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Via web portal: https://cara.ecosystem-management.org/Public//CommentInput?Project=60639

Re: Thomas Bay Young-Growth Timber Sale Project

ID Team Leader Case:

Thank you for this opportunity to comment on the Thomas Bay Young-Growth Timber Sale Project. These comments are submitted on behalf of the Center for Biological Diversity, a nonprofit, public interest environmental organization dedicated to the protection of imperiled species and the habitat and climate they need to survive through science, policy, law, and creative media. The Center is supported by more than 1.7 million members and online activists throughout the country. The Center works to secure a future for all species, great or small, hovering on the brink of extinction.

I. BACKGROUND: THE THOMAS BAY PROJECT.

The Forest Service states that the purpose of the Thomas Bay project

> is to move the project area toward desired future conditions by managing the timber resource for the production of sawtimber and other wood products and providing a reliable and predictable flow of commercial timber to support jobs and income in timber and supporting industries in an economically efficient manner.
>
> Young-growth timber provided by this project is needed to support the transition from a predominantly old-growth based timber industry to a predominantly young-growth based industry (Forest Plan, pp. 2-5, 5-2, 5-3, 5-4, 5-13, and 5-14). The offer of this timber would increase the amount of economically viable young-growth timber available, consistent with Forest Plan Objectives O-YG-01 and O-YG-02 (Forest Plan pp. 5-2, 5-3).

Tongass National Forest, Thomas Bay Young-Growth Timber Sale (Aug. 2021) ("Scoping Notice") at 2, available at https://www.fs.usda.gov/nfs/11558/www/nepa/116455_FSPLT3_5658944.pdf (last viewed Sep. 16, 2021).

The Forest Service proposes to:

- Log, via clearcut, approximately 22 million board feet of young-growth timber across 835 acres or a 5-10 year period;

- Construct 0.6 mile of new temporary road;

- Reconstruct about 6.5 miles of decommissioned temporary road; and

- Maintain approximately 8 miles of National Forest System road.

Id. While the scoping letter itself does not specify the type of logging treatment the project will entail, the Forest Service silviculturalist confirmed: "We are proposing to clearcut these stands." Email of B. Case, Forest Service to G. Chew, Tenakee Logging Co. (Aug. 20, 2021 7:11 AM), attached as Ex. 1.

II. THE TONGASS NATIONAL FOREST SHOULD ALIGN THE PROJECT'S PURPOSE AND NEED WITH THE 'SOUTHEAST ALASKA SUSTAINABILITY STRATEGY.'

On July 15, 2021, the U.S. Department of Agriculture announced a change in direction for the management of the Tongass National Forest. The Forest Service's parent agency stated that: "As a key part of Southeast Alaska Sustainability Strategy, USDA will end large-scale old growth timber sales on the Tongass National Forest and *will instead focus management resources to support forest restoration, recreation and resilience*, including for climate, wildlife habit and watershed improvement." Press Release, USDA Announces Southeast Alaska Sustainability Strategy, Initiates Action to Work with Tribes, Partners and Communities (July 15, 2021) (emphasis added), attached as Ex. 2, available at https://www.usda.gov/media/press-releases/2021/07/15/usda-announces-southeast-alaska-sustainability-strategy-initiates (last viewed Sep. 16, 2021). *See also* Forest Service website, Southeast Alaska Sustainability Strategy, available at https://www.fs.usda.gov/detail/r10/landmanagement/resourcemanagement/?cid=FSEPRD950023 (last viewed Sep. 16, 2021).

Although the Thomas Bay project is one of the first proposals initiated by the Forest Service since the Sustainability Strategy was announced, it does not appear to "support forest restoration, recreation and resilience" or demonstrate sustainable young growth management. The entirety of the project's purpose and need addresses timber and economics. It involves large clearcuts, which are not sustainable and will delay long-term restoration, and does not attempt to provide recreation benefit. While clearcutting may provide some temporary benefits to some wildlife species (by, for example, providing foraging habitat for deer for up to 25 years), the project initiation documents do not address how this would benefit forest "resilience," or any other kind of resilience.

The Forest Service's approach appears to have come as an unpleasant surprise to at least one logging business. A representative of the Tenakee Logging Company, upon learning that the Forest Service intended to clearcut the 835 acres at Thomas Bay, reacted as follows:

"Apparently, you [the Forest Service] still see the forest as a crop to be mowed down…. [M]aybe you should be highlighting the "transition" away from clearcutting as a practice: this is not Forestry; it is habitat destruction and deforestation." Email of G. Chew, Tenakee Logging Co. (Aug. 20, 2021 7:26 AM) (Ex. 1).[1]

We urge the Forest Service to reconsider the purpose and need for the project. Rather than designing a project that simply removes all young growth trees over a number of large areas, the Forest Service should consider a project that seeks to enhance forest restoration and resilience, as USDA Secretary Vilsack has directed, via smaller clearcuts, patch cuts, selective thinning, or other non-clearcut prescription.

III. THE TONGASS NATIONAL FOREST MUST CONSIDER A RANGE OF REASONBLE ALTERNATIVES.

A. Environmental Assessments Must Analyze a Range of Reasonable Alternatives.

CEQ's 1978 regulations, which applied to all NEPA documents, not just EISs, required that agencies "to the fullest extent possible ... [i]mplement procedures ... to emphasize real environmental issues and alternatives" and to "use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(b), (e) (1978).

