

August 12, 2024

***Via Electronic Submission to CARA and Email***

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**Re: Comments on Grandfather, Appalachian, Pisgah (GAP) Restoration Project  
Draft Environmental Assessment**

Dear Mr. Melonas,

Thank you for the opportunity to comment on the draft Environmental Assessment (“Draft EA”) for the Grandfather, Appalachian, Pisgah (GAP) Restoration Project (“the Project” or “GAP Project”). We submit these comments on behalf of the Southern Environmental Law Center, Center for Biological Diversity, Defenders of Wildlife, MountainTrue, the North Carolina Chapter of the Sierra Club, and The Wilderness Society (“Conservation Groups”).

As participants in the Pisgah Restoration Initiative, we begin by reiterating our strong support for restoration of fire-adapted communities across the Pisgah National Forest. As the Draft EA explains, doing so would not only benefit towns and communities outside the national forest by further reducing wildfire risk, but more importantly (for our landscape, where risk is generally manageable) it would move fire-adapted ecozones closer to the natural range of variation (“NRV”). The best available science shows compellingly that these ecozones are departed from NRV in terms of structure, composition, and process. And because restoring NRV inherently requires a landscape-level approach, we also appreciate the Forest Service’s willingness to take a look at the Pisgah as a whole. As we have explained in field visits, a narrow focus on well-supported restoration actions within this broad landscape could help to patch some of the holes in the Forest Plan, which sets objectives for silvicultural interventions no matter whether they will contribute to NRV or not. A well-designed Project and process could set the stage for true conservation benefits and help the Forest Service maximize its scant resources.

We also support and appreciate the collaborative, science-based foundation of the GAP Project. We are especially appreciative of the contributions made by partners to help identify needs and opportunities. We believe that aspects of the Project could go a long way toward fulfilling the Project purpose and need. Specifically, we support an increase in the scale and frequency of prescribed burning in fire-adapted communities. We also support silvicultural treatments, if well integrated with prescribed fire, to restore the trajectory of stands that have departed from NRV

because of fire suppression, previous inappropriate harvest, and other historical land uses. This includes commercial and noncommercial thinning to promote fire-adapted southern yellow pine and oaks by increasing open canopy conditions. We are even open to management interventions in existing or future old growth, state designated Natural Areas, and other special interest areas when there is a clear, site-specific reason to take action, and treatments can be designed to avoid undermining the rare and unique values present in those areas.

Up until now, this is the kind of project we expected to see. We were told that the Project would be focused exclusively on fire-adapted ecozones and treatments needed to restore them. We were also told that the Project would be site-specific, with an analysis that would analyze the full spread of treatments all the way to the ground. We also expected that management area differences in the Forest Plan would have made more of a difference in Project design. We are very disappointed to see that the Project, as currently described, does not live up to these expectations.

Primary among our concerns is that while the Project is ostensibly crafted to benefit fire-adapted communities, a huge portion of the agency's proposed vegetation management areas would actually occur in mesic forests. Though the agency asserts that harvests in these areas will be "incidental" to management in fire-adapted communities, many of the Forest Service's proposed vegetation management areas seem specifically targeted at mesic communities. Likewise, the sheer number of mesic forest acres involved in the Project suggests that management in these areas is a feature, not a bug. To be clear, targeted harvests in these areas are not consistent with the Collaborative Forest Landscape Restoration Program, the recommendations of the Pisgah Restoration Initiative, or the Project purpose and need.

Conservation Groups are also very disappointed that the Project and its analysis are not, in fact, site specific, at least when it comes to the vegetation management actions at the heart of the proposal. In addition, the Draft EA ignores the important differences between management areas under the Forest Plan. The Project also has a number of problems under the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"). Among other issues, the Draft EA fails to consider a reasonable range of alternatives; neglects to account for the compounding effects of climate change as well as the Project's impacts on carbon storage and sequestration; fails to adequately consider impacts to wildlife; and inappropriately downplays effects to water and soils, Inventoried Roadless Areas, non-native invasive plants, and more. These failures must be addressed in a revised NEPA study.

Despite the Project's express intent to identify site-specific opportunities to effect landscape-level restoration benefits, the proposal here is a blank check that could just as easily cause significant harm. As a result, unless the Forest Service is willing to make some key improvements, the Project will require an environmental impact statement ("EIS"). As we explain below, an EIS is required for projects that have a "significant effect" on the human environment. The Project, as currently constituted, certainly exceeds that threshold. To avoid the need to prepare an EIS, we recommend making the following changes to the Project:

- Drop vegetation management in mesic forests;
- Prohibit ground-based timber harvests on slopes exceeding 35%;
- Require surveys for old-growth forests prior to timber harvest activities;
- Prohibit temporary road construction in Backcountry, Appalachian Trail, or Special Interest Area management areas;
- Prohibit temporary road construction in state-designated Natural Areas;
- Require temporary roads constructed in Chapter 70 areas to be obliterated;
- Create a time limitation for the Project to cap the total amount of temporary road construction;
- Implement time-of-year restrictions and species-appropriate gap-size limits when conducting timber harvest in suitable roosting, foraging, and commuting habitat for the Virginia big-eared bat, gray bat, Indiana bat, northern long-eared bat, tricolored bat, and little brown bat.

The Forest Service must also either eliminate timber harvest and road construction in the following areas *or* commit to further NEPA decision-making to address their unique site-specific values or needs in tiered, streamlined “mini EAs” that would complete the site-specific analysis missing from the Draft EA:

- Inventoried Roadless Areas, state-designated Natural Areas, and eligible Wild and Scenic River corridors;
- Areas proposed as unsuitable for timber harvest by the Nantahala–Pisgah Forest Partnership; and
- Within the Appalachian Trail corridor.

In light of the strong, consensus support for the *concept* of the GAP Project, we are truly surprised that it is necessary to submit such critical comments at this stage. Had there been an opportunity for collaborative input on the Project’s actual design following the identification of vegetation management areas, perhaps this could have been avoided. But we want to be as clear as possible: While we are not waffling in our support for the Project’s goals, we are on track to actively oppose the GAP Project as currently envisioned.

On the other hand, if the agency embraces the changes we identify in our comments, we believe that the Forest Service can get the Project back on track—enabling the Forest Service to meet the stated Project purposes while avoiding unnecessary environmental harm to outstanding and biologically rich portions of the Pisgah National Forest. It would also avoid the necessity of preparing an EIS. We look forward to discussing these issues with you further.

## I. Project Background

As part of its broader Pisgah Restoration Initiative (“PRI”), the Pisgah National Forest has proposed a 10-year program of treatment across all three of its ranger districts primarily consisting of prescribed fire and timber harvest. The Forest Service asserts the GAP Project is necessary to “restore fire-adapted ecosystems and reduce wildfire risk for local communities by implementing fuels reduction and vegetation treatment activities across portions of the Forest.”<sup>1</sup>

Specifically, the Draft EA sets goals for prescribed burning on between 10,000 and 18,000 acres per year; “stand improvement” on 1,800 acres per year; commercial timber harvest on 500 acres per year; and creation of woodland conditions on 150 acres per year.<sup>2</sup> The PRI proposal additionally commits the Forest to 100 annual acres of “mechanical thinning,”<sup>3</sup> which the Draft EA likely includes in “stand improvement.”

The Draft EA indicates that the GAP Project will focus on wildfire prevention and managing fuel loads in Shortleaf Pine-Oak, Pine-Oak Heath, Dry Oak, and Dry-Mesic Oak ecozones.<sup>4</sup> It also hopes to “[i]mprove and maintain species composition, structure, fire resilience, and increase regeneration of desirable species in our more mesic fire adapted forests,” i.e., Mesic Oak and High-Elevation Red Oak ecozones.<sup>5</sup> The Draft EA also discloses that “[p]rescribed burning and vegetation management would occur” “in mesic ecozones (i.e., acidic cove, rich cove, northern hardwoods, spruce fir, floodplain forests),” but notes that any “[a]ctivities in mesic ecozones would generally be incidental to activities in neighboring dry or moderate ecozones.”<sup>6</sup>

Instead of providing concrete, stand-level proposals for particular treatments within specific areas, the Draft EA identifies “Areas of Interest” (“AOIs”) and “Vegetation Management Areas” (“VMAs”) in which treatments *may* occur.<sup>7</sup> AOIs—which cover 254,318 acres of National Forest System lands and 2,784 acres of National Park Service lands—are “[a]vailable for prescribed burning and non-ground disturbing vegetation treatments.”<sup>8</sup> VMAs—encompassing 29,518 acres within these AOIs—are further divided into two categories: areas “available for

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<sup>1</sup> Draft EA at 6.

<sup>2</sup> *Id.* at 16.

<sup>3</sup> U.S. Forest Serv., Pisgah Restoration Initiative CFLRP Proposal (2019) (“PRI Proposal”), [https://www.fs.usda.gov/restoration/documents/cflrp/2019Proposals/R8\\_Pisgah\\_CompleteProposal\\_NewProject.pdf](https://www.fs.usda.gov/restoration/documents/cflrp/2019Proposals/R8_Pisgah_CompleteProposal_NewProject.pdf).

<sup>4</sup> Draft EA at 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 17.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

ground-disturbing vegetation treatments” with and without a “saw timber product.”<sup>9</sup> As far as Conservation Groups can tell, apart from an assumption about the ultimate end use of the harvested timber product based on current, mutable market conditions,<sup>10</sup> there is no difference between the activities allowed in sawtimber and non-sawtimber VMAs.<sup>11</sup> For example, both types of VMAs may employ “a variety [of] timber harvest methods,” and “involve use of heavy equipment and skid trails, construction of skid roads and landings, and temporary roads in some locations.”<sup>12</sup>

Apart from identifying these AOIs and VMAs, the Draft EA defers all decision-making regarding specific treatments to a later date. For example, the Draft EA does not specify the sizes of individual treatments, their distribution across the landscape, the location of roads to access individual stands, what treatments will occur in those stands, the indicators that will bind the agency’s selection of treatment sites, or the monitoring benchmarks that will guide the Forest’s assessment of whether the GAP Project is succeeding or needs course correction. Instead, the Draft EA proposes a “five step implementation process” to be conducted after publication of the final EA.

Specifically, after the Forest Service designs a “site-specific activity” that will occur within a larger AOI identified in the GAP EA, it must (1) characterize resources in the specific activity area; (2) “review the site-specific activity” to ensure “it is consistent with the effects and decision associated with the GAP EA” and “identify any design features needed to ensure consistency”; (3) complete any required “pre-activity regulatory” requirements including consultation pursuant to Section 7 of the Endangered Species Act (“ESA”); (4) implement and monitor the activity; and (5) conduct any needed post-activity reporting.<sup>13</sup> To be clear, none of these site-specific activities will be subject to further scoping or NEPA study.<sup>14</sup> The only opportunity the public has to weigh in on these activities—which again, have not been designed yet—is the current comment period for the Draft EA.

In other words, the Forest has many significant choices left to make before the GAP Project is implemented—choices that may easily add up to significant impacts. However, its exercise of that discretion is limited in a variety of ways by legal and programmatic requirements.

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<sup>9</sup> *Id.*

<sup>10</sup> It is unclear how the Forest Service will police this distinction, which depends on the nature of private financial transactions occurring after lumber is removed from National Forest System lands.

<sup>11</sup> See Draft EA at 190.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 325–31.

<sup>14</sup> *Id.* at 39 (“This EA describes the affected environment and environmental consequences to the extent required by NEPA to inform the decision being made; no additional NEPA documentation would be prepared during implementation.”).

## II. Legal Background

### a. Collaborative Forest Landscape Restoration Program

As a project to be funded through the Collaborative Forest Landscape Restoration Program (“CFLRP”),<sup>15</sup> the GAP Project must meet certain eligibility criteria relevant to pacing, site selection, treatment options, and effects analysis. These statutory requirements will constrain the Forest Service’s discretion as it builds out the GAP Project. Fundamentally, the CFLRP limits projects to “ecological restoration treatments” for fire-adapted communities.

More specifically, the CFLRP requires eligible proposals to “identif[y] and prioritize” landscapes “in need of active ecosystem restoration,”<sup>16</sup> incorporating “the best available science and scientific application tools in ecological restoration strategies.”<sup>17</sup> Among other requirements, these activities must “fully maintain[], or contribute[] toward the restoration of, the structure and composition of old growth stands according to the pre-fire suppression old growth conditions characteristic of the forest type” by, where appropriate, “focusing on small diameter trees” and “maximizing retention of large trees.”<sup>18</sup> Additionally, CLFRP projects must not involve the establishment of any permanent roads, and they must commit funding to decommission any temporary roads necessary to complete project work.<sup>19</sup>

### b. NEPA

NEPA was enacted in 1969 “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”<sup>20</sup> Federal agencies must fulfill NEPA’s mandates “to the fullest extent possible.”<sup>21</sup> NEPA has twin aims: “First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.”<sup>22</sup>

NEPA’s objectives are “realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’” at the environmental consequences of major federal actions.<sup>23</sup> If an agency concludes that a proposal for major federal action “will or may” have significant effects on the quality of the human environment, it must prepare an Environmental Impact Statement (“EIS”).<sup>24</sup> This “detailed statement” must disclose the “reasonably foreseeable environmental

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<sup>15</sup> Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11 § 4003 (2009), 16 U.S.C. § 7303.

<sup>16</sup> 16 U.S.C. § 7303(b)(1)(B).

<sup>17</sup> *Id.* § 7303(b)(1)(C).

<sup>18</sup> *Id.* § 7303(b)(1)(D), (E).

<sup>19</sup> *Id.* § 7303(b)(1)(F).

<sup>20</sup> 42 U.S.C. § 4321.

<sup>21</sup> *Id.* § 4332.

<sup>22</sup> *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citation and quotation marks omitted).

<sup>23</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted).

<sup>24</sup> 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.1(b) (emphasis added).

effects of the proposed agency action” and consider “a reasonable range of alternatives to the proposed agency action,” among other things.<sup>25</sup>

If the need for an EIS is unclear—i.e., if it is uncertain whether the major federal action will significantly affect the quality of the human environment—an agency may first prepare an Environmental Assessment (“EA”).<sup>26</sup> If the EA concludes that the proposal is likely to have significant effects, the agency must prepare an EIS.<sup>27</sup> If the EA reveals that the action would not have significant effects, then the action could proceed with a Finding of No Significant Impact.<sup>28</sup> 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.<sup>29</sup> 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.”<sup>30</sup>

When completing an EA or EIS, agencies are obligated to analyze the “environmental impacts of the proposed action” as well as any “reasonable alternatives.”<sup>31</sup> Environmental impacts or effects include reasonably foreseeable direct, indirect, and cumulative effects.<sup>32</sup> “Direct effects . . . are caused by the action and occur at the same time and place.”<sup>33</sup> “Indirect effects . . . are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”<sup>34</sup> Cumulative effects “result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.”<sup>35</sup>

c. ESA

ESA Section 7(a)(2) commands each federal agency to ensure “that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”<sup>36</sup> To police the substantive duty to avoid jeopardizing listed species, the

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<sup>25</sup> 42 U.S.C. § 4332(C).

<sup>26</sup> 40 C.F.R. § 1501.5(a).

<sup>27</sup> *Id.* § 1501.3(a)(3).

<sup>28</sup> *Id.* § 1501.6.

<sup>29</sup> *See id.* § 1508.1(b).

<sup>30</sup> *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (internal citations omitted).

<sup>31</sup> 40 C.F.R. §§ 1501.5(c), 1502.16(a)(1).

<sup>32</sup> *Id.* § 1508.1(g).

<sup>33</sup> *Id.* § 1508.1(g)(1).

<sup>34</sup> *Id.* § 1508.1(g)(2).

<sup>35</sup> *Id.* § 1508.1(g)(3).

<sup>36</sup> 16 U.S.C. § 1536(a)(2).

ESA and its implementing regulations set out a detailed consultation process to assess the effects of proposed agency actions.<sup>37</sup>

To start, a federal agency proposing to take some action—here, the Forest Service—must request information from the U.S. Fish & Wildlife Service concerning whether any species that has been listed as endangered or threatened (or is proposed to be listed) is present in the “action area.”<sup>38</sup> If the Fish & Wildlife Service determines that listed species may be present, the Forest Service must then determine whether the “action may affect listed species or critical habitat.”<sup>39</sup> “Any possible effect, whether beneficial, benign, adverse, or of an undetermined character,” satisfies the “may affect” standard.<sup>40</sup> If the action may affect a listed species or critical habitat, the Forest Service must engage in “formal consultation” with the Fish & Wildlife Service,<sup>41</sup> unless the Forest Service further determines, with the written concurrence of the Fish & Wildlife Service, “that the proposed action is not likely to adversely affect any listed species or critical habitat.”<sup>42</sup>

The Forest Service has increasingly moved toward post-NEPA ESA consultation. While nothing in the ESA itself requires that consultation occur during the NEPA process, the “effects” required to be disclosed under NEPA include the effects to listed species that would ordinarily be assessed and mitigated during the consultation process.

### **III. The Draft EA’s NEPA analysis has multiple systemic issues.**

We appreciate the difficulty of preparing a comprehensive NEPA document for a project as large as the GAP Project. However, when the size of the project increases, so does the agency’s analytical burden. Unfortunately, the Draft EA contains several systemic errors that prevent the Forest Service from meeting this burden. These errors must be corrected in a revised NEPA study.

#### **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.”<sup>43</sup> What “constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case,” but must “cover[] the full spectrum of alternatives.”<sup>44</sup> At a minimum, the agency must include alternatives that

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<sup>37</sup> *Id.*; 50 C.F.R. § 402.1.

<sup>38</sup> 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).

<sup>39</sup> 50 C.F.R. § 402.14(a).

<sup>40</sup> *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018–19 (9th Cir. 2009) (emphasis original) (quoting Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (final rule)).

<sup>41</sup> 50 C.F.R. § 402.14(a).

<sup>42</sup> *Id.* § 402.14(b)(1) (emphasis added).

<sup>43</sup> 40 C.F.R. § 1502.14(a), (c).

<sup>44</sup> 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 newly promulgated NEPA regulations.

address “unresolved conflicts concerning alternative uses of available resources.”<sup>45</sup> Failure to consider a “viable but unexamined alternative” will render a NEPA analysis inadequate.<sup>46</sup>

Here, the Draft EA only evaluates two alternatives in full: the no-action alternative and the proposed action alternative. These two options reflect an “all or nothing” approach that, by its very nature, does not cover the “full spectrum of alternatives.” The failure to consider a full suite of reasonable alternatives violates NEPA.

The Forest Service argues that it determined “no alternatives to the Proposed Action need to be evaluated” because none “were identified during agency coordination, agency and tribal consultation, or public scoping.”<sup>47</sup> That is false.<sup>48</sup> Several members of Conservation Groups identified numerous potential alternatives during scoping. For example, these members asked that the Forest Service consider alternatives that:

- Commit to conducting timber harvests only in fire-adapted ecozones;<sup>49</sup>
- Add additional sideboards to protect soil and water resources, such as limits on ground-disturbing activity or additional monitoring;<sup>50</sup>
- Exclude state-designated Natural Heritage Natural Areas (“NHNAs”) from extractive commercial logging practices like regeneration harvests;<sup>51</sup>
- Limit gap sizes to ten acres in hardwood-dominated forests containing suitable habitat for sensitive bat species;<sup>52</sup>
- Develop treatments consistent with the Nantahala–Pisgah Forest Partnership’s recommended management area allocations;<sup>53</sup>
- Identify and exclude existing old-growth from commercial harvest activities during implementation;<sup>54</sup>

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<sup>45</sup> 40 C.F.R. § 1507.2(h)

<sup>46</sup> *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)).

<sup>47</sup> Draft EA at 36.

<sup>48</sup> Even if it were true, the obligation to design and study reasonable alternatives lies with the *action agency*, not the public.

<sup>49</sup> S. Env’t L. Ctr. et al., Comments on Grandfather, Appalachian, Pisgah Restoration Project (GAP Project) at 7 (Nov. 7, 2022) [hereinafter “Scoping Letter”].

<sup>50</sup> *Id.* at 7–8.

<sup>51</sup> *Id.* at 9–10.

<sup>52</sup> *Id.* at 10.

<sup>53</sup> *Id.* at 11

<sup>54</sup> *Id.* at 14.

In addition to analyzing the preceding middle-ground alternatives, the Forest Service should also consider analyzing the following:

- An alternative that drops units predominantly located on slopes >35% or on soils with severe or very severe erosion risk;
- An alternative that prohibits commercial timber harvest and road construction in Inventoried Roadless Areas, state-designated Natural Areas, and eligible Wild and Scenic River corridors;
- An alternative that prohibits commercial timber harvest along the Appalachian Trail corridor.

Put simply, the Forest Service must develop some reasonable, middle-ground options instead of adopting an “all or nothing” approach.

b. The Draft EA fails to disclose the influence of timber targets on Project design.

NEPA regulations require the Forest Service to prepare a NEPA study “early enough so that it can serve as an important practical contribution to the decision-making process and *will not be used to rationalize or justify decisions already made*.”<sup>55</sup> This ensures that agencies “carefully weigh environmental considerations and consider potential alternatives to the proposed action *before* the government launches any major federal action.”<sup>56</sup>

Here, however, the Forest Service has already locked itself into an alternative that will provide timber volume to meet mandated timber targets. According to internal agency documents, the National Forests in North Carolina unit is counting on timber volume from the Project to satisfy timber targets in fiscal years 2025 to 2027.<sup>57</sup> We are aware, furthermore, that before it began to refine the Project through scoping and collaboration, the Forest Service had already determined how much timber volume it is expected to produce.<sup>58</sup> That volumetric expectation has skewed harvest toward mesic stands, steep slopes, and road-inaccessible areas where the logging and associated access will be harmful. However, the Draft EA does not disclose the relationship of the Project to timber targets, nor how project-specific volume targets may have influenced Project design or development.

