gain access to adjacent state land for the purpose of liquidating old growth there. One of these SUP applications seeks access across Forest Service land on Prince of Wales Island near Thorne Bay, the other access across agency land on the north side of Heceta Island. The Forest Service has indicated that it intends to approve the permit applications through the use of a single categorical exclusion, thereby avoiding preparation of either an environmental assessment (EA) or environmental impact statement (EIS).

Last month, the U.S. Department of Agriculture announced its “Southeast Alaska Sustainability Strategy,” in which the Department pledged to “end large-scale old growth timber sales on the Tongass National Forest and ... instead focus management resources to support forest restoration, recreation and resilience, including for climate, wildlife habit and watershed improvement.” U.S. Dep’t of Agric., Press Release, “USDA Announces Southeast Alaska Sustainability Strategy, Initiates Action to Work with Tribes, Partners and Communities,” (July 15, 2021), attached as Ex. 1, available at <https://www.usda.gov/media/press-releases/2021/07/15/usda-announces-southeast-alaska-sustainability-strategy-initiates> (last viewed Aug. 12, 2021). We are disappointed that through this scoping period -- the first NEPA process that we are aware of following the Department’s announcement -- the Tongass National Forest is proposing to undermine that strategy, reflecting a “business as usual” approach to the destruction of old and mature forest at a time when the protection of carbon-rich stands is only increasing in importance.

We therefore urge the Forest Service to consider rejecting the permit applications because the proposed road access will facilitate the liquidation of up to 130 acres of old growth forest, which is not in the public interest. In the alternative, the Forest Service should prepare at least an environmental assessment on the proposal, given the potentially significant environmental impacts that may occur from logging the state parcels, logging that will be made possible by, and is the reason for, the access the Forest Service proposes to grant.

FACTUAL BACKGROUND.

The Thorne Bay application. On September 5, 2018, the Alaska Department of Natural Resources, Division of Forestry submitted to the Tongass National Forest a special use permit application for a road right-of-way “[i]n support of the Thorne Bay Watch Subdivision timber sale,” also sometimes referred to by the State of Alaska as the “Overlook” sale. See State of Alaska, Thorne Bay Watch Subdivision timber sale Use Permit application (Sep. 9, 2018) at 1 (“Thorne Bay SUP App.”), attached as Ex. 2. See also State of Alaska, Map, Access Map - Thorne Bay Watch Proposed Timber Sale (Sep. 5, 2018) (submitted with application), attached as Ex. 3; Map, North Thorne Bay Area, in State of Alaska, Division of Forestry, Southern Southeast Area, Five-Year Schedule of Timber Sales, Fiscal Years 2021 Through 2025 (Mar. 2021) at pdf 27, attached as Ex. 4, and available at http://forestry.alaska.gov/Assets/pdfs/timber/ketchikan_timber/2021/2021_2025_fysts_SSE.pdf (last viewed Aug. 12, 2021) (most recent five-year timber schedule identifying the project as the “Overlook” sale).

Specifically, the SUP application sought:

1. Access to isolated State land utilizing 3,956 ft. of USFS road # 3018050.... [The Alaska Department of Forestry’s] timber operator will be responsible for road maintenance during the life cycle of the timber sale.... [M]aintenance should be minimal. There is one small stream crossing and no observed fish habitat concerns.
2. Construction of 960 feet of forest road off road #3018050_1.03. The total width for this 16 ft. wide single lane road will be 24 ft. and the total footprint will be 23,040 sq. ft. [or about 0.5 acres.] This access road will support a small timber sale (~750 MBF) and [is] proposed to remain in place.

Thorne Bay SUP App. (Ex. 2) at 1. The reference to the newly constructed road segment “remain[ing] in place” evidently means that the State initially intended for the Forest Service to add the new route to the Tongass National Forest’s permanent road system. The State initially sought access to a third road segment, but later dropped that request. Email of J. Nudelman, Alaska Dept. of Natural Resources to R. Jacobson, USFS (June 25, 2020, 11:55 AM) (indicating State of Alaska intended to drop segment 3), attached as Ex. 5. According to the Forest Service’s scoping notice, the State has modified its request to seek to construct the 960-foot segment as a temporary, not a permanent, road, and also seeks approval to construct “an 86 foot landing extension on NFS land,” which the Forest Service does not map. Tongass National Forest, Scoping Notice, POW 2021 Road Access Project (July 2021) (“Scoping Notice”) at pdf p. 2, attached as Ex. 6, and available at https://www.fs.usda.gov/nfs/11558/www/nepa/113989_FSPLT3_5656512.pdf (last viewed Aug. 12, 2021).

Road maintenance and construction are intimately linked to the state land timber project. As the SUP application explains: “The construction costs of the two new road segments through USFS land will be incorporated into the timber sale, considering that the purchaser will be required to construct the road. The purchaser will need to be qualified or have a qualified road builder on contract. The purchaser’s construction costs will be built into their bid.” Thorne Bay SUP App. (Ex. 2) at 2. The Scoping Notice confirms that the purpose of the permit is “for a year-round commercial timber haul for up to five years beginning approximately in January 2022.” Scoping Notice (Ex. 6) at pdf p. 2.

The application asserts that without road access, there will be no logging on state land. “Alternatives routes for access to the parcel do not exist. Denial of this request would result in the development project not occur[ing].” *Id.* at 2. *See also id.* (“there are no feasible alternatives,” to the proposed access); email of R. Jacobson, USFS to M. Dillman, USFS et al. (Sep. 21, 2020), attached as Ex. 7 (project proponent asserts that a proposed alternate route would be too expensive, and thus that “the project would not occur if the reroute were forced upon us”). The Tongass National Forest’s Scoping Notice similarly contends that approval of both of the State’s requests for road use and construction “is needed because the State does not currently have economic access to State land adjacent to NFS land, and desires to implement timber sales on State land.” Scoping Notice (Ex. 6) at pdf p. 2. The Forest Service has apparently not addressed the potential for the State to access these parcels from the air (via helicopter) or by water, despite the fact that the parcel abuts the ocean.

The state land timber sale will liquidate 25 acres of old growth forest: “The road segments will provide access to approximately 25 acres of timber.” Thorne Bay SUP App. (Ex. 2) at 2. *See also* Southern Southeast Area, Five-Year Schedule of Timber Sales, 2021-2025 (Mar. 2021) (Ex. 4) at pdf 11 (describing the “Overlook” sale as involving 25 “old growth acres”).

The application further asserts that the newly-constructed road “will increase the value of the timber infrastructure for both present *and future harvests*. There is a small isolated strip of USFS timber along the USFS/State property line near [the] proposed road segment[] that could be extracted simultane[ous]ly with the state sale.” *Id.* at 2 (emphasis added). Road construction on Forest Service land will also require removal of forested stands. Email of M. Simonson, USFS to L. Maldonado, USFS (May 15, 2020 8:10 AM) (Forest Service staff stating of road construction: “It’s a permanent conversion of land use, and sell what’s merchantable in the process. No managing the trees for the future to consider”), attached as Ex. 8.

Thus, the application anticipates logging by both the State and the Forest Service beyond the Thorne Bay Watch Subdivision timber sale.

The State of Alaska also anticipates that the area logged will be subdivided for housing development, as the project’s name implies. In an email to the Forest Service, state officials wrote that DNR-Mining, Land and Water anticipates filing a “separate permit application” to implement the agency’s “long-range plans of a subdivision on the property, whereby the USFS road segment would be needed for [permanent, not temporary, road] access.” Email of J. Nudelman, Alaska Dept. of Natural Resources to E. Goad, USFS (June 14, 2021, 2:18 PM), attached as Ex. 9.

The SUP application itself does not appear to contain any evaluation of the environmental impacts of the Thorne Bay Watch Subdivision timber sale, although it contains some assertions about the impacts of road construction. Thorne Bay SUP App. (Ex. 2) at 2-3.

The Heceta Island application. In the fall of 2016, the Alaska Dept of Natural Resources, Division of Forestry submitted a special use permit application for a road right-of-way “[i]n support of the Heceta East State Timber Sale in the Southeast State Forest.” State of Alaska, Heceta East State Timber Sale application (undated, unsigned) at 1 (“Heceta East SUP App.”), attached as Ex. 10; Alaska Div’n of Forestry, Heceta East Timber Sale Unit Map (Sep. 22, 2016), attached as Ex. 11; *see also* letter of G. Staunton, Alaska Div’n of Forestry to T. Gunn, U.S. Forest Service (Apr. 25, 2019) (referring to a request to the Tongass National Forest of “October 3, 2016 by the DOF (Nudelman) for accessing the Heceta East Sale”), attached as Ex. 12.

The SUP application seeks Forest Service approval

to build 450 ft. of a temporary forest road through the adjacent USFS harvest area (from a 2015 timber sale) The total width for this 16 ft. wide single lane road will be 24 ft. and the total footprint will be 10,800 sq. ft. [about ¼ acre]. This temporary access road will support a small timber sale (~2 MMBF) and will be in place for no more than one year following the award of the timber sale contract.

Heceta East SUP App. (Ex. 10) at 1. The newly-constructed road will “provide ... access to approximately 105 acres of timber,” including old growth. *Id.* at 2.

As with the Thorne Bay Subdivision project, the Heceta East proposal for road construction is inextricably interconnected with the proposed timber project: “The construction costs of this road segment through USFS land will be incorporated into the timber sale, considering that the purchaser will be required to construct the road. The purchaser will need to be qualified or have a qualified road builder on contract. The purchaser’s construction costs will built into their bid.” *Id.* at 2. The Scoping Notice confirms that Heceta East proposal is also meant to facilitate logging, stating that the purpose of the permit is “for a year-round commercial timber haul for up to five years beginning approximately in January 2022.” Scoping Notice (Ex. 6) at pdf p. 2.

The State alleges that an alternative route exists for road access, but contends that it would be more expensive and damaging. “The alternative is to build a longer, steeper and more expensive road off ... USFS #1445000 on State land, which would cross ~700’ of wetland.” Heceta East SUP App. (Ex. 10) at 2. That route was not selected because “[t]he alternative would begin in a wetland for 700’ before climbing a steep grade with two switchbacks. It is 1100’ longer than the preferred route, therefore more expensive to build.” *Id.* at 2. *See also id.* (indicating alternative route would cost about \$59,000 to build while the selected route would cost about \$17,000). The application for Heceta East, like that for the Thorne Bay Watch Subdivision, fails to address helicopter or saltwater access to the parcel.

