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Comments: Dear Ms. Bell:

Thank you for continuing to discuss the NEPA process for the Foothills project.

Collaboration is hard, time-consuming work, and we appreciate your patience as we bring concerns to your attention. We are confident that collaboration can result in better projects with widespread acceptance and we look forward to continuing to work through these issues with the agency and forest stakeholders. Following conversations on August 15, 2017, and August 24, 2017, and in advance of our November meeting, we offer additional thoughts about potential approaches to Foothills NEPA. As you know we are very concerned about one approach the agency is considering. We want to be clear about those concerns and look for ways to resolve them. As always, we are raising these concerns with you early in this process to try work through them efficiently and not impede project progress.

Throughout this letter we use the term [ldquo]site-specific[rdquo] in reference to a level of NEPA analysis. We want to be clear about how we understand that term to reduce any potential for miscommunication. By [ldquo]site-specific[rdquo] we are referring to the on-the-ground impacts that will occur in a specific place as a result of a proposed action. In the past the Forest Service has assessed impacts at the stand level and we continue to believe that at a minimum stand-level analysis must be included in NEPA documents. Our understanding stems from NEPA[rsquo]s requirement to take a [ldquo]hard look[rdquo] at project impacts or effects. [ldquo]Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.[rdquo] 40 C.F.R. [sect] 1508.8(b). [ldquo]Direct effects, [] are caused by the action and occur at the same time and place.[rdquo] [sect] 1508.8(a)(emphasis added). Site-specific impacts are the ecological, aesthetic, historic, cultural, etc., impacts that will result in the place a project occurs; by definition this is a site-specific, place-specific, consideration that cannot be replaced by reliance only on broader impacts assessment or general project sideboards.

I. The Agency[rsquo]s Typical Approach to NEPA

Since at least publication of the current Forest Plan the agency has utilized both a programmatic and site-specific approach to NEPA. The Forest Plan [ldquo]estimat[es] the effects of alternatives at the programmatic [] level[rdquo] and the [ldquo]actual location, design, and extent[rdquo] of resource management activities is determined in [ldquo]site-specific (project-by-project) decisions.[rdquo] Forest Plan, Final Environmental Impact Statement, 3-2. Restated, the Forest Plan includes [ldquo]programmatic decisions[rdquo] that are stepped down to [ldquo][s]ite-specific analysis of proposed activities [to] determine what can be accomplished.[rdquo] Forest Plan, Record of Decision, 27.

With the Forest Plan[rsquo]s programmatic analysis in place, the agency can implement projects by tiering site-specific decisions to the Forest Plan EIS. For example, [ldquo]the Upper Warwoman Landscape Management Project EA tiers to the Forest Plan Final Environmental Impact Statement (FEIS).[rdquo] Upper Warwoman Project Final Environmental Assessment, 21. The [ldquo]tiering[rdquo] approach allows the agency to avoid redoing the broad, programmatic analysis of impacts in the Forest Plan when implementing specific projects.

The agency can choose to complete additional programmatic analyses to avoid duplicative impacts consideration in site-specific decision documents for closely-related management activities. The Dept. of Agriculture[rsquo]s Gypsy Moth EIS exemplifies this approach. The Gypsy Moth EIS [ldquo]is programmatic; it does not authorize

any specific project, but sets the parameters within which project decisions for gypsy moth management will be made. [This approach] requires that site-specific environmental analyses be conducted, and public input gathered to identify and consider local issues before any Federal or cooperative suppression, eradication, or slow the-spread projects are authorized and implemented.[rdquo] Gypsy Moth Management, Supplemental Record of Decision (2012), 2. The gypsy moth programmatic analysis produces NEPA efficiencies because subsequent site-specific analyses and public input can be restrained according to the [ldquo]parameters[rdquo] identified in the programmatic NEPA document. Still, [ldquo]site-specific environmental analyses will be tiered to the programmatic SEIS and documented in accordance with agency National Environmental Policy Act (NEPA) implementing procedures.[rdquo] Id. Under either approach, site-specific analysis is completed before the agency makes a site-specific decision reflected in a NEPA document.

II. The New Approach to NEPA Being Considered in the Foothills Collaborative Our understanding is the Forest Service is considering the following new approach to

meet its NEPA obligations: The agency will scope a broad project generally proposing various treatments (e.g., thinning, woodland creation, etc.) across several thousand acres in the 140,000- acre Foothills analysis area. Areas considered for active management will be identified on large-scale maps (similar to what is currently available online¹); there will be no stand-level identification. Scoping will be followed by environmental analysis either by Environmental Assessment (EA) or Environmental Impact Statement (EIS). The crux of environmental analysis will be providing a checklist of conditions used to determine where certain treatments are appropriate. As an oversimplified example, the EA/EIS may explain that stands that are dominated by oak on west-facing slopes of site index less than 90 will be thinned to a certain degree. Or the analysis may prescribe woodland treatment for those same stands if certain other conditions are present. Alternatives analysis in the EA/EIS will consider different versions of the treatment-prescribing checklist.² Using the above example, alternatives analysis may weigh tradeoffs between thinning areas on site index up to 90 or only thinning areas with site index up to 70. The EA/EIS will not include stand-level identification or analysis but will provide overall project sideboards and mitigation strategies.

