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November 4, 2022

Via Electronic Submission

Mary Yonce
District Ranger
North River Ranger District
George Washington National Forest
401 Oakwood Drive
Harrisonburg, VA 22801

Re: Comments on Archer Knob Project Draft Environmental Assessment

Dear Ms. Yonce,

Thank you for the opportunity to comment on the draft Environmental Assessment ("Draft EA") for the Archer Knob Project ("the Project"). We submit these comments on behalf of the Southern Environmental Law Center, the Virginia Wilderness Committee, and Wild Virginia.

We appreciate the hard work that the Forest Service put into the preparation of this analysis. We also recognize that the Draft EA is just that—a draft—and that the Forest Service may collect additional information and perform further analyses. That said, we are concerned that the Draft EA fails to adequately analyze the environmental impacts of the Project in contravention of the National Environmental Policy Act ("NEPA") and that parts of the proposed action violate the National Forest Management Act ("NFMA"). We also believe that, without substantive changes to the proposed action, the Project may have significant effects on the human environment, triggering the need to prepare an environmental impact statement ("EIS").

To avoid the need to prepare an EIS, we recommend that the Forest Service make the following changes to the action alternative:

- Drop harvest units in Potential Wilderness Areas and Virginia Mountain Treasures;
- Bring the Forest Service's prescription targets for the Project's Mosaics of Habitat prescription area in line with the Forest Plan's desired conditions for that area;
- Drop units accessed by Forest Service Roads 383B and 383E due to their problematic crossings of the Little Calfpasture River and Daniel Run;
- Drop units with high erosion risk;
- Drop units in the Cabin Creek/Mill Creek watershed; and
- Impose time-of-year restrictions for timber harvest to protect endangered and threatened bat species.

I. Factual Background

a. The 2014 Forest Plan

In 2014, the U.S. Forest Service completed its Revised Land and Resource Management Plan for the George Washington National Forest ("the Forest Plan"). The goal of the Forest Plan was to provide "for the ecological, social and economic sustainability of the natural resources on lands administered by the George Washington National Forest."[1] To that end, the Plan developed desired conditions for the Forest as a whole, as well as specific desired conditions for the twenty-nine different management prescription areas within the Forest.

Conservation groups, including some of the organizations commenting here, were active participants in the development of the Forest Plan. Many of the suggestions proffered by these groups were eventually accepted by the Forest Service and incorporated into the final Forest Plan. Some of these organizations also joined a diverse group of George Washington National Forest stakeholders to jointly recommended certain areas on the Forest for congressional and administrative designations, including recommending that any Potential Wilderness Areas allocated to the Mosaics of Habitat management prescription, or to other management areas which allow road construction, limit new roads to temporary ones where location and closure will be determined at the project level. The group discussed Archer Knob in particular and recommended that a 4,923-acre portion of Archer Knob west of the ridge be allocated to Remote Backcountry.[2]

After the Plan was promulgated, conservation groups continued to work with the Forest Service to refine and clarify the Forest Plan's requirements. For example, several groups filed an administrative appeal of the Forest Service's 2014 Record of Decision seeking further clarification on several specific issues, including management of Potential Wilderness Areas and Virginia Mountain Treasures. That appeal was withdrawn after Forest Supervisor Thomas Speaks Jr. issued a written clarification of the newly promulgated Forest Plan.[3]

In that clarification, the Forest Service explained that all projects within the National Forest "will be determined by site-specific project analyses and decisions and will require another phase of environmental analysis and decision-making."[4] Regarding the specific concerns raised by the administrative appellants, the Forest Service declared the following:

- **Potential Wilderness Areas ("PWAs"):** "Before a decision is made to conduct activities in a PWA, site-specific analysis must be conducted."[5] If possible impacts to a PWA are identified, the agency's site-specific NEPA analysis must include "consideration of (1) the effects on the PWA's characteristics and on the PWA's status for inventory and evaluation

[1] Forest Plan at 1-1.
[2] *See* Letter from 14 Organizations to Maureen Hyzer, U.S. Forest Service (Oct. 17, 2011).
[3] Letter from George Washington National Forest Supervisor Thomas Speaks Jr. (July 29, 2015) [hereinafter Clarification Letter].
[4] *Id.* at 1.
[5] *Id.*

in the future, . . . and (2) alternatives . . . that could avoid or mitigate adverse effects on these characteristics."[6]

- **Virginia Mountain Treasures ("VMTs"):** "As concerns about the characteristics of any such area are identified in project-level scoping by the public, Forest Service staff, or others, these areas' [distinctive] characteristics will be considered in the project-level planning and analysis."[7]

b. The Archer Knob Project

The Forest Service held a virtual information session to discuss the Project on November 17, 2021 and issued a scoping notice for the Project on December 15, 2021. On October 5, 2022, the North River Ranger District issued the Draft EA. The Project area comprises 41,900 acres of land in the Calfpasture and Little Calfpasture watersheds. Of these 41,900 acres, 25,860 acres are owned by the Forest Service. The remaining ~16,000 acres are private lands containing a mixture of forest, developments, and "grassland/shrub habitats along with a scattering of ponds."[8]

According to the Forest Service, the purpose and need for the Project is "addressing the difference between the existing condition and the desired condition and the goals and objectives of the Forest Plan."[9] In large part, the agency is focused on addressing the difference between existing and desired conditions in the Project area for management prescription area 13—Mosaics of Habitat ("MA 13"). Most of the land owned by the Forest Service within the Project area falls within this prescription.[10]

The Forest Plan provides that the desired conditions for this management prescription include:

- **Oak and Pine Forests and Woodlands:** 9–11% in a 0–10 age class, and 60–80% of mid-to-late successional forests with open canopy conditions.[11]

- **Cove forests:** 4–6% in a 0–10 age class, as well as 6–12% of mid-to-late successional stands with open canopy conditions.[12]

To "move the project area closer to the[se] desired conditions," the Forest Service proposes "establish[ing] more open habitat, early-successional, younger forests, [and] open woodlands" and improving "stand health and vigor via thinning."[13] Specifically, the Forest Service proposes:

- Commercial regeneration cuts on 2,142 acres to create early-successional habitat;

[6] *Id.*
[7] *Id.* at 2.
[8] Draft EA at 41, 69.
[9] Draft EA at 3.
[10] Draft EA at 3.
[11] Forest Plan at 4-132.
[12] Forest Plan at 4-132.
[13] Draft EA at 7.

- Commercial thinning on 2,610 acres[14] to promote open and late-successional conditions;
- Clearing 44 acres to create additional wildlife openings;
- Variable thinning on 273 acres to create a mosaic of habitat conditions adjacent to existing wildlife openings;
- Forest stand improvement (non-commercial mechanical and chemical treatments) on 766 acres to encourage the establishment of oak, hickory, and other species;
- Prescribed burns on 2,403 acres, including one 2,261-acre burn block and five smaller burn areas totaling 142 acres;
- Rehabilitation and maintenance activities on 79 acres of existing permanent wildlife openings; and
- Habitat enhancement to 28 acres adjacent to the Augusta Springs trail system.[15]

The Forest Service also proposes 10.1 miles of temporary road construction, 1.3 miles of road reconstruction, 39.3 miles of road maintenance, 64.73 miles of skid trails, 3 miles of dozer lines, as well as 163 log landings covering 41 acres in total.[16]

II. The Draft EA's NEPA analysis is inadequate

We acknowledge the work that the Forest Service put into its environmental analysis of the Project. On-the-ground examinations like the old growth surveys conducted by the agency are crucial building blocks for any project-level NEPA analysis. But as detailed below, other portions of the Forest Service's project-level analysis for Archer Knob fall well short of the bar set by NEPA and NFMA.

a. The Draft EA fails to consider the full range of reasonable alternatives

Federal regulations require the Forest Service to "[e]valuate reasonable alternatives to the proposed action," including the "no action alternative."[17] What "constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case," but must "cover[]

[14] At times, the Forest Service says that it will conduct commercial thinning on 2,883 acres, not 2,610 acres. *See* Draft EA at 7. The Forest Service must clarify this discrepancy.
[15] Draft EA at 7. Elsewhere in the Draft EA, the Forest Service states that "[a] total of 6,457 acres are proposed for mechanical treatment" in addition to the "766 acres . . . proposed for manual forest stand improvement activities and about 2,403 acres for prescribed fire." Draft EA at 57. However, all of the mechanical treatments listed above only add up to around 5,200 acres—well short of the 6,457-acre estimate. The Forest Service must explain this discrepancy.
[16] Draft EA at 7, 52.
[17] 40 C.F.R. § 1502.14(a), (c) (2022).

the full spectrum of alternatives."[18] Failure to consider a "viable but unexamined alternative" will render a NEPA analysis inadequate.[19]

Multiple viable but unexamined alternatives exist here. The Draft EA examines four alternatives in total: (1) the action alternative (the proposed action); (2) an alternative with no temporary road development; (3) an alternative with no prescribed fire; and (4) the no-action alternative.[20] While these four alternatives are a good start, they reflect an "all or nothing" approach. In essence, they offer choices between two extremes: extensive management or no management; ten miles of temporary roads or no temporary roads; thousands of acres of prescribed fire or no fire. Such extreme options, by their very nature, do not cover the "full spectrum of alternatives."