The Ninth Circuit has explicitly held for decades that the alternatives requirement applies equally to EAs and EISes. "Any proposed federal action involving ... the proper use of resources triggers NEPA's consideration of alternatives requirement, whether or not an EIS is also required." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988), cert denied, 489 U.S. 1066 (1988). *See also W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (in preparing EA, "an agency must still give full and meaningful consideration to *all* reasonable alternatives" (emphasis added) (internal quotation and citation omitted)); *Te-Moak Tribe v. Interior*, 608 F.3d 592, 601-602 (9th Cir. 2010) ("Agencies are required to consider alternatives in both EISs and EAs and must give full and meaningful consideration to all reasonable alternatives."); *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1245 (9th Cir. 2005) ("alternatives provision" of 42 U.S.C. § 4332(2)(E) applies whether an agency is preparing an EIS or an EA and requires the agency to give full and meaningful consideration to all reasonable alternatives); *Gifford Pinchot Task Force v. Perez*, 2014 U.S. Dist. Lexis 90631, No. 03:13-cv-00810-HZ (D. Or. July 3, 2014) (finding agency failed to consider range of reasonable alternatives in an EA); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1199 (N.D. Cal. 2004) (stating that "an EA must consider a reasonable range of alternatives"); *Or. Natural*

[1] *See also* email of S. Chew, Second Growth Homes to B. Case, Tongass NF (Aug. 20, 2021 6:23 PM) ("It has long been my personal worry that when the Forest Service begins to transition to Second Growth Timber harvest in the Tongass; that they will make the same exact mistakes they made in the past harvest of this region. The over commercialization and clearcutting of endless stands of healthy timber is the mistake that has been made, these actions have long term negative effects on our Local environment and Local communities…. [T]he Forest Service's next big step in the Harvest of Second Growth is planning to Clear Cut 835 Acres? This is appalling. This is not the way to harvest this Timber."), attached as Ex. 3.

Desert Ass'n v. Singleton, 47 F. Supp. 2d 1182, (D. Or. 1998) ("The requirement of considering a reasonable range of alternatives applies to an EA as well as an EIS" (citing 40 C.F.R. § 1508.9(b)).

Other courts agree. *See Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (granting injunction where EA failed to consider reasonable alternatives); *Diné Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010) (alternatives analysis "is at the heart of the NEPA process, and is 'operative even if the agency finds no significant environmental impact.'" (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004)).

NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions "involve[] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). *See also* 40 C.F.R. § 1507.2(d) (2020) (agencies must "study, develop, and describe alternatives to recommended courses of action that involves unresolved conflicts concerning alternative uses of available resources, consistent with 102(2)(E) of NEPA."). 40 C.F.R. § 1501.2(c) (1978) (agencies must "study, develop, and describe appropriate alternatives to the recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act."). "NEPA's requirement that alternatives be studied, developed, and described both guides the substance of the environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place." *Bob Marshall Alliance*, 852 F.2d at 1228 (citation omitted).

In taking the "hard look" at impacts that NEPA requires, an EA must "study, develop, and describe" reasonable alternatives to the proposed action. 42 U.S.C. § 4332(2)(C) & (E). CEQ regulations explicitly mandate that an EA shall "briefly discuss ... the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1501.5(c) (2020); *see also* 40 C.F.R. § 1508.9(b) (1978) (an EA "[s]hall include brief discussions ... of alternatives.").

Forest Service NEPA regulations further direct that:

> (b) An EA must include the following:
>
> ….
>
> (2) Proposed action and alternative(s). The EA shall briefly describe the proposed action and alternative(s) that meet the need for action. No specific number of alternatives is required or prescribed.
>
> (i) When there are no unresolved conflicts concerning alternative uses of available resources (NEPA, section 102(2)(E)), the EA need only analyze the proposed action and proceed without consideration of additional alternatives.

36 C.F.R. § 220.7(b).

The purpose of the multiple alternative analysis requirement is to ensure that no major federal project is undertaken without intense consideration of other more ecologically sound courses of

action, including shelving the entire project, or of accomplishing the same result by entirely different means. *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974); *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1989) (agency must consider alternative sites for a project).

Reasonable alternatives must be analyzed for an EA even where a FONSI is issued because "nonsignificant impact does not equal no impact. Thus, if an even less harmful alternative is feasible, it ought to be considered." *Ayers v. Espy*, 873 F. Supp. 455, 473 (D. Colo. 1994) (internal citation omitted). When an agency considers reasonable alternatives, it "ensures that it has considered all possible approaches to, and potential environmental impacts of, a particular project; as a result, NEPA ensures that the most intelligent, optimally beneficial decision will ultimately be made." *Wilderness Soc'y v. Wisely*, 524 F. Supp. 2d 1285, 1309 (D. Colo. 2007) (quotations & citation omitted).

In determining whether an alternative is "reasonable," and thus requires detailed analysis, courts look to two guideposts: "First, when considering agency actions taken pursuant to a statute, an alternative is reasonable only if it falls within the agency's statutory mandate. Second, reasonableness is judged with reference to an agency's objectives for a particular project." *Diné Citizens Against Ruining Our Env't*, 747 F. Supp. 2d at 1255 (quoting *New Mexico ex rel. Richardson*, 565 F.3d at 709). *See also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) ("nature and scope of proposed action" determines the range of reasonable alternatives agency must consider).