Like the Thorne Bay application, the East Heceta SUP application contains no evaluation of the environmental impacts of the timber sale the proposed road will access, although it contains some allegations about road construction impacts. *Id.* at 2-3.

LEGAL BACKGROUND

The Forest Service’s review is governed by a number of statutes and regulations including those related to special use permits, NEPA, and ANILCA.

I. Forest Service Regulation of Special Use Permit Applications.

- A. The Forest Service Must Ensure that Special Use Permits Serve the Public Interest and Protect Wildlife.

“All uses of National Forest System lands, improvements, and resources, except those authorized by [certain specified] regulations ... are designated ‘special uses.’” 36 C.F.R. § 251.50(a). Those seeking to conduct a special use on National Forest lands must in most cases “submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer.” *Id.* A special use authorization is defined as: “a written permit, term permit, lease, or easement that authorizes use or

occupancy of National Forest System lands and specifies the terms and conditions under which the use or occupancy may occur.” *Id.* § 251.51.

Before the Forest Service will analyze an application for a proposed use pursuant to the National Environmental Policy Act (NEPA), agency regulations require the Forest Service to undertake two levels of screening. The Forest Service’s “initial screening” must “ensure that the [proposed] use meets ... minimum requirements applicable to all special uses.” *Id.* § 251.54(e)(1). Among other things, the Forest Service must “ensure” that:

The proposed use is consistent with the laws, regulations, orders, and policies establishing or governing National Forest System lands, with other applicable Federal law

Id. § 251.54(e)(1)(i). “Any proposed use ... that does not meet all of the minimum requirements of [36 C.F.R. § 251.54 (e)(1)(i) – (ix)] shall not receive further evaluation and processing. In such event, the authorized officer shall advise the proponent that the use does not meet the minimum requirements.” *Id.* § 251.54(e)(2) (emphasis added).

Where the Forest Service concludes a “proposal ... passes the initial screening,” the agency then undertakes a “[s]econd-level screening.” *Id.* § 251.54(e)(5). As part of the second-level screening, the Forest Service “shall reject any proposal ... if, upon further consideration, the officer determines,” among other things, that:

[t]he proposed use would not be in the public interest

Id. § 251.54(e)(5)(ii). Where the special use authorization “does not meet [each and every one of] the criteria” evaluated for second-level screening, the Forest Service need not prepare “environmental analysis and documentation” pursuant to NEPA before rejecting the application. *Id.* § 251.54(e)(6).

Thus, the Forest Service has a duty to reject special use authorization applications if, among other reasons, the proposed use is not “in the public interest.”

The Forest Service has previously rejected proposals as not in the public interest where those proposals would have led to private gain at the public’s expense. For example, the GMUG National Forest in Colorado in 2009 rejected without NEPA analysis a proposed master development plan for expansion of the Crested Butte ski area. The Forest Service based its rejection on its conclusions, among others: that the local community was deeply divided about the expansion; that the expansion threatened to harm significant natural resource values (roadless lands and wildlife habitat); that the expansion would increase area visitation, thus burdening local infrastructure; and that completing the NEPA process “would require a large commitment” of Forest Service and other agency resources. Letter of C. Richmond, Supervisor, GMUG National Forest to T. Mueller, Pres., Crested Butte LLC (Nov. 5, 2009), attached as Ex. 13, and available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5288146.pdf (last viewed Aug. 12, 2021). In 2016, the Forest Service also rejected a special use permit for utility rights-of-way (ROWs) as not in the public interest where those ROWs would have facilitated a widely-opposed private land development on the doorstep of Grand Canyon National Park. See letter of H. Provencio, Kaibab Nat’l Forest to Town of Tusayan (Mar. 4, 2016), attached as Ex. 14.

Regulations governing the management of special uses specifically provide the Forest Service with authority to ensure that an action approved via a SUP will protect the public interest and minimize harm to wildlife. These rules state that

Each special use authorization must contain:

(i) Terms and conditions which will: ...

(B) Minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment

(ii) Such terms and conditions as the authorized officer deems necessary to: ...

(C) Protect other lawful users of the lands adjacent to or occupied by such use; ...

(F) Require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and

(G) Otherwise protect the public interest.

36 C.F.R. § 251.56(a).

II. The National Environmental Policy Act

A. Legal Background: Levels of NEPA Analysis

NEPA regulations and federal courts require that agencies prepare an environmental impact statement (EIS) in those cases where the major federal action has the potential to result in significant impacts.

For example, the Ninth Circuit has established a “relatively low threshold for preparation of an EIS,” namely that an EIS must be prepared if a plaintiff raises substantial questions about whether a project will have significant effects. *NRDC v. Duvall*, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991). “We have held that an EIS must be prepared if ‘substantial questions are raised as to whether a project ... may cause significant degradation to some human environmental factor.’ To trigger this requirement a ‘plaintiff need not show that significant effects will in fact occur,’ [but instead] raising ‘substantial questions whether a project may have a significant effect’ is sufficient.” *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis original). *See also Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864-65 (9th Cir. 2005) (“To trigger this [EIS] requirement a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a project may have a significant effect is sufficient.”) (internal quotations, citations, and alterations omitted); *Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002) (“To prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are “‘substantial questions whether a project may have a significant effect’ on the environment” is sufficient.”) (citations omitted); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

Where an agency has questions as to whether a federal action has the potential to have significant impacts, the agency prepares an environmental assessment (EA) to “determin[e] whether to prepare an

environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.1(h) (2020); 40 C.F.R. § 1508.9 (2019). Even where a proposal will not have significant impacts, NEPA nonetheless requires consideration of alternatives when there are “unresolved conflicts concerning alternative uses of available resources” via an EA. 42 U.S.C. § 4332(2)(E). If an agency “decides not to prepare an EIS,” and instead to prepare an EA, “it must put forth a convincing statement of reasons’ that explains why the project will impact the environment no more than insignificantly. This account proves crucial to evaluating whether the [agency] took the requisite ‘hard look.’” *Ocean Advoc.*, 402 F.3d at 864. *See also Blue Mountains*, 161 F.3d at 1212 (If the agency decides not to prepare an EIS, the agency must supply a “convincing statement of reasons” to explain why the action will not have a significant impact on the environment); *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (“An agency’s decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant”) (citation and quotations omitted).

Categorical exclusions (CEs) are those categories of actions “that the agency has determined, in its agency NEPA procedures ... normally do not have a significant effect on the human environment.” 40 C.F.R. § 1508.1(d) (2020); *see also* 40 C.F.R. § 1508.4 (2019) (defining CEs as those categories of actions “which do not individually or cumulatively have a significant effect on the human environment.”). Categorical exclusions do not involve the consideration of alternatives; consequently, where unresolved conflicts exist, a CE is the wrong tool. Forest Service regulations state that “[i]f the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA.” 36 C.F.R. § 220.6(c).

The Forest Service apparently intends to apply the CE established by 36 C.F.R. § 220.6(e)(3), which involves:

Approval, modification, or continuation of special uses that require less than 20 acres of NFS lands. Subject to the preceding condition, examples include but are not limited to:

- (i) Approving the construction of a meteorological sampling site;
- (ii) Approving the use of land for a one-time group event;
- (iii) Approving the construction of temporary facilities for filming of staged or natural events or studies of natural or cultural history;
- (iv) Approving the use of land for a utility corridor that crosses a national forest;
- (v) Approving the installation of a driveway or other facilities incidental to use of a private residence; and
- (vi) Approving new or additional communication facilities, associated improvements, or communication uses at a site already identified as available for these purposes.

The Forest Service in November 2020 increased the acreage for which the CE might apply from 5 to 20 acres. U.S. Dep’t of Ag., Final Rule, National Environmental Policy Act (NEPA) Compliance, 85 Fed. Reg. 73620 (Nov. 19, 2020).

To avail itself of a CE, the Forest Service must ensure that the project will not involve “extraordinary circumstances,” which, under NEPA regulations, mandate that the Forest Service cannot utilize a CE and must prepare at least an EA. Forest Service regulations state that:

Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS are:

(i) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species

36 C.F.R. § 220.6(b)(1). The Forest Service rules state that the “mere presence of one or more of these resource conditions does not preclude use of a [CE]. It is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.” *Id.*

B. Legal Background: The Direct and Indirect Impacts of Road Construction and Road Use

CEQ regulations have long required, and courts have long recognized, that agencies must disclose the reasonably foreseeable effects of agency actions, and those effects include those that are direct, indirect, and cumulative. 40 C.F.R. Part 1500 (2019).

CEQ’s 2020 NEPA regulations re-defined impacts as:

changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives.

40 C.F.R. § 1508.1(g) (2020).

Courts have ruled that where an agency evaluates road construction or road access pursuant to NEPA, and where the purpose of that road is to provide access for development (including logging), that NEPA analysis must disclose the effects of the development, either because the development is a direct or indirect effect of that road construction, or because the two projects (the road and the development) are “connected actions” which must be reviewed together. *See* 40 C.F.R. § 1508.25(a)(1) (2019) (the scope of a NEPA analysis should include “connected actions”); 40 C.F.R. § 1501.9(e)(1) (2020) (same).