Instead of adopting an "all or nothing" approach for its alternatives analysis, the Forest Service must develop some reasonable, middle-ground options. As discussed in greater detail below, we recommend studying—and adopting—the following reasonable alternatives in place of the action alternative:

- An alternative that avoids timber harvest and road construction within PWAs and VMTs;
- An alternative that drops units accessed by Forest Service Roads 383B and 383E;
- An alternative that drops units predominantly located on slopes >35% or on soils with severe erosion risk; and
- An alternative that eschews timber harvesting and road construction in sensitive or impaired sub-watersheds, including the Upper and Lower Little Calfpasture watersheds, as well as Cabin Creek/Mill Creek.

b. <u>The Draft EA arbitrarily eliminates all alternatives from detailed study apart from the action alternative</u>

Under NEPA, "once an agency establishes the objective of the proposed action—which it has considerable discretion to define—the agency need not provide a detailed study of alternatives that do not accomplish that purpose or objective, as those alternatives are not 'reasonable.'"[21] However, agencies are not permitted to (1) define what level of performance will satisfy that purpose and need "so narrowly as to preclude a reasonable consideration of alternatives";[22] or (2)

[18] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981) [hereinafter "Forty Questions"]. According to the Council of Environmental Quality, this guidance is still current except to the extent it conflicts with regulations promulgated on September 14, 2020.
[19] *Dubois v U.S. Dep't of Agric.*, 102 F.3d 1273, 1289 (1st Cir. 1996) (quoting *Res. Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994)).
[20] Draft EA at 7–15.
[21] *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1244 (10th Cir. 2011) (citations omitted).
[22] *Cf. Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002).

omit the no-action alternative from detailed study simply because it does not accomplish the project purpose and need.[23]

The Forest Service commits both oversights in the Draft EA. To start, the agency defines the Project's purpose and need as "addressing the difference between the existing condition [in the Project area] and the desired condition and the goals and objectives of the Forest Plan."[24] Though the Forest Service considers two alternatives that would make some headway toward this goal—the "no temporary roads" and "no prescribed fire" alternatives—the agency drops them from detailed study because they "would have the effect of limiting management and habitat enhancement within the project area" or would deprive the Forest Service of an "effective tool."[25] In other words, because these alternatives do not 100% accomplish the agency's goal—creating the desired conditions within the Project area using preferred tools—they are arbitrarily rejected.[26]

The Forest Service also arbitrarily eliminates the no-action alternative from detailed study.[27] According to the agency, the no-action alternative "would not meet the purpose and need of the project" because it "is essentially the 'status quo'" and would have "no effect on current trends" in the Project area.[28] But an agency cannot decline to fully analyze the no-action alternative because it has no action. That is exactly what the no-action alternative is designed to show—and exactly what the Forest Service must analyze in detail.[29]

A more detailed analysis of the no-action alternative here would help the agency understand the comparative benefits of maintaining the status quo. To list just a few examples, choosing the no-action alternative would: (1) not implicate the Archer Knob PWA's eligibility for a different potential future designation; (2) preserve the viewshed of the Great North Mountain Trail; (3) maintain the wild and remote character of the Archer Knob and Elliot Knob VMTs; (4) avoid negative impacts to listed species like the Indiana bat and Northern long-eared bat; and (5) avoid negative impacts to water quality and aquatic species. If the Forest Service had analyzed these and other benefits of the no-action alternative, it would have provided a helpful—and legally required—contrast to the negative effects of the action alternative.

Due to the agency's oversights, however, the Forest Service ends up analyzing only one alternative in detail: the action alternative.[30] But "[t]his one-sided approach conflicts with the

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[23] *Wyoming*, 661 F.3d at 1244 ("Within the detailed alternatives analysis, agencies are also required to '[i]nclude the alternative of no action.'" (citation omitted)); 40 C.F.R. § 1502.14(c) (requiring an agency to "[i]nclude the no action alternative" it its detailed analysis).

[24] Draft EA at 3.

[25] Draft EA at 15.

[26] *See Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975) (holding that where "the objective of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible agent is required to study, develop and describe each alternative for appropriate consideration").

[27] Draft EA at 14 (explicitly "dropp[ing]" the no-action alternative "from detailed analysis").

[28] Draft EA at 14.

[29] *See supra* note 23.

[30] The Forest Service does include a few scattered references to the no-action alternative in other portions of the Draft EA. *See* Draft EA at 35–36, 38, 44–45. However, these singular and sporadic references cannot be characterized as a "detailed" analysis.

agency's obligation under NEPA to provide legitimate consideration to [all reasonable] alternatives," including the no-action alternative.[31]

c. The action alternative is inconsistent with the Forest Plan and fails to accurately account for early-successional habitat within and without the Project area

According to the Draft EA, commercial logging is needed to bring portions of the Project area in line with the desired conditions of the Forest Plan. However, the Forest Service never acknowledges that the Project far overshoots the Forest Plan's early-successional habitat targets. Nor does the agency analyze whether early-successional habitat exists on nearby private lands.

As noted above, the Forest Plan provides that between 9–11% of oak and pine forests and 4–6% of cove forests in MA 13 prescription areas should fall within a 0–10 age class.[32] The Draft EA says differently, explaining that, "[a]ccording to the [Forest Plan], between *9 and 12 %* of [oak and pine] forests in MA 13 should be [early-successional habitat], defined as stands *0 to 15 years old*."[33] Apparently the Forest Service is referring to the Forest-wide Desired Conditions for Ecological Systems Diversity, which relate similar numbers.[34] However, those desired conditions are *forest-wide* conditions—not the specific desired conditions for *MA 13*. The Forest Service errs by neglecting to observe those specific MA 13 conditions.

Regardless, no matter which numbers are applied, the Forest Service's proposed management far overshoots those targets within the Project area. According to the Draft EA, under the action alternative, 13% of MA 13 oak forests and 18% of MA 13 pine forests will be early-successional habitat in 10 years; in 15 years, those numbers will rise to 14% and 19% of oak and pine forests, respectively.[35] Similarly, under the action alternative, 7% of MA 13 cove forests will be early-successional habitat in 10 years; in 15 years, it will be 8%.[36] In other words, within 10 to 15 years the Project area will contain hundreds of extra acres of early-successional habitat not called for in the Forest Plan. The Forest Service's own regulations require it to "describe how" this situation "is consistent with" the Forest Plan.[37] If it does not, or cannot, then the Project necessarily violates NFMA and its implementing regulations.[38]

Exceedances aside, the Forest Service's early-successional targets are also flawed because they never factor in the presence of early-successional habitat on nearby private lands. As explained in greater detail below, NEPA requires agencies to assess the impacts of the action

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[31] *High Country Conservation Advocs. v. U.S. Forest Serv.*, 951 F.3d 1217, 1224 (10th Cir. 2020) (internal quotation marks omitted); *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1331 (D. Idaho 2019) (rejecting an agency's NEPA analysis because it "only considered [the agency's] preferred outcome").
[32] Forest Plan at 4-132.
[33] Draft EA at 17 (emphases added).
[34] Forest Plan at 2-16.
[35] Draft EA at 20.
[36] Draft EA at 20.
[37] 36 C.F.R. § 219.15(d); *see also Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1377 (9th Cir. 1998) (holding that the Forest Service must provide a reasoned explanation describing how "a site-specific project would be consistent with the land resource management plan of the entire forest").
[38] 16 U.S.C. § 1604(i) (requiring all Forest Service actions to be consistent with the governing land management plan); 36 C.F.R. § 219.15(b) (same).

alternative "when added to the effects of other past, present, and reasonably foreseeable actions."[39] Here, the Forest Service has already noted the existence of early-successional habitat on adjacent private lands within the Project area.[40] However, the agency never quantitatively analyzes the extent of such habitat, or considers how its plan to create even more early-successional habitat on Forest Service land adds to the cumulative totals of early-successional habitat in Project area.

If it had conducted this analysis and discovered "high amounts of quality early successional forest on surrounding private land," then the agency might have taken a different approach.[41] For example, the Forest Service may have embraced the same approach it does in the Jefferson National Forest and "provide[d] [for] such [early-successional] habitat on national forest land at the low end of the objective range" for MA 13 areas.[42] But until the Forest Service does the proper analysis, we will be left guessing at what cumulative effect the Project will have in the larger landscape and, consequently, whether the Forest Service's plan makes sense in that landscape.

d. <u>The Draft EA impermissibly defers a significant portion of its effects analysis</u>

NEPA requires federal agencies to "carefully weigh environmental considerations and consider potential alternatives to the proposed action *before* the government launches any major federal action."[43] Forest Service regulations implementing NEPA require the same: "*before* making a decision on the proposal," the agency must "[c]onsider[] the alternatives" and "[c]omplet[e] [its] environmental document review."[44]

Instead of heeding these directives, the Draft EA defers a good portion of its site-specific environmental analysis to a later date. To list a few examples:

- **Roads 383B and 383E:** The Forest Service has identified portions of system roads 383B and 383E as "specific areas of concern."[45] Road 383B crosses the Little Calfpasture River floodplain where the river splits into multiple braided channels.[46] This crossing is complicated because it is "currently configured as multiple fords with steep approaches" which "is not adequate for log haul."[47] Similarly, Road 383E makes multiple crossings of Daniel Run and requires significant reconstruction activities in the stream's riparian corridor.[48] The agency could deal with these issues in several ways. For example, the agency could: (1) use the crossings "as is," risking serious impacts to the streambed and banks; (2) install temporary bridges, which may require additional clearing and compaction in a sensitive riparian corridor; or (3) relocate the road itself, which might

[39] 40 C.F.R. § 1508.1(g)(3).
[40] Draft EA at 41 (noting that "private lands in and around the project area provide additional grassland/shrub habitats along with a scattering of ponds").
[41] U.S. Forest Service, Jefferson National Forest Land and Resource Management Plan at 2-11 (2005).
[42] *Id.*
[43] *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (emphasis added).
[44] 36 C.F.R. § 220.4(c).
[45] Draft EA at 52.
[46] Draft EA at 52.
[47] Draft Soil and Water Resources Report at 13.
[48] Draft EA at 52.

trigger additional sedimentation. But instead of spelling out its plan and the impacts that may result—as required by NEPA—the agency notes that these crossings will be dealt with later following "[c]onsultation with engineering staff"[49] and "additional field review."[50]

- **Road Maintenance:** The Forest Service proposes conducting road maintenance on 39.3 miles of existing system roads to "facilitate project activity implementation."[51] However, the agency does not explain which roads it plans to maintain,[52] what mitigation measures it will employ to reduce sedimentation impacts, or where it will conduct water-quality monitoring.[53] Without these details, the agency's extensive road maintenance activities cannot be meaningfully analyzed in the Draft EA.