Any alternative that is unreasonably excluded will invalidate the NEPA analysis. "The existence of a viable but unexamined alternative renders an EA inadequate." *Western Watersheds v. Abbey*, 719 F.3d. at 1050; *see also Diné Citizens Against Ruining Our Env't*, 747 F. Supp. 2d at 1256 ("The existence of a viable but unexamined alternative renders an alternatives analysis, and the EA which relies upon it, inadequate.").

The agency's obligation to consider reasonable alternatives applies to citizen-proposed alternatives. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217-19 (9th Cir. 2008) (finding EA deficient, in part, for failing to evaluate a specific proposal submitted by petitioner); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999) (agency's "[h]ard look" analysis should utilize "*public comment* and the best available scientific information") (emphasis added). "In respect to alternatives, an agency must on its own initiative study all alternatives that appear reasonable and appropriate for study at the time, and must also look into other significant alternatives that are called to its attention by other agencies, or by the public during the comment period afforded for that purpose." *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996).

Courts hold that an alternative may not be disregarded merely because it does not offer a complete solution to the problem. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972). Even if additional alternatives would not fully achieve the project's purpose and need, NEPA "does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multipurpose project." *Town of Matthews v. U.S. Dep't. of Transp.*, 527 F. Supp.

1055 (W.D. N.C. 1981). *See also Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908, 933 (D. Or. 1977) ("An alternative may not be disregarded merely because it does not offer a complete solution to the problem.") If a different action alternative "would only partly meet the goals of the project, this may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact." *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990).

Further, courts reviewing EAs have consistently found them lacking where there existed feasible mid-range or reduced-impact alternatives failing between the extremes of granting in full or denying in full the proposed action, but the agency opted not to analyze them in detail. *See, e.g.*, *W. Watersheds Project v. Abbey*, 719 F.3d at 1050 (finding EA arbitrary and capricious where it failed to consider "reduced-grazing" alternatives); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Dep't of Interior*, 655 F. App'x 595, 599 (9th Cir. 2016) (holding that agency's "decision [in EA] not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion, and the agency did not adequately explain why it eliminated this alternative from detailed study"); *Wild Fish Conservancy v. Nat'l Park Serv.*, 8 F. Supp. 3d 1289, 1300 (W.D. Wash. 2014) (finding agency's EA deficient because the "conclusion that there is not a meaningful difference, or viable alternative, between 0% and 90% [of fish survival] [was] suspect"), aff'd, 687 F. App'x 554 (9th Cir. 2017); *Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095, 1110, (D. Or. 2014) (holding that agency "erred in failing to consider a reasonable range of alternatives" in EA, and finding that "[g]iven the obvious difference between the release of approximately 1,000,000 smolts and zero smolts, it is not clear why it would not be meaningful to analyze a number somewhere in the middle").

The courts also require that an agency adequately and explicitly explain in the EA any decision to eliminate an alternative from further study. *See Wilderness Soc'y*, 524 F. Supp. 2d at 1309 (holding EA for agency decision to offer oil and gas leases violated NEPA because it failed to discuss the reasons for eliminating a "no surface occupancy" alternative); *Ayers*, 873 F. Supp. at 468, 473.

B. The Tongass National Forest Should Modify Its Purpose and Need, and Analyze Several Potential Alternatives.

First, the Forest Service should consider modifying the project's purpose and need, which currently focuses exclusively on logging the forest for commodity extraction. This conflicts with the USDA's Southeast Alaska Sustainability Strategy which directed the Tongass National Forest to "focus management resources to support forest restoration, recreation and resilience." To comply with the Forest's new direction, the Forest Service should consider an alternative (or alternatives) that involves thinning, group or single tree selection, or other treatments of second growth to attempt with the objective of improving wildlife habitat, including by speeding the treated forest's return to old growth.

Second, we urge the Forest Service to consider alternatives that remove a mid-range amount of timber compared to the proposed action and the no action alternative, say 400 acres, which could still allow logging from the area for years. The Forest Service could do this by removing all Unit

Pools that require the use, construction, or reconstruction of roads through Old-Growth Habitat LUDs. *See* discussion of Forest Plan conformity, below. This would still permit the Tongass to achieve its purpose and need, just at a lower level, and would address some of the "unresolved conflicts" concerning road use, construction, and reconstruction in such LUDs, and the unresolved conflicts involved in degrading wildlife habitat, human presence, and foreclosing future restoration opportunities.

Third, we urge the Forest Service to consider breaking the project into a number of smaller projects or micro-sales that would be more attractive to small mills. As currently proposed, the proposed action is likely to attract bids only from larger mills.

The Forest Service could also consider an alternative that reduced the proposed volume of timber to be removed by implementing a larger number of much smaller clearcuts. The Forest Service could also consider a hybrid project, that involved thinning some of the 835 acres identified for treatment and clearcutting the balance of acres.

Each of these alternatives would allow the Forest Service to sharply define the different impacts and outcomes resulting from varying project scales, and different types and levels of logging approaches.