For example, in *Alpine Lakes Protective Association*, the Forest Service used a categorical exclusion to exempt from preparation of an EA or EIS a decision to issue a special use permit to allow a private company to construct a short segment of road across national forest land. The purpose of the road construction was to allow the company to access timber for logging. The court ruled that the Forest Service’s use of the categorical exclusion was arbitrary and capricious because the agency failed to consider the impacts of logging together with those of road construction. The court stated:

The Ninth Circuit has held that where access road construction and contemplated timber harvesting are “inextricably intertwined” such that the timber harvesting could not proceed without the road and the road would not be built but for the contemplated harvesting, the Forest Service was required to consider the environmental effect of the timber cutting which the access road was being built to facilitate. *Thomas [v. Peterson]*, 753 F.2d [754] at 759 [(9th Cir. 1985)] (cited with approval in *Save the Yaak Committee v. Block*, 840 F.2d 714, 720 (9th Cir. 1988)). This requirement extends to non-federal actions undertaken exclusively by private parties if the federal actions are so interrelated as to constitute “links in the same bit of chain”. *Morgan v. Walter*, 728 F. Supp. 1483, 1493 (D. Idaho 1989) (quoting *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989)). See also *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 480 (9th Cir. 1979) (agency’s EIS had to consider both the supply of federal power and the construction of a private magnesium plant that was to use the power); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985) (agency’s EIS had to consider both the federal action of stabilizing a river bank and the private housing to be built as a result). While defendants argue that federal control of the connected action was critical to the courts’ reasoning in decisions such as *Thomas*, a careful examination of these cases reveals that federal control was not a factor articulated by the courts in reaching their conclusions. Rather, the courts’ reasoning turned on the functional interdependence of the actions in question, *i.e.*, whether the actions at issue were “links in the same bit of chain”. See *Morgan*, 728 F. Supp. at 1493.

Alpine Lakes Protective Association v. U.S. Forest Serv., 838 F. Supp. 478, 482 (W.D. Wash. 1993). See also *Thomas v. Peterson*, 753 F.2d at 758 (finding road and timber sales to be connected actions that must be analyzed together in a single NEPA document because the “timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.”).

While the Ninth Circuit found in one case that road access and a development project were not connected actions for purposes of requiring a full EIS, the court did so on the grounds that the private party had *private access to the property* that would have permitted that party to complete the development. *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015). The court affirmed that when evaluating whether actions are connected, the court must review “whether *each of two projects* would have taken place *with or without the other* and thus had independent utility.” *Id.* at 1226 (quotations omitted) (emphasis in original).

III. ANILCA

It is our understanding that the Forest Service believes the road rights-of-way are governed by 16 U.S.C. § 3210(a).¹ To the extent that ANILCA applies to the state’s request for rights-of-way for this project, the Forest Service has discretion in granting the rights-of-way and must complete a NEPA analysis to consider alternative access modes and routes and ensure that the agency balances its obligations to protect national forest resources with the state’s need for access. See *Alpine Lakes Prot. Soc’y v. U.S. Forest Serv.*, 838 F. Supp. 478, 484-85 (W.D. Wash., 1993); see also *Hale v. Norton*, 476 F.3d 694, 700 (9th Cir. 2007) (construing parallel provision of ANILCA applicable to national parks and other conservation system units, 16 U.S.C. §3170(b), to require NEPA compliance to help the Park Service “in

¹ Other sections of ANILCA, including 16 U.S.C. § 3170(b) and 16 U.S.C. § 3210(b) also regulate access to inholdings, but do not appear to be applicable to the request at issue here.

fulfilling its statutory duty under ANILCA to balance ‘adequate and feasible access’ with the protection of ‘natural and other values of [the] lands.’”).

First, it is not clear that ANILCA’s requirement to provide access to inholdings applies to the state’s request because the state property at issue is not surrounded on all sides by national forest lands. See Scoping Notice at 5-6 (maps showing saltwater access from state property). Courts have concluded that the access provisions of ANILCA apply only to “landlocked properties.” *Bunyard v. U.S. Dep’t of Agric.*, 301 F. Supp. 2d 1052, 1058 (D. Ariz. 2004); see also *Friends of the Columbia Gorge, Inc. v. U.S. Forest Serv.*, 546 F. Supp. 2d 1088, 1093 (D. Or. 2008) (as amended); but see *Grill v. Quinn*, 2013 WL 3146803, n.16 (E.D. Cal. June 18, 2013) (disagreeing with *Bunyard*). In this case, access may be possible without an easement across national forest lands and the inholder access provisions of ANILCA are therefore inapplicable.

In addition, even if ANILCA applies to the state’s request, the Forest Service must comply with its NEPA obligations and analyze alternative access routes, including water access and helicopter access routes. See S. REP. 96-413, 248, 1980 U.S.C.C.A.N. 5070, 5191 (access rights “may include the right to traverse the federal land with aircraft, motor boats, or land vehicles”). Furthermore, although the Forest Service must grant inholders feasible and adequate access, the access granted need not be “the most economically feasible alternative” in all instances; the Forest Service must also limit adverse impacts on the federal lands. *Id.* To meet these obligations, the Forest Service should analyze alternatives in an environmental impact statement or an environmental assessment.

BECAUSE FACILITATING OLD AND MATURE FOREST LOGGING IS CONTRARY TO THE PUBLIC INTEREST, THE FOREST SERVICE SHOULD REJECT THE SPECIAL USE PERMIT APPLICATIONS.

The proposed applications do not serve the public interest because they will lead to the destruction of old growth and mature forest in Southeast Alaska. The purpose of each of the applications is to enable the State of Alaska to conduct clearcut logging operations. Together the two applications will result in the loss of old and mature forest totaling up to 130 acres – more than one-fifth of a square mile. The application for the Thorne Bay Watch Subdivision timber sale also anticipates *more* state and federal logging facilitated in the area, and the development of a subdivision once the clearcuts are complete.

Old growth and mature forests in and adjacent to the Tongass National Forest provide critical ecosystem functions by providing habitat for important wildlife species. These species include: Forest Service sensitive species such as the Queen Charlotte’s goshawk; the Alexander Archipelago wolf, which the U.S. Fish and Wildlife Service is now evaluating for listing under the Endangered Species Act (see 86 Fed. Reg. 40186, 40188 (July 27, 2021)); and Sitka black-tailed deer, a cornerstone of Alaska Native subsistence. Old and mature forests also protect watersheds critical for wildlife (including salmon), and sequester vast amounts of carbon. Logging over the last century has destroyed tens of thousands of acres of old growth, denuding vast landscapes (especially on Prince of Wales Island). Research has shown that contiguous high-volume old growth forest in areas such as these on Prince of Wales was reduced by 93.8% following logging between 1954 and 2004. J. Schoen and D. Albert, “Use of Historical Logging Patterns to Identify Disproportionately Logged Ecosystems within the Temperate Rainforests of Southeastern Alaska,” *Conservation Biology* (2013), attached as Ex. 15. An additional 16 years of old growth logging since has only increased those losses, including as a result of Tongass land transfers on the island to Sealaska (2015) and the Alaska Mental Health Trust (2017). Forest Service actions facilitating the destruction of Southeast’s remaining old growth are not in the public interest, as the USDA itself has recognized with its Southeast Alaska Sustainability Strategy, and neither are these

applications. Supporting the destruction of old and mature forests that are champions of carbon storage also contradicts President Biden's day one directive that agencies "immediately commence work to confront the climate crisis," and the administration's policy to "bolster resilience to the impacts of climate change. Executive Order 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021) at Sec. 1.

BECAUSE ROAD ACCESS IMPACTS ARE SIGNIFICANT, THE FOREST SERVICE MUST PREPARE AN EA OR AN EIS.

If the Forest Service intends to review the State of Alaska's applications notwithstanding that granting them violates the public interest, the agency cannot rely on a categorical exclusion to approve the proposals.

I. Because the State of Alaska's Thorne Bay Application Is Inextricably Linked with the State's Old Growth Clearcutting in the Thorne Bay Watch Subdivision Timber Sale, the Forest Service Must Disclose the Impacts of That Logging.

Because the State of Alaska asserts that the Thorne Bay Watch Subdivision timber sale could not occur but for the special use application for road access, and the road would not be built or used by the State but for the State's proposal, the Forest Service must disclose the impacts of the State's timber sale in any evaluation of the rights-of-way approval both because the timber sale is a direct or indirect impact of the road access, and because the road access and logging are "connected actions."

The State's September 2018 application admits the interconnection between the sale and its special use permit. In describing the proposal, the State asserts: "In support of the Thorne Bay Watch Subdivision timber sale on land managed by the Alaska Dept of Natural Resources (DNR), the Division of Forestry (DOF) is requesting a Use Permit for ... *necessary infrastructure items*." Thorne Bay SUP App. (Ex. 2) at 1. The infrastructure items include new road construction that "will support a small timber sale ... and [is] proposed to remain in place." *Id.*

The interconnectedness of the road construction sought via the state's application and the timber sale is proven by the application's statement that "the purchaser will be *required* to access the State resource through these road segments," and that "[a]lternatives routes for access to the parcel *do not exist*. Denial of this request would result in the development project not occur[r]ing." *Id.* at 2 (emphasis added). State of Alaska staff reviewed a proposed alternative route to reduce impacts to watersheds and concluded that the alternative was too expensive: "the project *would not occur if the reroute were forced upon us*." Email of J. Nudelman, State of Alaska to R. Jacobson, Forest Service et al. (Sep. 18, 2020 11:05 AM), attached as Ex. 16.

In *Alpine Lakes*, 838 F. Supp. at 484-85, a district court in the Ninth Circuit rejected a nearly identical Forest Service attempt to use a CE to address the impacts of road access while the agency ignored the impacts of logging that the road was built to access. The court held that the Forest Service must consider the impacts of logging and road access together. The court's ruling requires that the agency do the same here. By the State's admission, the State land timber sale would not occur absent access across Tongass National Forest land; and the Forest Service would not approve road access without the State's request to access State land for logging. The two projects thus lack independent utility and are thus "connected" under controlling Ninth Circuit precedent and both the 1978 and 2020 CEQ NEPA regulations. The Forest Service must disclose the impacts of the road and the timber sale together.

Further, the 25-acre timber sale in section 21 that the road segments will directly access is not the only timber harvest the roads will facilitate. The roads will facilitate additional future logging of state lands, and may do the same for Forest Service land, because the new road construction “will increase the value of the timber infrastructure for both present *and future* harvests” on both state and federal land. *Id.* at 2 (emphasis added). The Forest Service must disclose foreseeable impacts of such logging as well.

As identified in the state’s application, the state land proposed to be logged under this project is designated settlement land under the management of the State Division of Mining Land and Water. State officials admit that the agency has “long-range plans of a subdivision on the property.” Email of J. Nudelman (Ex. 9). The Forest Service must also disclose the foreseeable impacts of subdividing the state parcel.