- **Water-quality impacts:** The Project proposes logging within two Surface Water Zone 2 areas: Augusta Springs and Goshen Spring.[54] However, the Forest Service declines to analyze the potential water-quality impacts for these features. Instead, the agency promises to "work with both water users to ensure that spring source areas and all water conveyance and storage infrastructure is identified and protected" at some point in the future.[55] The Forest Service also notes that "[w]here project activities have the potential to impact water infrastructure adjustments to the proposed activities would be made."[56] It does not specify what those potential impacts might be or what adjustments might be made. To the extent that the Forest Service is embracing an "adaptive management" approach, it is contravening the guidelines in its own Handbook.[57] The agency is also missing the point of preparing an EA, which is to analyze and disclose to the public those potential impacts *now*, and suggest adjustments to the proposed activities *now*, so that unnecessary impacts can be avoided during project implementation.

- **Watershed-improvement measures:** The Forest Service proposes several watershed-improvement measures, including (1) installing "up to 10 aquatic organism passages" in "some streams" that "may be identified as the project develops" and (2) performing soil and water restoration treatments "as more information becomes available."[58] While we

[49] Draft Soil and Water Resources Report at 13.
[50] Draft EA at 52.
[51] Draft EA at 52.
[52] Draft EA at 11 (stating that "the following [Forest Service Roads] would receive some or all of these maintenance activities" and then failing to list said roads).
[53] Draft EA at 65 (noting that monitoring "would be implemented where deemed necessary across the project area").
[54] Draft EA at 59.
[55] Draft EA at 59–60.
[56] Draft EA at 60.
[57] *See* U.S. Forest Serv. Handbook § 1909.15 at 14-1 ("An adaptive management proposal or alternative must clearly *identify the adjustment(s) that may be made* when monitoring during project implementation indicates that the action is not having its intended effect, or is causing unintended and undesirable effects. The EIS [or EA] *must disclose not only the effects of the proposed action or alternative but also the effect of the adjustment*. Such proposal or alternative *must also describe the monitoring that would take place* to inform the responsible official during implementation whether the action is having its intended effect." (emphases added)).
[58] Draft EA at 11.

whole-heartedly approve of the agency's intent to develop such improvements—which are key to increasing watershed connectivity and reducing sedimentation—the lack of details precludes cogent analysis and a meaningful opportunity to comment. It also precludes the agency from relying on these measures to mitigate the Project's water-quality impacts.[59]

- **Mitigation measures for listed species**: The Forest Service created a Draft Biological Assessment examining the impacts of the Project on federally listed species, among others.[60] However, the U.S. Fish and Wildlife Service ("FWS") has yet to concur in the Forest Service's findings.[61] And as the Forest Service acknowledges, the FWS may propose "additional mitigations or design features" to protect listed species—or reject the Forest Service's findings entirely.[62] Though the Forest Service assures us that any input from the FWS "would inform the proposal and decision notice," this deferral frustrates the purposes of NEPA. Under the statute, members of the public are supposed to be able to comment on agencies' proposals *before* they are finalized. Releasing the Draft EA before the Biological Assessment is completed puts the cart before the horse and precludes meaningful comment.

- **Take of Indiana bat:** The Forest Service correctly observes that the Incidental Take Statement for the Forest Plan authorized certain levels of take—measured by impacts to potential bat habitat—for the Indiana bat on an annual basis.[63] However, the agency never explains how much potential habitat is in the proposed Project area, or how much bat habitat will, in fact, be taken. Instead of analyzing these impacts up front, the agency promises to report acres of take on an annual basis after the fact.[64] By deferring this analysis to a later date, the Forest Service makes it impossible to determine whether forest-wide take limits for the Indiana bat will be violated during the life of the Project.[65]

- **Prescribed fire:** The Forest Service proposes prescribed burning on 2,403 acres in the Project area.[66] The agency notes that "[s]pecific burn treatment parameters are based on the objectives in individual stands and would include seasonality, fire return intervals and intensity."[67] However, the agency never discusses the objectives in these individual stands apart from noting that its burn plan contemplates a "return interval of 4 to 12 years" and will "continue for the foreseeable future."[68]

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[59] *Wyo. Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1251 (D. Wyo. 2005) (concluding that "vague and speculative" mitigation measures could not support an agency's NEPA analysis).
[60] Draft EA at 30.
[61] Draft EA at 30.
[62] Draft EA at 32.
[63] Draft EA at 35.
[64] Draft EA at 33.
[65] Forest Plan at J–2.
[66] Draft EA at 9.
[67] Draft EA at 9.
[68] Draft EA at 9, 20–21.

Under NEPA, important issues like those described above cannot be analyzed at a later date. Since these are important issues, we ask that the agency address these and other deficiencies identified in these comments, and then make available a revised draft NEPA document for public comment.

e. The Draft EA risks becoming stale by the time some of its planned activities are completed

NEPA analyses do not have an explicit expiration date. But at some point, all NEPA analyses become "too stale to carry the weight assigned to [them]."[69] For that reason, the Council on Environmental Quality ("CEQ") has explained that, "[a]s a rule of thumb," NEPA studies "that are more than 5 years old should be carefully reexamined to determine if the criteria in [40 C.F.R. §] 1502.9 compel preparation of an [EA or] EIS supplement."[70]

According to the Forest Service, Project activities will likely extend far beyond that five-year rule of thumb. Precisely how much farther is up in the air. At first, the Draft EA estimates "that the mechanical and prescribed fire restoration would conclude in approximately 12 to 15 years."[71] In the next sentence, however, the agency notes that this Project "is viewed as a long-term management project that would require management action *for decades to come*."[72] For example, the Forest Service notes that "without continued restoration and management work in this area, improvements in ecological structure" from prescribed fire management "would likely be lost within *20 to 30 years* after the initial treatments are completed."[73]

To the extent the Forest Service is suggesting that its 2022 EA can serve as the NEPA document for management activities through 2052 and beyond, we believe it is mistaken. In several decades' time, it is almost certain that the 2022 EA's findings will be too stale to rely on.[74] NEPA supplementation, at the very least, will be required. But even if a three-plus-decade timeframe was not what the agency has in mind, its more modest "12 to 15 year" estimate would still triple CEQ's 5-year rule of thumb. Courts of Appeal have rejected NEPA analyses as arbitrary and capricious for far less.[75]

We recommend that the agency adjust its proposal to avoid such concerns. We do not mean to suggest that the agency should rush to complete its proposed activities in a shorter timeframe. As the Forest Service notes, a multi-year schedule for proposed activities is "needed particularly in the Lower Little and Upper Little Calfpasture watersheds," where modeled sediment increases are predicted to be significant.[76] Instead, we believe that it would be prudent for the agency to narrow its proposal by eliminating some of the more problematic actions described below. This would not only allow the agency to avoid preparation of an EIS but would also help the agency

[69] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011).
[70] Forty Questions at 24.
[71] Draft EA at 20.
[72] Draft EA at 20 (emphasis added).
[73] Draft EA at 21 (emphasis added).
[74] *N. Plains*, 668 F.3d at 1086.
[75] *See id.* (finding that ten-year-old data was too stale to sustain a NEPA analysis); *Lands Council*, 395 F.3d at 1031 (finding that six-year-old data, without updated habitat surveys, was too stale).
[76] Draft EA at 65.

complete its target prescriptions in a shorter timeframe—thereby avoiding any staleness concerns that might arise.

No matter what timeframe the agency decides on, the Forest Service must include its proposed "multi-year schedule" in a revised NEPA analysis so that the public can meaningfully weigh in on its proposal.

f. The Draft EA's cumulative-effects analyses impermissibly weigh the effects of the Project against other environmental stressors

NEPA regulations require agencies to consider the "cumulative effects" of their actions.[77] Cumulative effects are *currently* defined as "effects on the environment that result from the incremental effects of the action when *added* to the effects of other past, present, and reasonably foreseeable actions."[78] The Forest Service, however, appears to be using a definition of cumulative impact sourced from the 1978 NEPA regulations.[79] While there is no material difference between these two cumulative-effects standards, it begs the broader question: is the Forest Service relying on the 1978 or the 2022 NEPA regulations for its overall analysis?