For each of alternative evaluated, the Forest Service should consider restoration projects (e.g., fixing blocked culverts), and should consult with local communities concerning recreation priorities in the area. Thomas Bay is a popular recreation area for residents of and visitors to Petersburg, and there are likely recreation enhancement projects that, with local input, could be identified and implemented within the project area.

IV. THE TONGASS NATIONAL FOREST SHOULD PREPARE AT LEAST AN ENVIRONMENTAL ASSESSMENT.

A. Legal Background.

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).

B. The Forest Service Should Prepare at Least an EA.

The Thomas Bay project will clearcut over a square mile of forest, requiring 7 miles of road construction or reconstruction. It will set an ecosystem recovering from decades-old clearcuts back to zero. It will modify whatever habitat and carbon storage values and services the existing second growth forest is now providing. It has the potential to impact stream health and may lead to the spread of exotic weeds. It is likely to have cumulative impacts together with management actions proposed on adjacent lands management by State and other landowners. The Project may set a precedent for future actions because it is, as the District Ranger has stated, "one of the first YG [young growth] projects on the Forest," as the Forest Service "shift[s] from OG [old growth] management to YG management," making the project "a big priority for the district and region." Tongass National Forest, Notes, WRD-PRD Zone IDT Meeting (Aug. 16, 2021), attached as Ex. 4.

For these and other reasons, there is at least a potential for significant impacts that the Forest Service must address in an EA. We further request that the Forest Service prepare a draft EA for public comment, and then a final EA and proposed decision notice, to ensure adequate public involvement.

V. THE TONGASS NATIONAL FOREST SHOULD DISCLOSE BASELINE CONDITIONS IN THE PROJECT AREA.

NEPA requires disclosure of baseline conditions. Here, the Forest Service should disclose the existing values of the project area, including:

- The nature of the existing forest, including its age and species composition;
- Wildlife values, including monitoring and inventory data addressing species use;
- Human use of the area, including use of adjacent state and private property;
- The nature of the existing transportation system, including the state and uses of roads or corridors proposed for use, construction, and reconstruction.

VI. THE TONGASS NATIONAL FOREST SHOULD DISCLOSE THE PROJECT'S IMPACT ON INCOME AND JOBS.

The project's purpose includes "providing a reliable and predictable flow of commercial timber to support jobs and income in timber and supporting industries in an economically efficient manner," and the Forest Service states that the project "would increase the amount of economically viable young-growth timber available." Scoping Notice at 2.

Any subsequently prepared NEPA document should therefore estimate and disclose a number of factors concerning the project's economic costs and benefits, including:

- Logging Costs (stump to truck);
- Road costs (construction, reconstruction and maintenance);
- Haulage costs (truck and/or tow); and
- Direct employment and income.

This is analysis is particularly important because the Tongass has a history of proposing (and selling) timber sales that result in a significant loss to the American taxpayer. Further, we note that the ID Team for the project identified "designing an economical timber sale" as a "preliminary concern" for the project. T. Sandhofer, Project Initiation Letter, Thomas Bay YG Timber Sale (June 15, 2021), attached as Ex. 5. Any NEPA document should address that concern.

VII. THE TONGASS NATIONAL FOREST SHOULD DISCLOSE THE PROJECT'S CLIMATE IMPACTS.

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).

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 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. 6, and available at https://nca2018.globalchange.gov/chapter/26/ (last viewed Sep. 16, 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. 7.

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. 8. 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. 7), 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. 9, and available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf (last viewed Sep. 16, 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. C*olo. 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. S*ierra 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. 10, and available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf (last viewed Sep. 16, 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. 7), 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. 11, and available at https://www.govinfo.gov/content/pkg/FR-2021-02-19/pdf/2021-03355.pdf (last viewed Sep. 16, 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 & Enf't*, 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 & Enf't*, 82 F. Supp. 3d 1201, 1213-1218 (D. Colo. 2015); *High Country Conservation Advocates*, 52 F. Supp. 3d at 1174.

C. Logging, Even of Young Growth, Will Degrade Carbon Storage.

Any NEPA document the Forest Service prepares must disclose the fact that logging decades-old young-growth trees will reduce the amount of carbon stored on the Tongass National Forest, thereby hindering progress toward limiting the worst impacts of the climate crisis. The Forest must also quantify those impacts in comparison to the "no action" alternative.

The Forest Service cannot turn a blind eye to the project's reduction in carbon storage because evaluating or estimating such impacts may be complex or complicated. To the contrary, federal courts have long ruled that NEPA requires agencies to make reasonable estimates of potential impacts. "Reasonable forecasting and speculation is ... 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.'" *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). *See also Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984) (quoting same); *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (because "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 …. [r]easonable forecasting and speculation is ... implicit in NEPA."). "If it is reasonably possible to analyze the environmental consequences in an [EIS], the agency is required to perform that analysis." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) (finding both EIS and later EA inadequate under NEPA). "NEPA analysis necessarily involves some 'reasonable forecasting,' and ... agencies may sometimes need to make educated assumptions about an uncertain future." *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)).[2] "While foreseeing the unforeseeable is not required, an agency must use its best efforts to find out all that it reasonably can." *Barnes v. United States Dep't of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011) (internal quotation marks omitted)). *See also Del. Riverkeeper Network*, 753 F.3d at 1310 ("While the statute does not demand forecasting that is 'not meaningfully possible,' an agency must fulfill its duties to 'the fullest extent possible.'" (citation omitted)).