Furthermore, comments by a Thorne Bay resident on proposed sales near the community assert that remaining old growth forests in the area are valued for subsistence deer hunting by residents.² Therefore, the Forest Service must evaluate and disclose the impacts on subsistence use that may result from the loss of old growth facilitated by granting road access on adjacent Forest Service land.

In sum, the proposed road construction sought in the state’s permit application will result in the State of Alaska logging 750,000 board feet of old growth forest, and will make possible other, future logging of Forest Service and state land, as well as subdivision development of the State parcel. The State of Alaska alleges that no logging could take place unless the Forest Service grants the State of Alaska’s application. NEPA and federal caselaw therefore require the Forest Service to disclose the impact of immediately logging the 25 acres of old growth, and to address the impacts of reasonably foreseeable “future harvests” and future development contemplated by the State of Alaska and the Forest Service.

Further, and for the same reasons, state land logging and its environmental consequences are a direct result of road construction under either the 1978 or the 2020 NEPA regulations. Under the 2020 regulations’ more restrictive definition of effects, the impacts of state land logging:

- Are “reasonably foreseeable.” 40 C.F.R. § 1508.1(g) (2020). The State has proposed the logging project that the Forest Service roads will use; and
- Have a “reasonably close causal relationship to the proposed action ... including those effects that occur at the same time and place as the proposed action.” *Id.* The roads the State seeks to build or utilize are physically connected to the logging project, and both are addressed in the same contract.

As such, under the 2020 CEQ regulations, the state logging proposals meet the definition of “effects” that the Forest Service must consider.

Because logging of this old growth forest has the potential to have significant impacts, the Forest Service must disclose the timber sales’ impacts in any NEPA analysis – but at least an environmental assessment – of the State’s permit application.

² “[P]eople in Thorne Bay – especially youth – hunt in close proximity to town and this will impact the remaining deer habitat since the Forest Service has harvested most of the other lands.” Comment from Karen Petersen on the Bayview timber sale in Southern Southeast Area, Five-Year Schedule of Timber Sales, 2021-2025 (Mar. 2021) (Ex. 4) at pdf 35.

II. Other Impacts of the Thorne Bay SUP Are Significant.

The road access would facilitate the liquidation of old growth forest. Certain species are exclusively dependent on old growth trees for habitat, including the Queen Charlotte goshawk. Designated a sensitive species by the Forest Service, little assessment has been conducted in recent years to understand the current condition of the population, including on Prince of Wales. In 1996, scientists conducted five years of inventory across the Forest. G. C. Iverson et al., Conservation assessment for the northern goshawk in Southeast Alaska, US Forest Service, General Technical Report PNW-387 (1996), attached as Ex. 17, available at <https://www.fs.fed.us/pnw/pubs/goshawk.pdf> (last viewed Aug. 12, 2021). Alaska Department of Fish and Game also conducted a survey in the late 1990s, but those researchers acknowledged in their publication that their methods may have been insufficient. C. Flatten et al., Northern Goshawk Monitoring, Population Ecology and Diet on the Tongass National Forest, April 1991-Sept 2001, Alaska Department of Fish and Game Final research report (2001), attached as Ex. 18, available at https://www.adfg.alaska.gov/static/home/library/pdfs/wildlife/federal_aid/goshawk.pdf, pp. 9-27 (last viewed Aug. 12, 2021). According to the 2014 Tongass National Forest Monitoring and Evaluation Report, “the Queen Charlotte goshawk is an Alaska Region sensitive species because (a) there is continued uncertainty about goshawks in some geographic areas with concentrated past timber harvest (e.g., Prince of Wales Island) which has resulted in a vulnerability of habitat conditions in those areas, (b) the goshawk population trend is unknown, and (c) management of the Tongass continues to play a large role in the conservation of this species.” See Tongass National Forest, Monitoring and Evaluation Report (2014), attached as Ex. 19, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3856124.pdf (last viewed Aug. 12, 2021).

Given these uncertainties, the Forest Service must evaluate and disclose the impacts of the proposed action on the goshawk.

Destruction of old and mature forest also threatens the imperiled Alexander Archipelago wolf. In responding to a petition to list the wolf, the U.S. Fish & Wildlife Service concluded last month that the petition presented “substantial scientific or commercial information” indicating that the wolf may warrant listing “due to potential threats associated with ... Logging and road development,” the very activities the Forest Service proposes to approve and facilitate here. U.S. Fish & Wildlife Service, 90-Day Findings for Three Species, 86 Fed. Reg. 40186, 40188 (July 27, 2021). At a minimum, the Forest Service must evaluate the potential impacts that road construction and State-land logging will have on wolf habitat.

III. Because the State of Alaska’s Heceta East Application Is Inextricably Linked with the State’s Old Growth Clearcutting in the Heceta East Timber Sale, the Forest Service Must Disclose the Impacts of That Logging.

Similarly, because the State of Alaska makes clear Heceta East State timber sale would almost certainly not occur but for the State’s requested special use application for road access, the Forest Service must disclose the impacts of that timber sale.

The State’s application describes the road access project as “[i]n support of the Heceta East State Timber Sale in the Southeast State Forest,” and asserts that “road will support a small timber sale (~2 MMBF).” Heceta East SUP App. (Ex. 10) at 1. The application admits that the purpose of the newly-constructed road is to “provide ... access to approximately 105 acres of timber,” and that the costs of the road construction will be bundled into the timber sale contract. *Id.* at 2. The application fails to disclose what

portion of the timber at issue is old vs. young growth, though some or all of the volume appears to be old growth.³ In any subsequently prepared NEPA document, the Forest Service must disclose the nature of forest to be logged at Heceta East as well as the impacts of that logging.

The Forest Service cannot avoid analyzing the impacts of the Heceta East State Timber Sale because an alternative access route purportedly exists. The permit application discloses that the alternate route would be more than three times more costly, would be more environmentally damaging and require additional permitting (as it would cross 700 feet of wetlands and climb a “steep grade”), and would pose a “higher safety risk.” Heceta East SUP App. (Ex. 10) at 1. For all of these reasons, the alternate route is impractical, and logging and road construction have no “independent utility” apart from one another. Because the road access and logging are “connected actions,” the Forest Service must disclose the impacts of the Heceta East State Timber Sale when it undertakes its NEPA review for construction of the route across Forest Service land.

Further, under any definition of impacts, including that of the 2020 NEPA regulations, the Forest Service must disclose the effects of the State’s timber sale in an analysis of road access. As with the Thorne Bay Subdivision timber sale, the impacts of the State’s East Heceta sale are “reasonably foreseeable” and have a “reasonably close causal relationship to the proposed” permit application for road construction. 40 C.F.R. § 1508.1(g) (2020).

IV. The Impacts of Logging up to 105 Acres of Old Forest at Heceta East Are Significant.

As discussed above, the destruction of old growth forests for commercial logging is likely to have significant environmental impacts – on wildlife, on carbon storage, and on the scenic integrity of the impacted areas. Forest Service staff in early 2020 predicted that there was a “good probability of goshawks” in the Heceta East area. Tongass Nat’l Forest, Three Roads EA project IDT meeting notes (Mar. 13, 2020) (obtained through FOIA), attached as Ex. 20. Logging, as discussed, will degrade goshawk habitat. Logging old growth will impact carbon stores, and conflict with administration policy that the Forest Service confront the climate crisis, as well as policy the Tongass National Forest limit old growth logging. To address these impacts, the Forest Service should prepare at least an environmental assessment.

Further, the agency should prepare at least an EA because the project’s impacts extend far beyond the 20-acre threshold of the categorical exclusion the Forest Service intends to invoke. Although the CE (e)(3) applies to projects that “require less than 20 acres of NFS lands,” it would be illogical for the Forest Service to apply this exclusion where forest on more than five times that area would be unalterably degraded by granting the permit application.

V. The Forest Service Must Disclose the Climate Impacts of Logging and Road Construction.

The climate crisis is the preeminent environmental issue of our time, threatening to drastically modify ecosystems, alter coastlines, worsen extreme weather events, degrade public health, and cause massive human displacement. Its impacts are already being felt in the United States, and particularly and

³ The State’s Five-Year timber schedule indicates that the Heceta East and related Heceta West projects combined will remove 145 acres of old growth and 80 acres of young growth, but does not specify the breakdown between the two units. Southern Southeast Area, Five-Year Schedule of Timber Sales, 2021-2025 (Mar. 2021) (Ex. 4) at pdf 13. Because the Heceta East unit is 105 acres, between 25 and 105 acres must be old growth.

increasingly in Alaska, which has warmed twice as quickly as the global average since 1950. U.S. Global Change Research Program, Fourth National Climate Assessment (2018) at 1190, attached as Ex. 21, and available at <https://nca2018.globalchange.gov/chapter/26/> (last viewed Aug. 12, 2021).

A. President Biden Requires Prompt Action to Assess and Reduce Climate Pollution.

On the day he was inaugurated, President Biden committed to overturning the prior administration's failure to address, and its outright denial of, the climate emergency.

It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; *to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change*; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

To that end, this order directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and *to immediately commence work to confront the climate crisis*.

Executive Order 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021) at Sec. 1 (emphasis added), attached as Ex. 22.

Days later, President Biden further committed to taking swift action to address the climate crisis. Per Executive Order 14,008, he recognized that “[t]he United States and the world face a profound climate crisis. We have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of that crisis and to seize the opportunity that tackling climate change presents.” Executive Order 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021), attached as Ex. 23. Pres. Biden announced that under his administration,

The Federal Government must drive assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy, marshaling the creativity, courage, and capital necessary to make our Nation resilient in the face of this threat. Together, we must combat the climate crisis with bold, progressive action that combines the full capacity of the Federal Government with efforts from every corner of our Nation, every level of government, and every sector of our economy.

Id. at 7622 (Sec. 201).