The agency must clarify its position in its revised NEPA analysis. The differences between other provisions of these two sets of regulations *are* material, and bear on some of the issues discussed in these comments. The 2020 regulations, moreover, are unlawful and currently the subject of pending litigation, and they will be defunct (either because courts have found them unlawful or because CEQ has withdrawn them through rulemaking) while this Project is still ongoing.

At any rate, the Forest Service did attempt to account for the cumulative effects of the Project. However, its various cumulative-effects analyses reflect a misunderstanding of what such analyses require—in 1978 or in 2022. The purpose of a cumulative-effects analysis, as its definition suggests, is to assess the impacts of the proposed action "when *added* to the effects of other past, present, and reasonably foreseeable actions." But instead of adding impacts together here, the Forest Service *weighs* the effects of the proposed action against all other "past, present, and reasonably foreseeable actions."

To list a few examples:

- "Long-term effects of [White-Nose Syndrome] are unknown currently, but it is likely that Indiana bats, northern long-eared bats, and R8 sensitive bat species will be further affected by [White-Nose Syndrome] and those cumulative effects *may exceed any action that the project or Forest Plan implementation would cause*."[80]

- "Potential cumulative effects to sword-leaf phlox also include competition from non-native invasive species and altered natural disturbance regimes. . . . [However,] contribution of

[77] 40 C.F.R. §§ 1501.3, 1508.1(g)(3) (2022).
[78] *Id.* § 1508.1(g)(3) (emphasis added).
[79] *See* Draft EA at 15 (citing the old definition of cumulative impact found at "40 CFR 1508.7")
[80] Draft EA at 38 (emphasis added).

the proposed actions to the cumulative negative effects of [non-native invasive plants] *is expected to be small*."[81]

- "With project specific resource protection measures in place, and as identified in the Soil and Water Resources Report, the modeled sediment increases within [certain watersheds] *would be unmeasurable and insignificant in comparison to the sediment load of Mill Creek and Calfpasture River* and would have no significant effect on habitat for fish or other aquatic life downstream in those streams."[82]

- "[T]he minor sediment increases [attributable to the Project] are *unmeasurable and insignificant in comparison to the sediment load of streams in the analysis area* and would have no significant effect on habitat for fish or other aquatic life."[83]

- "It was determined that the total combined proposed harvest and prescribed fire acres *represents less than one percent* of the 1.1 million acres of forested land on the [George Washington and Jefferson National Forests] and that the *scope and degree of change would be minor*."[84]

- "Considering cumulative effects, the proposed action would not contribute to an increase of NNIP *at the landscape level*."[85]

In effect, the Forest Service repeatedly finds that the impacts of the Project are a drop in the bucket when compared to the effects of larger environmental stressors. But weighing the effects of the Project against landscape-level stressors like this flips the cumulative-effects analysis on its head. The point of a cumulative-effects analysis is not to determine "the proportional share of *responsibility* the federal agency bears for the [harm to the resource], *but what* [*harm*] *might result* from the agency's proposed actions in the present and future human and natural contexts."[86] "Noting that a particular environmental resource is degraded" by larger stressors "is not an excuse or justification for further degradation."[87]

g. <u>The Draft EA fails to consider the compounding effects of climate or cumulative impacts on carbon storage</u>

As explained above, a proper cumulative-effects analysis requires an agency to consider "the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions."[88] This includes the reasonably foreseeable effects of climate

[81] Draft EA at 38–39 (emphasis added).
[82] Draft EA at 55 (emphasis added).
[83] Draft EA at 56 (emphasis added).
[84] Draft EA at 73 (emphases added).
[85] Draft EA at 23.
[86] *Pac. Coast Fed'n of Fishermen's Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005) (emphasis added).
[87] *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers*, 417 F. Supp. 3d 1354, 1364 (W.D. Wash. 2019).
[88] 40 C.F.R. § 1508.1(g)(3).

change.[89] It also includes the effects "from individually minor but collectively significant actions taking place over a period of time"[90]—like the impacts of the Forest Service's timber program on carbon storage.

To its credit, the Forest Service includes a "Climate Change and Carbon Storage" section in its draft analysis. However, this analysis is flawed in two ways: (1) it fails to consider the effects of the Project "when *added* to" the compounding effects of climate change; and (2) it fails to add the effects of the Project on carbon storage to the incremental effects of other timber projects.

To start, a proper cumulative-effects analysis would consider the additive effects of the Project and climate change *on the Project area*. For example, we already know that the Project is "*expected* to create conditions which could increase the spread of [non-native invasive plants]"[91] and increase sediment loads in certain watersheds by as much as 46%.[92] We also know that climate change may exacerbate these effects: "[w]armer temperatures could increase the number and intensity of wildfires" in the South, "as well as outbreaks of damaging forest pests," including non-native invasive species;[93] and "climate change is also expected to increase the frequency and intensity of flooding, and thus sedimentation."[94] Considering all of these impacts together within the Project area—as the agency must—shows that the Project's potentially significant impacts on non-native-invasive spread and sedimentation—among other things—will be made *even worse* by the compounding effects of climate change.

In addition, the Forest Service must *add* the carbon-storage effects of the Project to the "individually minor but collectively significant" carbon-storage effects of the Forest Service's logging program. As noted above, instead of adding these impacts together, the agency weighs them against each other. Specifically, the Forest Service notes that "the total combined proposed harvest and prescribed fire acres *represents less than one percent* of the 1.1 million acres of forested land on the [George Washington and Jefferson National Forests] and that the scope and degree of change [in carbon storage caused *by the Project*] would be minor."[95] At no point does the agency add these effects together—as it must under NEPA.

h. <u>The Draft EA fails to consider impacts to the Archer Knob Potential Wilderness Area</u>

The Archer Knob Project area is notable for containing portions of two Potential Wilderness Areas ("PWAs")—the Archer Knob and Elliot Knob PWAs. While only Congress can designate official wilderness areas, the Forest Service plays a key role in identifying candidate

[89] *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259, 271 (4th Cir. 2022) (holding that "[i]t is clear . . . that climate change typically must form part of the [cumulative-effects] analysis in some way").
[90] *Id.*
[91] Draft EA at 23 (emphasis added).
[92] Draft EA at 64 (emphasis added).
[93] EPA, *Climate Impacts in the Southeast*, https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-southeast_.html; *see also* U.S. Geological Survey, *Assessing Climate-Sensitive Ecosystems in the Southeastern United States* (2016), https://pubs.usgs.gov/of/2016/1073/ofr20161073.pdf.
[94] *Appalachian Voices*, 25 F.4th at 278.
[95] Draft EA at 73 (emphasis added).

tracts for wilderness designation.[96] During the 2014 planning process, the Forest Service identified thirty-seven PWAs, including the Archer Knob and Elliot Knob PWAs. Together, these two PWAs form "a nearly contiguous wilderness unit of over 12,000 acres" containing pockets of potential old-growth forest, exceptional black-bear habitat, rare plants, numerous cold mountain springs, and miles of popular recreation trails like the Great North Mountain Trail.[97]

Because PWAs contain such exceptional resources—and because PWAs' unique wilderness character can be so easily lost—the Forest Service has expressly committed to conducting site-specific analyses of impacts "[b]efore a decision is made to conduct activities in a PWA."[98] And "[i]f possible impacts to a PWA [are] identified, the agency's site-specific NEPA analysis must include consideration of (1) the effects on the PWA's characteristics and on the PWA's status for inventory and evaluation in the future, . . . and (2) alternatives . . . that could avoid or mitigate adverse effects on these characteristics."[99] Even if the Forest Service had not agreed to these measures, NEPA would require such an analysis anyway.[100] In fact, Forest Service NEPA regulations expressly note that projects "that would substantially alter the undeveloped character of . . . a potential wilderness area" "*normally*" require an EIS.[101]

Despite these requirements, the Draft EA contains *no* discussion of the Project's impacts on the Archer Knob PWA, even though it appears that several proposed treatment areas fall within this PWA. Specifically, the Forest Service has proposed treatments that encroach on the Archer Knob PWA in the Fridley Branch Area (commercial logging) and the Wallace Draft Area (prescribed burning, wildlife thinning, wildlife opening expansion, and fire-break creation). These concrete and potentially significant effects should have triggered the agency to consider impacts on the PWA's status as well as alternatives that could avoid said impacts. However, the Draft EA never analyzes either issue. As explained below, these significant and as-yet unanalyzed impacts will likely require the preparation of an EIS.

i. <u>The Draft EA fails to adequately consider impacts to Virginia Mountain Treasures</u>

The Archer Knob Project area is also notable for containing portions of the Archer Knob and Elliot Knob Virginia Mountain Treasures ("VMTs"). The VMT boundaries are somewhat more expansive than the smaller areas that the Forest Service inventoried as PWAs. Despite the

[96] Forest Plan at App'x C-1 (noting that identification of PWAs "has always been an integral part of the [Forest Service] planning process").
[97] Forest Plan at App'x C-13 & C-17.
[98] Clarification Letter at 1.
[99] *Id.*
[100] *See, e.g.*, *Lands Council v. Martin*, 529 F.3d 1219, 1230 (9th Cir. 2008) (discussing NEPA obligations that extend to the attributes of uninventoried roadless areas); *Sierra Club v. Austin*, 82 F. App'x 570, 573 (9th Cir. 2003) (finding error where the Forest Service failed to address the effects of logging in unroaded areas on their characteristics vis-a-vis potential for future wilderness or IRA designation); *Cascadia Wildlands v. Carlton*, 2017 WL 1807607, at *10 (D. Or. Mar. 20, 2017) (finding deficient the EA's analysis of "timber sale's effects to Wilderness, Potential Wilderness, and other undeveloped areas"); *see also Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092 (9th Cir. 2010) (concluding that BLM violated NEPA by declining to study wilderness characteristics because "[w]ilderness values are among the resources which the BLM can manage").
[101] 36 C.F.R. § 220.5(a)(2).

critical importance of these areas and the resources they contain, the Draft EA gives cursory and inadequate treatment to the Project's impacts on both VMTs.