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<sup>55</sup> 40 C.F.R. § 1502.5 (emphasis added); *see also Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000) (agency violated NEPA by agreeing to support a gray whale harvest quota before studying the impacts of that decision in an EA).

<sup>56</sup> *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (emphasis added).

<sup>57</sup> *See, e.g.*, Email from Matthew Keyes to Nicolas Larson (June 15, 2023) (Attachment A); U.S. Forest Serv., Pisgah Zone Five Year Timber Sale Plan (Attachment B).

<sup>58</sup> FSM 2432.15 (requiring Forest Service staff to certify the volume of timber for a timber sale at “Gate 1,” before a NEPA analysis is conducted at “Gate 2”).

Those targets may have had a profound impact on the Project. For example, the need to meet mandated timber targets may have influenced the range of reasonable alternatives the agency was willing to consider. Though members of Conservation Groups proposed several alternatives during scoping, the Forest Service ignored all of them—likely because they did not meet the Forest Service’s predetermined need to generate timber volume from this Project. Yet the primary purposes of NEPA are to (1) force agencies to carefully consider their proposals *before* they make decisions; and (2) allow the public to actually participate in the decision-making process. Both of those aims are frustrated if the Forest Service has already decided that it will use the GAP Project to satisfy timber-volume-sold targets before completing the NEPA process.

To be clear, the Forest Service’s timber-volume expectations must be disclosed along with all the other factors influencing the Project’s development already mentioned in the Draft EA.<sup>59</sup> Ultimately, the Forest Service must explain whether timber volume is a Project “need,” in which case the Project would be outside the CFLR’s statutory constraints, or it must seriously consider reasonable alternatives that can meet the Project’s *stated* purpose and need but which might produce less volume. The Forest Service cannot, however, screen out otherwise reasonable alternatives based on a hidden purpose and need.

c. The Draft EA impermissibly defers its site-specific analysis.

As noted above, 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.”<sup>60</sup> 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.”<sup>61</sup> At the project level, this means completing a “site-specific analysis” of potential effects.<sup>62</sup> Agencies cannot avoid the necessity of conducting a site-specific NEPA analysis by promising to consider these effects later in a non-NEPA document.<sup>63</sup>

We sincerely appreciate the efforts to describe some aspects of the Project at a site-specific level. In particular, we realize that identifying locations for fire control lines required considerable

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<sup>59</sup> See *N.C. Wildlife Fed’n v. N.C. Dep’t of Transp.*, 677 F.3d 596, 604–05 (4th Cir. 2012) (“When relevant information ‘is not available during the [NEPA] process and is not available to the public for comment[,] . . . the [NEPA] process cannot serve its larger informational role, and the public is deprived of [its] opportunity to play a role in the decision-making process.’”).

<sup>60</sup> *Powell*, 395 F.3d at 1026 (emphasis added).

<sup>61</sup> 36 C.F.R. § 220.4(c).

<sup>62</sup> *N. Alaska Env’t Ctr. v. U.S. Dep’t of the Interior*, 983 F.3d 1077, 1086 (9th Cir. 2020) (NEPA requires site-specific review when “the agency proposes to make an ‘irreversible and irretrievable commitment of the availability of resources’ to a project at a particular site”).

<sup>63</sup> *S. Fork Band Council Of W. Shoshone Of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (“A non-NEPA document . . . cannot satisfy a federal agency’s obligations under NEPA.”); *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004) (“A NEPA document cannot tier to a non-NEPA document.”).

work. Given that the analysis was described to us as “site specific,” we had expected that this same level of detail would be attempted for other aspects of the Project, too.

We were disappointed to learn this was not the case. For example, the Forest Service identifies numerous polygons where it says it will conduct some sort of vegetation management—among the most consequential choices the Forest Service will make in this Project. However, the Draft EA never specifies *what* specific treatments it will conduct in these areas<sup>64</sup> or *where* precisely they will occur.<sup>65</sup> Instead, the Draft EA describes the general effects of logging,<sup>66</sup> and defers all “site-specific” decisions and considerations to the “implementation phase”<sup>67</sup>—a phase that the agency asserts will not be subject to NEPA.<sup>68</sup> For example, the Forest Service promises that, during implementation, “[s]ite specific assessments will be completed to determine appropriate logging systems and BMPs for [specific] location[s].”<sup>69</sup> It also asserts that the “locations of skid roads, temporary roads, and landings for any VMA” will be “determined at pre-implementation by the timber sale administrator,” at which point the agency will consider “erosion impacts” from these as-yet-unidentified features “based on site conditions.”<sup>70</sup> Perhaps most critically, the degree to which mesic forests are included in harvest operations is left to the future. This is an incredibly consequential decision, especially in the aggregate over the life of the Project. In effect, the agency claims it will figure out the details and effects of its logging treatments at a later time—without the benefit of NEPA. However, NEPA requires the Forest Service to conduct a site-specific analysis of its proposal now.

Vegetation management decisions were not the only issues that the Forest Service deferred to the post-NEPA implementation phase. To list a few other examples:

- **Baseline conditions:** NEPA requires a site-specific analysis of baseline conditions so that the agency can determine what effect its action will have relative to that baseline.<sup>71</sup> The Forest Service candidly acknowledges that it has yet to perform that site-specific baseline analysis here, noting that it will “characterize baseline conditions” for specific activity areas within its AOIs after publishing its final EA but “[p]rior to implementation.”<sup>72</sup> At that point, the Forest Service promises that it will conduct any required “plant and animal

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<sup>64</sup> Draft EA at 22 (“The specific treatment methods for each targeted area would be determined based on monitoring of existing stand conditions and would be targeted to improve or maintain desired conditions.”).

<sup>65</sup> *Id.* at 2 (“[S]pecific areas for treatment would be identified based on factors including ability to meet the purpose and need, opportunities for leveraging nearby efforts on state or private land, staff capacity, access, weather, and other factors.”).

<sup>66</sup> *Id.* at 45–51.

<sup>67</sup> See, e.g., *id.* at 118.

<sup>68</sup> *See id.* at 39 (confirming that “no additional NEPA documentation would be prepared during implementation”).

<sup>69</sup> *Id.* at 64.

<sup>70</sup> *Id.*

<sup>71</sup> *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (“Establishing appropriate baseline conditions is critical to any NEPA analysis. ‘Without establishing the baseline conditions which exist . . . before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA.’” (citation omitted)).

<sup>72</sup> Draft EA at 30.

surveys,” “cultural resource inventories,” “historic research,” and “stand exams,” among other studies. However, deferring these analyses to a later date is inappropriate. A site-specific baseline analysis must be completed *now*, during the NEPA process—not after.<sup>73</sup>

- **Prescribed fire and noncommercial mechanical or chemical treatment:** Like with its VMA polygons, the Forest Service identifies large AOIs where it says it will conduct prescribed fire and/or noncommercial stand improvement. And again, the Draft EA fails to specify *where* those treatments will occur<sup>74</sup> or the nature and intensity of fire, mechanical treatment, and herbicide application.<sup>75</sup> We understand, as the Draft EA notes, that some operational considerations for prescribed fire (e.g., “staffing, funding, weather, fuel conditions,” etc.) must be addressed contemporaneous with the burn.<sup>76</sup> And “[d]epending on site-specific conditions and monitoring results, the Forest Service may implement low or mixed intensity burn plans.”<sup>77</sup> However, the agency must know that the effects of these decisions may be very different. For example, repeat burning or burning in an area with more accumulated fuel is likely to have very different effects than low-intensity, one-time application of fire. At a minimum, therefore, the Forest Service must describe the intended effects of applying fire along with an explicit adaptive management framework (including monitoring and triggers) to ensure that those will be the actual effects of the agency’s future implementation decisions. Because the agency does not yet know precisely where or how it will conduct prescribed burning, and because it has failed to develop an explicit adaptive management framework, it resorts to discussing the effects of burning generally.<sup>78</sup> That is insufficient under NEPA.
- **Road construction:** The Forest Service also does not know *how many* miles of temporary roads are needed to enable its proposed vegetation management or *where* these roads will be located. The Draft EA predicts that “an *average* of 2 miles of temporary road would be constructed annually,” but it does not disclose an estimated total.<sup>79</sup> Perhaps more concerningly, the Draft EA also does not know where these temporary roads will be constructed—instead, it asserts that the “location of temporary roads would be identified during the implementation phase.”<sup>80</sup> Similarly, no information is provided about how long roads will stay on the landscape before the Project is over—a very important environmental

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<sup>73</sup> *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1083 (9th Cir. 2011) (noting that since a NEPA document did “not provide baseline data for many of the species, and instead plans to conduct surveys and studies as part of its post-approval mitigation measures, we hold that the [agency] did not take a sufficiently ‘hard look’ to fulfill its NEPA-imposed obligations at the impacts as to these species prior to issuing its decision”).

<sup>74</sup> See Draft EA at 2 (“[S]pecific areas for treatment would be identified based on factors including ability to meet the purpose and need, opportunities for leveraging nearby efforts on state or private land, staff capacity, access, weather, and other factors.”).

<sup>75</sup> *Id.* at 19 (“Isolated areas where mixed/moderate intensity ignition methods would be applied would be identified in each burn plan and reviewed by specialists prior to implementation”).

<sup>76</sup> See *id.* at 18.

<sup>77</sup> *Id.* at 54.

<sup>78</sup> *Id.* at 52–54.

<sup>79</sup> *Id.* at 30 (emphasis added).

<sup>80</sup> *Id.*

consideration given that temporary roads are not approved by an engineer or required to use adequately sized culverts. Though it does not know where or how many miles of road it is analyzing, the Draft EA guarantees that “[p]otential runoff impacts” from these temporary roads “will be assessed based on site conditions” during the implementation phase and controlled with BMPs.<sup>81</sup> But without knowing where these roads will be located, how many miles of roads there may be, or how long they will pose a risk, it is impossible for the Forest Service to adequately assess their effects and for the public to provide meaningful input.

- **NHNAs:** The project’s VMAs and AOIs include many acres of state-designated Natural Areas. The choice of whether, how, and why to conduct harvest within these areas is among the most consequential decisions that the agency can make. It is a choice so important that the Plan requires special consultation with the Natural Heritage Program before proceeding. Indeed, perhaps no other issue has required as much site-specific NEPA analysis in prior, recent projects. Yet the process conceived for this Project assumes that the public has no interest during the NEPA process in being informed or providing input on these critical decisions.
- **Special Area Designations:** The Forest Service proposes numerous AOIs or VMAs in special area designations, including Wilderness Study Areas, recommended wilderness, Inventoried Roadless Areas (“IRAs”), special interest areas (“SIAs”), as well as areas eligible for Wild and Scenic River status. The Draft EA acknowledges that vegetation management in affected areas “can affect scenic quality” as well as the outstanding ecological values they contain.<sup>82</sup> However, the agency largely declines to conduct any site-specific analysis of these areas. For example, the agency notes that it is proposing VMAs in several eligible Wild and Scenic River corridors, but it declines to analyze the specific effects on these corridors *at all*.<sup>83</sup> Instead of studying these and other special-area impacts in the Draft EA, the Forest Service promises to conduct a “site-specific analysis” during implementation “to ensure Forest Plan compliance” and craft applicable “design criteria.”<sup>84</sup> NEPA does not allow such a deferral. Not only does the Forest Service have an obligation under NFMA to ensure plan compliance; it also has a NEPA obligation to ensure that the public understands and can provide input on scenic effects.
- **Scenery:** Both NEPA and the Forest Plan require the Forest Service to “undergo a project-level scenery impact analysis of potential visibility considering associated viewpoints.”<sup>85</sup> Instead of conducting this analysis in the Draft EA, the Forest Service defers it to the implementation phase. According to the agency, “detailed pre-implementation field

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<sup>81</sup> *Id.* at 64.

<sup>82</sup> See, e.g., *id.* at 118.

<sup>83</sup> See *id.* at 117, 182–85.

<sup>84</sup> See, e.g., *id.* at 118.

<sup>85</sup> U.S. Forest Serv., Nantahala and Pisgah National Forests Final Land Management Plan at 129 (2023) [hereinafter “Forest Plan”].

reviews” will be conducted post-NEPA “to verify visibility and devise appropriate mitigation.”<sup>86</sup> Similarly, the Draft EA promises to conduct a subsequent “site-specific scenery analysis for AOIs on [National Park Service] lands” following publication of the Draft EA.<sup>87</sup> Instead of “provid[ing] a detailed analysis of scenic resources potentially affected by proposed actions” in the Draft EA—as required by NEPA—the agency instead describes “a range of potential mitigation” that could be used to ameliorate any impacts.<sup>88</sup> Where the Forest Service actually conducts its timber harvest within the VMAs will have major differences for scenic effects, mitigation or not. Plan compliance does not equate to “no effect” for NEPA’s purposes. Without actually conducting a site-specific analysis of effects to scenery in the Draft EA, the public is unable to comment on the agency’s plans or their consistency with Forest Plan standards and guidelines. This failure violates NEPA and NFMA.

- **Appalachian Trail:** The Forest Service also proposes extensive vegetation management along the Appalachian Trail corridor; nearly “5% of the total saw timber VMA acreage” falls within the corridor.<sup>89</sup> The Draft EA notes some of the stringent limits on vegetation management in this corridor, but largely declines to analyze any potential impacts. Instead, the Forest Service defers its site-specific analysis to “pre-implementation field reviews” to be conducted at a later date.<sup>90</sup> At that time, the agency “would identify design criteria/mitigation for scenery” needed to offset anticipated impacts.<sup>91</sup> But again, the Forest Service cannot defer its analysis of impacts to nationally significant resources like the Appalachian Trail to a non-NEPA study.
- **Social and economic resources:** The Draft EA recognizes that the Project may have impacts on social and economic resources, including tourism, Tribal resources, and recreation.<sup>92</sup> However, because it does not yet know where its site-specific activities will occur, the Forest Service is forced to describe impacts to these resources generally.<sup>93</sup> Though the agency promises that a “site-specific analysis” will take place during project implementation,<sup>94</sup> deferring this analysis to a non-NEPA document violates NEPA. How is the public supposed to give site-specific feedback on how the proposal will affect their recreational, economic, or other uses without knowing where activities will occur? And how are partners expected to reassure members of the public that the ecological benefits of the proposed activities will outweigh social and recreational impacts if we don’t know any more than they do?

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<sup>86</sup> Draft EA at 133–34.

<sup>87</sup> *Id.* at 134.

<sup>88</sup> *Id.* at 193.

<sup>89</sup> *Id.* at 133.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 133–34.

<sup>92</sup> *Id.* at 137.

<sup>93</sup> *Id.* at 137–39.

<sup>94</sup> *Id.* at 139.

Again, we appreciate the difficulty of the task before the Forest Service. Describing site-specific impacts across more than 250,000 acres of the Pisgah National Forest is no small task. “The scope of the undertaking here, however, was the Forest Service’s choice and not [Conservation Groups’].”<sup>95</sup> Having decided to simultaneously manage hundreds of thousands of acres across a diverse forested landscape, “the Forest Service may not rely upon forecasting difficulties or the task’s magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision’s environmental consequences.”<sup>96</sup>

Put simply, the Forest Service has a choice. If it wishes to prepare a single NEPA study for the GAP Project, that study must contain a site-specific analysis adequate to support a finding of no significant impact and to address unresolved conflicts in the use of available resources. If it wishes to defer said site-specific decisions (and analysis), the agency could adopt the two-tiered programmatic approach suggested by Conservation Groups during scoping.<sup>97</sup> Under that approach, the agency would prepare a programmatic NEPA study with sideboards—akin to what the agency already has produced here in the Draft EA—then tier narrower, site-specific EAs to this larger document. As Conservation Groups explained in their scoping letter, this approach has already been embraced on the Cherokee National Forest for its “Goal 17” projects, where it has resulted in (1) efficiency gains and (2) social buy-in from affected community members. The Forest Service risks sacrificing both benefits here by continuing with its selected approach—preparing a single NEPA study with no site-specific analysis in contravention of clear statutory and regulatory directives. However, the Forest Service cannot make a decision that purports to cover site-specific action on the ground without first analyzing it through the NEPA process.

We also wish to highlight that failing to conduct required site-specific analyses not only violates NEPA, but also violates the requirements of the CFLRP. As Conservation Groups explained during scoping, the GAP Project cannot meet the program’s requirements without making site-specific commitments prior to approval. The GAP Project’s ability to, for instance, “fully maintain or contribute toward” restoration of characteristic forest composition and structure critically depends on the precise location and design of treatments across the landscape. Drawing huge polygons and setting an acreage goal for treatments is not enough. More specifically, setting a general purpose to address ecological needs in fire-adapted communities while reserving the discretion to harvest in cove forests is not enough. As we have explained in our comments on and objection to the recently finalized Nantahala and Pisgah Forest Plan (“the Forest Plan”), it is impossible to meaningfully analyze the ecological effects of a given amount of treatment by acreage without understanding how those treatments will be distributed across the area—especially an area as ecologically heterogeneous as the Pisgah National Forest.<sup>98</sup> In fact, the recommendations

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<sup>95</sup> *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982).

<sup>96</sup> *Id.*

<sup>97</sup> Scoping Letter at 18.

<sup>98</sup> See, e.g., S. Env’t L. Ctr., Wilderness Soc’y, MountainTrue, & Defs. of Wildlife, Notice of Objection to the Revised Land Management Plan for the Nantahala and Pisgah National Forests 33 (March 22, 2022) (“NPNF Plan Objection”) (“The Plan places no limits whatsoever on the frequency and distribution of structural manipulations by reference to ecozone [reference conditions]. What the Plan must do but fails to do is, for example, ensure that these ‘local

and concerns expressed here will echo some of those we expressed in our objection because the Forest Service’s NFMA regulations, similar to the funding criteria for the CFLRP, require a demonstration that actions will achieve “ecological integrity.”<sup>99</sup>

The CFLRP also requires that eligible projects “be developed and implemented through a collaborative process.”<sup>100</sup> We appreciate agency officials’ transparency and openness to feedback about the GAP Project to date, demonstrating the recognition that social license and public education are crucial, particularly for projects of this magnitude. And we are very supportive of the ongoing work of the PRI. However, some of the most relevant and useful collaborative work on the Pisgah National Forest has occurred over the last decade through the Nantahala–Pisgah Forest Partnership (“the Partnership”), which developed and submitted to the Forest Service recommendations reflecting consensus views on where certain treatments would be appropriate and where they ought to be more limited. The agency should leverage these hard-won solutions rather than starting from scratch as it makes site-specific project decisions.

As the Project is currently conceived, the Forest Service will make choices during its implementation that will determine whether the outcome is consistent with collaborative consensus. For example, it will choose whether and how to conduct commercial harvest in state-designated Natural Areas that the Partnership recommended. Because the Forest Service has chosen to defer those site-specific decisions to the future, those decisions will require analysis and public disclosure and input in accordance with NEPA—and the CFLRP.

d. The Draft EA relies on uncertain and unspecified mitigation measures to arrive at its proposed finding of no significant impact.

The Draft EA’s decision to defer most, if not all, of its site-specific analysis also creates a separate problem for the agency—namely, that it does not know how to mitigate effects that it has yet to analyze. The Forest Service attempts to solve this problem by listing “generalized” mitigation measures<sup>101</sup> and promising that, during project implementation, “Forest Service specialists” will “identify *additional* design criteria so that each site-specific activity meets the applicable [Forest Plan] Standards and Guidelines.”<sup>102</sup>

The agency repeats its promise to fold in additional, as-yet-to-be-determined mitigation measures, design criteria, and BMPs throughout the Draft EA. To list a few relevant examples:

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deviations’ do not cause too many 40-acre gaps in cove hardwood landscape in a manner inconsistent with ecosystem [reference conditions].”).

<sup>99</sup> 36 C.F.R. § 219.8.

<sup>100</sup> 16 U.S.C. § 7303(b)(2), (6).

<sup>101</sup> Draft EA at 190, 303–23.

<sup>102</sup> *Id.* at 36 (emphasis added).

- Burn plans to be developed after the Draft EA is completed will “include, but are not limited to, a risk assessment that identifies hazards and *potential mitigation measures* that would be used to protect life, property, and resources.”<sup>103</sup>
- “Site specific assessments will be completed to determine *appropriate* logging systems and *BMPs* for that location based on slope and soil composition.”<sup>104</sup>
- “Dozer lines or hand lines will be created for this burn project, and therefore [swamp pink] individuals could be uprooted or killed. Specialist review of burn plans would minimize impacts through *identification of design criteria*.”<sup>105</sup>
- “Vegetation treatments can affect scenic quality and site-specific analysis and *design criteria would be applied at the implementation phase* to ensure Forest Plan compliance.”<sup>106</sup>
- “Specialists would review each site-specific activity as part of the implementation process, and *design criteria would be applied* to meet Forest Plan, Section 7, and Section 106 consultation requirements *where applicable*.”<sup>107</sup>
- “The pre-implementation field review process would be conducted for all proposed actions within each AOI, ideally in leaf-off season. This would verify visibility from nearby viewpoints, *determine what (if any) mitigation would be necessary* to meet desired [scenic integrity objectives], and involve consultation with the [Appalachian Trail Conservancy], [National Park Service], or other partners where appropriate.”<sup>108</sup>
- “Pre-implementation field reviews would consider effects associated with construction of these features and *potential need for mitigation*.”<sup>109</sup>
- “Meeting these desired [scenic integrity objectives] and other [Forest Plan] requirements in the [Appalachian Trail] and Interface management areas will require detailed pre-implementation field reviews to verify visibility and *devise appropriate mitigation*, especially with almost 15% of all proposed saw timber VMA activities falling within these two management areas, and in the Foreground distance zone of nationally or regionally significant recreation travel ways and use areas. As part of the implementation process described in Section 2.1.3 and 2.1.5, Forest Service specialists would *identify design*

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<sup>103</sup> *Id.* at 20 (emphasis added).