Addressing the need for the accurate assessment of climate costs, Pres. Biden announced on day one that “[i]t is *essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible*, including by taking global damages into account.” Executive Order 13,990 (Ex. 22), 86 Fed. Reg. at 7040, Sec. 5(a) (emphasis added). The President also re-established Interagency Working Group on the Social Cost of Greenhouse Gases, on which the Secretary of Agriculture will serve. *Id.*, Sec. 5(b). The President directed the Working Group to publish interim values for the social cost of carbon by February 19, 2021. *Id.*, Sec. 5(b)(ii)(A). The Working Group that month set that price at \$51/ton at a 3% discount

rate. See Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990 (Feb. 2021), attached as Ex. 24, and available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf (last viewed Aug. 12, 2021).

B. NEPA Requires Agencies to Disclose the Climate Impacts of Proposed Actions.

The Forest Service must analyze the direct, indirect, and cumulative impacts of a proposed action. *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999); see also 40 C.F.R. § 1508.25(c) (1978) (when determining the scope of an EIS, agencies “shall consider” direct, indirect, and cumulative impacts). NEPA and NFMA require the Forest Service to use high quality, accurate, scientific information to assess the effects of a proposed action on the environment. See 40 C.F.R. § 1500.1(b); 36 C.F.R. § 219.3.

Meaningful consideration of greenhouse gas emissions (GHGs) and carbon sequestration is clearly within the scope of required NEPA review. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). As the Ninth Circuit has held, in the context of fuel economy standard rules:

The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct. Any given rule setting a CAFE standard might have an “individually minor” effect on the environment, but these rules are “collectively significant actions taking place over a period of time.”

Id., 538 F.3d at 1216 (quoting 40 C.F.R. § 1508.7 (1978)). Courts have held that a “general discussion of the effects of global climate change” does not satisfy NEPA’s hard-look requirement. *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1189-90 (D. Colo. 2014).

Courts have ruled that federal agencies must consider indirect GHG emissions resulting from agency policy, regulatory, and fossil fuel leasing decisions. For example, agencies cannot ignore the indirect air quality and climate change impact of decisions that would open up access to coal reserves. See *Mid States Coal. For Progress v. Surface Transp. Bd.*, 345 F.3d 520, 532, 550 (8th Cir. 2003); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1197-98 (D. Colo. 2014); *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017), *amended in part, adhered to in part*, 2017 WL 5047901 (D. Mont. 2017).

NEPA requires “reasonable forecasting,” which includes the consideration of “reasonably foreseeable future actions ... even if they are not specific proposals.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (citation omitted). That an agency cannot “accurately” calculate the total emissions expected from full development is not a rational basis for cutting off its analysis. “Because speculation is ... implicit in NEPA,” agencies may not “shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.” *Id.* The D.C. Circuit has echoed this sentiment, rejecting the argument that it is “impossible to know exactly what quantity of greenhouse gases will be emitted” and concluding that “agencies may sometimes need to make educated assumptions about an uncertain future” in order to comply with NEPA’s reasonable forecasting requirement. *Sierra Club v. Federal Energy Regulatory Commission*, 863 F.3d 1357, 1373-74 (D.C. Cir. 2017). See also *De La Comunidad v. FERC*, 2021 U.S. App. LEXIS 22881 (D.C. Cir. Aug. 4, 2021)

(agency violated NEPA where it allege that it was "unable to determine the significance of the Project's contribution to climate change.").

The 2016 final CEQ *Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Review*, dated August 1, 2016, provides useful direction on the issue of federal agency review of greenhouse gas emissions as foreseeable direct and indirect effects of the proposed action. Notice available at 81 Fed. Reg. 51,866 (Aug. 5, 2016); full guidance attached as Ex. 25, and available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf (last viewed Aug. 12, 2021).

The CEQ guidance provides clear direction for agencies to conduct a lifecycle greenhouse gas analysis that quantifies GHG emissions or storage because the modeling and tools to conduct this type of analysis are available:

If the direct and indirect GHG emissions can be quantified based on available information, including reasonable projections and assumptions, agencies should consider and disclose the reasonably foreseeable direct and indirect emissions when analyzing the direct and indirect effects of the proposed action. Agencies should disclose the information and any assumptions used in the analysis and explain any uncertainties. To compare a project's estimated direct and indirect emissions with GHG emissions from the no-action alternative, agencies should draw on existing, timely, objective, and authoritative analyses, such as those by the Energy Information Administration, the Federal Energy Management Program, or Office of Fossil Energy of the Department of Energy. In the absence of such analyses, agencies should use other available information.

Id. at 16 (citations omitted). The guidance further specifies that estimating GHG emissions is appropriate and necessary for actions such as logging projects.

In addressing biogenic GHG emissions, resource management agencies should include a comparison of estimated net GHG emissions and carbon stock changes that are projected to occur with and without implementation of proposed land or resource management actions. This analysis should take into account the GHG emissions, carbon sequestration potential, and the changes in carbon stocks that are relevant to decision making in light of the proposed actions and timeframes under consideration.

Id. at 26 (citations omitted).

Although the Trump administration withdrew the 2016 CEQ guidance, President Biden on January 20, 2021 rescinded that Trump Executive Order, and directed CEQ to "review, revise, and update" its 2016 climate guidance. Executive Order 13,990 (Ex. 22), 86 Fed. Reg. at 7040, Sec. 7, 86 Fed. Reg. at 7042. On February 19, 2021, CEQ effectively reinstated the 2016 GHG guidance:

CEQ will address in a separate notice its review of and any appropriate revisions and updates to the 2016 GHG Guidance. In the interim, agencies should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 GHG Guidance.

Council on Environmental Quality, National Environmental Policy Act, Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (Feb. 19, 2021), attached as Ex. 26, and available at <https://www.govinfo.gov/content/pkg/FR-2021-02-19/pdf/2021-03355.pdf> (last viewed Aug. 12, 2021).

Further, regardless of the guidance, the underlying requirement from federal courts – that NEPA requires agencies to consider, quantify, and disclose climate change impacts, including indirect and cumulative combustion impacts and loss of sequestration foreseeably resulting from commercial logging decisions – has not changed. *See S. Fork Band Council of W. Shoshone v. United States Dept. of Interior*, 588 F.3d 718, 725 (9th Cir. 2009); *Ctr. for Biological Diversity*, 538 F.3d at 1214-15; *Mid States Coalition for Progress*, 345 F.3d at 550; *WildEarth Guardians v. United States Office of Surface Mining, Reclamation & Enft*, 104 F. Supp. 3d 1208, 1230 (D. Colo. 2015) (coal combustion was indirect effect of agency’s approval of mining plan modifications that “increased the area of federal land on which mining has occurred” and “led to an increase in the amount of federal coal available for combustion.”); *Diné Citizens Against Ruining Our Env’t v. United States Office of Surface Mining Reclamation & Enft*, 82 F. Supp. 3d 1201, 1213-1218 (D. Colo. 2015); *High Country Conservation Advocates*, 52 F. Supp. 3d at 1174.

B. Logging Old Growth Forests Has Significant, Negative Carbon Storage and Pollution Impacts.

Logging of the State parcels, particularly the old and mature forests found there, will contribute to carbon pollution impacts because the rainforests of Southeast Alaska in general, and the Tongass National Forest in particular, act as a critical carbon sink for the planet. As the Forest Service has recognized:

The Tongass National Forest stores more forest carbon than any other national forest in the United States As such, a critical ecosystem service sustained by this forest is carbon sequestration (i.e., the removal of carbon dioxide from the atmosphere and keeping that carbon inactive by storing it in live or dead biomass as well as organic soil matter). This makes the Tongass National Forest a critical component in the global carbon cycle.

Forest Service, Tongass Land and Resource Management Plan, Final EIS (2016) at 3-13. *See also* USDA Forest Service, Coastal Alaska’s Forest Resources, 2004–2013: Ten-Year Forest Inventory and Analysis Report, General Technical Report, PNW-GTR-979 (April 2020) at 26 (“The forests of south-central and southeast Alaska are a *key component of the global climate cycle* as they provide the vital ecosystem service of storing a vast amount of C [carbon] in relatively stable and long-lived individual trees” (emphasis added)), attached as Ex. 27, available at https://www.fs.fed.us/pnw/pubs/pnw_gtr979.pdf (last viewed Aug. 12, 2021).

The Forest Service has stated that “the carbon stored in the Tongass National Forest makes up about 8 percent of the carbon currently stored in the forests of the United States.” Forest Service, Tongass Land and Resource Management Plan, Final EIS (2016) at 3-15. *See also* D. DellaSala, *The Tongass Rainforest as Alaska’s First Line of Climate Change Defense and Importance to the Paris Climate Change Agreements* (2016) attached as Ex. 28. Other Forest Service experts have concluded that prior studies have underestimated the Tongass’s ability to sequester carbon in soils; as a result they estimate that the Tongass may store up to 12 percent of the carbon of all U.S. forests. M.C. Martin, *From rock to forest: Southeast’s carbon sink*, Juneau Empire (Feb. 19, 2016) (paraphrasing Forest Service scientist), attached as Ex. 29. A more recent study concluded that of all national forests, “the Tongass is the national carbon

champ, storing the equivalent of 44% of the total ecosystem carbon for the entire national forest system.” D. DellaSala, *Protecting the Tongass Rainforest, Older Forests, and Large Trees Nationwide for the U.S. Nationally Determined Contribution to the Paris Climate Agreement* (2021), attached as Ex. 30, and available at <https://wild-heritage.org/wp-content/uploads/2021/03/DellaSala-2021-Tongass.pdf> (last viewed Aug. 12, 2021).

Whatever the precise number, the forests of Southeast Alaska “play[] an important role in [the] amount of carbon that is stored globally as well as the global climatic condition ... *land management and other actions taken on the Tongass National Forest can affect climate change at a local, regional, and global scale.*” Forest Service, Tongass Land and Resource Management Plan, Final EIS (2016) at 3-19 (emphasis added). The Tongass’s old forests, and the soil they protect, are particularly efficient at sequestering carbon. *Id.* at 3-14. A 2020 Forest Service technical report reinforced the conclusion that old-growth forests sequestered an outsized volume of carbon on the Tongass. USDA Forest Service, Coastal Alaska’s Forest Resources (Ex. 27) at 25 (“The distribution of C [carbon] within stand ages of these four dominant species revealed a strong trend toward a higher concentration of C in stands older than 200 years Thus, more than 54 percent of aboveground live tree C mass in coastal Alaska was found in the oldest stands of four tree species.”).