VMTs are "some of the wildest and least-developed tracts remaining in Virginia."[102] Individually and collectively, these tracts are invaluable recreational and cultural resources, important ecological benchmarks, and arks of biodiversity.[103] The Archer Knob and Elliot Knob VMTs are no exception—they contain exceptional habitat, rare plants, and extensive recreation opportunities.[104] NEPA requires the consideration of impacts to these natural resources and characteristics, and as the Clarification Letter made clear the George Washington National Forest intends to consider these impacts in project-level analyses.

The Draft EA gives short shrift to these irreplaceable attributes, however. The Forest Service acknowledges that the action alternative calls for nearly 1,000 acres of commercial logging and 1.6 miles of temporary road construction in the Elliot Knob VMT and nearly 200 acres of commercial logging in the Archer Knob VMT.[105] However, the Draft EA dismisses these impacts as insignificant, almost entirely because the proposed treatments do not penetrate "into undisturbed, interior sections of the VMT[s]" where recreation use is highest along the Great North Mountain Trail.[106]

Boiling an impacts analysis down to proximity to current recreational resources like the Great North Mountain Trail misses the point. The Archer Knob and Elliot Knob VMTs are considered treasures precisely because they are large, contiguous tracts of undeveloped land. Eating away at the edges of these blocks diminishes their biological and cultural value, even if portions of the interior remain undisturbed.

What's more, it is not clear that the Forest Service factored in the visual impacts of logging to users of the Great North Mountain Trail. In its analysis, the agency reports that "[c]onsideration of the visual impacts to the hiking experience on this trail [presumably the Great North Mountain Trail] are included in the Visual and Scenic Resources section of the EA but were found to meet Forest Plan [Scenic Integrity Objectives] standards."[107] However, the Visual and Scenic Resources section of the Draft EA never mentions the Great North Mountain Trail.[108] Instead, the visual analysis focuses entirely on visual impacts to Highway 42, Interstate 81, and State Highways 39, 600, 629, 687, and 692.[109] It stands to reason that if the agency had analyzed visual impacts to the users of the Great North Mountain Trail, it would have found significant impacts—the trail rides a knife-edge ridge with sweeping views of the proposed treatment areas on the slopes of the valleys below.

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[102] Mark Miller, *Virginia's Mountain Treasures: The Unprotected Wildlands of the George Washington National Forest* at 8, https://www.vawilderness.org/uploads/1/7/4/4/17446555/virginia_mountain_treasures_overview.pdf.
[103] *Id.* at 9.
[104] *Id.* at 56–57.
[105] Draft EA at 74–75.
[106] Draft EA at 75.
[107] Draft EA at 74–75.
[108] *See* Draft EA at 69–72.
[109] Draft EA at 70–71.

j. The Draft EA fails to adequately assess Project impacts to soils and water quality

The Forest Service transparently acknowledges that the Project poses a risk of detrimental soil disturbance and sediment loading in the Project area.[110] However, it dismisses those impacts as either short term or insignificant. That conclusion and the analyses underlying it are flawed for at least four reasons.

First, the Draft EA fails to analyze whether the predicted water-quality impacts are consistent with Virginia water-quality standards. The Clean Water Act requires all federal agencies conducting activities "resulting, or which may result, in the discharge or *runoff of pollutants*" to comply with state water-quality standards.[111] Virginia has several water-quality standards that might be applicable to the proposed action, including a narrative standard for turbidity.[112] However, the agency never discusses this narrative standard—or any other water-quality standard, for that matter. This oversight not only violates NEPA but also exposes the Forest Service to potential liability under the Clean Water Act.

Second, the Forest Service neglects to consider the water-quality impacts of its crossings of the Little Calfpasture River and Daniel Run. As noted above, these crossings—which provide access to numerous prescription units—are "specific areas of concern" because they involve complicated crossings of multiple braided channels.[113] Erecting a bridge or crossing large enough to stretch these spans may involve significant water-quality impacts. However, the Forest Service has opted to defer that analysis pending "[c]onsultation with engineering staff" and "additional field review." Until that review is complete, the Project's water-quality analysis is incomplete.

Third, the Forest Service fails to adequately assess the erosion impacts of logging on steep slopes. Analyzing the agency's figures in the Draft EA reveals that approximately 13% of the mechanical treatment units occur on slopes exceeding 45%, and nearly 40% of all units occur on slopes exceeding 25%.[114] In addition, over 900 acres of the Project are rated as a severe erosion hazard.[115] Though these are concerning numbers, the Forest Service concludes that "[a]dministration of [best management practices ("BMPs")], design criteria, and other contract provisions by the [Timber Sale Administrator] would prevent [significant or severe] level[s] of surface erosion during and after operations."[116] However, it leaves us guessing what those BMPs, design criteria, or contract provisions might be.

[110] Draft EA at 56.
[111] 33 U.S.C. § 1323(a) (emphasis added); *see also Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 848 (9th Cir. 1987) (holding that the Clean Water Act "requires all federal agencies to comply with all state requirements").
[112] 9 Va. Admin. Code § 25-260-20(A) ("State waters, including wetlands, shall be free from substances"—including "substances that produce color, tastes, *turbidity*, odors, or settle to form sludge deposits"—"in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life." (emphasis added)).
[113] Draft EA at 52.
[114] *See* Draft EA at 61.
[115] *See* Draft EA at 61.
[116] Draft EA at 61.

That is error. It is well established that "the mere listing of mitigation measures and processes, without any analysis, cannot support" a NEPA analysis.[117] In effect, the Forest Service "presumes, on this record, that whatever the impacts, it will be able to mitigate them successfully and further, that the procedures incorporated into the [Forest Plan] are sufficient to ensure that success."[118] But "[a]n analysis based on presumptions at every step cannot support any sort of conclusion and especially not" a finding of no significant impact.[119]

Fourth, the Forest Service underplays the severity of the sediment loading its GRAIP model predicts will occur. According to the model, the Project is predicted to increase sediment loading in the Upper and Lower Little Calfpasture Rivers by *42 and 46%*, respectively.[120] These increases are so severe that the Forest Service proposes a "multi-year schedule" for activities in these watersheds to limit the amount of sediment entering each watershed in any one year. The agency then summarily concludes that while "[w]ater quality may be adversely affected by sediment loading over the short-term, . . . measurable long-term water quality effects resulting from the proposed action should not occur if Forest Plan standards, design criteria, and Virginia's Forestry BMP are adhered to."[121]

That is an inadequate analysis for several reasons:

- To start, as explained above, the Forest Service cannot presume, without explanation, that unspecified mitigation measures and design criteria will mitigate the effects of its action.

- If anything, the GRAIP model's predicted increases are a gross *under*estimation of sediment loading because the model only folds in the sedimentation effects of road construction. The model does not incorporate the sedimentation effects of: (1) the Project's 163 proposed log landings; (2) dozens of miles of overland skid trails; (3) logging the forest itself; and (4) the long-term erosion impacts from tree removal. Though the Forest Service acknowledges these limitations at times,[122] the agency neglects to consider what impact they might have on its actual effects determination.[123]

- The agency's prediction that water-quality impacts will be "short term"—approximately "two years"—is out of step with its decision to stagger activities in the Upper and Lower Little Calfpasture watersheds over an unspecified "multi-year schedule."[124]

- The Forest Service fails to appreciate that even "short term" impacts on water quality can have long-term impacts on the ecosystem. Many of the species dwelling in the rivers and

[117] *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 887 (S.D.W. Va. 2009); *see also Wyo. Outdoor Council*, 351 F. Supp. 2d at 1252 (holding the court cannot "defer to the Corps' bald assertions that mitigation will be successful" in the NEPA and Clean Water Act contexts).
[118] *Hurst*, 604 F. Supp. 2d at 895–96.
[119] *Id.* at 896.
[120] Draft EA at 64.
[121] Draft EA at 65.
[122] Draft EA at 64 (recognizing that the model outputs are "a *minimum* estimate of erosion and sedimentation associated with logging plan features" (emphasis added)).
[123] Draft EA at 66 (merely noting that "[w]ater quality may be adversely affected by sediment loading").
[124] Draft EA at 65.

streams of the Project area only live for a few years. To aquatic macroinvertebrates, for example, two years of increased sediment loading may render streams uninhabitable for the equivalent of one to four generations[125]—around 20 to 80 human years. Such impacts cannot be dismissed as "short term"—for these species, at least.