<sup>104</sup> *Id.* at 64 (emphasis added).

<sup>105</sup> *Id.* at 105 (emphasis added).

<sup>106</sup> *Id.* at 118 (emphasis added).

<sup>107</sup> *Id.* at 119 (emphases added).

<sup>108</sup> *Id.* at 133 (emphasis added).

<sup>109</sup> *Id.* (emphasis added).

*criteria/mitigation for scenery* (e.g., leave tree density, buffers, activity area shape, etc.) so that each site-specific activity is consistent with Forest Plan direction.”<sup>110</sup>

- “During site-specific scenery analysis for AOIs on [National Park Service] lands, the Forest Service would also notify and coordinate with the [Park Service] to *identify mitigation needed* to protect scenic resources on [Park Service] land and minimize adverse impacts on viewsheds/overlooks.”<sup>111</sup>
- “Meeting these desired [scenic integrity objectives] and other [Forest Plan] requirements in the [Appalachian Trail] and Interface management areas would require pre-implementation field review and *refinement of design criteria*, especially with over 15% of all proposed VMAs with a saw timber products falling within these two management areas, and in the foreground distance zone of nationally or regionally significant travel ways and use areas.”<sup>112</sup>
- “During the pre-implementation phase, proposed activities in each AOI would undergo field reviews (ideally in leaf-off season) to verify visibility of proposed treatments which could affect scenic resources. This would allow consideration of viewpoint location, viewing distance, vegetative screening, and existing scenic character; as well as proposed treatment types, leave tree densities, and associated ground disturbing activities for operational requirements. From this information, *mitigation would be designed to ensure activities meet desired [scenic integrity objectives]*.”<sup>113</sup>
- “As described in EA Section 2.1.5, *additional design criteria may be identified during the pre-implementation specialist review process* that precedes each site-specific activity.”<sup>114</sup>
- “After completing the pre-activity resource characterization, each resource specialist must review the site-specific activity, confirm whether it is consistent with the effects and decision associated with the GAP EA, *identify any design features needed to ensure consistency*, and document any unique site-specific considerations that should be incorporated into the implementation process.”<sup>115</sup>

As these examples illustrate, the Forest Service is repeatedly relying on a future non-NEPA “review process that would identify necessary and appropriate mitigation measures at a later time and on a case-by-case basis” to support the Draft EA’s conclusions.<sup>116</sup> In effect, the agency “presumes, on this record, that whatever the impacts, it will be able to mitigate them successfully

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<sup>110</sup> *Id.* at 133–34 (emphases added).

<sup>111</sup> *Id.* at 134 (emphasis added).

<sup>112</sup> *Id.* at 193 (emphasis added).

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> *Id.* at 304 (emphasis added).

<sup>115</sup> *Id.* at 327 (emphasis added).

<sup>116</sup> *Ohio Valley Env’t Coal. v. Hurst*, 604 F. Supp. 2d 860, 889 (S.D.W. Va. 2009).

and further, that the procedures incorporated into the [Draft EA] are sufficient to ensure that success. [But a]n analysis based on presumptions at every step cannot support any sort of conclusion and especially not the” Forest Service’s proposed finding of no significant impact.<sup>117</sup> The Forest Service’s “unexplained and unsupported reliance on a generic mitigation process” and a list of potential mitigation measures is not a “substitute” for evaluating the Project’s actual effects.<sup>118</sup>

We appreciate the difficulty of predicting what mitigation measures may be needed to alleviate environmental harms for site-specific activities that have not yet been designed. But this problem results from the Forest Service’s decision to plow ahead with a single NEPA study that omits site-specific analysis for the actions at the proposal’s heart—vegetation management. If the agency had chosen to adopt Conservation Groups’ suggestion of a two-tiered NEPA approach, the Forest Service could defer the selection and analysis of its mitigation measures to the site-specific EA level. At that point, the agency would be in a much better place to: (1) identify site-specific impacts; (2) select specific mitigation measures to address those impacts; and (3) adequately explain why those mitigation measures will be successful. Those site-specific EAs would be streamlined and would not need to address the cumulative or broad-scale impacts covered by this EA, and the public’s role in providing site-specific input would be preserved. The Forest Service’s inability to meet those requirements here is a symptom of a larger dysfunction in how the GAP Project is designed. Until this design issue is rectified, the Project will continue to be inconsistent with NEPA.

e. The Draft EA’s plans for adaptive management are inconsistent with Forest Service regulations and NEPA.

In general, we are supportive of the concept of adaptive management. Properly implemented, adaptive management ensures that an action achieves its predicted effects. It does so by testing for bad assumptions and adjusting management activity in response to feedback from conditions on the ground. Monitoring the results of an action and adjusting future management activities based on the results is a sensible approach. Adaptive management *could* address some of the concerns we identify in these comments by increasing clarity around the Project’s ultimate effects. But the feedback mechanisms and adjustments must be explained in the EA, not merely left as hypotheticals. Making a nod to adaptive management generally is not a substitute for public engagement about site-specific information under NEPA.

The Forest Service uses the concept of adaptive management in two separate (and admittedly confusing) ways. One type of adaptive management occurs in *multiple NEPA decisions*. This is the classic NEPA-NFMA triangle. We learn from individual projects and incorporate that information into our analysis for the next NEPA process.

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<sup>117</sup> *Id.* at 895–96; *see also N. Plains Res. Council*, 668 F.3d at 1084–85 (“In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of \*1085 what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.”).

<sup>118</sup> *Hurst*, 604 F. Supp. 2d at 895.

In order to use adaptive management in a *single decision*, however, 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 EA must disclose not only the effect 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 whether the action is having its intended effect.”<sup>119</sup> To summarize, adaptive management is appropriate when the agency knows specifically what it wants to accomplish, but there is some uncertainty in whether the proposed action will be able to produce that effect, necessitating a “plan b.” In other words, adaptive management must identify the *effect* intended, a “plan a” for achieving that effect, monitoring and triggers for abandoning “plan a” in favor of another approach, and a “plan b” to ensure that the predicted effect is achieved.

The Forest Service Handbook gives direction to “[d]isclose the site-specific effects of all of these actions, adjustments, or use of acceptable tools in the analysis.”<sup>120</sup> While not at a site-specific level, the process outlined in the Draft EA does a fairly good job of describing the intended effects of treatments for xeric and moderate ecozones in Table 7. There we see measurable descriptions of desired conditions within each of the target ecozones, styled confusingly as “indicators.” For example, we see that for the dry oak ecozone, the Forest Service wants to achieve canopy closure levels between 40% and 60%, and that canopy closure greater than 60% would therefore prompt action such as a “non-commercial thinning or maybe mastication, followed by prescribed burning.”

While helpful to understand the intent of the Project, these “indicators” and “potential” management actions do not constitute an adaptive management process. Fundamentally, the agency’s “adaptive” strategy is simply cover for the fact that it hasn’t figured out where and what it plans to do in the first place—no site-specific “plan a,” because the agency doesn’t know the baseline conditions on the ground. This listing of “potential” management actions addressing unknown conditions is the hallmark of an unlawful “condition-based” management scheme, not adaptive management.

This scheme violates Forest Service regulations in several ways. To start, the Draft EA does not “clearly identify the adjustment(s) that may be made.”<sup>121</sup> Again, to be clear, Table 7 identifies potential “plan a” actions. For instance, the agency suggests that removal of off-site white pine may be appropriate in a dry oak ecozone with certain hypothetical canopy and shrub densities. But these hypotheticals are not “adjustments” to a prior plan of action that may be needed, after monitoring, to keep the Project on track to have the desired effect. Instead, they are just actions that the Forest Service “may” take in the first place, depending on what it finds on the ground. “Adaptive management” is not a blank check to conduct whatever management the agency deems appropriate at a future date. If it intends to use an adaptive management framework, the

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<sup>119</sup> 36 C.F.R. 220.7(b)(2)(iv).

<sup>120</sup> FSH 1909.15, ch. 10, sec. 14.1.

<sup>121</sup> 36 C.F.R. 220.7(b)(2)(iv).

agency must identify the actions it will take now, plus the adjustments that may be needed if monitoring shows that those actions are not getting the job done.

The approach is also problematic because it is not prescriptive (or comprehensive). It is merely a list of “potential” actions. To even constitute a “plan a” for adaptive management, the Draft EA would need to prescriptively explain, all the way to the ground, how site-specific conditions will drive the corresponding management action. As explained above, NEPA requires that agencies undertake and disclose site-specific analysis before making decisions with site-specific impacts.<sup>122</sup> If the Forest Service is putting off the gathering of on-the-ground information, then it takes on the burden now, in this EA, to explain what it will be looking for and how it *will* respond—not merely how it *may* respond. How will it determine, for example, whether to use a ground-disturbing commercial thinning versus a noncommercial slashdown versus mastication versus herbicide or girdling? Based on best available information about current conditions, how often and where does it expect to encounter each of the conditions that would prompt those respective actions? If such information is not available, how does the uncertainty affect the agency’s ability to describe effects and justify a finding of no significant impact? This analysis and disclosure is designed to both ensure that the Forest Service conducts a thorough review of the potential environmental effects of their action, and it also allows an opportunity for the public to respond to the proposal and share relevant information or expertise they may have.

The Draft EA does not provide nearly enough information about site-specific indications and contraindications for specific treatments, much less the “adjustments” that might be needed to those specific treatments. The Draft EA merely notes that “[t]reatment types would depend on site-specific conditions, including access, sensitive soils, relative locations of special status species, and other considerations.”<sup>123</sup> These factors are presented as relevant to the treatment decision despite being nowhere in the table of indicators and not being mentioned anywhere else in the section. Additionally, simply listing factors stops well short of explaining how to analyze these factors, let alone actually conducting the analysis and public engagement that NEPA requires. This amounts to a statement of “trust us; we’ll figure it out later” rather than an environmental analysis. To be compliant with NEPA, the Forest Service must either conduct site-specific analysis in its final analysis or tier subsequent EAs featuring site-specific analysis to this one. A process which notes that the Forest Service intends to account for site-specific conditions without any discussion of how it intends to consider those conditions and no opportunity under NEPA for meaningful public input is inadequate.

Next, and relatedly, an adaptive management strategy “must also describe the monitoring that would take place” to determine when to move from “plan a” to “plan b.”<sup>124</sup> Because there is

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<sup>122</sup> *E.g.*, *Block*, 690 F.2d at 761 (holding that site-specific impacts must be “fully evaluated” when an agency proposes to make an “irreversible and irretrievable commitment” of resources to a project at a particular site). Congress alone may make exceptions to this rule. *E.g.*, 16 U.S.C. §§ 6591a(b)(2), 6591b(a)(1), 6591(d) (allowing the Forest Service to skip NEPA for site-specific actions that otherwise would require an EA or EIS, provided that all the requirements for eligibility are met—but such exceptions are narrow and rare).

<sup>123</sup> Draft EA at 34.

<sup>124</sup> 36 C.F.R. 220.7(b)(2)(iv).

no “plan b” described here, and not even a fully formed “plan a,” it is no surprise that the adaptive management proposal also lacks “triggers” for moving from one to the other. Presumably, the same “indicators” in Table 7 will continue to be relevant. For example, perhaps if one round of prescribed fire doesn’t achieve the indicators associated with the affected ecozones, then a next round of prescribed fire might be preceded by mechanical slashdown to increase fuel loading. But although we can *imagine* how adaptive management might work here, the proposal surely does not describe it. Furthermore, the Draft EA’s description does not indicate the point in time after an action when monitoring should occur. As written currently, it appears that “monitoring” for these indicators would occur only *before* action is taken in the first place (i.e., to determine what the “plan a” action will be). How will monitoring occur *after* initial actions are taken to determine whether to take some follow-up action? This lack of clarity does not amount to a sufficient description of the monitoring that will take place. This uncertainty must be resolved in a revised NEPA study.

In addition, the description of monitoring fails to note the circumstances which would compel the Forest Service to consider whether a new or supplemental NEPA review is required. The Forest Service Handbook states that “[i]f monitoring indicates that the environmental effects of each action do not exceed the bounds of those anticipated in the original decision and the actions serve to move the project toward the intended effects, implementation continues using the ‘implement-monitor-adapt’ cycle without the need for new or supplemental NEPA review.”<sup>125</sup> However, if “changed circumstances result in environmental impacts of a proposed action not disclosed or analyzed,” the Forest Service Handbook directs interdisciplinary review.<sup>126</sup> The description of adaptive management in the Draft EA does not identify which indicators would show that the environmental effects of the actions are exceeding the bounds of the original decision and would suggest the need for a new or supplemental NEPA review. These indicators must be added to a fully fleshed-out Table 7 identifying the complete list of “adjustment(s) that may be made” to aid compliance with the Forest Service Handbook during implementation. The Forest Service should connect the dots between its adaptive management strategy and the implementation-stage decision about whether individual actions will be within the scope of the existing analysis.

f. The Draft EA never explains how its plan for extensive logging in mesic ecozones is consistent with the Project purpose and need.

Conservation Groups wholeheartedly endorse the express purpose of the GAP Project—“to restore fire-adapted ecosystems and reduce wildfire risk for local communities by implementing fuels reduction and vegetation treatment activities across portions of the Forest.”<sup>127</sup> As the Draft EA explains, portions of the Pisgah National Forest have departed from the natural fire regime due to long-term fire suppression. Given the potential of climate change to both

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<sup>125</sup> FSH 1909.15, ch. 50, sec. 54.1.

<sup>126</sup> *Id.*

<sup>127</sup> Draft EA at 6.

exacerbate this departure and contribute to increased wildfires, the need to promote restoration of fire-adapted forests is an acute one.

That said, Conservation Groups are concerned that a large portion of the management planned as part of the GAP Project is inconsistent with this purpose and need. Specifically, Conservation Groups believe that the inclusion of tens of thousands of acres of non-fire-adapted, mesic forests in VMAs is inappropriate. To be clear, we are comfortable with mesic ecozones being included in AOIs where fire will be used, and we agree that conditions in mesic ecozones will generally limit the extent to which fire affects them. However, the same cannot be said for VMAs. Without prohibitively extensive fire lines, we cannot precisely control where fire goes, but we absolutely can control where timber harvest occurs. And the Draft EA shows that the agency intends to use timber harvest in mesic ecozones where it is not ecologically appropriate and does not bear any relationship to the Project’s stated purpose and need.

According to the Draft EA’s metrics, the Project’s proposed VMAs contain 29,518 acres of forest.<sup>128</sup> Nearly 40% percent of these 29,518 acres<sup>129</sup> are comprised of non-fire-adapted mesic forests, including acidic cove, rich cove, floodplain, northern hardwood, and spruce-fir forests;<sup>130</sup> another 14% is comprised of high-elevation red oak and mesic oak forests. For example, the Project proposes nearly 4,000 acres of prescribed burning and 254 acres of vegetation management in spruce-fir and northern hardwood ecozones—ecozones where fire is “extremely infrequent.”<sup>131</sup> Timber harvest in these non-fire-adapted ecozones cannot satisfy the purpose and need of the GAP Project—which again, is restoring “fire-adapted ecosystems” and reducing wildfire risk across the Pisgah National Forest.

The Draft EA asserts that inappropriate restoration treatments in mesic forests will “generally be incidental” to work in fire-adapted forests and are a natural consequence “of conducting landscape-scale restoration.”<sup>132</sup> However, a closer examination of the Forest Service’s VMA polygons do not bear this out. For example, our desktop analysis shows nearly two hundred stands falling within a Project VMA either contain more than 50% cove forest or at least 40 acres of cove forest.<sup>133</sup> For example, PIS0203 is a 284-acre stand that falls in a Backcountry management area, overlaps with an IRA, and may contain forests up to 170 years old (according to FSVEG). More than 256 of these 284 acres are cove forest—more than 90% of the stand. Many targeted stands contain an even higher percentage of cove forest.<sup>134</sup>

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<sup>128</sup> As explained below, there is no relevant ecological differences between the sawtimber and non-sawtimber VMAs—both allow use of heavy equipment, road construction, and extractive logging treatments. *See* Draft EA at 190.

<sup>129</sup> *Id.* at 40.

<sup>130</sup> Forest Plan at 99 (“The following ecozones are not considered fire-adapted, and fire return intervals exceed multiple planning cycles: Northern Hardwood; Rich Cove; Acidic Cove; Floodplain Forest; Spruce Fir.”).

<sup>131</sup> Draft EA at 44.

<sup>132</sup> *Id.* at 17, 20 (emphasis added).

<sup>133</sup> *See* Table 1 & Table 2 (attached). There is a +/- 2% potential error from the analysis due to the intersection of raster data with vector data—hence some stand IDs in these tables show > 100% mesic forest.

<sup>134</sup> *See id.*

Plainly, the Forest Service is specifically targeting mesic ecozones for vegetation management, including timber harvests. These treatments are not “incidental” to restoration of fire-adapted communities—as the numbers and tables referenced above indicate, many stands are almost entirely focused on mesic forests alone. Nor is it even clear what “incidental” means in this context. The agency has disclosed no reason why its silvicultural staff cannot identify or avoid marking trees for harvest in mesic ecozones, for example. There is no reason given why these VMAs are a natural consequence of “landscape-scale restoration.” Instead, many of these isolated blocks appear specifically selected to allow the agency to do large-scale timber harvest in non-fire-adapted communities—likely to fulfill the agency’s unstated purpose and need of meeting mandated timber targets. Put simply, harvests in mesic forests seem to be a feature, not a bug.

To be consistent with the CFLRP’s statutory requirements, the Forest Service must remove mesic forests from Project VMAs. Doing so will not be difficult. As a first step, the agency can calculate the percentage of mesic forest within a VMA with GIS. Then, the Forest Service can clip mesic ecozones from proposed VMAs. Merely clipping mesic forests from VMAs will not fully solve the issue, however. As the Forest Service recognizes, “ecozones are models and have not been field verified.”<sup>135</sup> Therefore, there is a high likelihood that some mesic forests have been misidentified as fire-adapted communities.

To ensure it avoids or minimizes inappropriate fire-adapted management in these non-fire-adapted communities, the agency must adopt a Project-wide condition similar to that which it imposed on mesic harvests in Special Interest Areas. In those areas, the Forest Service has clarified that non-fire-adapted ecozones like “coves and northern hardwood habitats” are not appropriate targets for “fire-adapted habitat[] . . . restoration.”<sup>136</sup> Accordingly, the agency promises to field verify that “desired (fire-adapted) ecozones are present within the potential VMA . . . so that activities can be focused in those ecozones” and those ecozones alone.<sup>137</sup> Imposing this condition across the entire Project area would help ensure that effects to mesic ecozones are truly “incidental” to fire-adapted community restoration. If mesic ecozones can be avoided in SIAs, then there is no practical reason they can’t be avoided elsewhere. If the Forest Service declines to embrace this restriction, Conservation Groups believe that the agency’s current NEPA analysis—which is premised on “incidental” effects to mesic ecozones—would fail to draw a rational connection between facts in the record and the proposed finding of no significant impact.

g. The Draft EA never explains how long it will be used to govern activities in the Pisgah National Forest.

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].”<sup>138</sup> For that reason, the Council on Environmental Quality (“CEQ”) has explained that, “[a]s a rule of thumb,” NEPA studies “that

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<sup>135</sup> Draft EA at 121.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *N. Plains Res. Council*, 668 F.3d at 1086.

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.”<sup>139</sup>

The Forest Service is not clear about how long it intends to rely upon this EA, stating only that it “would be implemented over a long period.”<sup>140</sup> The project is intended to last at least the 10-year period of CFLRP funding, but it appears clear it will go substantially longer. Without a site-specific description of baseline conditions now and an analysis of whether and how those baseline conditions will change during the life of the Project, there is a high risk of the Project going stale quickly. This is exacerbated by the lack of a prescriptive decision about what actions will be taken (without which the Project cannot credibly predict the effects of its treatments in the face of changing baseline conditions) and the lack of an adaptive management framework (without which the Project cannot ensure that those effects will be accomplished notwithstanding the uncertainty created by other drivers and stressors).

For example, it is likely that many of the Project stands slated for vegetation management contain mature forest approaching old-growth conditions. Depending on how long the Project drags on—and again, the Draft EA seems intentionally vague on this point—these stands may become old growth before Project implementation and maintenance is completed. The Draft EA never recognizes this potentiality, however, nor does it articulate how the agency would respond to these changed conditions under an adaptive management framework. To address these gaps, the Forest Service’s revised NEPA analysis must address (1) how long Project implementation will last and (2) how it will adapt its management to eventualities like the natural development of additional old-growth.

h. The Draft EA repeatedly relies on documents that are not available in the public record.