The 2016 Tongass Forest Plan Amendment admitted that a "quantitative (i.e., numeric) assessment [of climate impacts] is feasible." Forest Service, Tongass Land and Resource Management Plan, Final EIS (2016) at 3-21. But the Forest Service declined to undertake such an analysis because "the quantitative results would include a large amount of error or uncertainty, such that the calculated differences between the alternatives would be difficult to discern." *Id*. While we reject that EIS's contention that some uncertainty renders quantification useless, we note that the Forest Service declined to address climate impacts at the Forest Plan level in part because "it is unknown when forests will be harvested or the extent of harvest that would occur at any particular time ... for any alternative." *Id*. That uncertainty is not present here. The Thomas Bay project proposes to log a defined amount of timber (24 million board feet) over a defined period (5-10 years). Now that the agency has the information it lacked at the Plan level, it cannot kick the can down the road based on uncertainty about the scope and pace of logging. This is particularly true given President Biden's executive order directing that "[t]he Federal

[2] In *Sierra Club v. FERC*, the D.C. Circuit ruled that the agency violated NEPA by failing to disclose the climate impacts of a pipeline where the agency "had not provided a satisfactory explanation for why" "quantification [of climate pollution] may not be feasible." *Id*.

Government must drive *assessment*, disclosure, and mitigation of climate pollution." Executive Order 14,008, 86 Fed. Reg. 7619, 7622 (Ex. 8).

In addition, the Forest Service itself has stated that it has numerous modeling tools to project climate impacts:

> Accurate estimates of carbon in forests are crucial for forest carbon management, carbon credit trading, national reporting of greenhouse gas inventories to the United Nations Framework Convention for Climate Change, calculating estimates for the Montreal Process criteria and indicators for sustainable forest management, and registering forest-related activities for state and regional greenhouse gas registries and programs.
>
> Our scientists have contributed to developing a toolbox full of basic calculation tools to help quantify forest carbon for planning or reporting.

Forest Service, Tools for carbon inventory, management, and reporting (Nov. 2018), attached as Ex. 12, and available at https://www.nrs.fs.fed.us/carbon/tools/#cole (last viewed Sep. 16, 2021).

D. Logging and Road Construction Caused by the Thomas Bay Project Will Worsen Climate Pollution.

Not only will the Thomas Bay project worsen climate emissions directly by cutting down and eliminating forest, destroying the ability of those stands to store carbon, it will also result in the combustion of fossil fuels to chainsaw forests, build "temporary" roads, and move wood to mills or overseas markets, adding to climate pollution. None of these impacts would occur without the Forest Service's approval of the Thomas Bay project.

Logging within the project area for 5-10 years will require the use of heavy equipment, almost certainly exclusively powered by fossil-fueled engines, to construct or reconstruct over 7 miles of temporary road, to remove trees, and to take removed logs to market. This activity will result in greenhouse gas pollution that will worsen climate change for centuries, and that pollution caused by the proposed action will be over and above the pollution that will occur under the no action alternative.

We note that the Forest Service and other agencies, such as the Office of Surface Mining, have disclosed in NEPA documents the estimated pollution from internal combustion engines necessary to mine, process, and ship coal to market.[3] And while we do not endorse as sufficient

[3] *See, e.g.*, Office of Surface Mining & Bureau of Land Management, Environmental Assessment, Colowyo Coal Mine Collom Permit Expansion Area Project (Jan. 2016) at 4-15 – 4-18 (including table assessing "direct GHG emissions" from "drills," "dozers," "graders," "haul trucks," etc., for the proposed action), excerpts attached as Ex. 13; U.S. Forest Service, Supplemental Final Environmental Impact Statement, Federal Coal Lease Modifications COC-1362 & COC-67232 (Aug. 2017) at 102-113 (publishing tables estimating emissions of air pollutants, including greenhouse gases CO2 and Ch4 (methane) for activities including road and

either the OSM or the Forest Service's Federal Coal Lease Modifications analyses cited, they demonstrate that agencies (including the Forest Service itself) can and do attempt to disclose direct climate emissions from construction and transportation activities.

As part of its climate change analysis, the Forest Service should disclose the potentially significant climate effects of overseas shipping of young growth logged. In the South Revilla Draft EIS, published in August 2020, the Tongass National Forest stated.

> Young-growth volume is assumed to be 100 percent exported because there is currently no established market for domestically sawn young-growth harvest. This was assumed true for the life of this project since the estimated amount of young-growth available on the Tongass in the next 15 years would not be enough to warrant the construction of a mill especially designed to handle young-growth logs. Recent young-growth contracts with domestic processing have not been fully successful for the purchasers due to a lack of local markets for sawn young-growth.

Tongass National Forest, Draft EIS, South Revillagigedo Integrated Resource Project (Aug. 2020), Vol. I, at 54, excerpts attached as Ex. 15, available at https://www.fs.usda.gov/nfs/11558/www/nepa/108739_FSPLT3_5401585.pdf (last viewed Sep. 16, 2021). Therefore, to understand the Thomas Bay project's impacts on climate change – as well as to understand the project's socio-economic impacts – any subsequently prepared NEPA document should address the likelihood that young growth logs will be exported, or must explain how the market for domestically sawn young growth has changed since last year.