Logging old-growth forests in particular worsens climate change by releasing significant amounts of carbon and by preventing such forests from continuing to sequester carbon. The U.S. Forest Service has acknowledged that “timber harvesting, and not land use change or fire, was the largest source of gross [greenhouse gas] emissions from US forests between 2006 and 2010.” U.S. Dept. of Agriculture, *The U.S. Forest Carbon Accounting Framework: Stocks and Stock Change, 1990-2016* (Nov. 2015) at 41, attached as Ex. 31, available at https://www.fia.fs.fed.us/forestcarbon/docs/CarbonReport_OnlineDraft-opt.pdf (last viewed Aug. 12, 2021). “[M]ature forests on the Tongass National Forest likely store considerably more carbon compared to younger forests in this area (within the individual trees themselves as well as within the organic soil layer found in mature forests).” Forest Service, Tongass Land and Resource Management Plan, Final EIS (2016) at 3-14. A 2019 paper concluded that the “[p]rimary (unlogged) forests on the Tongass store much more carbon than logged forests because of the relatively high percentage of old growth and long stable residence times of carbon stored in these forests, and in fact old growth forests are accruing biomass at a rate of approximately a Teragram a year. D. DellaSala & B. Buma, *Analysis of Carbon Storage in Roadless Areas of the Tongass National Forest* (Dec. 2019) at 1, attached as Ex. 32. When old-growth and mature forest within and adjacent to the Tongass is cut down, the vast majority of the stored carbon in the forest is released over time as CO₂, thereby converting forests from a sink to a “source” or “emitter.” See, e.g., D. DellaSala, *The Tongass Rainforest* (Ex. 28) at 5.

Further, to address the climate crisis, agencies cannot rely on the re-growth of cleared forests to make up for the carbon removed when old-growth is logged. One prominent researcher explains: “It takes at least 100 to 350+ years to restore carbon in forests degraded by logging (Law et al. 2018, Hudiburg et al. 2009). If we are to prevent the most serious consequences of climate change, we need to keep carbon in the forests because we don’t have time to regain it once the forest is logged (IPCC, 2018).” B. Law, et al., *The Status of Science on Forest Carbon Management to Mitigate Climate Change* (June 1, 2020), attached as Ex. 33. See also Moomaw, et al., *Intact Forests in the United States: Proforestation Mitigates Climate Change and Serves the Greatest Good, Frontiers in Forests and Global Change* (June 11, 2019) at 7 (“Stakeholders and policy makers need to recognize that the way to maximize carbon storage and sequestration is to grow intact forest ecosystems where possible.”), attached as Ex. 34.

C. Logging and Road Construction Caused by the Prince of Wales 2021 Road Access Project Will Worsen Climate Pollution.

This science above demonstrates that the proposed Prince of Wales 2021 Road Access Project will worsen climate emissions directly by cutting down and eliminating old-growth and mature forest, destroying the ability of those stands to store carbon. In addition, the project will result in the combustion of fossil fuels to chainsaw forests, build roads, and move wood to mills or overseas markets, adding to climate pollution. None of these impacts would occur without the road access across National Forest land sought by the State of Alaska.

This loss of carbon stores and increase in climate pollution will occur at the same time that climate change is accelerating, making the need to protect carbon stores even more urgent than it was just a few years ago. See, e.g., Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis, Summary for Policymakers* (Aug. 2021) at 17 (“Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades.”), attached as Ex. 35, available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (last viewed Aug. 12, 2021); see also *id.* at 21 (“With every increment of global warming, changes get larger in regional mean temperature, precipitation and soil moisture”). Therefore, any environmental analysis of the proposed road access must disclose the potentially significant climate change impacts of the project.

THE FOREST SERVICE MUST DISCLOSE THE REASONABLY FORESEEABLE IMPACTS OF ADDITIONAL, PROPOSED STATE ACCESS AND LOGGING PROPOSALS.

Beyond the immediate and direct impacts of the two access applications – the construction of roads through national forest and logging at the Thorne Bay Watch Subdivision and Heceta East parcels – the Forest Service must analyze the proposals’ impacts together with those of other foreseeable projects which may have cumulative effects when considered together with the proposed action. The Forest Service cannot avoid doing so by relying on the 2020 NEPA regulations which eliminate the word “cumulative” from the definition of impacts.

I. The Forest Service Should Apply the 1978 NEPA Regulations to This Project.

Although CEQ adopted new regulations implementing NEPA in July 2020, 85 Fed. Reg. 43304 (July 16, 2020), the new regulations “apply to any NEPA process begun after September 14, 2020.” 40 C.F.R. § 1506.13. The Tongass National Forest first identified this project on its “Schedule of Proposed Action” on July 1, 2020, before the agency was required to apply the 2020 NEPA regulations. See Tongass NF, Schedule of Proposed Action, 07/01/2020 – 09/30/2020 (July 1, 2020) at 11, available at <https://www.fs.fed.us/sopa/components/reports/sopa-111005-2020-07.pdf> (last viewed Aug. 12, 2021), excerpts attached as Ex. 36.

Therefore, the Forest Service can and should apply the familiar 1978 CEQ regulations to this project.

II. The 2020 NEPA Regulations Cannot Eliminate the Forest Service’s Duty to Consider Cumulative Effects.

Even if the Forest Service determines that it should or must apply the 2020 NEPA regulations, it must still analyze and disclose cumulative effects: the impacts of the proposal together with those of other reasonably foreseeable actions likely to cumulatively impact the environment in the area. While the

1978 NEPA regulations identified three types of impacts – direct, indirect, and cumulative – the revised 2020 regulations eliminate the terms “indirect” and “cumulative,” and explicitly repeal the definition of cumulative effects. 40 C.F.R. § 1508.1(g)(3) (2020). However, this attempt to eliminate the mandate that agencies analyze and disclose cumulative impacts contravenes Congressional intent, statutory language, previous CEQ guidance, and federal court decisions interpreting NEPA prior to the adoption of the agency’s 1978 regulations that the 2020 regulations purport to repeal. If the Forest Service here fails to address cumulative effects, it does so at considerable legal peril.⁴

Legislative history shows that Congress adopted NEPA in part to address cumulative effects. As it considered taking action that ultimately resulted in NEPA’s enactment, the United States Congress hosted a joint House-Senate Colloquium on a “National Policy for the Environment” on July 17, 1968. See Congressional White Paper on a National Policy for the Environment, U.S. Gov’t Printing Office (Oct. 1968), attached as Ex. 37, and available at <https://ceq.doe.gov/docs/laws-regulations/Congress-White-Paper.pdf> (last viewed Aug. 12, 2021). Invited to participate in the Colloquium were “interested members with executive branch heads and leaders of industrial, commercial, academic, and scientific organizations,” with the purpose of “focus[ing] on the evolving task the Congress faces in finding more adequate means to manage the quality of the American environment.” *Id.* at III, 1. The outcome of the day-long discussion was a Congressional White Paper on a National Policy for the Environment, published in October 1968. *Id.* Noting the near-consensus views expressed by those participating in the Colloquium, the Congressional White Paper explained that “in the recent past, a good deal of public interest in the environment has shifted from its preoccupation with the extraction of natural resources to the more compelling problems of deterioration on natural systems of air, land, and water. The essential policy issue of conflicting demands has become well recognized.” *Id.* at 1.

The Congressional White Paper highlighted additional issues that stakeholders agreed were essential and ripe for Congressional consideration in its development of a national environmental policy. For example, Dr. Walter Orr Roberts, an atmospheric physicist and founder of the National Center for Atmospheric Research, explained the importance of considering climate change due to “[s]ubtle alterations of the chemical constitution of the atmosphere, through pollutants added in the form of trace gases, liquids, or solids, result from industrial activity or urbanization. This is an area of biometeorology that has significance in every living person and yet we have not yet seen even the first beginnings of an adequately sustained research effort in this area.” *Id.* at 1. Subtle alterations from multiple projects, including the type of projects at issue here, could also have significant impacts when viewed cumulatively.

⁴ In addition, the 2020 CEQ regulations have been challenged as illegal in numerous courts and could soon be vacated by a court. See *Environmental Justice Health Alliance v. CEQ*, Case 1:20-cv-06143 (S.D.N.Y. Aug. 6, 2020); *Wild Virginia v. CEQ*, Case 3:20-cv-00045-NKM (W.D. Va. July 29, 2020); *Alaska Community Action on Toxics v. CEQ*, Case 3:20-cv-05199-RS (N.D. Ca. July 29, 2020); *State of California v. Council on Environmental Quality*, Case No. 3:20-cv-06057 (N.D. Cal. Aug. 28, 2020). The Biden administration has also signaled its intent to revise the 2020 NEPA regulations. See Council on Environmental Quality, *National Environmental Policy Act Implementing Regulations Revisions*, RIN: 0331-AA05, 0331-AA06, 0331-AA07, available at <https://bit.ly/3xFbQmX> (last viewed Aug. 12, 2021); see also Council on Environmental Quality, *Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures*, 86 Fed. Reg. 34154, 34155 (June 29, 2021) (“CEQ is engaged in an ongoing and comprehensive review of the 2020 Rule for consistency with the nation’s environmental, equity, and economic priorities; to evaluate the process CEQ used in developing the 2020 Rule; and to consider whether the 2020 Rule properly and lawfully interprets and implements NEPA.”).

NEPA's legislative history is replete with additional references to the complexity of environmental impacts, the consequences of "letting them *accumulate* in slow attrition of the environment" and the "ultimate consequences of quiet, creeping environmental decline," all of which Congress concluded required an analysis of proposed impacts beyond the immediate, direct effects of an action. 115 Cong. Rec. 29070 (October 8, 1969) (emphasis added); *see also*, S. Rep. No. 91-296, 91st Cong., 1st Sess. (July 9, 1969) at 5 (bemoaning the fact that "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."), attached as Ex. 38, and available at <https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf> (last viewed Aug. 12, 2021). For 50 years, CEQ interpreted the law to accomplish just that.