NEPA regulations allow agencies to incorporate material by reference into their environmental documents to “cut down on bulk.”<sup>141</sup> However, agencies “shall not incorporate material by reference unless it is reasonably available for review, such as on a publicly accessible website, by potentially interested persons throughout the time allowed for comment or public review. Agencies should provide digital references, such as hyperlinks, to the incorporated material or otherwise indicate how the public can access the material for review”<sup>142</sup>

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<sup>139</sup> See 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. See also *Friends of Animals v. U.S. Bureau of Land Mgmt.*, No. 3:15-CV-0057-LRH-WGC, 2015 WL 555980, at \*3 (D. Nev. Feb. 11, 2015) (rejecting agency reliance on a five-year-old EA after circumstances changed); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 936 (D. Or. 2016) (“Notably, the Council of Environmental Quality, which promulgates the NEPA regulations, has emphasized that NEPA documents more than five years old should be ‘carefully reexamined’ for supplementation.”).

<sup>140</sup> Draft EA at 16.

<sup>141</sup> 40 C.F.R. § 1501.12.

<sup>142</sup> *Id.*

Here, the Forest Service incorporates by reference several documents which are not available for public review. For example, the Draft EA cites to a worksheet discussing conservation measures in the “Bat Conservation Strategy.”<sup>143</sup> According to the Forest Service, this worksheet discusses “which measures” from the Strategy “were not included [in the Project] and why.”<sup>144</sup> The Draft EA claims this document is “in the public record,”<sup>145</sup> but Conservation Groups were unable to locate it on the Project website. When asked to provide this worksheet, the Forest Service refused, acknowledging that this worksheet “is being used to craft the project design features” but is “considered deliberative.”<sup>146</sup> According to the Forest Service, the worksheet will only be available to the public once it is “finalized”<sup>147</sup>—apparently after the public comment period closes.

As another example, the Draft EA repeatedly cites to a “Biological Assessment” (“BA”) in its wildlife and botany analyses.<sup>148</sup> According to the Forest Service, effects on “species were analyzed *in detail* in the BA” and are merely “*summarized*” in the Draft EA.<sup>149</sup> Though the Draft EA indicates that the BA is complete,<sup>150</sup> the Forest Service did not make this document available on the Project website. When asked to provide it, the Forest Service again refused, claiming that the BA was not finished<sup>151</sup> and will only be “available for public release once [it is] finalized”<sup>152</sup>—also apparently after the public comment period is over.

The agency’s failure to provide these documents and other documents during the public comment period inhibited Conservation Groups’ ability to provide meaningful comments. As an illustration, the Draft EA mentions that “[a]t the time the BA was written, 9 [bat] hibernacula roost buffers exist within the Action Area.”<sup>153</sup> The Draft EA then cites to a table within the BA as support.<sup>154</sup> Yet while the location of these roost buffers was apparently disclosed in the BA, the Draft EA is silent on the subject. As a result, Conservation Groups have no way to assess whether these hibernacula will be affected by the Project.

Conservation Groups understand that agencies are *generally* not required to provide deliberative documents to the public.<sup>155</sup> However, NEPA *requires* the agency to publicly disclose

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<sup>143</sup> Draft EA at 305.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Email from Nicholas Larson, District Ranger, to Spencer Scheidt, SELC Staff Attorney (July 30, 2024) (Attachment C).

<sup>147</sup> *Id.*

<sup>148</sup> *See, e.g.*, Draft EA at 36, 69–70, 77, 83, 87, 92, 197, 304.

<sup>149</sup> *See, e.g.*, *id.* at 70 (emphases added).

<sup>150</sup> *See id.* at 87 (“The Forest Service and [National Park Service] prepared a Biological Assessment for Section 7 consultation with the USFWS Asheville Office.”).

<sup>151</sup> Email from Nicholas Larson, District Ranger, to Spencer Scheidt, SELC Staff Attorney (July 19, 2024) (Attachment D).

<sup>152</sup> Attachment C.

<sup>153</sup> Draft EA at 307.

<sup>154</sup> *Id.*

<sup>155</sup> *Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. U.S. Dep’t of Just.*, 697 F.3d 184, 194 (2d Cir. 2012) (explaining that the deliberative process privilege is qualified).

documents it incorporates by reference into the Draft EA during the public comment period.<sup>156</sup> Because the Draft EA explicitly relies on the BA and worksheet in its analysis, these documents should have been disclosed during the public comment period. The Forest Service’s failure to do so violates NEPA.<sup>157</sup>

The Forest Service cannot cure this failure by releasing these documents after the public comment period closes. However, it could prepare a revised NEPA study for the Project, reopen the public comment period, and make the BA, worksheet, and other documents incorporated by reference available to the public. But it cannot rely on purportedly deliberative documents to justify its decision-making while shielding those documents from public view.

- i. Any actual analysis of impacts to species, as informed by consultation, would happen outside the NEPA process.

One of the twin aims of NEPA is to guarantee that “relevant information about a proposed project will be made available to members of the public so that they may play a role in both the decisionmaking process and the implementation of the decision.”<sup>158</sup> To that end, applicable CEQ regulations require agencies to “disclose to the public relevant environmental information early in the process *before* decisions are made and *before* actions are taken.”<sup>159</sup> Failing to adhere to this obligation “deprives the public of its procedural right to an adequate opportunity to participate in the [NEPA] process.”<sup>160</sup>

Yet that is precisely what is happening here. According to the Draft EA, the Project will be “[c]onsistent with requirements in the GAP Project Biological Opinion” prepared during forthcoming “ESA Section 7 consultation.” However, that ESA Section 7 consultation has yet to take place, and the biological opinion that will be produced at the end of that consultation process does not yet exist. Which means that the Forest Service is making a bald prediction that the Project will be consistent with yet-to-be-determined “requirements” in a yet-to-be-written biological opinion. Meaningful comment on these hypothetical “requirements” is impossible. This not only deprives the public of its procedural right to participate in the NEPA process, but also violates the regulatory prohibition mentioned above against incorporating a document by reference “unless it

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<sup>156</sup> 40 C.F.R. § 1501.12.

<sup>157</sup> *Cf. Clinch Coal. v. U.S. Forest Serv.*, 693 F. Supp. 3d 643, 652 (W.D. Va. 2023) (holding the Forest Service cannot use deliberative documents as a “sword” to justify agency action while simultaneously using those documents’ deliberative nature as a “shield” to protect them from disclosure).

<sup>158</sup> *Hedges v. Abraham*, 300 F.3d 432, 438 (4th Cir. 2002) (citation omitted).

<sup>159</sup> 40 C.F.R. § 1500.1(b) (emphases added).

<sup>160</sup> *Ohio Valley Env’t Coal. v. U.S. Army Corps of Eng’rs*, 674 F. Supp. 2d 783, 809–10 (S.D.W. Va. 2009); *see also Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 953 (9th Cir. 2008) (holding that NEPA requires agencies to “provide the public with sufficient environmental information . . . to permit members of the public to weigh in with their views and thus inform the agency decision-making process”); *Block*, 690 F.2d at 770–71 (concluding that since it is “[o]nly at the stage when the draft EIS is circulated [that] the public and outside agencies have the opportunity to analyze a proposal and submit comment,” withholding information at this stage illegally “insulates [an agency’s] decision-making process from public scrutiny”).

is reasonably available for review, such as on a publicly accessible website, by potentially interested persons throughout the time allowed for comment or public review.”<sup>161</sup>

Delaying ESA consultation until after NEPA review is complete is an increasingly common practice for the Forest Service. We acknowledged that there is no explicit requirement to conduct ESA consultation before preparing a NEPA study.<sup>162</sup> However, the Forest Service is required by NEPA to disclose impacts to listed species and develop mitigation for site-specific and cumulative impacts to those species. NEPA does not allow the Forest Service to defer these tasks to a post-NEPA process. But that is exactly what the Forest Service is doing here—promising to more fully analyze impacts to listed species and develop appropriate mitigation measures during post-NEPA Section 7 consultation. This deferral violates NEPA.

j. The Draft EA consistently misapplies cumulative effects.

NEPA regulations require agencies to consider the “cumulative effects” of their actions.<sup>163</sup> 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.”<sup>164</sup> 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. 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* other “past, present, and reasonably foreseeable actions.”

For example, the Draft EA dismisses Project effects to water and soils because “negative impacts from poor agricultural practices and increased conversion to impermeable surface” outside the Pisgah National Forest “*likely represent a greater contribution* to adverse impacts than activities on [National Forest System] lands that are subject to Forest Plan standards and guidelines.”<sup>165</sup> In a similar vein, the Forest Service dismisses Project effects to scenery because “development on adjacent private lands likely has the *largest potential* for adversely affecting scenery because those lands may not have regulations or policies to preserve scenery or viewsheds.”<sup>166</sup>

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<sup>161</sup> 40 C.F.R. § 1501.12.

<sup>162</sup> See 50 C.F.R. § 402.06(a) (“Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA)”). *But see also id.* § 402.06(b) (“Where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the documents required by those statutes.”) (emphasis added)).

<sup>163</sup> 40 C.F.R. § 1508.1(i)(3).

<sup>164</sup> *Id.*

<sup>165</sup> Draft EA at 65.

<sup>166</sup> *Id.* at 134.

In effect, the Forest Service repeatedly finds that the impacts of the Project are insignificant 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.”<sup>167</sup> “Noting that a particular environmental resource is degraded” by larger stressors “is not an excuse or justification for further degradation.”<sup>168</sup> In its revised NEPA analysis, the Forest Service must ensure that it *adds* cumulative effects together, rather than weighing them against each other.

At times, the Draft EA also refuses to add cumulative effects together if they fall outside of the Project area. For example, the Draft EA recognizes that “[o]ngoing and future land uses on nearby private land (e.g., road building, residential development, timber harvest) would adversely affect listed bat foraging and roosting habitat.”<sup>169</sup> However, it dismisses these adverse cumulative effects because they “are not expected to measurably reduce habitat suitability *within the AOIs*.”<sup>170</sup> That is not how NEPA works; the agency cannot dismiss cumulative effects occurring right outside the project area merely because they will not have direct effects *within* the project area. Instead, the agency must *add* cumulative effects together to ensure that it gets a complete picture of potential impacts to species like listed bats. Otherwise, the agency “disregards the reality that small, non-threatening injuries can incrementally lead to a fatal result, whether it is the ‘straw that broke the camel’s back’ or ‘death by a thousand cuts.’”<sup>171</sup>

k. The Draft EA overlooks critical differences in management areas.

The Forest Plan identifies sixteen different management areas that each “have similar management intent and a common management strategy.”<sup>172</sup> Each management area comes with its own desired conditions, objectives, guidelines, and standards that govern activities within the area. Activities that are inconsistent with management-area requirements violate NFMA.<sup>173</sup>

The Draft EA largely overlooks differences between management areas. These differences can be substantial. For example, “timber production”—defined as the “purposeful growing, tending, harvesting, and regeneration of regulated crops of trees to be cut into logs, bolts, or other round sections for industrial or consumer use”<sup>174</sup>—is permitted in Matrix,

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<sup>167</sup> *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005) (emphasis added).

<sup>168</sup> *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng’rs*, 417 F. Supp. 3d 1354, 1364 (W.D. Wash. 2019).

<sup>169</sup> Draft EA at 86.

<sup>170</sup> *Id.* (emphasis added).

<sup>171</sup> *Ctr. For Native Ecosystems v. U.S. Fish & Wildlife Serv.*, 795 F. Supp. 2d 1199, 1207 (D. Colo. 2011).

<sup>172</sup> Forest Plan at 208.

<sup>173</sup> 16 U.S.C. § 1604(i) (“Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”).

<sup>174</sup> 36 C.F.R. § 219.19.

Interface, and other management areas, but is flatly prohibited in Backcountry, Special Interest Areas, the Appalachian Trail corridor, and others. The Draft EA does not seem to observe this critical difference—it proposes VMAs in each of these areas—“even in Backcountry (IRA) management area[s]”—that “may include extraction” of logs for commercial purposes, including the production of “pulpwood products.”<sup>175</sup> The Draft EA fails to explain how this proposal is consistent with the Forest Plan.

#### **IV. The Draft EA’s analysis of impacts to specific resources is inadequate.**

In addition to containing numerous systemic issues, the Draft EA’s analysis of impacts to specific categories of resources is flawed. These errors must be addressed in a revised NEPA study.

##### **a. The Draft EA’s analysis of impacts to forest landscapes is inadequate.**

The Draft EA’s analysis of impacts to forest landscapes, including forest ecozones, is inadequate for at least four reasons.

**First**, as noted above, the Draft EA contains no site-specific analysis of effects to forest resources. Instead, it describes effects from burning and logging generally and promises to conduct site-specific analyses and prescribe specific mitigation measures later using non-NEPA documents. These failures violate NEPA. The Forest Service must either complete this site-specific analysis in a revised NEPA document or adopt Conservation Groups’ recommended two-tiered programmatic NEPA approach.

**Second**, and again, as noted above, the Draft EA inappropriately minimizes impacts to mesic ecozones. In that document, the Forest Service repeatedly characterizes effects to mesic forests as “incidental” to fire-adapted management. However, this obscures the significant number of VMAs where the Forest Service is specifically targeting mesic ecozones for timber harvest. Opening over 10,000 acres of mesic forests to extractive logging practices is not an effect that can be dismissed as merely “incidental.” As explained above, the Forest Service must remove these acres from its proposal to be consistent with the CFLRP and its current NEPA document.

**Third**, the Draft EA inaccurately implies that the majority of harvests in VMAs will have limited effects because they are designated as “non-saw timber VMAs.”<sup>176</sup> In total, the Draft EA proposes 29,518 acres for inclusion in VMAs. However, more than half of these acres—17,301 acres, to be precise—are classified as VMAs “without saw timber products.”<sup>177</sup> According to the Draft EA, harvests in these non-saw timber VMAs will focus on “harvest of generally small and lower valued trees,” as opposed to saw timber VMAs which will emphasize more traditional

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<sup>175</sup> Draft EA at 190.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 17.

“[c]ommercial timber harvest.”<sup>178</sup> By drawing this distinction, the Forest Service seems to imply that non-saw timber VMAs will have lesser effects than saw timber harvests.

However, in a short paragraph on scenery impacts buried on page 190 of Appendix B, the Forest Service acknowledges that there is no meaningful difference between the types of activities allowed in saw timber versus non-saw timber VMAs. Specifically, the agency recognizes that “VMAs without saw timber products may also involve use of heavy equipment like buncher-fellers, masticators, or skidders;” “may include extraction of pulpwood products, even in Backcountry (IRA) management area”; and “may also require skid trails, construction of skid roads and landings (for loading pulpwood), and construction of temporary roads in some locations.”<sup>179</sup> Put simply, the agency’s prediction about the low-impact timber management that will “generally” occur in non-saw timber VMAs is a mirage—nothing in the Draft EA prevents the Forest Service from pursuing extractive and ecologically destructive logging in non-saw timber VMAs. To the extent that the Forest Service’s NEPA analysis is premised on the distinction between effects in saw timber versus non-saw timber VMAs, it is in error. We recommend that the Forest Service drop this artificial distinction<sup>180</sup> and instead categorize its VMAs based on whether ground-disturbing equipment will be used during timber harvest. Alternatively, the Forest Service could ensure that the distinction *will* make a difference—for example, by placing a cap on the acres of non-saw timber VMAs that will be harvested using ground-disturbing methods.

**Fourth,** the Draft EA fails to adequately analyze effects to existing old growth. The Draft EA describes some general potential effects to the Designated Old Growth Network,<sup>181</sup> but as Conservation Groups have pointed out to the Forest Service, this misleadingly named network is largely comprised of younger forests not in old-growth condition. The only nod the Draft EA makes to actual existing old growth in the Project area is an acknowledgment that certain “partner-identified Class B old growth”<sup>182</sup> is found in some AOIs. Later, the Forest Service promises to manage these areas to “conserve old growth characteristics.”<sup>183</sup> This bare promise to conserve old-growth resources in unnamed locations is an inadequate analysis, especially given the fact that there is no protocol in place to survey for old growth prior to implementation. For starters, the promise to “conserve” old growth characteristics must be elaborated on. What does that mean here, and how is it consistent with CFLRP requirements? Further, how will the Forest Service ensure that large and old *trees* are retained to the maximum extent possible?

The Draft EA’s inadequate analysis of effects to old growth cannot be saved by tiering to the Forest Plan’s FEIS. During Forest Plan revision, the Forest Service admitted that it *will* cut old

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<sup>178</sup> *Id.* at 25.

<sup>179</sup> *Id.* at 190.

<sup>180</sup> We add that there is effectively no way for the Forest Service to police its “saw timber” or “non-saw timber” designation. Whether wood is slated to become saw timber, pulpwood, or some other product is not always determined before harvest. Instead, it is often a market-driven decision that occurs during wood processing at the local sawmill.

<sup>181</sup> Draft EA at 48–49.

<sup>182</sup> The Class B designation does not apply to old growth—it applies to the Forest Service’s categorization of state-designated NHNAs.

<sup>183</sup> Draft EA at 49.

growth when found outside the Designated “Old Growth” Network and that surveys for existing old growth will not occur prior to implementation. In other words, the agency chose to overlook impacts to actual old growth—which is vanishingly rare across the Southeast<sup>184</sup>—because it had promised not to cut non-old-growth forests in the Designated Old Growth Network. But since the agency was unwilling to limit themselves *not* to cut existing old growth, and because it did not set an analytical cap on how *much* they’ll cut, there is no cumulative impacts analysis in the FEIS to which a project may tier. Put simply, because the Forest Service punted on conducting a cumulative effects analysis for existing old growth at the Forest Plan stage, it must conduct such an analysis here.

The need to understand impacts to existing old growth is only heightened by the recently proposed National Old Growth Amendment (“the NOGA”).<sup>185</sup> The NOGA, which will be finalized this coming winter—before Project implementation can occur—will amend the Nantahala and Pisgah Forest Plan to require the Forest Service to “conserve and steward existing old-growth forest conditions.”<sup>186</sup> Surprisingly, the Draft EA does not mention the NOGA, nor attempt to determine whether the Project will be consistent with the proposed standards and guidelines announced in the agency’s Advanced Notice of Proposed Rulemaking. Instead, the Draft EA makes a single oblique reference to a “review process” announced in tandem with the NOGA for projects proposed within old-growth conditions.<sup>187</sup> That process requires any such projects to be submitted to the Deputy Chief for review and approval.<sup>188</sup> The Draft EA promises that the Deputy Chief’s review of the Project “will be completed before the Decision Notice is signed.”<sup>189</sup> However, it is hard to see how this review can occur by that time. The Forest Service has never comprehensively surveyed for old-growth conditions in the Project area, and has yet to conduct a site-specific analysis of Project effects to old-growth resources in the Draft EA. Without knowing *where* old-growth conditions exist or *how* the Project will affect them, any review would be premature. The Forest Service must address these analytical gaps before implementing vegetation management in existing old growth. At the very least, the Forest Service must commit to field surveys for old growth prior to any implementation in order to give effect to the promise that old growth characteristics will not be degraded.

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<sup>184</sup> Robert E. Messick & Sam L. Davis, *Global Importance of Imperiled Old-Growth Forests With an Emphasis on the Southern Blue Ridge Mountains*, in *Imperiled: The Encyclopedia of Conservation* (Dominick A. DellaSala, Michael I. Goldstein eds., 2022) (estimating that only three percent of the Southern Blue Ridge Region is currently in old-growth condition).

<sup>185</sup> 88 Fed. Reg. 88,042 (Dec. 20, 2023).

<sup>186</sup> *Id.* at 88,402.

<sup>187</sup> Draft EA at 44.

<sup>188</sup> U.S. Forest Serv., *Review of Proposed Projects with Management of Old Growth Forest Conditions* (Dec. 18, 2023).

<sup>189</sup> Draft EA at 44.

b. The Draft EA consistently fails to consider the compounding effects of climate change.

NEPA regulations require agencies to consider the “cumulative effects” of their actions.<sup>190</sup> 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.”<sup>191</sup> This includes the reasonably foreseeable effects of climate change.<sup>192</sup>

As the FEIS for the Forest Plan recognized, climate change is expected to take an increasingly heavy toll on the Project area. Among other things, climate change is expected to increase daily maximum and minimum temperatures, increase the average number of days per year above 90 °F, decrease the average number of days per year with lows below freezing, increase precipitation levels, shift species’ ranges, restrict the ability of species to move into suitable habitat, increase non-native invasive species, alter soil moisture regimes, potentially increase flooding and landslides as well as periods of drought, increase the risks of wildfire, increase water temperatures, and decrease water oxygen content, among many other effects.<sup>193</sup>

These effects will influence the resource values the Forest Service is trying to address with the Project. For example, increased fires and drought will favor the same structural and compositional changes that the Project intends to promote, potentially lessening the need for aggressive management.<sup>194</sup> In addition, increased flooding, precipitation, and landslides caused by climate change will increase sedimentation and erosion concerns that will be exacerbated by the Project’s 29,000 acres of vegetation management. Climate change–driven increases in water temperatures could also act synergistically with vegetation treatments that remove shade trees and increase the amount of sunlight hitting streams, further impacting already-stressed brook trout. The best available science also suggests that species like listed bats will shift their ranges in response to climate change to favor places like the Southern Appalachians<sup>195</sup>—complicating the Forest Service’s plans to conduct extensive prescribed burns and other treatments in locations like the Project area that will reduce valuable roosting and foraging habitat for the next few decades.

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<sup>190</sup> 40 C.F.R. § 1508.1(i)(3).

<sup>191</sup> *Id.* (emphasis added).

<sup>192</sup> *Cf. 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”).

<sup>193</sup> U.S. Forest Serv., Final Environmental Impact Statement for the Nantahala and Pisgah National Forests’ Land Management Plan at 3-9 to 3-20 (2023) [hereinafter “Forest Plan FEIS”].