The project's increase in climate pollution (and its harm to the forest's carbon storage) 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. 16, available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (last viewed Sep. 16, 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 project must disclose the project's potentially significant climate change impacts.

VIII. THE TONGASS NATIONAL FOREST MUST DISCLOSE THE PROJECT'S IMPACTS ON WILDLIFE.

Clearcutting, road construction, road use, and increased human presence in the project area for a decade will impact wildlife habitat, wildlife use, wildlife corridors, and hunting (including subsistence) opportunities. We note that the District Ranger initiating the NEPA process

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well pad construction, heavy equipment use, and commuter vehicle trips for the no action and proposed action alternatives), excerpts attached as Ex. 14.

identified "preliminary concerns" for the project, including "the effects of timber harvest and road construction on wildlife including habitat, travel corridors, and subsistence." Dist. Ranger Sandhofer, Project Initiation Letter (Ex. 5). Any subsequently prepared NEPA document must address these issues.

Any NEPA document must address the temporal aspect of impacts to habitat. For example, clearcutting may create more forage habitat for deer (which may benefit wolves) over the short- and medium-term (0-25 years), but for a century thereafter, the forest will enter the "stem exclusion" phase, which results in poor habitat for deer or wolves, before the forest stands begin to exhibit more old growth characteristics, which are again favorable to deer and wolves. In evaluating the proposed action in comparison to the no action alternative (and any other alternatives), the Forest Service must disclose that clearcutting now will extend by decades the time it will take for the logged forest to recover old growth habitat attributes.

The Forest Service should disclose the project's potential impacts to the Alexander Archipelago wolf and wolf denning. We request that the Forest Service review and consider the information and recommendations in: (1) the State of Alaska's comments on the Twin Mountain II project, which address buffers required for denning wolves, among other things; and (2) the Center's and others' petition to list the wolf as a threatened or endangered species, which addresses, among other things, the fact that wolf populations in Game Management Unit 1B and others appear to be at risk of inbreeding depression. *See* letter of S. Kreel, State of Alaska, to E. Stewart, Tongass NF (Oct. 14, 2020), attached as Ex. 17; Center for Biological Diversity et al., Petition To List The Alexander Archipelago Wolf (July 15, 2020), attached as Ex. 18.

IX. THE TONGASS NATIONAL FOREST MUST ADDRESS THE PROJECT'S EFFECTS TOGETHER WITH OTHER MANAGEMENT PROPOSALS FOR NEARBY LANDS.

A. The 2020 NEPA Regulations Cannot Eliminate the Requirement that the Forest Service Disclose Cumulative Effects.

Although the CEQ adopted new regulations implementing NEPA in July 2020, 85 Fed. Reg. 43304 (July 16, 2020), and those regulations became effective for projects "begun" after September 14, 2020, those regulations have been challenged as illegal in numerous courts and are likely to be vacated. *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), on appeal to Fourth Circuit; *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).

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.

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.[4] 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 5-6.

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 pointed to the need for an analysis of proposed impacts beyond the immediate, direct effects of an action. 115 Cong. Rec. 29070 (October 8, 1969) (emphasis added).[5] For 50 years, CEQ interpreted the law to accomplish just that.

The text of NEPA 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

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[4] *See* Congressional White Paper on a National Policy for the Environment, U.S. Gov't Printing Office (Oct. 1968), attached as Ex. 19, and available at https://ceq.doe.gov/docs/laws-regulations/Congress-White-Paper.pdf (last viewed Sep. 16, 2021).

[5] *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. 20, and available at https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf (last viewed Sep. 16, 2021).

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 itself anticipates that agencies will consider impacts, like climate pollution and climate change, that may impact 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 reinforced the need to address 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).[6] 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. 21. 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, hold 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.

[6] 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 Sep. 16, 2021).

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).[7] 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). As a result, CEQ's attempt in its 2020 regulations to eliminate an agency's duty to consider cumulative effects is contrary to legislative intent, statutory language, 40 years of case law, and consistent CEQ interpretation.

B. Even Under the 2020 NEPA Regulations, the Forest Service Must Disclose Environmental Impacts that Occur in the Same Time and Place, and Should Disclose Effects Later in Time.

While the 2020 NEPA regulations rescind the definition of cumulative impacts and are silent as to an agency's duty to disclose indirect effects, the 2020 regulations require agencies to disclose:

> 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).

The District Ranger in charge of project NEPA compliance appears to have concluded that the Forest Service must address the cumulative impacts of the project. In his "Project Initiation Letter," he wrote "The IDT role is to ensure the environmental analysis covers the impacts, *cumulative effects*, and project design features necessary to ensure the harvest of timber resources is done in compliance with all existing laws and regulations pertaining to the

[7] Quoting *Scientists' Institute for Public Information v. A. E. C.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) and 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 Sep. 16, 2021).

management of the Tongass National Forest." Project Initiation Letter (Ex. 5) at 3 (emphasis added). We agree that such analysis is appropriate and necessary.

C. Under Either the 1978 or 2020 Regulations, the Forest Service Must Disclose the Impacts of the Thomas Bay Project Together with the Management of Adjacent State and Private Lands.

The proposed project area is adjacent to State of Alaska and other non-federal land. The Forest Service must disclose the impacts of the Thomas Bay project together with reasonably foreseeable actions on non-federal land.