The text of NEPA itself also indicates that agencies should address cumulative environmental effects. The evaluation of a proposed project must include a "detailed statement" on "the environmental impact of the proposed action," including "*any* adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii) (emphasis added). The evaluation must examine "the environmental impact of the proposed action" "*to the fullest extent possible.*" *Id.* §§ 4332 (emphasis added), 4332(2)(C)(i). The evaluating agency must also seek out other agencies' expertise regarding "*any* environmental impact involved." *Id.* § 4332(2)(C) (emphasis added). The statute requires agencies to "recognize the *worldwide* and *long-range* character of environmental problems." *Id.* § 4332(2)(F) (emphasis added).

Further, the statute anticipates that agencies will consider impacts that, like climate pollution and climate change, may accrete from numerous projects with small individual impacts to harm our "biosphere." 42 U.S.C. § 4321 (NEPA's purpose is "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and *biosphere*" (emphasis added)).

Within a few months of its establishment, CEQ interpreted NEPA to require the disclosure of all environmental impacts, including cumulative effects. "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to *the overall, cumulative impacts of the action* proposed (and of *further actions contemplated*)."

Council on Environmental Quality: Statements on Proposed Federal Actions Affecting the Environment; Interim Guidelines, April 30, 1970, Section 5(b) (filed with Fed. Reg. May 11, 1970), available in *Environmental Quality, The First Annual Report of the Council on Environmental Quality* (1970) at 288, available at <https://www.slideshare.net/whitehouse/august-1970-environmental-quality-the-first-annual-report-of> (last viewed Aug. 12, 2021). CEQ published interim guidance in 1971 that confirmed this mandate. CEQ, *Statements On Proposed Federal Actions Affecting The Environment Guidelines*, 36 Fed. Reg. 7,724 (April 23, 1971), attached as Ex. 39. The guidance explained that the requirement in Section 102(2)(C) of NEPA to identify "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" in the detailed statement (now known as an EIS) required the agency "to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations." *Id.* at 7,725 (interpreting 42 U.S.C. 4332(2)(C)(iv)).

Some of the earliest Federal court decisions, issued years before CEQ adopted its 1978 regulations, concluded that NEPA requires disclosure of cumulative effects. The Second Circuit ruled in 1972:

In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will “significantly” affect the quality of the human environment the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including *the cumulative harm* that results from its contribution to existing adverse conditions or uses in the affected area.

Hanly v. Kleindienst, 471 F.2d 823, 830-31 (2d Cir. 1972) (emphasis added)). Following *Hanly*, the Second Circuit reiterated the importance of disclosing cumulative impacts.

As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the *accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources*. ‘Important decisions concerning the use and the shape of man’s future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.’ S. Rep. No. 91-296, 91 Cong., 1st Sess. 5 (1969). NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach *so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted* as the price to be paid for the major federal action under consideration.

Natural Resources Defense Council v. Callaway, 524 F.2d 79, 88-89 (2d Cir. 1975) (emphasis added) (citation omitted).

The Ninth Circuit in 1975 further explained:

while “foreseeing the unforeseeable” is not required, an agency must use its best efforts to find out all that it reasonably can: It must be remembered that the basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as “crystal ball inquiry.” Nor does characterization of industrial development as a “secondary” impact aid the defendants. As the Council on Environmental Quality only recently pointed out, consideration of secondary impacts may often be more important than consideration of primary impacts.

Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects, these secondary or induced effects may be more significant than the project’s primary effects.

....

While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable. If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate. As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase.

City of Davis v. Coleman, 521 F.2d 661, 676-77 (9th Cir. 1975) (quoting *Scientists' Institute for Public Information v. A.E.C.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). See also CEQ, Fifth Annual Report of the Council on Environmental Quality, 410-11 (Dec. 1974), available at <https://www.slideshare.net/whitehouse/august-1974-the-fifth-annual-report-of-the-council-on-environmental-quality> (last viewed Aug. 12, 2021)).

The Supreme Court in 1976 endorsed the Second and Ninth Circuits' view that the statute requires disclosure of cumulative effects.

[W]hen several proposals for coal-related actions that will have *cumulative or synergistic environmental impact upon a region* are pending concurrently before an agency, their environmental consequence must be considered together. Only through *comprehensive* consideration of pending proposals can the agency evaluate different courses of action.

Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976) (emphasis added) (citation omitted).

In sum, CEQ's attempt in its 2020 regulations to eliminate an agency's duty to consider cumulative effects is contrary to legislative intent, statutory language, nearly 50 years of caselaw, and consistent CEQ interpretation. Therefore, the Forest Service must continue to disclose the cumulative effect of federal actions, including for the Prince of Wales road access project.⁵

III. The Forest Service Must Disclose the Effects of the Heceta East Road Access and Timber Sale Together with Those of the Heceta West Road Access and Timber Sale.

The State of Alaska designated the timber sale and road access project at issue as the Heceta East project to distinguish it from another state project involving road access across Forest Service land and clearcutting of old forests: the Heceta West project.

On April 25, 2019, the State of Alaska submitted to the Tongass National Forest a form SF-299 for road access and road construction to facilitate the Heceta West Unit timber sale. See G. Staunton, State of Alaska, State Heceta Timber Sale SUP application (Apr. 25, 2019) ("Heceta West SUP App."), attached as Ex. 40. The project would involve road construction across 1,600 ft. of National Forest land to facilitate logging of 2.7 million board feet of state timber. *Id.* at 1. See also State of Alaska Dep't of Forestry, Map,

⁵ The Forest Service has neither rescinded nor amended its NEPA handbook which requires the agency to consider cumulative effects. See Forest Service Handbook 1909.15, Ch. 15.1.

Heceta Timber Sale, West Unit (Apr. 25, 2019) (depicting location of proposed logging and road construction), attached as Ex. 41.

In response to the SF-299 application's prompt to "[l]ist authorizations and pending applications filed for similar projects which may provide information to the authorizing agency," the State of Alaska referenced the Heceta East project, noting that a "similar request [for road access] was filed on October 16, 2016 for access to a unit approximately two miles east of this location." Heceta West SUP App. (Ex. 40) at 2. The State of Alaska's five-year schedule of timber sales for 2021-2025 actually describes Heceta East and West as two "*units*" of the same project, which the schedule asserts will result in the combined removal of 230 acres of forest, including 145 acres of old growth and 85 acres of young growth. See Southern Southeast Area, Five-Year Schedule of Timber Sales, 2021-2025 (Mar. 2021) (Ex. 4) at pdf p. 13. That schedule includes a map showing the Heceta East and Heceta West units, demonstrating the two projects' proximity in location and timing (both are part of the same "Heceta" project on the 5-year timber schedule), and their interrelated nature. See *id.* at pdf p. 24. Prior five-year schedules show the same thing. See State of Alaska, Div'n of Forestry, Map, Five Year Schedule of Timber Sales, Calend[a]r Years 2018-2022 (Apr. 17, 2018), attached as Ex. 42.

Because the Heceta West access project and timber sale, together with the Heceta East application, are both reasonably foreseeable, are both currently pending proposals before the Forest Service, are each considered units of the same proposal by the State of Alaska, both involve nearby locations on the same island, are both likely to occur at approximately the same time, and will both impact similar forest resources and transportation networks, the two projects will have impacts that should be disclosed together in any Forest Service evaluation of the Heceta East permit application.

IV. The Forest Service Must Disclose the Effects of the Thorne Bay Watch Subdivision Road Access and Timber Sale Together with Those of the Thorne Bay View Timber Sale.

The Forest Service is reviewing the State of Alaska's application for road access to facilitate the State of Alaska's Thorne Bay Watch Subdivision timber sale just west and northwest of the City of Thorne Bay. At the same time, the state is preparing to initiate logging of the Bay View Timber Sale just east of the City. Because these two projects are likely to have synergistic impacts on the forest, habitat, and scenery of the same area, the Forest Service must disclose the cumulative impacts of the two projects in a single NEPA document.

On November 25, 2020, the State of Alaska issued a request for proposal, seeking bids on a 14 million board foot timber sale on state land on the east side of Thorne Bay. State of Alaska, Div'n of Forestry, Request for Proposals for the Purchase of the Bay View Timber Sale (SSE-1369-K) (Nov. 23, 2020), attached as Ex. 43 (hereafter "Bay View Timber Sale RFP"), available at <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=125485> (last viewed Aug. 12, 2021). Nearly all of the project's board feet, logged from 574 acres, come from old growth. *Id.* at 2. Maps prepared by the State show the Bay View timber sale is proposed to occur within 1-2 miles of the Thorne Bay Watch Subdivision sale, just on the other side of the town, and indicate that parts of the same road network could be used for both sales. State of Alaska, Division of Forestry, Map, Bay View Timber Sale (Oct. 21, 2020), attached as Ex. 44, available at <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=125486> (last viewed Aug. 12, 2021). The contract's term is five years, meaning that logging at Bay View will likely be occurring simultaneously, or in close temporal proximity to, road construction and logging associated with the Thorne Bay Watch Subdivision project, which the Forest Service states could commence operations this

year. Bay View Timber Sale RFP (Ex. 43) at 3 (five-year contract); Scoping Notice (Ex. 6) (logging for Thorne Bay Watch Subdivision sale and “year-round commercial timber haul for up to five years” is likely to “begin[] approximately in January 2022”).⁶ Further, the State of Alaska’s most recent five-year timber schedule includes and describes both sales (labeling the Thorne Bay Watch Subdivision sale as the “Overlook” sale) and contains a map further demonstrating the two sales’ proximity in time and location. See Alaska, Div’n of Forestry, 2021-2025 Five-Year Timber Sale Schedule (Ex. 4) at 10, 12, 27 (map).

According to the State, the Thorne Bay View timber sale will remove 587 acres of old growth forest stands now used by wolves, including areas in proximity to wolf dens, and will degrade deer habitat years into the future. See State of Alaska, Best Interest Finding & Decision for Bay View Timber Sale (May 2020) at 15-16 (noting “existence of a wolf den” on federal lands “to the east” of the project area, and “[e]vidence of wolf activity ... during ... field work on the project”), attached as Ex. 45, available at http://forestry.alaska.gov/Assets/pdfs/timber/ketchikan_timber/2020/BayView_bif%20CAF%20signed.pdf (last viewed Aug. 12, 2021); *id.* at 16 (“A reduction in deer habitat in the immediate area will result because of the harvest of this timber”); *id.* (noting existing of black bear dens in the project area).