- Finally, the agency's analysis fails to fold in critical context: (1) the Calfpasture River, Little Calfpasture River, and Mill Creek[126] are all currently listed as impaired on Virginia's 303(d) list;[127] and (2) three of the five affected watersheds are "Functioning at Risk," while another—the Upper Little Calfpasture—has "Impaired Function."[128]

Given these significant water-quality concerns, the Forest Service must revise its NEPA analysis to address these deficiencies, and we ask that the agency make its revised NEPA analysis available for public comment.

k. The Draft EA fails to adequately consider impacts to terrestrial and aquatic species

The Forest Service notes that the Project may affect numerous species within the Project area. While we appreciate the effort the agency put into studying these species, several of its analyses are lacking or outdated.

i. Indiana bat

The Forest Service's environmental analysis acknowledges that the Project is likely to adversely affect the Indiana bat. Though the agency did not conduct surveys for the bat, it notes that the Project area contains potential habitat for the bat.[129] Since that is the case, the Forest Service assumes that Indiana bats are present and that the proposed action will result in take.[130] For example, the agency notes that "[o]ccupied roost trees removed during non-hibernation (spring, summer and fall), could result in mortality if bats are non-volant (flightless – generally 1 May to 31 July) or unable to escape prior to or during felling."[131] However, the agency concludes that this take and other proposed activities impacting the bat are authorized under the terms and conditions of the 2013 Incidental Take Statement issued in connection with the Forest Plan.[132]

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[125] *See, e.g.*, Chesapeake Bay Program, *Mayflies*, https://www.chesapeakebay.net/discover/field-guide/entry/mayflies (explaining that most mayfly species "produce one or two generations per year").

[126] According to the Forest Service's figures, 5.1 miles of temporary road are slated to be built in the Cabin Creek/Mill Creek watershed. Draft EA at 60. However, only 383 acres are slated for mechanical treatment in the Cabin Creek/Mill Creek area. The Forest Service should confirm the accuracy of this strikingly high amount of temporary road for relatively few acres of harvest and should carefully evaluate whether the amount of harvest justifies the amount of temporary road construction.

[127] Virginia Dep't of Envtl. Quality, *2020 Impaired Waters – 303(d) List*, https://www.deq.virginia.gov/home/showpublisheddocument?id=2253.

[128] Draft EA at 59.

[129] Draft EA at 35.

[130] Draft Terrestrial Wildlife Specialist Report at 13.

[131] Draft EA at 33; *see also* Draft EA at 34 ("A few roost trees suitable for Indiana and northern long-eared bats may be lost during road reconstruction, but direct effects are expected to be limited, because these bats naturally know of and use multiple roost trees in an area, and roosting habitat is not a limiting factor in the project area.").

[132] Draft EA at 38.

To the extent the Forest Service is suggesting it can greenlight logging or prescribed burning of known active roost trees, it is mistaken. As the agency notes, Indiana bat management in the Forest is governed by Forest-Wide standards 47 to 62. Those standards provide, among other things, that:

- FW-50: "When active roost trees are identified on the Forest, they [must] be protected with a ¼ mile buffer surrounding them."[133]

- FW-51: "No disturbance that will result in the potential taking of an Indiana bat will occur within an active roost tree buffer," including disturbances from "[c]ommercial timber harvesting [and] road construction."[134]

The Forest Service's conclusion that no seasonal harvest restrictions are necessary to protect the bat[135] is also inconsistent with the Forest Plan. The Plan specifically provides that as the agency gains a "clearer understanding of how Indiana bats use the Forest, management activities described in the [Forest Plan] shall be directed to *areas and times of minimal bat use*."[136] As explained in the Draft EA, the agency now understands that trees removed during the bats' hibernation period (November through April) avoid direct effects to bats, while trees removed during spring, summer, and fall risk killing bats in occupied roost trees, especially between May 1 and July 31 when juvenile bats are non-volant.[137] Instead of crafting seasonal harvest restrictions based on this information, the Forest Service declines to impose any harvest restrictions at all. Since the Forest Service does not "describe how" this decision "is consistent with" the Forest Plan[138]—and since its failure to impose time-of-year restrictions in fact contravenes the Forest Plan—the proposed action violates NFMA and its implementing regulations.[139]

ii. Northern long-eared bat

The Draft EA explains that the Forest Service will rely on the Northern long-eared bat's "Final 4(d) Rule['s] . . . Activities Excepted from Take Prohibitions" to fulfill its "project-specific [Endangered Species Act] responsibilities" for that species.[140] However, in March 2022 the FWS proposed reclassifying the bat as endangered.[141] This reclassification is slated to take place very soon: the FWS must publish a final rule on the bat's status "by the end of November 2022 to meet

[133] Forest Plan at 4-5.
[134] Forest Plan at 4-5.
[135] Draft EA at 33.
[136] Forest Plan at App'x J-2 (emphasis added).
[137] Draft EA at 33.
[138] 36 C.F.R. § 219.15(d); *see also Cuddy Mountain*, 137 F.3d at 1377 (holding that the Forest Service must provide a reasoned explanation describing how "a site-specific project would be consistent with the land resource management plan of the entire forest").
[139] 16 U.S.C. § 1604(i) (requiring all Forest Service actions to be consistent with the governing land management plan); 36 C.F.R. § 219.15(b) (same).
[140] Draft EA at 35.
[141] Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat, 87 Fed. Reg. 16,442 (Mar. 23, 2022) (proposed rule).

a federal court order."[142] And "[i]f the reclassification is finalized, the 4(d) rule will be nullified as the Endangered Species Act does not allow application of 4(d) rules for species listed as endangered."[143]

Since that is the case, the Forest Service cannot rely on the 4(d) rule to satisfy its Endangered Species Act obligations for the northern long-eared bat. Instead, it must reinitiate consultation with the FWS.[144] We also recommend that the Forest Service follow the FWS's advice and "discuss with field office(s) if surveys may be prudent to avoid potential delays to their project timelines resulting from a change to the [bat]'s listing status."[145]

iii. Tricolored bat

The Forest Service notes that the Project "May impact [tricolored bat] individuals but [is] not likely to cause a trend to federal listing or a loss of viability."[146] That information is now dated, as the FWS has proposed listing the tricolored bat as endangered.[147] The agency's NEPA analysis must be updated to reflect this proposed listing, and the FWS must be consulted.[148]

iv. Roughhead shiner

According to the Forest Service, occupied habitat for the Roughhead shiner is located 250 feet downstream of Project activities on the Calfpasture River.[149] Despite this proximity, the Forest Service summarily concludes that the Project will have "no impact" on the shiner because any sediment increases triggered by the proposed activities "would be unmeasurable and insignificant in comparison to the sediment load of . . . [the] Calfpasture River."[150] But as explained above, the Forest Service cannot discount the impacts of its activities by *weighing* those impacts against other stressors. Instead, it is required to *add* the anticipated impacts of the Project to those other stressors. Only then can it assess the true impacts of its action on the shiner.

III. The Forest Service's limited analysis reveals that the action alternative may have significant effects, necessitating an EIS

For the many reasons explained above, the Forest Service's Draft EA fails to adequately analyze the environmental impacts of the Project. The limited analysis the agency *did* conduct, however, reveals that the Project may have significant environmental effects.

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[142] U.S. Fish & Wildlife Serv., *Indiana bat and Northern long-eared bat Summer Survey Guidelines: Frequently Asked Questions* at 2 (Mar. 22, 2022), https://www.fws.gov/sites/default/files/documents/USFWS_FAQ_2022_IBat_%26_NLEB_Survey_Guidelines_2022.03.22.pdf [hereinafter "Survey Guidance"].
[143] *Id.*
[144] 50 C.F.R. § 402.16(a).
[145] *See* Survey Guidance at 2.
[146] Draft EA at 35.
[147] Endangered and Threatened Wildlife and Plants; Endangered Species Status for Tricolored Bat, 87 Fed. Reg. 56,381 (Sept. 14, 2022) (proposed rule).
[148] *See* 16 U.S.C. § 1536(a)(4) ("Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of *any species proposed to be listed*." (emphasis added)).
[149] Draft EA at 48.
[150] Draft EA at 55.

Any major Federal action that "will or *may*" have a significant effect on the quality of the human environment requires preparation of an EIS.[151] To be sure, if the need for an EIS is unclear, an agency may first prepare an EA—as the Forest Service did here. But if the evidence before the agency is inadequate to conclude that a major federal action will *not* have a significant effect on the environment, the agency *must* prepare an EIS.[152] A decision not to prepare an EIS is unreasonable "[i]f substantial questions are raised regarding whether the proposed action may have a significant effect upon the human environment."[153]

Here, the limited analysis the Forest Service conducted confirms the need for an EIS. Several additional issues the Forest Service failed to adequately analyze—namely impacts to VMTs and the Archer Knob PWA—hammer this conclusion home. So does an application of CEQ's 1978 significance factors.

a. The Draft EA reveals that the Project may have significant effects

The Forest Service's Draft EA establishes that the Project may have significant effects on the human environment. The action alternative proposes over 10 miles of temporary road construction, nearly 40 miles of road maintenance, construction of 163 log landings totaling 41 acres, over 64 miles of skid trails, 2,400 acres of prescribed fire, 3 miles of dozer lines, and commercial timber harvest on over 5,000 acres of forest—around 7.8 square miles. At any scale, these are significant impacts. They are especially significant at the scale of the Project area, where more than 20% of the 25,860 acres owned by the Forest Service in the Project area will be directly impacted.