As the maps above demonstrate, proposed cutting units and proposed temporary roads abut State of Alaska lands. Therefore, there is a potential for actions on State lands to interact with those caused by the Thomas Bay project and vice versa. Any NEPA analysis must disclose these potential impacts. Similarly, the maps show logging and road construction proposed by the Thomas Bay project within a few hundred yards of private lands near Point Agassiz. Here, too, there is a potential for actions on private lands to interact with those caused by the Thomas Bay project and vice versa, which must be disclosed.

X. THE TONGASS NATIONAL FOREST SHOULD ENSURE COMPLIANCE WITH THE FOREST PLAN.

The Forest Service must ensure that the proposed action complies with the Tongass Forest Plan. 16 U.S.C. § 1604(i). We request that the Forest Service include a map in any subsequently-prepared NEPA document that depicts the proposed project components (logging areas, "pool units," roads to be constructed, reconstructed, and/or maintained) in relation to Forest Plan land use designations (LUDs).

The Thomas Bay project area includes three LUDs: (1) "Old-Growth Habitat," in which the agency is directed to "[m]aintain old-growth forests in a natural or near-natural condition for wildlife and fish habitat;" (2) "Scenic viewshed," in which the agency is directed to "[m]aintain scenic quality in areas viewed from popular land and marine travel routes and recreation areas, while permitting timber harvest;" and (3) "Modified Landscape," in which the agency is directed to "[p]rovide for natural-appearing landscapes while allowing timber harvest." *See* Figure 1, below, from Tongass National Forest Land and Resource Management Plan, Record of Decision, Land Use Designations (Dec. 2016), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd526845.pdf (last viewed Sep. 16, 2021).

The vast majority of the Unit Pools in the project area appears to occur within the Scenic Viewshed LUD. The Tongass Forest Plan's "objectives" for this LUD include that in this LUD, the Forest Service should "[s]eek to reduce clearcutting when other methods will meet land management objectives." Tongass Land and Resource Management Plan (Dec. 2016) at 3-103. Any subsequently prepared NEPA document should address how this proposal – calling exclusively for the use of clearcuts over 835 acres – complies with this Plan objective.

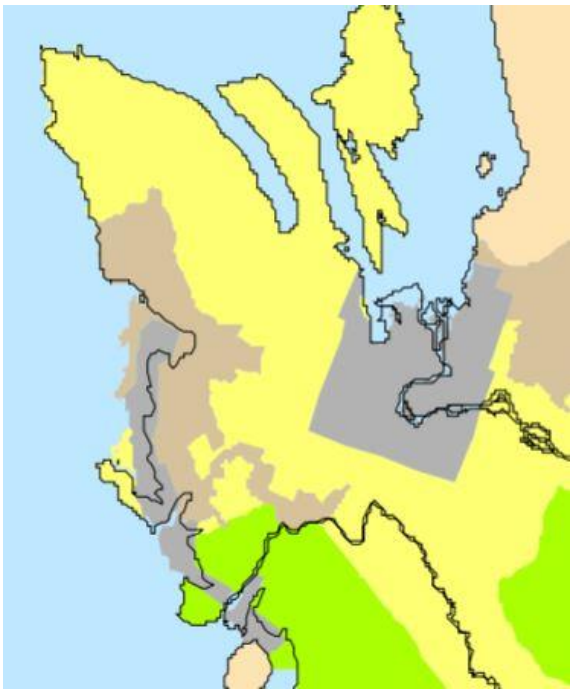

Figure 1. Forest Plan ROD Map (2016)

An additional objective of the Scenic Viewshed LUD states that the Forest Service should "[p]erform viewshed analysis in conjunction with project development to provide direction for retaining or creating a scenically attractive landscape over time, and for rehabilitation of areas overly modified in the past." *Id*. *See also id.* at 3-109 (TIM4(b), stating "Scenery objectives will be emphasized in the analysis, in the development of environmental documents, and in the design and implementation of silvicultural activities.") Any subsequently prepared NEPA document should include a robust analysis of impacts to scenic values, as the Plan mandates, particularly because the public generally views clearcuts as unsightly eyesores incompatible with viewing a healthy forest.

The project also appears to include temporary road construction and road use through the Old-Growth Habitat LUD. Specifically, temporary roads to Unit Pool 16 and 19 would appear to require construction or reconstruction within Old-Growth Habitat LUD. Unit Pool 15 appears nearly completely surrounded by Old-Growth Habitat LUD, and Pool Units 14, 16, 18, 19, and 21 appear to be directly adjacent to that LUD. Transportation standards and guidelines for this LUD state:

- "New road construction is generally inconsistent with Old-growth Habitat LUD objectives, but new roads may be constructed if no feasible alternative is available." *Id*. at 3-62 (TRAN(A)).

- "Road maintenance and reconstruction *may* be permitted if consistent with road management objectives." *Id*. at 3-63 (TRAN(B)(3)).

We urge the Forest Service to analyze and disclose how the Thomas Bay project's proposed construction or reconstruction of temporary roads through the Old-Growth Habitat LUD complies with the Forest Plan, including the LUD's transportation standards and guidelines. We recommend that the Forest Service also disclose the project's potential for impacts on other old growth values, given the proximity of the Unit Pools to old growth forest.