<sup>194</sup> See Louis Iverson & Anantha Prasad, *Potential Changes in Tree Species Richness and Forest Community Types Following Climate Change*, 4 Ecosystems 186 (2001) (predicting that oak-hickory and oak-pine forest types are likely to increase by between 34% and 290% because of climate change). To be sure, management intervention may be needed to assist this transition due to currently poor oak regeneration, but those interventions may be different in kind. See Gregory Nowacki & Marc Abrams, *Is Climate an Important Driver of Post-European Vegetation Change in the Eastern United States*, 21 Global Change Biology 314 (2015); Louis Iverson et al., *Analysis of Climate Change Impacts on Tree Species of the Eastern U.S.*, 10 Forests 302 (2019).

<sup>195</sup> U.S. Fish & Wildlife Serv., Programmatic Biological Opinion on the Revised Forest Plan for the Pisgah and Nantahala National Forests at 35, 39 (2022) [hereinafter “2022 BiOp”].

These compounding effects are not addressed in the Draft EA. Though the Draft EA includes a section on “Climate Change,” this section only discusses impacts to carbon storage and emissions—not the local compounding impacts of climate change.<sup>196</sup> And in section after section, the Draft EA reports that cumulative effects on rare species and other resources are “insignificant” without considering climate change.<sup>197</sup> By failing to consider climate change as a cumulative effect, the Draft EA fails to take a “hard look” at the problem, in violation of NEPA.

c. The Draft EA fails to adequately consider the Project’s impacts on carbon storage and sequestration.

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.”<sup>198</sup> This includes the reasonably foreseeable effects of climate change.<sup>199</sup> It also includes the effects “from individually minor but collectively significant actions taking place over a period of time”<sup>200</sup>—like the impacts of the Project on carbon storage.

To its credit, the Forest Service includes a “Carbon and Greenhouse gas emissions” section in its Draft EA. This analysis purports to place the Project within the larger context of Forest Service action and evaluate its impact on the Nantahala and Pisgah National Forests’ important roles as carbon sinks. However, that analysis is flawed in several serious ways.

As an initial matter, the Draft EA contains extensive passages which are copied verbatim or nearly verbatim<sup>201</sup> from other recent NEPA analyses such as the Draft EA for the Lickstone project. This is cause for concern. The fundamental purpose of the NEPA process is to “ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”<sup>202</sup> When the GAP Draft EA uses language and analysis lifted directly from an assessment created for a *different* project implementing *different* techniques in a *different* area, it becomes very difficult to believe that the agency took a “hard look” at the Project. Even if using boilerplate were appropriate in a project-level NEPA analysis, as explained below, the GAP Draft EA’s boilerplate repeats several of the errors we have previously pointed out to the agency. Re-using the flawed analysis of another project is not consistent with NEPA.

Next, the Draft EA mistakenly fails to apply CEQ’s 2023 guidance on carbon emissions. The Draft EA claims that this guidance “grants agencies the discretion to decide whether to apply

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<sup>196</sup> See Draft EA at 57–61.

<sup>197</sup> *Id.* at 79, 81, 84, 101, 103, 105.

<sup>198</sup> 40 C.F.R. § 1508.1(i)(3).

<sup>199</sup> *Appalachian Voices*, 25 F.4th at 271 (holding that “[i]t is clear . . . that climate change typically must form part of the [cumulative-effects] analysis in some way”).

<sup>200</sup> *Id.*

<sup>201</sup> Compare Draft EA at 57–61, with U.S. Forest Serv. Draft Environmental Assessment for the Lickstone Project (2024).

<sup>202</sup> *Robertson*, 490 U.S. at 349.

the guidance to NEPA analyses that were in progress when the guidance was issued,” and that since the “interim CEQ guidance was published after the initiation of this EA,” the Draft EA “will rely on former iterations of climate change guidance.”<sup>203</sup> This misconstrues the 2023 guidance document. That document explains that while “CEQ does not expect agencies to apply this guidance to concluded NEPA reviews and actions for which a final EIS or EA has been issued,” agencies “should consider applying this guidance to actions in the EIS or EA preparation stage if this would inform the consideration of alternatives or help address comments raised through the public comment process.”<sup>204</sup> Because this guidance was issued long before the Forest Service issued its Draft EA and because it would certainly help “inform the consideration of alternatives” or help the agency address Conservation Groups’ comments, the Forest Service should apply it to the GAP Project. At the very least, the Forest Service should explain why it does not believe the 2023 guidance would be helpful to its analysis.

At any rate, the 2023 guidance is CEQ’s interpretation of *what the NEPA statute itself requires and has always required*—it is not a gloss that the Forest Service can ignore. According to CEQ, NEPA requires agencies to, among other things: (1) quantify the reasonably foreseeable greenhouse gas emissions of the proposed action and any alternatives; (2) provide appropriate context for those emissions; and (3) analyze reasonable alternatives that would reduce emissions and identify available mitigation measures to compensate for climate effects.<sup>205</sup> Critically, “NEPA requires more than a statement that emissions from a proposed Federal action or its alternatives represent only a small fraction of global or domestic emissions. Such a statement merely notes the nature of the climate change challenge, and is not a useful basis for deciding whether or to what extent to consider climate change effects under NEPA.”<sup>206</sup>

Held up against the appropriate statutory standard, the Draft EA’s carbon analysis falls flat. To start, the Draft EA fails to quantify expected emissions from the Project. That failure is unlawful.<sup>207</sup> Instead of quantifying emissions, the Draft EA commits the critical error that CEQ warns against and merely asserts that the Project “might temporarily contribute an extremely small quantity of [greenhouse gas] emissions relative to national and global emissions.”<sup>208</sup> As CEQ has explained, this is not helpful context—noting that “diverse individual sources of emissions each make a relatively small addition to global atmospheric [greenhouse gas] concentrations that collectively have a large effect” merely describes “the nature of the climate change challenge, and is not a useful basis for deciding whether or to what extent to consider climate change effects under NEPA.”<sup>209</sup>

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<sup>203</sup> Draft EA at 57.

<sup>204</sup> 88 Fed. Reg. at 1212 (emphasis added).

<sup>205</sup> *Id.* at 1200–01.

<sup>206</sup> *Id.* at 1201.

<sup>207</sup> *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 69 (D.D.C. 2019) (failure to quantify emissions using readily available data was arbitrary and capricious).

<sup>208</sup> Draft EA at 60.

<sup>209</sup> 88 Fed. Reg. at 1201.

Instead of dismissing the carbon impacts of the Project as a drop in the bucket, the Forest Service should have quantified emissions and placed them in their appropriate context. For example, the agency should have applied “the best available estimates” of the social cost of carbon “to the incremental metric tons of each individual type of [greenhouse gas] emissions.”<sup>210</sup> In addition, the Forest Service should have explained “how the proposed action and alternatives would help meet or detract from achieving relevant climate action goals and commitments,” including climate goals set by the Forest Service and Department of Agriculture.<sup>211</sup>

Finally, the Forest Service should have considered an alternative that resulted in reduced carbon emissions and identified mitigation measures in the Project to compensate for any such emissions. For example, the agency could reduce the amount of VMA acreage included in the Project, and it could eliminate prescribed burning in mesic forests.<sup>212</sup> The agency’s failures to compare the carbon benefits of reasonable alternatives violates NEPA. Let us be clear: the unnecessary liquidation of stored carbon in mesic forests under the current proposed action would have measurably different carbon implications than an alternative that focused more narrowly on appropriate treatments in dry forest systems, which could even help to *avoid* a risk of emissions from uncharacteristic wildfire.

The Draft EA is also inconsistent with NEPA because it fails to consider cumulative effects on carbon emissions from other Forest Service timber harvest projects. Such an analysis is required by NEPA.<sup>213</sup> Several members of the Conservation Groups are currently litigating this precise issue in the District of D.C., alleging that similar failures to consider cumulative carbon effects violate NEPA.

Even if the Forest Service were correct that NEPA does not require quantification of emissions, appropriate context, carbon mitigation measures, or consideration of cumulative carbon effects from other projects—and it is not—the carbon analysis the agency did provide would still fall short of NEPA’s “hard look” requirement, for several reasons.

To start, the Draft EA presents incorrect data. It claims that harvesting has “affected less than 0.25 percent of the forested area annually” from 1990 to 2011.<sup>214</sup> However, the cited report states that this number for the Southern Region, which includes North Carolina, is actually 0.5 percent of the forested area from 1990–2011.<sup>215</sup> This is twice as much area per year as was initially indicated. Furthermore, the Draft EA also indicates that carbon losses from National Forest System lands “have been relatively small compared to the total amount of carbon stored in the forest, with from 1990 to 2011 equivalent to about 0.9 percent of non-soil carbon stocks on the [National

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<sup>210</sup> *Id.* at 1202.

<sup>211</sup> *Id.* at 1203.

<sup>212</sup> Draft EA at 52.

<sup>213</sup> See 40 C.F.R. § 1508.1(i)(3).

<sup>214</sup> Draft EA at 58.

<sup>215</sup> U.S. Forest Serv., *Assessment of the Influence of Disturbance, Management Activities, and Environmental Factors on Carbon Stocks of United States National Forests* at 38 (Nov. 2019), [https://www.fs.usda.gov/rm/pubs\\_series/rmrs\\_gtr/rmrs\\_gtr402.pdf](https://www.fs.usda.gov/rm/pubs_series/rmrs_gtr/rmrs_gtr402.pdf) [hereinafter “Carbon Stocks Report”].

Forests in North Carolina].”<sup>216</sup> That is not the right number. According to the report—which describes non-soil carbon stocks in Forest Service Regions writ large, not the Pisgah National Forest—the number is not 0.9 percent of non-soil carbon stocks, but rather a *2.4 percent* reduction in the regional non-soil carbon stocks.<sup>217</sup> Again, this is a difference of more than double what was initially indicated. Finally, when the Draft EA attempts to place the Project in the context of a general increase in forested land,<sup>218</sup> it again misstates the information presented in the cited report. The Draft EA states that “[f]rom 2005 to 2018, there has been a 13% increase in annual carbon sequestered by the forestry sector” in North Carolina.<sup>219</sup> The category in the referenced report is broader than just forestry. It includes “Land Use, Land-Use Change, and Forestry.”<sup>220</sup> The “Forest Carbon Flux” category applies more narrowly to management practices which impact forests.<sup>221</sup> The percent change from 2005 to 2018 for this category is only 4%, and measuring from 1990, it actually shows a decrease in the annual amount of carbon removed from the atmosphere by forests.<sup>222</sup>

Beyond the data itself, the Forest Service’s analysis of the impact of forest regeneration and of harvested wood as a substitute material is flawed. The Draft EA suggests that “any initial carbon emissions from this proposed action will be balanced and possibly eliminated as the stand recovers and regenerates, because the remaining trees and newly established trees typically have higher rates of growth and carbon storage.”<sup>223</sup> This statement is misleading. Carbon released through timber harvest may eventually be re-sequestered by new forests that grow in place of the harvested forest. But even in the best-case scenario, forests do not re-sequester the carbon emitted during timber harvest for multiple decades to centuries at best.<sup>224</sup> Furthermore, achieving emissions reductions is highly time critical. The Biden Administration has set a target of “net-zero emissions economy-wide by no later than 2050.”<sup>225</sup> It is inadequate to point to eventual regeneration of a critical source of carbon sequestration, when the existing forest is sequestering carbon now. The possibility of breaking even on carbon emissions decades or centuries later is so remote as to be irrelevant.

In addition, the Draft EA’s reliance upon substitution effects is misguided and unsupported. The Draft EA suggests that harvested wood can sequester carbon for long periods when it is substituted for certain building materials or is used to substitute for fossil fuels in energy generation.<sup>226</sup> The Forest Service’s own data about carbon remaining in primary wood products

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<sup>216</sup> Draft EA at 58.

<sup>217</sup> Carbon Stocks Report at 39.

<sup>218</sup> Draft EA at 60.

<sup>219</sup> *Id.*

<sup>220</sup> N.C. Dep’t of Env’t Quality, *North Carolina Greenhouse Gas Inventory* at 32 (Jan. 2022).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Draft EA at 59.

<sup>224</sup> See Tara Hudiburg et al., *Meeting GHG Reduction Targets Requires Accounting for All Forest Sector Emissions*, 14 Env’t Rsch. Letters (2019) (noting that carbon removed from old-growth forests, for example, will not be fully replaced for hundreds of years—“and cannot be recovered [ever] if current management practices continue”).

<sup>225</sup> Executive Order 14057, 86 Fed. Reg. 70,935 (Dec. 8, 2021).

<sup>226</sup> Draft EA at 58–59.

demonstrates how little harvested wood is stored for long periods of time.<sup>227</sup> A decade after harvest, 57% of the carbon stored in the original forest—which likely took many decades or centuries to sequester—has been released to the atmosphere. Carbon emissions associated with the timber sale continue increasing over time as wood products are disposed so that fifty years post-sale, 70% of the carbon once stored in the harvested forest has been released to the atmosphere. After fifty years, only 12% of the carbon in the harvested forest is being stored in in-use wood products. The reality for energy generation from biomass is even worse. “Since in general woody biomass is less energy dense than fossil fuels, and contains higher quantities of moisture and less hydrogen, at the point of combustion burning wood for energy usually emits more greenhouse gases per unit of energy produced than is the case with fossil fuels.”<sup>228</sup> The Forest Service cannot rely on research suggesting that regrowth and substitution may under certain circumstances offset some carbon emissions when it has not provided any basis to conclude that those circumstances are present here.

Put simply, the Draft EA’s carbon analysis contains several glaring omissions. And what analysis it does provide is flawed. These issues must be addressed in a revised NEPA study.

d. The Draft EA fails to adequately assess Project impacts to soil and water resources.

The Draft EA concludes that the Project is not likely to have significant effects on soil and water resources. As support, the Draft EA points to: (1) the Forest Plan FEIS’s analysis of soil and water resources; (2) Forest Plan standards and guidelines, including protections for streamside management zones (“SMZs”); (3) best management practices (“BMPs”); (4) future “site assessments” that will be used to select appropriate BMPs and design criteria.<sup>229</sup> There are issues with each of these contentions.

*First*, the Draft EA inappropriately tiers to the Forest Plan FEIS, which failed to adequately assess effects to soil and water resources. As Conservation Groups explained during the objection process, the Forest Plan FEIS arbitrarily assumed that increasing active management levels by 500% would have no “measurable change in surface or ground water quality,”<sup>230</sup> despite ample evidence to the contrary.<sup>231</sup> As explained below, this incredible conclusion was based on an overestimation of BMP effectiveness as well as the failure to consider critical stressors like hydrologic modifications and construction of firelines.<sup>232</sup> The Forest Service cannot tier to this flawed analysis to support its analysis of the Project.

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<sup>227</sup> See U.S. Forest Serv., *Assessment for the Nantahala and Pisgah National Forests* at 83 (2014).

<sup>228</sup> Duncan Brack, *Woody Biomass for Power and Heat Impacts on the Global Climate* 14 (Feb. 2017), <https://www.chathamhouse.org/sites/default/files/publications/research/2017-02-23-woody-biomass-global-climate-brack-final2.pdf>. See also S. Env’t L. Ctr., *Comments on the Department of Treasury’s Treatment of Forest-Derived Biomass Electricity Under Section 45Y* (Nov. 4, 2022) (explaining that burning wood emits more carbon dioxide than fossil fuels per unit of electricity generated).

<sup>229</sup> Draft EA at 63–65.

<sup>230</sup> Forest Plan FEIS at 3-67.

<sup>231</sup> See NPNF Plan Objection at 125–52.

<sup>232</sup> *Id.* at 131–32.

**Second**, the Draft EA’s conclusion that following Forest Plan standards will assure de minimis effects to soil and water resources is misplaced. A few examples illustrate why. To start, consider Forest Plan standard SLS-S-02, which requires at least 85% of the activity area to maintain long-term soil productivity.<sup>233</sup> As Conservation Groups pointed out during the Forest Plan revision process, this standard was once an explicit requirement from Region 8, and was therefore something that national forest units could rely on without independent, original analysis. However, that Regional requirement has been withdrawn, because the literature now suggests that the simple 85/15 rule is not reflective of the best available science. In fact, the Forest Service’s own scientific research now recognizes that, contrary to previous guidance using the 15% disturbance threshold, “there is little or no documented evidence of any connection between disturbance thresholds and [soil] productivity. When critical data are lacking, it is prudent to err on the conservative side to ensure that productivity is not impaired.”<sup>234</sup> Instead, more recent research suggests that project-level expertise and data should be used “[f]or making judgments on impaired productivity.”<sup>235</sup>

The best available science for determining soil loss at the project level is the USLE (universal soil loss equation and subsequent revisions, RUSLE and RUSLE2). USLE was developed by the U.S. Department of Agriculture, is based on experimental data, and has been used for peer-reviewed analyses of forest management in the Appalachians. The USLE allows predictions of soil loss based on rainfall levels, soil erodibility, slope, and amount of disturbance. Combined with estimates of soil formation rates, the Forest Service could have predicted whether various disturbance rates on various slopes would result in soil loss rates in excess of soil formation rates, based on assumed rotation length. The Draft EA’s failure to conduct this analysis, and instead rely in part on the arbitrary 85/15 rule—among other Plan standards—violates NEPA and NFMA.

As another example, consider the Forest Plan standards and guidelines for SMZs. The Draft EA concludes that intermittent streams will be protected by a 50-foot SMZ buffer spelled out in the Forest Plan.<sup>236</sup> But as Conservation Groups explained during Forest Plan revision, this “one size fits all” approach to intermittent stream protection ignores scientific literature supporting increased riparian buffers as slope increases.<sup>237</sup> It also ignores the best practices of other national forests. For example, the George Washington National Forest uses the same core streamside zones of 100 feet for perennial waterbodies and 50 feet for intermittent streams.<sup>238</sup> But as slopes increase, an “extended area” ranging from 25 feet (slopes >10 percent) to 50 feet (slopes > 45 percent) is added to core areas.<sup>239</sup> Similar regimes govern the Cherokee and Chattahoochee-Oconee National

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<sup>233</sup> *Id.* at 38.

<sup>234</sup> Scientific background for soil monitoring on National Forests and Rangelands: workshop proceedings; April 29-30, 2008; Denver, CO (fsfed.us) at 21.

<sup>235</sup> *Id.*

<sup>236</sup> Draft EA at 63–65.

<sup>237</sup> S. Wegner for UGA Institute of Ecology, *A Review of the Scientific Literature on Riparian Buffer Width, Extent And Vegetation* (1999).

<sup>238</sup> George Washington National Forest Land and Resource Management Plan, App. A (Riparian Corridors), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd525098.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd525098.pdf).

<sup>239</sup> All Riparian Corridor standards apply to the core and extended areas; specific standards allow additional activities in the extended areas. *E.g., id.* at 11-018, 11-020, 11-022.

Forests as well.<sup>240</sup> The Nantahala and Pisgah National Forests have never adequately explained their departure from their neighbors or how their “one size fits all” approach comports with the best available science. The continued reliance on this arbitrary intermittent standard—especially in a Project area with steep slopes—is itself arbitrary and capricious.

**Third**, the Draft EA mistakenly assumes that BMP implementation will successfully manage any soil and water issues as they arise. According to the analysis, as-yet-to-be-determined BMPs will “ensure soil runoff does not reach hydrology within [the Project] area.”<sup>241</sup> 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” agency’s pre-implementation review process is “sufficient to ensure that success.”<sup>242</sup> 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.<sup>243</sup>

That is especially true where, as here, the Forest Service is overestimating its BMPs’ effectiveness.<sup>244</sup> As Conservation Groups explained during Forest Plan revision, the Forest Service’s BMP scoring system inflates the effectiveness of BMPs by treating each BMP separately instead of considering the success rate for a project.<sup>245</sup> In other words, while a single BMP failure can result in sediment release impacting a water body, the success of other BMPs in the same project will result in a high score for the whole project. Thus, projects with negative water quality impacts still receive high scores.

Further, the Forest Service’s cited BMP monitoring is not comprehensive. During Forest Plan revision, only 3% of road stream crossings on the Forests were examined.<sup>246</sup> No justification for the statistical reliability of the sample set was provided in the Forest Plan FEIS. In addition, the monitoring cited by the agency for the Project does not include impacts during implementation and prior to closure. The units that were selected for inspection were generally examined after closure, not when they are least stable. The timing is nearly always too late to evaluate the short-term effects. And because monitoring generally occurs only once after closure, it therefore does not consider the long-term effects of a failure to maintain BMPs (especially on closed roads). Finally, the monitoring excludes whole categories of impact, like firelines.

As Conservation Groups explained in their objection, a careful examination of the Forest Service’s actual data reveals a much greater risk. In the 63 timber sales surveyed between 2009 to 2018 and cited during Forest Plan revision, sediment was reaching streams on 70 separate

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<sup>240</sup> Prescriptions relating to riparian corridors are at, Cherokee National Forest Plan, Prescription 11, Riparian Corridors: Streams, Lakes, Wetlands, at 160, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5269436.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5269436.pdf); Chattahoochee-Oconee National Forest Plan (2004), 3-175 – 3-177 (Riparian Corridor Widths For Intermittent Streams), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsm9\\_028662.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm9_028662.pdf).

<sup>241</sup> Draft EA at 64; *see also id.* (noting that BMPs will “control erosion” from firelines).

<sup>242</sup> *Hurst*, 604 F. Supp. 2d at 895–96.

<sup>243</sup> *Id.* at 896.