Because the Bay View timber sale, together with the Thorne Bay Watch Subdivision application, are both reasonably foreseeable, both involve nearby locations, are both likely to occur at approximately the same time, and will both impact similar forest resources, the two projects will have cumulative effects on wildlife and other values that the Forest Service should disclose together in any evaluation of the Subdivision permit application.

THE FOREST SERVICE MUST ENGAGE IN TRIBAL CONSULTATION CONCERNING THE PROPOSED ACCESS PROPOSAL AND OLD FOREST LOGGING.

We understand that the protection of old growth forest in their traditional homelands is critical to many Alaska Native peoples in Southeast Alaska, and that road construction and logging can threaten those values. See, e.g., Organized Village of Kasaan *et al.*, Petition for USDA Rulemaking to Create a Traditional Homelands Conservation Rule for the Long-Term Management and Protection of Traditional and Customary Use Areas in the Tongass National Forest (July 2020) (“Our traditional lands comprise nearly every part of what is now called the Tongass National Forest, including many islands as well as portions of the mainland. Our customary and traditional uses cannot be protected when road construction, logging, mining, and other large-scale industrial development, which has already devastated large expanses of the forest, is permitted to spread even farther into new and previously unimpacted corners of the Tongass.”), attached as Ex. 46, available at <https://s3-us-west-2.amazonaws.com/ktoo/2020/07/FINAL-Southeast-Tribes-APA-Petition-7-17-2020-Nine-Tribe-Signatures.pdf> (last viewed Aug. 12, 2021). The Biden administration has committed to more robust tribal consultation on federal actions. See, e.g., Presidential Memorandum, Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02075.pdf> (last viewed Aug. 12, 2021).

We do not pretend to speak for the Tribes in this matter. We do urge the Forest Service to engage in comprehensive government-to-government consultation concerning this project with all potentially

⁶ More information on the project, including the May 2020 “Best Interest Finding and Decision” for the Bay View sale, is available at <http://forestry.alaska.gov/timber/ketchikan> (last viewed Aug. 12, 2021).

impacted Tribes, and urge the Forest Service to emphasize to the Tribal governments that the project is meant to facilitate the logging of 130 acres, much of which may be old and mature forest.

CONCLUSION

Because the two road access projects – Thorne Bay Watch Subdivision and Heceta East – pave the way for logging of old growth forests on state land, the Forest Service should reject the permit applications as not in the public interest. If the Forest Service continues to undertake a NEPA analysis for these projects, it must disclose the impacts the clearcutting of forest including old growth on state lands as connected actions, and it must consider the cumulative impacts of the projects together with those of nearby proposed or approved state land logging at Heceta West and Bay View. Because the proposed access permits, and the logging at Thorne Bay Watch Subdivision and Heceta East that they make possible, may have significant impacts, the Forest Service cannot utilize a categorical exclusion to approve the applications and must prepare at least an environmental assessment. At a minimum, it is certainly “uncertain whether the proposed action may have a significant effect on the environment,” the threshold under Forest Service regulations for preparing an EA. 36 C.F.R. § 220.6(c).

Thank you for your attention to this matter.

Sincerely,

Edward B. Zukoski, Senior Attorney
CENTER FOR BIOLOGICAL DIVERSITY
1536 Wynkoop Street, Suite 421
Denver, CO 80202
(303) 641-3149
tzukoski@biologicaldiversity.org

Chiara D’Angelo, Tongass Forest Program Manager
SOUTHEAST ALASKA CONSERVATION COUNCIL
2207 Jordan Creek Avenue
Juneau, AK 99801
(907) 957-8347
Chiara@seacc.org

Kate Glover, Attorney
Olivia Glasscock, Associate Attorney
EARTHJUSTICEPO
325 Fourth Street
Juneau, AK 99801
(907) 586-2751
Kglover@earthjustice.org
oglasscock@earthjustice.org

Rebecca Knight, President
ALASKA RAINFOREST DEFENDERS
PO Box 6064
Sitka, Alaska 99835
(907) 752-7557
bknight15@icloud.com

Patrick Lavin, Alaska Policy Advisor
DEFENDERS OF WILDLIFE
441 W. 5th Ave. Suite 302
Anchorage AK 99507
(907) 276-9410
plavin@defenders.org

Cc: Earl Stewart, Supervisor, Tongass National Forest, Earl.stewart@usda.gov

TABLE OF EXHIBITS

Exhibit 1.	U.S. Dep't of Agric., Press Release, "USDA Announces Southeast Alaska Sustainability Strategy, Initiates Action to Work with Tribes, Partners and Communities," (July 15, 2021)
Exhibit 2.	State of Alaska, Thorne Bay Watch Subdivision timber sale Use Permit application (Sep. 9, 2018)
Exhibit 3.	State of Alaska, Map, Access Map - Thorne Bay Watch Proposed Timber Sale (Sep. 5, 2018)
Exhibit 4.	State of Alaska, Division of Forestry, Southern Southeast Area, Five-Year Schedule of Timber Sales, Fiscal Years 2021 Through 2025 (Mar. 2021)
Exhibit 5.	Email of J. Nudelman, Alaska Dept. of Natural Resources to R. Jacobson, USFS (June 25, 2020, 11:55 AM)
Exhibit 6.	Tongass National Forest, Scoping Notice, POW 2021 Road Access Project (July 2021)
Exhibit 7.	Email of R. Jacobson, USFS to M. Dillman, USFS <i>et al.</i> (Sep. 21, 2020)
Exhibit 8.	Email of M. Simonson, USFS to L. Maldonado, USFS (May 15, 2020 8:10 AM)
Exhibit 9.	Email of J. Nudelman, Alaska Dept. of Natural Resources to E. Goad, USFS (June 14, 2021, 2:18 PM)
Exhibit 10.	State of Alaska, Heceta East State Timber Sale application (undated, unsigned)
Exhibit 11.	Alaska Div'n of Forestry, Heceta East Timber Sale Unit Map (Sep. 22, 2016)
Exhibit 12.	Letter of G. Staunton, Alaska Div'n of Forestry to T. Gunn, U.S. Forest Service (Apr. 25, 2019)
Exhibit 13.	Letter of C. Richmond, Supervisor, GMUG National Forest to T. Mueller, Pres., Crested Butte LLC (Nov. 5, 2009)
Exhibit 14.	Letter of H. Provencio, Kaibab Nat'l Forest to Town of Tusayan (Mar. 4, 2016)
Exhibit 15.	J. Schoen and D. Albert, "Use of Historical Logging Patterns to Identify Disproportionately Logged Ecosystems within the Temperate Rainforests of Southeastern Alaska," Conservation Biology (2013),
Exhibit 16.	Email of J. Nudelman, State of Alaska to R. Jacobson, Forest Service <i>et al.</i> (Sep. 18, 2020 11:05 AM)
Exhibit 17.	G. C. Iverson et al., Conservation assessment for the northern goshawk in Southeast Alaska, US Forest Service, General Technical Report PNW-387 (1996)

- Exhibit 18. C. Flatten *et al.*, Northern Goshawk Monitoring, Population Ecology and Diet on the Tongass National Forest, April 1991-Sept 2001, Alaska Department of Fish and Game Final research report (2001)
- Exhibit 19. Tongass National Forest, Monitoring and Evaluation Report (2014)
- Exhibit 20. Tongass Nat'l Forest, Three Roads EA project IDT meeting notes (Mar. 13, 2020)
- Exhibit 21. U.S. Global Change Research Program, Fourth National Climate Assessment (2018)
- Exhibit 22. Executive Order 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021)
- Exhibit 23. Executive Order 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021)
- Exhibit 24. Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990 (Feb. 2021)
- Exhibit 25. Council on Environmental Quality, *Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Review* (Aug. 1, 2016)
- Exhibit 26. Council on Environmental Quality, National Environmental Policy Act, Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (Feb. 19, 2021)
- Exhibit 27. USDA Forest Service, Coastal Alaska's Forest Resources, 2004–2013: Ten-Year Forest Inventory and Analysis Report, General Technical Report, PNW-GTR-979 (April 2020)
- Exhibit 28. D. DellaSala, *The Tongass Rainforest as Alaska's First Line of Climate Change Defense and Importance to the Paris Climate Change Agreements* (2016)
- Exhibit 29. M.C. Martin, *From rock to forest: Southeast's carbon sink*, Juneau Empire (Feb. 19, 2016)
- Exhibit 30. D. DellaSala, *Protecting the Tongass Rainforest, Older Forests, and Large Trees Nationwide for the U.S. Nationally Determined Contribution to the Paris Climate Agreement* (2021)
- Exhibit 31. U.S. Dept. of Agriculture, *The U.S. Forest Carbon Accounting Framework: Stocks and Stock Change, 1990-2016* (Nov. 2015)
- Exhibit 32. D. DellaSala & B. Buma, Analysis of Carbon Storage in Roadless Areas of the Tongass National Forest (Dec. 2019)
- Exhibit 33. B. Law, *et al.*, The Status of Science on Forest Carbon Management to Mitigate Climate Change (June 1, 2020)
- Exhibit 34. Moomaw, *et al.*, Intact Forests in the United States: Proforestation Mitigates Climate Change and Serves the Greatest Good, *Frontiers in Forests and Global Change* (June 11, 2019)

- Exhibit 35. Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis, Summary for Policymakers* (Aug. 2021)
- Exhibit 36. Tongass NF, Schedule of Proposed Action, 07/01/2020 – 09/30/2020 (July 1, 2020)
- Exhibit 37. Congressional White Paper on a National Policy for the Environment, U.S. Gov't Printing Office (Oct. 1968)
- Exhibit 38. S. Rep. No. 91-296, 91st Cong., 1st Sess. (July 9, 1969)
- Exhibit 39. CEQ, *Statements On Proposed Federal Actions Affecting The Environment Guidelines*, 36 Fed. Reg. 7,724 (April 23, 1971)
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