In case there was any doubt about this, the limited analysis in the Draft EA confirms the myriad ways the Project may affect the environment. Some of these issues standing alone may trigger the need for an EIS; their consideration in combination unquestionably passes that threshold:

- "Timber harvesting, prescribed burning and road construction proposed by this alternative *is expected* to create conditions which could increase the spread of [non-native invasive plants]."[154]

- "[I]ndividuals of tree-of-heaven and other [non-native invasive] tree, shrub and vine species *may* become established and/or grow in the harvest units."[155]

- "Roads and other soil disturbance associated with timber harvest *have the potential* to facilitate the spread of [non-native invasive plants], and USFS personnel have documented [non-native invasive] plant populations (e.g. Japanese stiltgrass, mile-a-minute vine) in the project area."[156]

[151] 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.1(b) (2020) (emphasis added).
[152] *See* 40 C.F.R. § 1508.1(b) (2020).
[153] *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (internal citations omitted).
[154] Draft EA at 23 (emphasis added).
[155] Draft EA at 23 (emphasis added).
[156] Draft EA at 39 (emphasis added).

- "*Potential* cumulative effects to [Region 8 Sensitive plant] sword-leaf phlox also include competition from non-native invasive species and altered natural disturbance regimes" introduced by the Project.[157]

- "Prescribed fire operations *could* have impacts through heat and smoke on bat and insect species, or through the removal of dead trees/snags that could serve as potential bat roosting sites on the landscape."[158]

- "Additional proposed activities that *could* affect R8 Sensitive species include commercial vegetation management and associated road activities, cut-back borders, herbicide application work, and wildlife opening management and expansion."[159]

- "All proposed activities *could* have at least a small chance of affecting R8 Sensitive plant species if undiscovered populations exist."[160]

- "While the probability is considered low, *some potential exists* for impacts to sensitive plants."[161]

- "Occupied roost trees removed during non-hibernation (spring, summer and fall), *could* result in mortality [to endangered bats] if bats are non-volant (flightless – generally 1 May to 31 July) or unable to escape prior to or during felling."[162]

- The Project "*May* Affect, [and is] Likely to Adversely Affect" the endangered Indiana bat and Northern long-eared bat.[163]

- "[N]orthern long-eared bat, tri-colored bat, and eastern small-footed bat and their habitats *may* experience minor short-term disturbance impacts under the proposed action."[164]

- "[T]imber removal around butternut trees *could* expose them to more windthrow."[165]

- "There is . . . *potential* for targeted chemical treatments of non-native invasive plant species (e.g., autumn olive, ailanthus, Japanese stilt grass)" in Special Biological Areas, which "*may* impact individuals within the rare community."[166]

[157] Draft EA at 38 (emphasis added).
[158] Draft EA at 34 (emphasis added).
[159] Draft EA at 34 (emphasis added).
[160] Draft EA at 34 (emphasis added).
[161] Draft EA at 34 (emphasis added).
[162] Draft EA at 33 (emphasis added).
[163] Draft EA at 35 (emphasis added).
[164] Draft EA at 36 (emphasis added).
[165] Draft EA at 37 (emphasis added).
[166] Draft EA at 39 (emphasis added).

- "Short-term displacement of individual birds is *likely* due to disturbance from proposed timber harvesting, prescribed burning, or Augusta Wetland enhancement activities (noise, human presence, vegetation removal)."[167]

- "Mast production *may* initially decrease as some hardwoods within the optimal mast production age (40-100) are harvested."[168]

- "[B]irds and other species preferring a low disturbance regime (e.g. developed leaf litter ground cover, closed canopy, old growth habitats) are *likely* to lose some potential habitat within the project area until conditions mature back into a tolerable threshold for that species."[169]

- "Species such as ovenbirds and hooded warblers are *likely* to decline in areas of prescribed burns."[170]

- "Wildlife species *may* be exposed to herbicides as a result of direct spray; consumption of contaminated vegetation, prey species, contaminated water, grooming and dermal contact with the treated area."[171]

- Sulfometuron methyl "is toxic to herbaceous weeds, and non-target terrestrial herbaceous plants *could* be impacted by drift or the chemical's mobility in soil."[172]

- "Species that require low disturbance of ground cover *may* slightly decrease with the additional burning."[173]

- "The Proposed Action *has the potential* to affect water resources and aquatic biota."[174]

- "The use and construction of roads, skid trails, and log landings *could* increase the amount of sediment entering the stream system during periods of high flow."[175]

- "Erosion and sedimentation from dozer lines poses the *greatest risk* from the prescribed burning activity."[176]

- "[T]wo Surface Water Zone 2 areas *are intersected* by the project area, Augusta Spring and Goshen Spring, and some proposed mechanical vegetation treatments and associated logging plan features fall within these Zone 2 areas."[177]

[167] Draft EA at 40 (emphasis added).
[168] Draft EA at 44 (emphasis added).
[169] Draft EA at 44 (emphasis added).
[170] Draft EA at 46 (emphasis added).
[171] Draft EA at 46 (emphasis added).
[172] Draft EA at 46 (emphasis added).
[173] Draft EA at 47 (emphasis added).
[174] Draft EA at 52 (emphasis added).
[175] Draft EA at 53 (emphasis added).
[176] Draft EA at 53 (emphasis added).
[177] Draft EA at 59 (emphasis added).

- "Long-term detrimental soil disturbance"—exceeding one hundred years—"*is expected* across approximately 78 acres."[178]

- "Short-term (within 2 years) effects to water quality *are expected* at and downstream of proposed road-stream crossings and other road incursion into riparian corridors."[179]

- "Effects to water quality *are expected* from storm events during project implementation and after sale areas close but before herbaceous vegetation becomes established on disturbed areas."[180]

- "Under existing conditions sediment loading at the HUC-12 watershed scale ranges from about 0.9 to 1.9 tonnes/yr/km2. Sediment loading *is estimated* to increase from essentially zero to about 45% due to sediment yield from proposed temporary roads, bladed skid trails, and bulldozed fire line."[181]

- "In the short term (two years) [aquatic organism passage improvement] work *has the potential* to increase sediment loads at the crossing site and to downstream reaches."[182]

- "Water quality *may* also be adversely impacted through the introduction of chemicals (e.g., petroleum products) used with machinery working in and around stream channels. Depending on how and where the chemicals contact water, impacts to surface and groundwater *may* be short or long-term."[183]

- "Water quality *may* be adversely affected by sediment loading over the short-term."[184]

- "[P]roposed operations *may* impact dispersed recreation opportunities in the area.'[185]

- "[R]ecreation visitors *could potentially* see and hear logging activities as well as possibly encounter log trucks on Forest Service Roads within the project area."[186]

- "[W]ith increased access [created by the Project], *there is a potential* for an increase in illegal activities such as unauthorized vehicle use, poaching, vandalism, graffiti, and littering."[187]

[178] Draft EA at 60 (emphasis added).
[179] Draft EA at 63 (emphasis added).
[180] Draft EA at 64 (emphasis added).
[181] Draft EA at 64 (emphasis added).
[182] Draft EA at 65 (emphasis added).
[183] Draft EA at 65 (emphasis added).
[184] Draft EA at 66 (emphasis added).
[185] Draft EA at 66 (emphasis added).
[186] Draft EA at 67 (emphasis added).
[187] Draft EA at 67 (emphasis added).

- "The North Mountain trail (Tr 443) has the *greatest potential* to be impacted in the project area . . . because it follows the ridge of the North Mountain and is well inside the project boundary" and "*would* be used as a containment line for prescribed fire."[188]

- "Noise from harvesting and site preparation *is expected* to last intermittently for up to one year after harvesting is complete. Also, hikers *may* see and hear log trucks leaving the project area on Forest Service roads."[189]

- "Augusta Springs Wetlands trail (Tr 100) *has the potential* to be impacted."[190]

- "The Augusta Springs Wetlands area *has the opportunity* to be impacted visually in the short term as treatments occur within the foreground."[191]

- "The Augusta Spring wetlands trail stands to be the only negatively affected impacted visuals area. This would be due to prescribed fire activities used to stimulate growth and promote desired wildlife conditions. The wetlands *may* appear blackened, charred, unnatural or trammeled in the foreground."[192]

- "The recreational experience of horseback riding on Forest roads *may* be impacted where those activities intersect the proposed treatments within the [Elliot Knob] VMT."[193]

This litany of potential effects in the Draft EA makes it clear that the Project *may* have a significant effect on the human environment. Therefore, the Forest Service must prepare an EIS.

b. Other unanalyzed impacts may also have significant effects

As explained above, the Draft EA also *neglects* to consider several significant impacts on the Project area. When considered in combination with the effects detailed above, they undoubtedly pass the "significant effects" threshold:

- **VMTs and the Archer Knob PWA:** The action alternative calls for nearly 1,000 acres of commercial logging and 1.6 miles of temporary road construction in the Elliot Knob VMT and nearly 200 acres of commercial logging in the Archer Knob VMT. It also calls for logging, prescribed burning, wildlife thinning, wildlife opening expansion, and fire-break creation within the Archer Knob PWA. Because these areas represent "some of the wildest and least-developed tracts remaining in Virginia," any activity that permanently destroys or diminishes their wild character is locally and regionally significant.