<sup>244</sup> Draft EA at 89 (claiming that when BMPs are implemented, “no visible sediment reaches stream channels 93 percent of [the] time”).

<sup>245</sup> NPNF Plan Objection at 130.

<sup>246</sup> Forest Plan FEIS at 3-58.

occasions. This fact was not disclosed in the Forest Plan FEIS; instead, this failure rate (more than one unlawful sediment impact per timber sale) was obscured as a 97.4% success rate, per the agency’s accounting. Similarly, the Forest Plan FEIS does reveal that one project per year has caused critical visible sediment to enter streams (i.e., long-term, high-volume levels of sediment).<sup>247</sup> Plainly, the Forest Service cannot simply assume that BMPs will protect against soil erosion.

**Fourth**, a Draft EA cannot rely on future site-specific non-NEPA analyses to support its conclusions. According to the Draft EA, “[p]otential runoff impacts on hydrology . . . will be assessed based on site conditions” post-NEPA during pre-implementation review.<sup>248</sup> At that point, the agency will complete “[s]ite specific assessments . . . to determine appropriate logging systems and BMPs for that location based on slope and soil composition.”<sup>249</sup> But as explained above, an agency cannot rely on development of appropriate mitigation measures during future (non-NEPA) site-specific review to justify a finding of no significant impact.<sup>250</sup> The agency’s decision to defer the work it must do now—site-specific analysis of effects to water resources and ways to mitigate them—to a future non-NEPA pre-implementation-review process violates NEPA.

Even if the Draft EA’s proffered justifications had merit, there are several other issues that it overlooks entirely.

**First**, as discussed in greater detail below, the Draft EA overlooks soil and water-quality impacts from temporary roads. According to the Draft EA, effects from temporary roads will not be significant because roads will be “stabilized using BMPs” and “decommissioned when no longer needed.”<sup>251</sup> However this overlooks the fact that temporary roads often have more serious impacts than system roads because they are not subject to oversight from Forest Service engineering staff. The Draft EA also overlooks a practical reality: that temporary roads will need to remain on the landscape if the Forest Service intends to conduct “multiple entries or follow-up treatments” as it spells out in the Draft EA.<sup>252</sup> Put simply, temporary roads are not “temporary” if they remain on the landscape for decades at a time or for multiple entries. The Draft EA’s failure to consider these factors invalidates its analysis.

**Second**, the Draft EA overlooks other water quality stressors that will be exacerbated by the Project. For example, the Forest Service notes that “landslides” triggered by past road construction and timber harvest are a threat to soil and water resources on the Pisgah National Forest.<sup>253</sup> However, the Draft EA entirely fails to discuss the Project’s potential contributions to

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<sup>247</sup> *Id.* at 3-60 to 3-61.

<sup>248</sup> Draft EA at 64.

<sup>249</sup> *Id.*

<sup>250</sup> *S. Fork Band Council*, 588 F.3d at 726 (“A non-NEPA document . . . cannot satisfy a federal agency’s obligations under NEPA.”); *see also Klamath-Siskiyou*, 387 F.3d at 998 (“A NEPA document cannot tier to a non-NEPA document.”).

<sup>251</sup> Draft EA at 30.

<sup>252</sup> *Id.* at 48.

<sup>253</sup> *Id.* at 63.

increased landslide risks.<sup>254</sup> Similarly, the agency notes that *past* timber harvests themselves “destabilized soils” and contributed to “increased runoff potential during heavy rain events.”<sup>255</sup> However, the Draft EA seems to overlook the potential for the *Project’s* proposed timber harvests to contribute to erosion and sedimentation, noting that “[p]otential runoff impacts” from the Project will come from construction of “temporary roads, skid roads, and log landings” alone.<sup>256</sup> The Draft EA never attempts to justify this disparate treatment. Perhaps most glaringly, the Draft EA also contains no discussion of slopes and soil composition in the Project area, nor how proposed timber harvests on steep slopes with erodible soils will affect water quality. Instead, the Draft EA simply relays that future “[s]ite specific assessments” will help the agency “determine appropriate logging systems and BMPs for that location based on slope and soil composition.”<sup>257</sup> The agency’s failure to address these issues, among others, in the Draft EA violates NEPA.

**Third**, the Draft EA fails to analyze whether the predicted water-quality impacts are consistent with North Carolina 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.<sup>258</sup> North Carolina has several water-quality standards that might be applicable to the Project, including numeric standards for turbidity<sup>259</sup> and temperature for trout waters.<sup>260</sup> However, the agency never discusses these standards—or any other water-quality standard, for that matter—even though it acknowledges a risk of increased turbidity<sup>261</sup> as well as increased temperatures.<sup>262</sup> This oversight not only violates NEPA but also exposes the Forest Service to potential liability under the Clean Water Act.

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<sup>254</sup> Recent research confirms that local timber harvests “change[] the age structure of the forest and thus affects landslide-susceptibility.” R.M. Wooten et al., U.S. Forest Serv., *Frequency and Magnitude of Selected Historical Landslide Events in the Southern Appalachian Highlands of North Carolina and Virginia: Relationships to Rainfall, Geological and Ecohydrological Controls, and Effects* at 244 (2015); R.C. Sidle & H. Ochiai, *Landslides: Processes, Prediction and Land Use*, 18 Water Res. Monograph 312 (2006).

<sup>255</sup> Draft EA at 63.

<sup>256</sup> *Id.* at 64.

<sup>257</sup> *Id.*

<sup>258</sup> 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”).

<sup>259</sup> 15A N.C. Admin. Code 02B .0211(21) (“Turbidity: the turbidity in the receiving water shall not exceed 50 Nephelometric Turbidity Units (NTU) in streams not designated as trout waters and 10 NTU in streams, lakes, or reservoirs designated as trout waters; for lakes and reservoirs not designated as trout waters, the turbidity shall not exceed 25 NTU; if turbidity exceeds these levels due to natural background conditions, the existing turbidity level shall not be increased.”).

<sup>260</sup> *Id.* 02B .0211(18) (“Temperature: not to exceed 2.8 degrees C (5.04 degrees F) above the natural water temperature, and in no case to exceed 29 degrees C (84.2 degrees F) for mountain and upper piedmont waters and 32 degrees C (89.6 degrees F) for lower piedmont and coastal plain waters; the temperature for trout waters shall not be increased by more than 0.5 degrees C (0.9 degrees F) due to the discharge of heated liquids, but in no case to exceed 20 degrees C (68 degrees F).”).

<sup>261</sup> Draft EA at 63 (acknowledging “[p]otential runoff impacts on hydrology”).

<sup>262</sup> *Id.* at 88 (“Additionally, the removal of live trees and their foliage on the riparian corridor could remove shade of cold-water and cool-water stream features, which would likely increase the temperature of the water[.]”).

e. The Draft EA fails to adequately consider impacts to listed species.

The Draft EA recognizes that the Project has the potential to adversely affect numerous listed species. However, it consistently and inappropriately downplays these effects and overlooks potential impacts to several listed species.

i. Gray bat and Virginia big-eared bat

The Draft EA's analysis of impacts to the gray bat and Virginia big-eared bat is contradictory and flawed. The Draft EA recognizes the Project may have numerous adverse effects on these bats, including increased "smoke exposure," "torpor disruption," "foraging habitat alterations," disruptions to "fall swarming and spring staging," and potential "roost abandonment."<sup>263</sup> However, the analysis claims that these effects will be mitigated by (1) Forest Plan standards and guidelines; (2) "design features," including maintenance of "foraging habitat along intermittent and perennial streams"; (3) avoidance of treatments that would "change the lighting that reaches streams and rivers"; and (4) BMPs to protect water quality.<sup>264</sup> Any lingering adverse effects will eventually be balanced out by "long term" "beneficial" effects to bat habitat.<sup>265</sup> As a result, the argument goes, the Project is "not likely to adversely affect" the gray bat or Virginia big-eared bat.<sup>266</sup> This conclusion is flawed.

As an initial matter, if the Draft EA is suggesting that short-term adverse harms to these bats can be ignored so long as the bats ultimately benefit from habitat improvements, it is mistaken.<sup>267</sup> What's more, the supporting rationales for this conclusion do not hold water. To start, as explained above, the Forest Plan standards and guidelines for intermittent streams do not do enough to protect such streams on steep slopes—which likely covers most of the streams in the Project area. And a 50-foot buffer is not enough to avoid changing the amount of light that reaches such streams. Next, the Forest Service's reliance on other "design features" is misplaced. As support for the notion that foraging and commuting habitat "will be maintained,"<sup>268</sup> the Forest Service points to design criteria #3, which simply states that foraging and roosting habitat for the gray bat "shall be maintained."<sup>269</sup> Such a vague and conclusory mitigation measure cannot support a finding of no significant impact.<sup>270</sup> Next, the contention that the "GAP Project will not change

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<sup>263</sup> Draft EA at 79–80.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 80.

<sup>266</sup> *Id.*

<sup>267</sup> *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1271 (11th Cir. 2009) ("It is not enough that the habitat will recover in the future if there is a serious risk that when that future arrives the species will be history.").

<sup>268</sup> Draft EA at 79.

<sup>269</sup> *Id.* at 316.

<sup>270</sup> *Hurst*, 604 F. Supp. 2d at 893 (rejecting "generic" and "loose" mitigation measures that amounted to "little more than [an agency's] own promise to obey the law").

the lighting” on Project area streams is contradicted elsewhere in the document,<sup>271</sup> and is inconsistent with the need to build temporary roads over waterbodies to access and remove lumber.

Finally, as noted above, BMPs are not a panacea. The Forest Service recognizes as much several pages later when describing effects to forest-dwelling bats. According to that analysis, Project effects to water quality and habitat for forest-dwelling bats can be “minimized” or “reduce[d]” but not eliminated.<sup>272</sup> For example, the Draft EA recognizes that “GAP Project activities” may result in numerous adverse effects to aquatic ecosystems, including “ash inclusion from prescribed burns, run-off of silt from exposed soil following prescribed burns, and run-off of herbicides from vegetation treatments,” as well as “the loss of forested habitat surrounding the stream impacting covered flyways and stream microclimate and habitat.”<sup>273</sup> It is unclear why the Draft EA assumes that these and other similar effects to forest-dwelling bats—which the Draft EA determines are *likely* to be adversely affected by the Project—will not also adversely affect the gray bat and Virginia big-eared bat, which use similar summer foraging habitat.<sup>274</sup> This contradiction must be addressed in a revised NEPA study.

In addition to contradicting itself, the Draft EA also overlooks some of the best available science for the Virginia big-eared bat. According to the document, impacts to the population of bats roosting at Big Rock Cliffs Cave—the last remaining major hibernaculum in the state—are expected to be minimal because “the closest VMA is about 3 miles away and the closest AOI is about 1.8 miles away.”<sup>275</sup> But the best available science indicates that Virginia big-eared bats will forage up to “7 miles” from their “cave/mine roost sites” and that foraging areas must be “connected to the cave/mine site with suitable travel corridors.”<sup>276</sup> Though there are several VMAs and AOIs within 7 miles of Black Rock Cliffs, the Draft EA does not attempt to account for effects from management within these polygons. This failure also must be addressed in a revised NEPA study.

## ii. Indiana bat, Northern long-eared bat, and Tricolored bat

The Draft EA also inappropriately downplays potential effects to forest-dwelling bats including the Indiana bat, northern long-eared bat, and tricolored bat. As an initial matter, the Draft

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<sup>271</sup> Draft EA at 101, 104 (“The thinning effects of fire may result in a reduction of overstory and midstory which may change the amount of light and wind reaching the forest floor.”); *id.* at 105 (“In addition to the direct and indirect effects of fire line construction and prescribed burning, *riparian tree release* and planting may occur . . . [and] could result in changes to the light regimes[.]” (emphasis added)); *id.* at 109 (“Stand improvements and related treatments that result in more open canopy conditions may introduce increased sunlight and favorable conditions for the establishment and spread of NNIS.”).

<sup>272</sup> Draft EA at 82.

<sup>273</sup> *Id.*

<sup>274</sup> If anything, the gray bat is even more sensitive to aquatic ecosystem disturbances than the forest-dwelling bats. U.S. Fish & Wildlife Serv., *Gray bat 5-Year Review: Summary and Evaluation* at 7 (2009) (observing gray bats “are highly dependent on aquatic insects,” so their foraging patterns are “strongly correlated with open water of rivers, streams, lakes or reservoirs”).

<sup>275</sup> Draft EA at 80.

<sup>276</sup> U.S. Fish & Wildlife Serv., *Virginia big-eared bat 5-Year Review: Summary and Evaluation* at 10 (2019) (emphasis added).

EA neglects to mention the best available science on current and future bat population dynamics. Though the Draft EA mentions that northern long-eared bats, for example, have dramatically declined in recent years, it neglects to mention that these declines are predicted to continue in the future. Specifically, the number of extant northern long-eared bat winter colonies will decline to zero by 2050 and range-wide abundance will decline by 99% by 2060.<sup>277</sup> The Draft EA also neglects to mention that local populations of Indiana bat declined by 94% since 2013—a situation that will likely worsen before it gets better.<sup>278</sup> Despite the increased risk of extinction or extirpation to northern long-eared and Indiana bats in the near term—a risk that is exacerbated by the vegetation management proposed in the Project—the Draft EA ultimately concludes that the bats will benefit from “long term” habitat improvements.<sup>279</sup> But “[i]t is not enough that the habitat will recover in the future if there is a serious risk that when that future arrives the species will be history.”<sup>280</sup> The Forest Service must more carefully consider whether its Project—which it acknowledges will harm forest-dwelling bats in the short term—will push these species further into an extinction spiral in the interim.

The Draft EA also overlooks bat preferences and behaviors that may influence the effects of the Project. For example, the best available science indicates northern long-eared bats are associated with gap sizes smaller than two acres in size.<sup>281</sup> Though the Project may create openings far larger than this in occupied bat habitat, the Draft EA does not assess the effects of the proposal on these bats. As another example, each of the forest-dwelling bats is known to exhibit philopatry or site-fidelity, meaning bats return to the same area summer after summer to roost and forage.<sup>282</sup> In some cases, this site fidelity may extend to individual trees.<sup>283</sup> Felling roost trees or foraging areas that bats return to year after year has adverse effects on these bats; harvesting these areas not only “places additional stress on pregnant females at a time when fat reserves are low or depleted and they are already stressed from energy demands of migration and pregnancy,” but also forces bats “to seek new habitat and expand their foraging range, potentially reducing foraging success and exposing bats to increased predation and competition.”<sup>284</sup> The Draft EA does not consider these consequences. Instead, it appears to assume that the bats’ habitat is fungible, i.e. that bats displaced from one area can simply shift to other portions of the Forest without consequence.<sup>285</sup> This necessarily fails to account for bats’ site fidelity.

The Draft EA also suggests that adverse effects to forest-dwelling bats will be mitigated by Project design criteria, including criteria adopted from the March 2024 Bat Conservation

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<sup>277</sup> U.S. Fish & Wildlife Serv., *Species Status Assessment Report for the Northern long-eared bat (Version 1.1)* at 60 (2022) [hereinafter “NLEB SSA”].

<sup>278</sup> U.S. Fish & Wildlife Serv., *Indiana bat 5-Year Review App’x A* at 11 fig.6 (2019).

<sup>279</sup> Draft EA at 81.

<sup>280</sup> *Miccosukee Tribe*, 566 F.3d at 1271.

<sup>281</sup> U.S. Forest Serv., Final Biological Assessment for the Nantahala–Pisgah Forest Plan at 34 (Mar. 16, 2022).

<sup>282</sup> See, e.g., NLEB SSA at 17, 154.

<sup>283</sup> *Id.*

<sup>284</sup> U.S. Fish & Wildlife Serv., *Indiana Bat (Myotis sodalis) Draft Recovery Plan: First Revision* at 75, 109 (2007).

<sup>285</sup> Draft EA at 82 (“These effects to tree-roosting bat foraging and commuting habitat from prescribed burns and vegetation treatments will be insignificant as a result of the limited percent of habitat affected in any given year[.]”).

Strategy.<sup>286</sup> However, a quick perusal of these criteria reveal that they are incapable of preventing potentially serious adverse effects to bats. For example, many of the criteria only apply to “known” roost areas—however, there is no requirement that the Forest Service survey for such roosts, rendering these protections effectively meaningless.<sup>287</sup> In addition, though these Bat Strategy criteria restrict the use of high-intensity fire during the summer occupancy period—which the Draft EA acknowledges can harm bats and their pups<sup>288</sup>—the Strategy comes with an enormous loophole. Namely, high-intensity fire can be used in occupied summer bat habitat to “maintain or create habitat for associated rare” but non-listed species such as “golden-winged warbler.”<sup>289</sup> Which means the Forest Service can employ burns that kill or harm *listed* bat species to create habitat for *non-listed* species—turning the ESA on its head. What’s more, the Bat Strategy also includes *no* time-of-year or gap-size restriction on logging—which can have serious adverse effects on tree-dwelling bats and their non-volant pups.

We recommend that the Forest Service fill in the gaps in the Bat Conservation Strategy by clarifying that: (1) acoustic surveys are required before prescribed fire and timber harvests are implemented; (2) high-intensity fire cannot be used during the summer occupancy period to create habitat for non-listed species; (3) the agency may not engage in timber harvest in potentially occupied habitat during the summer occupancy period; and (4) appropriate gap-size restrictions must be implemented in potential roosting and foraging habitat. Failing that, the agency must better explain how its design criteria will protect listed bats—especially those bats that are predicted to be functionally extinct or extirpated in the next few decades.

### iii. Carolina northern flying squirrel

There are several issues with the Forest Service’s analysis of effects to Carolina northern flying squirrel. As an initial matter, the agency never adequately explains why management in occupied squirrel habitat is consistent with the Project purpose and need. The Draft EA notes that the Project includes 247 acres of vegetation management in spruce-fir and northern hardwood forests within the squirrel’s consultation range, as well as 3,326 acres of prescribed burning in these same ecozones. As mentioned above, the agency never explains how planned management in spruce-fir and northern hardwood ecozones—which are “not considered fire-adapted”<sup>290</sup>—is consistent with the need to restore fire-adapted ecozones. Unless the agency wishes to contravene the requirements of the CFLRP, these spruce-fir and northern hardwood forests must be removed from the VMAs.

The agency also overstates the effectiveness of its proposed mitigation measures. According to the Draft EA, the Project could negatively affect squirrel habitat by destroying nests

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<sup>286</sup> Draft EA at 305.

<sup>287</sup> *See id.*

<sup>288</sup> *Id.* at 82, 315.

<sup>289</sup> *Id.* at 306.

<sup>290</sup> Forest Plan at 99.

or dreys, felling favorite foraging trees, or even result in direct mortality.<sup>291</sup> However, the Draft EA concludes the Project is not likely to adversely affect the squirrel because (1) vegetation management would involve “non-ground disturbing” activities only; (2) squirrels “would reasonably be able to vacate actively burning areas”; (3) trees and dreys in occupied squirrel habitat will be inspected prior to disturbance; and (4) long-term habitat benefits are expected.<sup>292</sup> There are issues with each contention.

To begin, though the Draft EA suggests that only non-ground disturbing activities are allowed in spruce-fir and northern hardwood ecozones, there is no design criterion saying so. And indeed, VMAs within these ecozones expressly allow for “heavy equipment,” road construction, and other ground disturbing activities.<sup>293</sup> Next, forcing squirrels to flee their homes is still a negative effect amounting to “take” that must be accounted for, not incorporated as a mitigation strategy. Next, though the agency touts its survey procedures, they are dependent on the expertise of non-experts in identifying squirrel cavities, dens, and dreys, often during leaf-on season.<sup>294</sup> Biologists or staff with expertise in identifying squirrel habitat only become involved if (1) the agency has already identified potential den sites and (2) felling is planned during maternity season.<sup>295</sup> Finally, to the extent that the agency is suggesting that long-term benefits can be used to offset short-term adverse effects, it is mistaken.<sup>296</sup> These issues must be addressed in a revised NEPA study.

#### iv. Appalachian elktoe

The Draft EA concludes that the Project is not likely to adversely affect Appalachian elktoe or its critical habitat.<sup>297</sup> As support for this conclusion, the Draft EA points to (1) planned survey efforts on the Nolichucky River; (2) Forest Plan standards and guidelines; (3) BMPs; and (4) future “site-specific analysis.” There are problems with each of these rationales.

To start, the Nolichucky River is not the only place in the Project area where the Appalachian elktoe occurs. It also occupies portions of the Mills River, French Broad, North Toe, South Toe, Cane River, and Pigeon River watersheds.<sup>298</sup> Several of these watersheds overlap with Project AOIs. For example, the Forest Service is planning extensive burning and vegetation management on the North Fork of the Mills River, which will drain directly into occupied habitat on the mainstem. Similarly, the Project includes extensive burning and timber harvest in the upper

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<sup>291</sup> Draft EA at 83–84.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 190.

<sup>294</sup> *Id.* at 317–18.

<sup>295</sup> *Id.*

<sup>296</sup> *Miccosukee Tribe*, 566 F.3d at 1271 (“It is not enough that the habitat will recover in the future if there is a serious risk that when that future arrives the species will be history.”).

<sup>297</sup> Draft EA at 91.

<sup>298</sup> U.S. Fish & Wildlife Serv., *Appalachian Elktoe Summary and Evaluation* at 6 (2022).