A small part of the southern portion of the project area overlaps the Modified Landscape LUD. The Forest Service must also demonstrate how the proposed logging and road construction or reconstruction complies with the standards and guidelines of that LUD.

XI. THE TONGASS NATIONAL FOREST MUST ENGAGE IN ROBUST CONSULTATION WITH TRIBES.

The Center for Biological Diversity does not and cannot speak for Southeast Alaska Tribes. We simply note that the land that is now called the Tongass National Forest and the first peoples of Alaska have been connected since time immemorial, and that the ocean, rivers and tributary streams, forests, and mountains of the Tongass all support a unique web of life that many generations of Alaska Native people have stewarded and thrived upon. As such, and as required by law, it is critical that the Tongass National Forest consult with, and listen to, Tribal governments and communities in the development and analysis of this proposal, and any other proposal affecting the Forest.

President Biden underscored the importance of the Forest Service's consultation duties in his first week in office, issuing a "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships," which states in part:

> American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy. The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and climate change — all of which disproportionately harm Native Americans. History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.
>
> To this end, Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), charges all executive departments and agencies with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications. Tribal consultation under this order strengthens the Nation-to-Nation relationship between the United States and Tribal Nations. The Presidential Memorandum of November 5, 2009 (Tribal Consultation), requires each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175. This memorandum reaffirms the policy announced in that memorandum.

Pres. Joseph R. Biden, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), attached as Ex. 22. The announcement of the new Southeast

Alaska Sustainability Strategy also reaffirmed the critical importance of consultation: "In implementing this strategy, USDA will prioritize respecting Tribal sovereignty and self-governance, renewing our commitment to Federal Trust responsibilities, and engaging in regular, meaningful, and robust consultation." USDA Press Release (July 15, 2021) (Ex. 2) at 3.

In addressing its consultation duties, the Forest Service should be aware that the Alaska delegation has introduced legislation in 2020 and 2021 that identifies lands within the Thomas Bay project area for selection for the Alaska Native community of Petersburg. The lands identified for selection encompass all or parts of 8 of the Thomas Bay project's 12 Unit Pools. *Compare* Figure 2, below, *with* Figure 3, below, excerpt of Map, Unrecognized Southeast Alaska Native Communities Recognition and Compensation Act, Urban Corporation for Petersburg, Petersburg Selections, Map 2 of 3, Preliminary Map, Version 2.0 (Feb. 19, 2021), attached as Ex. 23, and available at https://donyoung.house.gov/uploadedfiles/petersburg_maps_-_useancrca.pdf (last viewed Sep. 16, 2021). *See also* Press Release, Congressman Don Young Introduces Legislation to Rectify 50-Year Injustice Keeping Land from Southeast Alaska Native Communities (May 13, 2021) (providing link to map), available at https://donyoung.house.gov/news/documentsingle.aspx?DocumentID=401995 (last viewed Sep. 16, 2021).

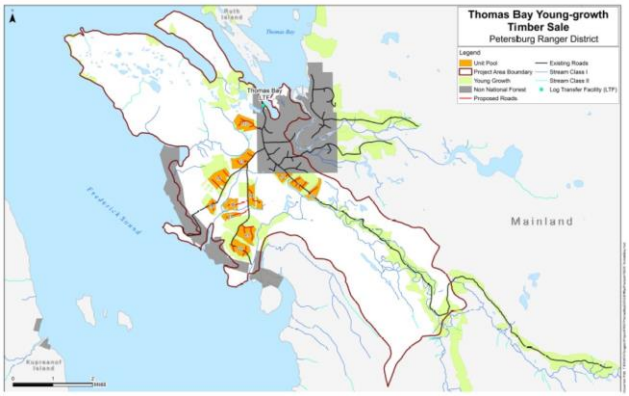

Figure 2.
Thomas Bay Project Area Scoping Map

Figure 3
Map of Lands in Thomas Bay Area to Be Identified for Selection in Rep. Young's 2021 Landless Selection Bill

CONCLUSION

The Forest Service must disclose the environmental and socio-economic impacts of the Thomas Bay project's clearcutting, road construction, reconstruction and maintenance in at least an environmental assessment.

We urge the Forest Service to consider revising the project so that it will enhance forest restoration, recreation and resilience, as USDA Secretary Vilsack has directed.

Thank you for your attention to this matter.

Sincerely,

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TABLE OF EXHIBITS

Exhibit 17. Letter of S. Kreel, State of Alaska, to E. Stewart, Tongass NF (Oct. 14, 2020)

Exhibit 18. Center for Biological Diversity et al., Petition To List The Alexander Archipelago Wolf (July 15, 2020)

Exhibit 19. Congressional White Paper on a National Policy for the Environment, U.S. Gov't Printing Office (Oct. 1968)

Exhibit 20. S. Rep. No. 91-296, 91st Cong., 1st Sess. (July 9, 1969)

Exhibit 21. CEQ, *Statements On Proposed Federal Actions Affecting The Environment Guidelines*, 36 Fed. Reg. 7,724 (April 23, 1971)

Exhibit 22. Pres. Joseph R. Biden, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021)

Exhibit 23. Map, Unrecognized Southeast Alaska Native Communities Recognition and Compensation Act, Urban Corporation for Petersburg, Petersburg Selections, Map 2 of 3, Preliminary Map, Version 2.0 (Feb. 19, 2021)