- **Extra Early-Successional Habitat:** If the action alternative is approved, the Forest Service will overshoot the management prescriptions for MA 13 and end up clearing

[188] Draft EA at 68 (emphasis added).
[189] Draft EA at 68 (emphasis added).
[190] Draft EA at 68 (emphasis added).
[191] Draft EA at 71 (emphasis added).
[192] Draft EA at 72 (emphasis added).
[193] Draft EA at 75 (emphasis added).

hundreds of extra acres of mature forest to create unneeded early-successional habitat. Such a major and unnecessary departure from the prescriptions of the Forest Plan—and all of the careful compromises it represents—may constitute a significant effect.

- **Visual Impacts to the Great North Mountain Trail**: The Great North Mountain Trail is a popular trail with hikers and mountain bikers that runs along the crest of the Great North Mountain Ridge. From this trail, recreationists have sweeping views of the Calfpasture and Little Calfpasture valleys below. The Project will directly impact this Trail and these views in a number of ways: (1) the Trail will serve as a fire-break for the largest prescribed burn block; (2) wildlife thinnings are planned along the Trail; and (3) large portions of the viewshed will be logged. That last impact is the most concerning because it will seriously impact the wild and remote character of the Trail. These potentially significant visual impacts are not analyzed in the Draft EA.

- **Excessive Sedimentation**: The Forest Service's GRAIP model—which, as explained above, seriously underestimates the sediment impacts of the Project—predicts that the Project will increase sediment loads in the Upper and Lower Little Calfpasture Rivers by *42 and 46%*, respectively.[194] For comparison, only a few years ago, the Forest Service told Mountain Valley Pipeline, LLC, that "in downstream areas where [threatened and endangered] aquatic species are present," even a "less than 10% increase in sediment load" might create unacceptable impacts.[195] The Forest Service impliedly acknowledges the significance of the Project's sedimentation impacts here by imposing a "multi-year schedule" in the Little Calfpasture watershed to disperse sediment loads. However, that multi-year schedule—which was not disclosed in the Draft EA—may still be inadequate to prevent significant sediment loading, given the serious limitations of the GRAIP model. Since this sediment loading *may* cause significant impacts, an EIS is required.

- **Logging on steep slopes:** Over six hundred acres proposed for mechanical treatment occur on slopes exceeding 45%, and over 900 acres are rated as a severe erosion hazard. Logging on these steep and erosive slopes poses a serious risk of landslides—which the Draft EA never analyzes. Logging on this terrain also increases the likelihood of excessive and unnecessary sedimentation, which, when layered on top of the sediment loading already predicted to occur and the sedimentation impacts of climate change, may result in a significant effect.

- **Crossings for 383B and 383E:** As noted above, these crossings—which provide access to numerous prescription units—are "specific areas of concern" because they involve complicated crossings of multiple braided channels.[196] Due to these challenges, erecting a bridge or crossing large enough to stretch these spans may involve significant water-quality impacts.

[194] Draft EA at 64.
[195] *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 592 (4th Cir. 2018).
[196] Draft EA at 52.

These significant and unanalyzed impacts require preparation of an EIS—especially when considered in combination with the numerous potential effects listed above.

c. Application of CEQ's former significance factors confirms the need for an EIS

For decades, agencies assessed the need for an EIS by considering ten "intensity" factors in the appropriate context.[197] However, CEQ weakened its NEPA regulations by eliminating those factors in an unlawful rulemaking.[198] CEQ's regulations now simply call on agencies to "analyze the potentially affected environment and degree of the effects of the action" when determining the need for an EIS.[199] The current rule, however, is under challenge in several cases across the country. In addition to those cases, CEQ is also working to replace the rule with a more protective one. The current rule will almost certainly be stricken from the books during the life of this Project. So, if the Forest Service fails to meet the higher standard of the 1978 rule, it puts this Project at risk.

In other words, if the agency hopes to avoid the need to prepare a supplemental EIS later on when NEPA's safeguards are restored, it must ensure that the Project does not cross the line drawn by the 1978 significance factors. Doing so will require additional analysis, mitigation commitments, and project changes as described throughout these comments.

A brief review of the 1978 significance factors confirms the need for an EIS. For example, one factor addresses the "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas."[200] As explained at length above, the Project area contains numerous unique characteristics, including two PWAs, two VMTs, an extensive inventoried roadless area, several Special Biological Areas, and exceptional hiking trails. This factor undoubtedly weighs in favor of a significance finding.

Another factor addresses the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks."[201] Here, the impacts of many features of the Project—including road maintenance, water improvements, mitigation measures, and species take—are unknown because the agency has expressly deferred its analyses of these features. Therefore, this factor too suggests the Project is significant.

Finally, yet another factor considers whether "the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment."[202] As explained above, the Project threatens to violate NEPA, NFMA, the Clean Water Act, the Forest Plan, Forest Service regulations, and Virginia water-quality standards. It also may violate Executive Order 13751, which establishes "[i]t is the policy of the United States to prevent the introduction, establishment, and spread of invasive species."[203] In addition, unless the Forest Service adjusts its

[197] *See* 40 C.F.R. § 1508.27 (2019).
[198] CEQ, Final NEPA Rule, 85 Fed. Reg. 43,304, 43,322 (July 16, 2020).
[199] 40 C.F.R. § 1501.3(b) (2020).
[200] 40 C.F.R. § 1508.27(b)(3) (2019).
[201] *Id.* § 1508.27(b)(5) (2019).
[202] *Id.* § 1508.27(b)(10) (2019).
[203] Executive Order 13751, 81 Fed. Reg. 88,609 (Dec. 5, 2016).

analysis of the Northern long-eared bat and consults with the FWS regarding the tricolored bat, it may run afoul of the Endangered Species Act. This factor unquestionably supports the need for an EIS.

Although this is not an exhaustive application of all ten factors, even this brief survey confirms that the Project is likely to have significant or potentially significant impacts.

IV. The Forest Service must modify the Project to avoid significant effects to the Archer Knob Project area

The proposed action threatens to cause significant effects to the Project area. Unless the action alternative is modified, the Forest Service will be required to analyze these significant impacts in an EIS. We recommend the following project modifications to reduce the environmental impacts of the Project below the "significance" level:

- **Drop prescription units in PWAs and VMTs**: Proposed management units in PWAs and VMTs represent a small fraction of the overall Project but will have an outsized impact on biological, cultural, and recreational values. Dropping these units from consideration will avoid serious impacts to these values.

- **Bring the Forest Service's prescription targets for MA 13 in line with the Forest Plan:** The Forest Service's proposed management for MA 13 areas in the Project area will seriously overshoot the amount of early-successional habitat called for in the Forest Plan. The Forest Service should drop as many prescription units as it takes to bring the Project in line with the Forest Plan and avoid unnecessary and potentially significant effects.

- **Drop prescription units accessed by Forest Service Roads 383B and 383E**: The Forest Service acknowledges that the Little Calfpasture River and Daniel Run crossings pose significant engineering challenges. Instead of erecting bridges or crossings to access stands in the Trout Branch area, the agency should drop these units from the Project. Creating adequate bridges for a multi-braided channel may create serious water-quality impacts. What's more, the units accessed by these roads—which only comprise a small portion of the Project—may exacerbate water-quality issues in the already-impaired Little Calfpasture River.

- **Drop stands with high erosion risk:** As noted above, over six hundred acres proposed for mechanical treatment occur on slopes exceeding 45% and over 900 acres are rated as a severe erosion hazard. The Forest Service already recognizes that logging on slopes with a greater than 35% grade poses an increased risk of soil disturbance and erosion. The Virginia Department of Forestry recognizes the same. For that reason, the Forest Service should drop any units that are predominantly located on slopes >35% or on soils that pose a severe erosion risk. At a minimum, the agency should include a specific design criterion that prohibits ground-based logging on slopes greater than 35%, rather than just incorporating a BMP by reference.

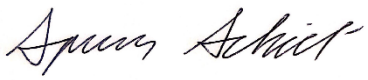
- **Drop prescription units in the Cabin Creek/Mill Creek watershed:** The Forest Service only plans on logging 383 acres in this watershed.[204] However, the agency plans on constructing 5.1 miles of temporary roads to access these units.[205] We believe this temporary-roads number may be a misstatement;[206] however, logging in this watershed should be avoided entirely because it is a Priority Watershed containing impaired waterbodies and threatened or endangered species.

- **Implement time-of-year restrictions on timber harvest to avoid unnecessary take of listed bat species:** The Forest Service recognizes that listed bat species are particularly sensitive to logging occurring between May 1 and July 31 when juvenile bats are non-volant. To protect these species and avoid potentially significant impacts, the Forest Service should impose time-of-year restrictions that forbid logging during this time period.

V. Conclusion

The Forest Service's Draft EA fails to adequately assess the impacts of the Archer Knob Project in contravention of NEPA. The agency must revise the Draft EA to correct the deficiencies listed above before resubmitting a NEPA document for public comment. Without significant changes, the proposed action will require preparation of an EIS.

Thank you for consideration of this letter. Please contact Spencer Gall (434-977-4090; sgall@selcva.org) or Spencer Scheidt (828-258-2023; sscheidt@selcnc.org) if you have any questions regarding these comments.



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[204] Draft EA at 58.
[205] Draft EA at 60.
[206] *See supra* note 126.
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