South Toe River watershed, which contains “the best population segment of Appalachian elktoe remaining in the Nolichucky Sub-basin.”<sup>299</sup>

Next, as Conservation Groups already explained during the Plan objection, Forest Plan standards and guidelines do not do enough to protect the Appalachian elktoe. These standards and guidelines—most of which simply command the Forest Service to “mitigate” impacts<sup>300</sup>—rely entirely on BMPs to protect sediment-sensitive species like the elktoe.<sup>301</sup> And as explained above, the Forest Service seriously overestimates the efficacy of its BMPs. Skewed math aside, even the Forest Service’s BMP statistics acknowledge that these measures only prevent sediment from reaching stream channels “93 percent of [the] time.”<sup>302</sup> Plainly, the agency cannot assume that BMPs will work every time—as it effectively does in its aquatics analysis for the Project, and as it did during Plan revision.

Finally, for the reasons listed above, promising to subsequently study site-specific effects to Appalachian elktoe does not satisfy NEPA. These effects must be disclosed in a revised NEPA study.

#### v. Spotfin chub

The Draft EA does not mention or discuss potential impacts to federally threatened spotfin chub. Within North Carolina, the chub is currently restricted to portions of the Nantahala National Forest. However, the North Carolina Wildlife Resources Commission and U.S. Fish & Wildlife Service have plans in the coming years to reintroduce the spotfin chub to numerous western North Carolina river systems, including numerous watersheds covered by the Project, including the Big Laurel River, Davidson River, Pigeon River, Cane River, and upper Nolichucky River.<sup>303</sup> Because the Draft EA estimates that the Project implementation will take years, the Draft EA must assess how the Project may affect reintroduction efforts in watersheds across the Project area.

#### f. The Draft EA fails to adequately consider impacts to species of conservation concern, especially salamanders.

The Draft EA contains no independent analysis of potential impacts to species of conservation concern. Instead, for species after species, it simply states that “[p]lan components maintain persistence of species” and “[n]o further design criteria [are] needed.”<sup>304</sup> This conclusory

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<sup>299</sup> *Id.* at 10.

<sup>300</sup> See, e.g., Forest Plan at 43 (Standard AWQ-S-01).

<sup>301</sup> See, e.g., *id.* at 41 (Standard WTF-S-01: “Prevent visible sediment from reaching perennial and intermittent stream channel and perennial water bodies in accordance with North Carolina Forest Practice Guidelines Related to Water Quality”).

<sup>302</sup> Draft EA at 89.

<sup>303</sup> N.C. Wildlife Res. Comm’n & U.S. Fish & Wildlife Serv., *Programmatic Safe Harbor Agreement and Candidate Conservation Agreement with Assurances for Twenty-One Aquatic Species in North Carolina* at 68 (2022).

<sup>304</sup> See Draft EA at 204–213.

analysis does not satisfy NEPA.<sup>305</sup> The Forest Service cannot save this analysis by tiering to the Forest Plan FEIS, because that analysis is also arbitrary and capricious.

As Conservation Groups explained during the objection process, the Forest Plan does not satisfy the 2012 Planning Rule’s requirement to maintain the viability of species of conservation concern. The issue begins with the agency’s so called “coarse-filter” protections. For example, the Draft EA suggests that the Forest Plan’s broad survey requirements will help prevent harm to species of conservation concern. However, the Forest Plan does not require species surveys before prescribed burning or timber harvest unless four separate criteria are met: (1) the proposed treatment area has a potential for occupancy; (2) project activities may affect species of conservation concern; (3) adequate population inventory information is unavailable; and (4) information on the number and location of individuals and habitat conditions would improve project design, the application of mitigations to reduce adverse effects, or the assessment of effects on the population.<sup>306</sup> The absence of any one of these factors allows the Forest Service not to survey a stand before conducting a regeneration harvest or other management.

The Forest Plan also does little to ensure that species of conservation concern recover. During vegetation management, the Plan requires the Forest Service to “maintain characteristics required by these species” in “areas *occupied*” by species of conservation concern.<sup>307</sup> Outside of these known occupied areas, the Forest Service has the discretion to conduct management that would harm species’ recovery, so long as that management is consistent with other aspects of the plan. Which means that the Forest Plan does very little to advance the ball for species of conservation concern.

It some instances, it represents a step backwards. To illustrate, consider salamanders. The Southern Blue Ridge is the global capital for salamander biodiversity—at least thirty species of salamander occur on the Nantahala and Pisgah National Forests.<sup>308</sup> Apart from the green salamander, the Forest Plan contains essentially zero fine-filter components protecting individual salamander species. Instead, the Forest Service lumped all terrestrial salamanders together—including species with very different habitat requirements—and concluded that its coarse-filter components (like the requirement to “[e]mphasize retention of downed woody debris of various sizes, where available”)<sup>309</sup> were sufficient to protect these species. The agency also reasoned that unless *more* of the Forest were opened to logging—logging that can kill salamanders outright, destroy their habitat, and inhibit migration—then there would be less opportunities to *mitigate* the

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<sup>305</sup> See, e.g., *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 72 F.4th 1166, 1178 (10th Cir. 2023) (“Conclusory statements regarding impacts without adequate discussion do not meet the required ‘hard look’ under NEPA.”); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (“[S]imple, conclusory statements of ‘no impact’ are not enough to fulfill an agency’s duty under NEPA.”).

<sup>306</sup> See Forest Plan at 80 (PAD-S-04).

<sup>307</sup> *Id.* (PAD-S-02) (emphasis added).

<sup>308</sup> Forest Plan FEIS at 3-356.

<sup>309</sup> Forest Plan at 69.

harm to those salamanders.<sup>310</sup> Conservation Groups explained that this “we must harm salamander habitat to fix salamander habitat” rationale was nonsensical, and that the agency’s decision to lump salamanders together was contrary to the best available science.<sup>311</sup> Because the Forest Plan FEIS did not adequately explain why the Forest Plan would maintain viable populations of rare salamanders, the Draft EA cannot tier to it to avoid conducting its own species- and site-specific analyses of effects here.

g. The Draft EA fails to adequately consider impacts from nonnative invasive plants.

Executive Order 13751 requires the Forest Service to “refrain from authorizing, funding, or implementing actions that are likely to cause or promote the introduction, establishment, or spread of invasive species,” unless it publicly determines that (1) “the benefits of such actions clearly outweigh the potential harm caused by invasive species” and (2) “all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.”<sup>312</sup> The Draft EA expressly recognizes that the Project will promote the introduction or spread of non-native invasive plants (“NNIP”), but claims that Project design criteria and herbicide application will “avoid or reduce the spread of NNI[P].”<sup>313</sup> However, Executive Order 13751 flatly prohibits actions that cause or promote the spread of invasive species, period. A revised NEPA study must more clearly address the requirements of Executive Order 13751 in its analysis.

That said, it is not clear that the Forest Service can make the showing required by Executive Order 13751. To start, it is unclear whether the benefits of the Project “clearly outweigh” the potential harm caused by NNIP. As the Draft EA recognizes, NNIP can have both short-term and long-term “adverse impacts” on the forest community, and that risks are “accentuated in mesic ecozones.”<sup>314</sup> The Draft EA does not conduct any site-specific review of NNIP or estimate how many acres of forest may be made more vulnerable to invasion. Given that the Project is slated to include more than 29,000 acres of vegetation treatments—one of the primary vectors for NNIP introductions—the potential harm from NNIP introduced by the Project is high.

The Draft EA suggests this harm is mitigated by design elements in the Project. However, it is not clear that “*all* feasible and prudent measures” will be taken to minimize the risk of invasive spread. For example, the Forest Service supports its analysis with a citation to FHL-S-05, which requires surveys and treatments for NNIP both “before and after vegetation management.”<sup>315</sup> However, as Conservation Groups explained during the objection process, the Forest Service

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<sup>310</sup> Forest Plan FEIS at 3-359 (“[T]his analysis assumes that locations that have the greater potential for active management (i.e. Management Area Group 1), would have a greater potential to apply project specific standards to support salamander habitat.”); *see also id.* at 3-360 (“In general, because it places fewer acres in MA Group 1, Alternative C would probably result in the least frequency to apply project specific standards to support salamander habitat than the other alternatives.”).

<sup>311</sup> NPNF Plan Objection at 97–100; Ctr. for Biological Diversity, Objections to the Revised Forest Plan for the Pisgah and Nantahala National Forests at 47–59 (Mar. 22, 2022).

<sup>312</sup> Executive Order 13751, 81 Fed. Reg. 88,609 (Dec. 5, 2016).

<sup>313</sup> Draft EA at 110.

<sup>314</sup> *Id.*

<sup>315</sup> Forest Plan at 88.

knows that it lacks the capacity to deal with proliferating invasives, and the Forest Plan declined to ensure that NNIP treatments are occurring commensurate with harvest activities. This Project could begin to fill that gap by committing that iterative ground-disturbing activities will not move forward until required surveys are completed and necessary treatments are implemented.

Even if the requirements of Executive Order 13751 were met, the agency’s NEPA analysis of NNIP is still lacking. As an initial matter, as noted above, the Draft EA fails to assess whether climate change will exacerbate the spread of NNIP or reduce the efficacy of the Project mitigation measures to control them. That failure alone is enough to invalidate the agency’s analysis.<sup>316</sup>

On a more fundamental level, the Draft EA presents a false choice—engage in no action and miss out on “landscape-scale improvements in NNI[P] conditions” or engage in widespread vegetative treatments that increase the spread of NNIP but are also paired with mitigation and control measures that will ultimately “allow[] for a reduction in NNI[P] in more areas.”<sup>317</sup> In effect, the Draft EA is claiming that it must add *more* NNIP to the Project area before it can mitigate them in comprehensive fashion. The Draft EA fails to persuasively explain why the Forest Service must first further damage the Project area before it can fix it. To be clear, this has never worked before, which is why NNIP are a problem today. There is no basis—not in the Forest Plan and certainly not in Project-level commitments—to ensure a different outcome this time.

The Draft EA’s NNIP analysis is also flawed for another reason—its repeated reliance on a 2009 programmatic EA discussing Nantahala and Pisgah National Forest Non-native Invasive Plant Control.<sup>318</sup> According to recent revisions to the NEPA statute, an agency may rely on a programmatic environmental document for up to five years without additional review of the analysis in said document (unless circumstances have changed).<sup>319</sup> However, if the agency intends to rely on a programmatic document that is more than five years old, then it must “reevaluate[] the analysis in the programmatic environmental document and any underlying assumption to ensure reliance on the analysis remains valid.”<sup>320</sup>

Here, the Draft EA relies on the 2009 programmatic EA as a method to control NNIP without reevaluating the document or its underlying assumptions. A quick review of the document suggests that those assumptions may be out of date. To start, the primary premise of the 2009 programmatic EA is that the herbicide and vegetation management it authorizes is “consistent with the Forest Plan”—the *previous* forest plan.<sup>321</sup> The document does not assess—nor could it assess—whether the herbicide is consistent with the current 2023 Forest Plan. New information also

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<sup>316</sup> *Cf. Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 918 (D. Or. 2016) (failure to consider how climate change may “diminish or eliminate the effectiveness of some of the [agency’s] habitat mitigation efforts” was arbitrary and capricious).

<sup>317</sup> Draft EA at 111.

<sup>318</sup> *Id.* at 109–10.

<sup>319</sup> 42 U.S.C. § 4336b(1).

<sup>320</sup> *Id.* § 4336b(2).

<sup>321</sup> U.S. Forest Serv., *Nantahala and Pisgah National Forest Non-Native Invasive Plant Control Decision Notice* at 3 (2009).

suggests that some of the herbicides authorized in the 2009 programmatic EA may be more harmful than thought at the time. For example, the 2009 EA authorizes use of dicamba, an herbicide that is now understood to drift far beyond the areas where it is applied, harming plants, crops, and listed species. In 2018, the Ninth Circuit vacated EPA's approval of several dicamba-based herbicides, finding EPA had "substantially understated" risks associated with dicamba herbicides.<sup>322</sup> In February 2024, a federal court again vacated the registrations for three dicamba-based weed killers after finding EPA violated FIFRA in approving them for use.<sup>323</sup> These and many other developments<sup>324</sup> in assessing the risks posed by herbicides are not addressed in the Draft EA. The Forest Service cannot continue to rely on the 2009 programmatic EA absent further review.

The Draft EA implies that such a review occurred in 2021, when the Forest Service prepared a "Supplemental Information Report" on the programmatic EA.<sup>325</sup> However, the 2021 Report is not available in the Project record, on the project page for the 2009 programmatic EA,<sup>326</sup> or on a publicly available website. Therefore, the Forest Service cannot rely on it to support its analysis of the Project.<sup>327</sup> Even if the agency rectified this issue, the 2021 Report itself will become outdated in just a year and a half—likely before any serious Project implementation can occur—and the agency will be in the same boat once more. Conservation Groups recommend that the Forest Service examine the assumptions underlying the 2009 programmatic EA in a revised NEPA study for the Project so that it can benefit from public input, incorporate new information, and address any lingering concerns about the staleness of the 2009 EA.

h. The Draft EA fails to adequately assess impacts to Special Area Designations.

Conservation Groups are deeply concerned about proposed timber harvest and road-building in Special Area Designations. Project VMAs occur in several biologically and recreationally exceptional areas, including the following:

- Inventoried Roadless Areas
  - Slide Hollow
  - Wilson Creek
  - Linville Gorge Addition
  - Dobson Knob
  - Jarrett Creek

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<sup>322</sup> *Nat'l Fam. Farm Coal. v. U.S. E.P.A.*, 960 F.3d 1120 (9th Cir. 2020).

<sup>323</sup> *Ctr. for Biological Diversity v. U.S. E.P.A.*, No. CV-20-00555-TUC-DCB, 2024 WL 455047, at \*1 (D. Ariz. Feb. 6, 2024).

<sup>324</sup> For example, in 2023 EPA developed an herbicide strategy framework to reduce exposures to federally listed species. See U.S. EPA, *Draft Herbicide Strategy Framework to Reduce Exposure of Federally Listed Endangered and Threatened Species and Designated Critical Habitats from the Use of Conventional Agricultural Herbicides* (2023).

<sup>325</sup> Draft EA at 109.

<sup>326</sup> U.S. Forest Serv., Non-Native Invasive Plant Control Project, <https://www.fs.usda.gov/project/nfsnc/?project=20521>.

<sup>327</sup> 40 C.F.R. § 1501.12.

- Laurel Mountain
- Special Interest Areas
  - Bald Mountain
  - Linville Mountain Dolomite Areas
  - Sevenmile Ridge Wetlands
  - Johns Creek
  - Pink Beds
  - Frying Pan Gap
  - Thompson River Gorge
- Wild and Scenic Rivers
  - Wilson Creek
  - Horsepasture River
- Eligible Wild and Scenic River corridors
  - Thompson River
  - North Fork French Broad
  - Davidson River
  - North and South Fork Mills River
  - South Toe River

The Draft EA’s analysis of impacts to these exceptional areas is problematic in several ways.

**First**, as noted above, the Draft EA largely fails to conduct a site-specific analysis of impacts to any of these special areas. For example, the Draft EA lists eligible Wild and Scenic Rivers<sup>328</sup> but fails to analyze site-specific impacts to these areas.<sup>329</sup> For other resources it does not even go that far—for instance, although the Draft EA acknowledges that some VMAs occur in IRAs, it fails to even identify *which* IRAs will be affected. Instead of disclosing this information, the Draft EA promises that “site-specific analysis and design criteria would be applied at the implementation phase to ensure Forest Plan compliance” in IRAs.<sup>330</sup> For the many reasons explained above, this violates NEPA. The Forest Service must conduct these site-specific analyses in a revised NEPA study or adopt Conservation Groups’ two-tiered programmatic proposal.

**Second**, as described above, the Draft EA again overestimates the ability of its BMPs to mitigate damage to Special Area Designations.<sup>331</sup> The Forest Service cannot assume that its future site-specific review process will appropriately identify all BMPs and eliminate all effects. “An analysis based on presumptions at every step cannot support any sort of conclusion and especially not the” Forest Service’s proposed finding of no significant impact.<sup>332</sup> Mitigation for special areas

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<sup>328</sup> Draft EA at 182–85.

<sup>329</sup> See *id.* at 117, 182–85.

<sup>330</sup> *Id.* at 118.

<sup>331</sup> See *id.* (“Impacts on hydrology and soils would be minimized by implementing measures such as North Carolina BMPs that would reduce the potential for erosion.”).

<sup>332</sup> *Hurst*, 604 F. Supp. 2d at 895–96; *see also N. Plains*, 668 F.3d at 1084–85 (“In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.”).

*comes primarily from the NEPA process*, in which the public can identify issues in need of mitigation, which can then be adopted in the decision. Cutting out the NEPA process guarantees that mitigation will be inadequate.

**Third**, the Draft EA fails to justify or adequately explain its proposed timber harvests in IRAs. The Draft EA expressly recognizes that IRAs are designed to be “unmanaged acres.”<sup>333</sup> However, it suggests that cutting and removing timber in these IRAs—which will necessitate road building—is necessary to “re-establish[] reference landscapes that provide a useful comparison to study the effects of more intensely managed areas elsewhere on the Forest.”<sup>334</sup> Conservation Groups believe IRAs are far more valuable as “unmanaged” roadless refuges than as moderately managed and roaded “reference landscapes.” Conservation Groups request that the Forest Service drop all VMAs in IRAs, or require that all vegetation management in these areas involve non-ground-disturbing activities.

The Draft EA currently does not commit to a prohibition on ground-disturbing activities in IRAs. Instead, it inconsistently describes what sorts of management will occur in IRAs. For example, at times, the Forest Service suggests that “[n]o temporary roads would be constructed within [IRAs].”<sup>335</sup> But at other times, the agency recognizes that timber will be “cut and removed” in IRAs,<sup>336</sup> which will necessitate construction of temporary roads, log landings, and skid trails/roads. The agency also acknowledges that the non-saw timber VMAs that intersect with IRAs “may also require skid trails, construction of skid roads and landings (for loading pulpwood), and construction of temporary roads in some locations.”<sup>337</sup>

The Draft EA never explains how this associated road construction will be consistent with the 2001 Roadless Rule. That Rule flatly prohibits construction of a “motor vehicle travelway over 50 inches wide”—a description which encompasses skid roads and trails—unless the Forest Service determines one of the following circumstances exists: (1) a road is needed to protect against an “imminent threat” to public health or safety; (2) a road is needed for a CERCLA, Clean Water Act, or Oil Pollution Act restoration action; (3) a road is needed pursuant to reserved or outstanding rights; (4) road realignment is needed to prevent “irreparable resource damage”; (5) road reconstruction is needed to implement a road safety improvement project; (6) the road is needed for a Secretary of Agriculture approved highway project; or (7) the road is needed for a mineral lease.<sup>338</sup> The Draft EA does not attempt to show that any of these circumstances will be met. Unless the Forest Service is prepared to make this showing, it must flatly prohibit any road construction—including temporary roads, skid roads, or skid trails—in IRAs targeted by the Project.

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<sup>333</sup> Draft EA at 118.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 321; *see also id.* at 117 (“Prohibiting temporary roads would reduce the potential for runoff from project-related activities.”).

<sup>336</sup> *Id.* at 118.

<sup>337</sup> *Id.* at 190.

<sup>338</sup> 66 Fed. Reg. 3244, 3272–73 (Jan. 12, 2001).

i. The Draft EA fails to adequately assess impacts to Mountain Treasures and state-designated Natural Areas.

Conservation Groups are deeply concerned about proposed timber harvest and road-building in Mountain Treasures and state-designated NHNAs. Project VMAs occur in several of these biologically and recreationally exceptional areas, including the following:

- North Carolina Natural Heritage Natural Areas
  - Thompson River Gorge (Exceptional)
  - Bald Rock/Bruce Ridge (Exceptional)
  - Pink Beds (Exceptional)
  - Frying Pan Gap (Exceptional)
  - Sevenmile Ridge Wetlands (Exceptional)
  - Wilson Creek Gorge (Exceptional)
  - Nolichucky River Gorge (Exceptional)
  - Boone Fork–Mulberry Creek (Very High)
  - Pack Hill/Thunderhole Creek (Very High)
  - Wilson Creek Slopes/Lost Cove Creek (Very High)
  - Paint Rock Road (Very High)
  - Max Patch/Roaring Fork Forest (Very High)
  - Pigeon Fork (Very High)
- Mountain Treasures
  - Dobson Knob
  - Upper Wilson Creek
  - Sugar Knob
  - Linville Gorge Extension A
  - Dobson Knob
  - Slide Hollow
  - Nolichucky Gorge
  - Bluff Mountain
  - Laurel Mountain
  - Cedar Rock Mountain

As Conservation Groups explained during the Forest Plan objection process, Mountain Treasures—which overlap substantially with Wilderness Inventory Areas—are unparalleled hotspots for rare and limited-range endemic species and “represent some of the most important lands in the U.S. to establish a protected areas system that is intact, connected, and representative of ecological diversity.”<sup>339</sup> State-designated NHNAs—which also overlap substantially with

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<sup>339</sup> Belote and Irwin, *Quantifying the National Significance of Local Areas for Regional Conservation Planning: North Carolina’s Mountain Treasures*, *Land* 2017, 6(2), 35 (May 27, 2017) (available at <https://www.mdpi.com/2073-445X/6/2/35/htm>).

Mountain Treasure areas—are also critical reservoirs of biodiversity, containing more than 70% of known rare species occurrences on the Nantahala and Pisgah National Forests.<sup>340</sup>

The Draft EA almost entirely omits any reference to these designations. At one point the Draft EA mentions the number of treatment acres in “Class B NC Natural Heritage Areas,”<sup>341</sup> but otherwise does not discuss site-specific effects to most of the impacted NHNAs listed above. The Draft EA does not mention Mountain Treasures at all. The failure to discuss impacts to these ecologically significant designations—designations that the Forest Service has previously recognized carry “special biodiversity significance”<sup>342</sup>—violates NEPA.

The Draft EA cannot tier to the Forest Plan to make up for this failure. As Conservation Groups noted in their objection, though the Forest Plan FEIS recognized the biological significance of NHNAs, it failed to analyze the effects of timber harvests in these areas.<sup>343</sup> In a similar vein, the Forest Service also failed to take a “hard look” at the best available science on Mountain Treasures during Plan Revision.<sup>344</sup> Because the Forest Service cannot tier to a non-existent analysis, it must either conduct a site-specific analysis of impacts to both designations in a revised NEPA study, drop VMAs in Mountain Treasures and NHNAs, or prohibit ground-disturbing harvests in these areas. If there are good site-specific reasons to intervene in these areas and the Forest Service is willing to consider site-specific treatment alternatives to address those reasons, we are open to the discussion. For example, we are supporting mechanical slashdown and application of fire on the Cherokee National Forest in order to create open and patchy structure in dry ecozones in appropriate “unsuitable” areas. But to justify something similar here would require a site-specific process, which this is not. We cannot endorse a blank check without first starting with a site-specific need.

j. The Draft EA consistently downplays impacts to recreation and scenery.

The Draft EA’s analysis of the Project’s impacts to recreation and scenery fails to meet NEPA’s “hard look” standard in several ways.

**First**, as explained above, the Draft EA fails to conduct any site-specific analysis of impacts to recreation and scenery and instead defers this analysis to the “site-specific activity” level.<sup>345</sup> That failure invalidates the agency’s NEPA analysis. It also violates the Forest Plan’s explicit requirement to conduct “*project-level* scenery impact analysis” that includes site-specific “analysis of potential visibility considering associated viewpoints at use areas, water bodies, open roads, rails, and closed roads used as trails” for High, Moderate, and Low scenic integrity objectives, and “from *any location* within an area with a Very High” objective<sup>346</sup>—which includes

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<sup>340</sup> NPNF Plan Objection at 89–90.

<sup>341</sup> Draft EA at 49. “Class B” NHNAs are not a designation recognized by the State.

<sup>342</sup> Forest Plan FEIS at 3-106 (describing NHNAs).

<sup>343</sup> NPNF Plan Objection at 88–92.

<sup>344</sup> *Id.* at 96–97.

<sup>345</sup> Draft EA at 36.

<sup>346</sup> Forest Plan at 129 (emphases added).

a good portion of the Project. Because the Draft EA failed to conduct this visibility analysis—as required by the Forest Plan—this means the Forest Service is also in violation of NFMA.<sup>347</sup>

**Second**, the Draft EA fails to justify or adequately explain the effects of vegetation management in the Appalachian Trail corridor. Though this corridor comprises little more than 3% of the total Project area, it contains more than “5% of the total saw timber VMA acreage” proposed in the Project,<sup>348</sup> as well as 5% of the total non-saw timber VMA acreage. The agency never adequately explains why it is necessary to allow commercial logging—which will involve heavy equipment, temporary road construction, log landings, skid roads, and skid trails—within a nationally recognized scenic trail corridor. It also never conclusively determines the effect of this management. Instead, as it does elsewhere, the Draft EA defers this analysis to non-NEPA “pre-implementation field reviews.”<sup>349</sup> The Appalachian Trail corridor and the tens of thousands of hikers who use it deserve better. Conservation Groups recommend that the Forest Service drop its plans to conduct commercial logging in the corridor or, at the very least, conduct a site-specific NEPA analysis of its plans to allow such logging and its effects on trailside scenery—and allow the public to comment on said plans.

**Third**, the Draft EA relies on an apparently non-existent design measure to mitigate effects from prescribed burning. According to the Draft EA, high-intensity prescribed burns may have increased impacts on “soil and associated trail” resources.<sup>350</sup> However, the Draft EA dismisses the effects of high-intensity burns on recreation “[b]ecause only 10% of burned acres would be subject to higher or mixed intensities.”<sup>351</sup> It is unclear where this 10% figure comes from—it is not in the design criteria listed in Appendix E, nor is it described anywhere else in the Draft EA. The Forest Service must clarify whether this limit applies in a revised NEPA study. And if this is a predicted effect, how will it be monitored? How will an adaptive management “adjustment” be made if it proves unwarranted?

**k. The Draft EA’s road analysis is inadequate.**

The Draft EA dismisses the Project’s effects on transportation and access as “minor” and “short term.” That conclusion, and the analysis supporting it, are flawed.

As an initial matter, we believe the Forest Service has seriously underestimated the number of temporary roads needed to facilitate its planned management. The Draft EA suggests that “[e]ach temporary road would be limited to a maximum length of 0.5 miles,”<sup>352</sup> which we support. However, as noted in the table below, many VMAs will require construction of roads much longer

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<sup>347</sup> See 16 U.S.C. § 1604(i) (“Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”).

<sup>348</sup> Draft EA at 133.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 129.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 30.

than that just to access them. And many AOIs are far longer and wider than 0.5 miles across. The agency does not explain how it plans to work in these areas while adhering to its 0.5-mile limit.

GAP VMA ID	Notes
GRF1301	> 1/2 mile access from either FSR 1167 or FSR 6089
GRF506	Long access from either SR 1515 or SR 1517
GRF2115	>1/2 mile access from FSR 299
APP0301	Will require either a bridge over the South Toe River or > 1/2 mile access. Has steep slopes and mostly mesic Ecozones.
APP0302	Will require either a bridge over the South Toe River or > 1/2 mile access. Has steep slopes and mostly mesic Ecozones.
APP1625	Will likely require > ½ mile of new road access
PIS2016	Will require > ½ mile of new access road
PIS2017	Will require > ½ mile of new access road
PIS2018	Will require > ½ mile of new access road
PIS2019	Will require > ½ mile of new access road
PIS2020	Will require > ½ mile of new access road

Even if the Forest Service were not underestimating the temporary road construction required by the Project, Conservation Groups would still be concerned that the Project will contribute to exceedances of Forest Plan estimates for road construction. In the Forest Plan FEIS, the agency anticipated that meeting its annual Tier 1 timber harvest levels would require 3.1 new system road miles and 2.6 new temporary road miles per year.<sup>353</sup> Yet with the GAP Project alone, the agency seems well on its way to maxing out the estimated annual temporary road construction mileage for the Nantahala *and* Pisgah National Forests—without coming near to the top end of Tier 1 timber harvest acres. This means the Forest Service will almost certainly overshoot its Forest Plan road-building estimates—which underscores our previously raised concerns that the Forest Plan FEIS did not accurately or comprehensively analyze the issues with the road system, the likely increase in the road system under elevated levels of timber harvest, and the subsequent damage to water quality and wildlife habitat that the increase in substandard roads will create.

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<sup>353</sup> Forest Plan FEIS at 3-518.

Even if the Forest Service were not rapidly approaching its forest-wide road construction estimates, additional temporary roads would still be a problem. As the Forest Plan FEIS disclosed, the “current road system has a backlog of maintenance needs” that are causing serious ecological impacts.<sup>354</sup> Though the Forest Service has informally indicated it would be willing to do more road decommissioning once the Project is approved, the Project itself makes no commitment to reduce this backlog by, for example, decommissioning older roads within the Project area. Instead, the Draft EA merely promises to “decommission” the temporary roads that it is *adding* to the Project area. Prior experience, however, shows that full decommissioning is the exception, not the rule. Thus, the Project will only make the maintenance backlog *worse*.

Because the Forest Service is continuing to add to a maintenance backlog across the Forests, it risks contributing to a systemic Clean Water Act violation. Section 404 of the Clean Water Act requires a permit for the discharge of “fill material,” which includes stream crossings by roads. National forests typically claim an exemption to that requirement for “construction or maintenance of . . . forest roads” used for timber management. This exemption, however, is available only for roads maintained in accordance with certain minimum BMPs and is intended to “assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.”<sup>355</sup> These requirements apply both at the time of construction *and* thereafter, specifically requiring *maintenance* as needed to prevent erosion and maintain passage for aquatic species, a duty that would exist until a road is fully decommissioned.

According to a 2015 study of roads in wilderness inventory areas, these statutory and regulatory requirements are not being met across the Nantahala and Pisgah National Forests.<sup>356</sup> Adding even more temporary roads, skid roads, and skid trails to these Forests will only exacerbate the problem and further contribute to an ongoing Clean Water Act violation.

In addition to *underestimating* the Project’s contributions to the Forest Service’s ever-growing maintenance backlog, the Draft EA also *overestimates* the Forest Service’s ability to mitigate the effects of temporary road construction. According to the Draft EA, the annual addition of an average of 2 miles of temporary roads and 16 miles of hand or dozer lines can be dismissed as “minor” and “short term” because (1) “dozer lines and temporary roads would not be open to the public”; (2) “temporary roads would be stabilized using BMPs”; and (3) roads would be “decommissioned when no longer needed.”<sup>357</sup> There are issues with each of these contentions.

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<sup>354</sup> *Id.* at ix.

<sup>355</sup> 33 U.S.C. § 1344(f)(1)(E).

<sup>356</sup> Kara Grosse, Antje Land & Caitlin Ryan, *Analysis of Forest Road Conditions and the Impact on Water Quality and Aquatic Organisms in the Pisgah-Nantahala National Forests* (2015) (Attachment E) (showing that 40% of stream crossings and other BMPs directly affecting intermittent or perennial streams violated the prohibitions on accelerated erosion in a stream crossing or visible sediment directly entering the stream).

<sup>357</sup> Draft EA at 136.

To begin, the Forest Service wholly fails to account for public use of “closed” roads and dozer lines. During Forest Plan revision, Conservation Groups alerted the agency to the threat posed by Off Highway Vehicle use of temporary roads.<sup>358</sup> And in the Forest Plan FEIS, the agency acknowledged that even those roads that are “not open to motorized travel” are “often used by hikers, mountain bikers, and equestrians to access the Forests” and “contribute to erosion, sedimentation into adjacent waters, and landslides on unstable road slopes.”<sup>359</sup> The Draft EA does not explain why this sort of public use is no longer a concern.

Next, as explained above, BMPs are not a panacea, and the Draft EA overstates their effectiveness at controlling sedimentation. The best available information shows that forest roads do have chronic and acute impacts to water quality that are ubiquitous across the Forest.<sup>360</sup> For example, the 2015 survey of roads in wilderness inventory areas showed that 40% of stream crossings and other BMPs directly affecting intermittent or perennial streams violated the prohibitions on accelerated erosion in a stream crossing or visible sediment directly entering the stream.<sup>361</sup> These effects are very measurable, if only the Forest Service would make the effort to take the measurements. But as noted above, the monitoring program systematically neglects roads outside of the time period immediately after closure of a timber sale.

Finally, and again, the Forest Service cannot promise that temporary roads will be decommissioned when this rarely happens in practice. As Conservation Groups noted during the objection period, the Forest Service’s own 2017 LiDAR data (as interpreted in the hillshade model that the Forests are already using in the field) shows that road prisms stay on the landscape for much longer, with much greater cumulative effects, than is disclosed in the Forest Plan FEIS—even though the FEIS used the 2017 LiDAR for other purposes in its analysis. Moreover, even when decommissioning occurs, the Forest Service has acknowledged that the “[s]uccess of restoring soil productivity on temporary roads is often marginal and adverse impacts frequently remain.”<sup>362</sup>

Asserting that temporary roads will be “decommissioned when no longer needed” is particularly misleading here, where the agency is planning multiple entries for each AOI. Unless the Forest Service is planning on decommissioning each temporary road after each entry—which it does not indicate in the Draft EA—these temporary roads will likely remain on the landscape for decades, if not longer. The effects from these roads cannot be dismissed as “short term” and “minor,” especially at the scale at which they are being added to the Project area.

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<sup>358</sup> S. Env’t L. Ctr. et al., *Comments on the Nantahala and Pisgah National Forests Draft Land Management Plan and Draft Environmental Impact Statement* at 206 (June 29, 2020) [hereinafter “Plan Comments”].

<sup>359</sup> Forest Plan FEIS at 3-519.

<sup>360</sup> NPNF Plan Objection at 125–33; Plan Comments at 162–85.

<sup>361</sup> Kara Grosse, Antje Land & Caitlin Ryan, *Analysis of Forest Road Conditions and the Impact on Water Quality and Aquatic Organisms in the Pisgah-Nantahala National Forests* (2015) (Attachment E).

<sup>362</sup> Forest Plan FEIS at 3-51.

## **V. The Draft EA’s conclusion that the Project is not likely to have significant effects is not supported by the record.**

For decades, agencies assessed the need for an EIS by considering ten “intensity” factors in the appropriate context.<sup>363</sup> Several years ago, CEQ weakened its NEPA regulations by eliminating those factors in an unlawful rulemaking.<sup>364</sup> The Forest Service does not explicitly discuss the “intensity” factors in its NEPA analysis. To the extent that the Forest Service is relying on the regulations promulgated by CEQ’s unlawful 2020 rulemaking to justify its finding of no significant impact, that decision is arbitrary and capricious.

CEQ recently restored most of the significance factors in its Phase 2 rulemaking, which went into effect on July 1, 2024. Though the Forest Service was not bound to consider those factors, it had the discretion to apply them. The Draft EA did not apply them, nor explain why it declined to do so. A brief review of these factors confirms that the Draft EA’s primary conclusion—that the Project will not have significant effects on the human environment—is unsupported by the record.

For example, one factor addresses the “degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.”<sup>365</sup> As explained above, the Project area contains numerous unique characteristics, including multiple state-designated natural areas, several North Carolina Mountain Treasures, IRAs, designated and eligible Wild and Scenic River corridors, Special Interest Areas, recommended wilderness, exceptional hiking trails, multiple trout waters, habitat for rare and listed species, thousands of acres of prime farmland, and countless exceptional streams. This factor undoubtedly weighs in favor of a significance finding.

Another factor addresses whether the proposal “may violate relevant Federal, State, Tribal, or local laws or other requirements or be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment.”<sup>366</sup> As explained above, the Project threatens to violate NEPA, NFMA, Forest Service regulations, the Clean Water Act, the Forest Plan, the Roadless Conservation Rule, and North Carolina 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.”<sup>367</sup> In addition, unless the Forest Service consults with the Fish & Wildlife Service regarding the Virginia big-eared bat, gray bat, Carolina northern flying squirrel, and Appalachian elktoe, it may run afoul of the ESA. This factor unquestionably supports the need for an EIS.

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<sup>363</sup> See 40 C.F.R. § 1508.27 (2019).

<sup>364</sup> CEQ, Final NEPA Rule, 85 Fed. Reg. 43,304, 43,322 (July 16, 2020).

<sup>365</sup> 40 C.F.R. § 1501.3(d)(2)(ii).

<sup>366</sup> *Id.* § 1501.3(d)(2)(iii).

<sup>367</sup> Executive Order 13751, 81 Fed. Reg. 88,609 (Dec. 5, 2016).

In a similar vein, another factor considers the “degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973.”<sup>368</sup> As explained above, the action alternative will have adverse effects to numerous listed species, including the Virginia big-eared bat, gray bat, Indiana bat, northern long-eared bat, Carolina northern flying squirrel, and Appalachian elktoe. The Project will also impact designated critical habitat for the Appalachian elktoe.<sup>369</sup> This factor also weighs in favor of the need for an EIS.

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

Even if the Forest Service declines to consider the current significance factors, there is little doubt that the Project, as currently constituted, will have significant effects. The Forest Service acknowledges that the Project—which covers more than 250,000 acres and 12 counties—proposes up to 18,000 acres of prescribed burning per year, more than 29,000 acres of vegetation management over the life of the Project, and the construction of dozens of miles of temporary roads, and perhaps hundreds of miles of skid trails, skid roads, and firelines. This extensive management will impact up to 2,741 miles of linear stream features, and take place in critical ecological areas. For example, the Project includes 41,750 acres of IRAs, 18,100 acres of Special Interest Areas, 5,530 acres of recommended wilderness, and 1,517 acres in Wild and Scenic River Corridors. On the recreation side, the agency acknowledges potential impacts to 457 miles of system trails, as well as effects to nationally important resources like the Appalachian Trail and regionally important trails like the Art Loeb Trail and Overmountain Victory Trail. The Forest Service also acknowledges that the Project is likely to adversely affect several listed species, and potentially adversely affect dozens more. By any objective measure, these are significant effects.

In fact, the Forest Service seems to be counting on the Project to have significant effects. According to the Draft EA, the purpose of the Project is to effectuate “*landscape-scale* changes” and “*wholesale restoration* of a fire-adapted *landscape*” across the entire Pisgah National Forest.<sup>370</sup> The Forest Service is also counting on this “*landscape-scale restoration*”<sup>371</sup> effort to “leverage additional efforts on nearby lands”—potentially expanding the reach of the Project far beyond the national forest boundary.<sup>372</sup> In other words, the Forest Service is counting on the action alternative to alter forest-wide ecology in a way that will leverage similar efforts across western North Carolina. If that is not a significant effect—or does not create at least the potential for a significant effect—it is hard to say what is.

Even if we look past the significant effects *acknowledged* in the Draft EA, there are many additional potentially significant effects that the Draft EA *neglects* to consider. When considered

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<sup>368</sup> 40 C.F.R. § 1501.3(d)(2)(iii).

<sup>369</sup> Draft EA at 91.

<sup>370</sup> *Id.* at 51, 88 (emphases added).

<sup>371</sup> *Id.* at 85.

<sup>372</sup> *Id.* at 139.

in combination with the effects detailed above, they undoubtedly pass the “significant effects” threshold. These issues include:

- Potential impacts to scenery, including vistas along the Appalachian Trail, Art Loeb Trail, and others;
- Impacts to water quality and soils;
- Sedimentation impacts from timber harvests;
- Impacts to intermittent streams on steep slopes;
- Impacts to listed species, including the Virginia big-eared bat, gray bat, Indiana bat, and northern long-eared bat;
- Impacts to Special Area Designations, including IRAs;
- Impacts to regional carbon storage;
- The compounding effects of climate change;
- Effects from introductions of non-native species.

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:

- Eliminate vegetation management areas in mesic forests;
- Eliminate vegetation management areas in areas proposed as unsuitable for timber harvest by the Nantahala–Pisgah Forest Partnership;
- Prohibit commercial timber harvest and road construction in Inventoried Roadless Areas, state-designated Natural Areas, and eligible Wild and Scenic River corridors;
- Prohibit commercial timber harvest along the Appalachian Trail corridor;
- Prohibit ground-based timber harvests on slopes exceeding 35%;
- Require surveys for old-growth forests prior to timber harvest activities;

- Prohibit temporary road construction in Backcountry, Appalachian Trail, or Special Interest Area management areas;
- Prohibit temporary road construction in state-designated Natural Areas;
- Require temporary roads constructed in Chapter 70 areas to be obliterated;
- Create a time limitation for the Project to cap the total amount of temporary road construction;
- Implement time-of-year restrictions and an appropriate gap-size limit on timber harvest in suitable roosting, foraging, and commuting habitat for the Virginia big-eared bat, gray bat, Indiana bat, northern long-eared bat, tricolored bat, and little brown bat.

**VI. The Forest Service must formally consult with the U.S. Fish and Wildlife Service regarding the Virginia big-eared bat, Gray bat, Carolina northern flying squirrel, and Appalachian elktoe mussel.**

As explained above, formal Section 7 consultation is required for any action that may affect listed species or critical habitat, unless the Forest Service and Fish & Wildlife Service concur that adverse effects are not likely.<sup>373</sup> Formal consultation will be required for the Virginia big-eared bat, gray bat, Carolina northern flying squirrel, and Appalachian elktoe mussel. That is because the Draft EA acknowledges that the Project is likely to have “short term” adverse effects on the Virginia big-eared bat, gray bat, and Carolina northern flying squirrel and may have effects on the Appalachian elktoe or its designated critical habitat.

The Forest Service cannot avoid the need for formal consultation for these species by claiming that short-term adverse effects will eventually be offset by long-term habitat improvements. Because the Forest Service cannot reasonably conclude that adverse effects to these species are unlikely, formal consultation with the U.S. Fish & Wildlife Service is required.

**VII. Conclusion**

We appreciate the effort the Forest Service put into designing and analyzing the GAP Project. We recognize how difficult it is to prepare an adequate NEPA study for a project of this size. However, as the size of the project area increases, so does the agency’s analytical burden under NEPA. And here, the Forest Service’s Draft EA fails to adequately assess the impacts of the Project in contravention of NEPA, NFMA, and several other statutes, regulations, and executive orders.

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<sup>373</sup> 50 C.F.R. § 402.14(b)(1) (emphasis added).

We recommend that the Forest Service pivot and adopt our original proposal for a two-tiered NEPA approval, with a programmatic EIS and tiered activity-specific EAs. We would be pleased to assist you in articulating, consistent with CEQ guidance, a limited subset of issues and decisions deferred to future NEPA analysis in order to ensure that those analyses are streamlined and painless. Otherwise, the agency will be required to revise its current NEPA study and conduct the site-specific analysis that it inappropriately deferred to pre-implementation review. We also recommend that the Forest Service drop many of the proposed VMAs, particularly those in NHNAs, IRAs, and other Special Area Designations. Without these and other significant changes described above, the action alternative will necessitate preparation of an EIS.

Thank you for consideration of this letter. Please contact Spencer Scheidt (828-258-2023; [sscheidt@selcnc.org](mailto:sscheidt@selcnc.org)) if you have any questions regarding these comments.



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