Site-specific concerns (e.g., the presence of perennial streams) and project adaptations (e.g., the amount of buffer necessary to protect a perennial stream) will be evaluated in the field post-NEPA as the agency uses the checklist to identify stands for treatment. The NEPA decision document will theoretically authorize any treatment considered in the EA/EIS in any area of the forest identified on the large-scale maps as long as that treatment does not have more significant impacts than the most significant impact considered (generally) in the EA/EIS. Stated differently, if the environmental analysis considered the impacts associated with up to 75% thinning in a certain area the agency would be authorized to utilize any harvest method as long as it did not exceed the impacts expected from a 75% thinning treatment. That could result in a thinning of less than 75% or a different treatment altogether (creating canopy gaps for instance). After a NEPA decision document is signed the Forest Service will work collaboratively with stakeholders to determine what (if any) specific treatments should occur in individual stands based on site characteristics. The agency does not intend to conduct treatments in every area identified on the maps provided with environmental analysis, or even most areas identified, but wants flexibility to conduct treatments in those stands at its discretion. Stand-level management decisions will be reflected in a subsequent document that will not be subject to NEPA.

The agency believes this will result in a more efficient process with multiple treatments authorized in individual stands, giving the agency flexibility to subsequently choose the most appropriate treatment based on site-specific conditions without having to redo NEPA. Additionally, because some of the work may not occur for 10 or 15 years, the agency will be able to adapt future site-specific management decisions taking into account lessons learned from previous implementation under the same NEPA decision.

Please let us know if our understanding of this potential approach to NEPA is incorrect as that may change the concerns we discuss below. Assuming our understanding is not significantly mistaken, we have serious doubts

about the legality of this approach. The approach

1 As an example, the agency's map showing areas where there is the potential for creating young oak forest is here: https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd543565.pdf.

2 We understand that this too is likely an oversimplification but use it here to convey our general understanding.

contravenes NEPA's requirements to consider impacts and mitigation measures at relevant scales, and involve the public in those considerations, before signing a site-specific decision document. Moreover, while we share the agency's desire to implement adaptive management³ and look for NEPA efficiencies we believe this approach will result in a less efficient NEPA process, not more. Nevertheless, there are multiple paths forward which allow the agency to utilize information collected from the Foothills collaborative while efficiently meeting NEPA obligations.

III. The Proposed Approach Contravenes NEPA's Requirement to Analyze Impacts Prior to Signing a Site-Specific Decision Document

Our main concern relates to the timing of impacts analysis and site-specific decision making. NEPA ensures that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. [sect] 1500.1(b)(emphasis added). That information is most often presented through publication of an EA or EIS comparing the impacts of alternative approaches to achieve a project purpose. Alternatives must be considered before rendering a decision on the proposal with the final decision encompassed within the range of alternatives considered in the EA or EIS. 36 C.F.R. [sect] 220.4(c)(emphasis added). When an agency proposes to complete a site-specific project (i.e., conducting a specific action in a specific location) it must complete both general and site-specific analysis of the impacts of that decision before a final decision is made. *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006).

Because site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development, *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003), opinion clarified, 366 F.3d 731 (9th Cir. 2004)(internal quotations omitted), the necessity of site-specific impacts analysis turns on when the critical decision threshold is crossed.⁴ Before that threshold is crossed, both general and site-specific impacts must be evaluated. Courts have explained that this threshold is reached when, as a practical matter, the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to a project at a particular site. *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir.1982)(internal quotations omitted); *Friends of Yosemite Valley v. Norton*, 348 F.3d at 801. Thus, NEPA requires a full evaluation of site-specific impacts only when a critical decision has been made to act on site development—i.e., when the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to project at a particular site.(internal quotations omitted). Completing the final step in the agency's NEPA decision-making process by signing a decision document authorizing site-specific activities constitutes this critical decision. See *Cure Land, LLC v. United States Dep't of Agric.*, 833 F.3d 1223, 1231 (10th Cir. 2016)(rejecting Dept. of Agriculture's argument that a FONSI is not a final agency decision). As a result, impacts analysis at all relevant scales must be completed before a NEPA decision authorizing site-specific activities is signed.

The proposed approach runs afoul of these requirements in two ways. First, the approach puts the cart before the horse by attempting to comply with NEPA requirements applicable to site-specific decision making before actually making a site-specific decision. If the agency is reserving site-specific decision making authority to be exercised at a later date then it cannot sign a site-specific NEPA decision document now. At the very least, a subsequent NEPA decision document will be required when the site-specific decision is made.

Any other approach stretches the Forest Service's decision making capacity beyond the bounds of NEPA. While the Forest Service may sometimes choose not to implement its NEPA decision, the approach being considered expands the agency's post-NEPA decision making authority beyond a choice merely to implement its decision or not: it can effectively develop projects from scratch as long as the possibility of the combination of treatments was generally disclosed in the EA/EIS. At the time a NEPA decision document is signed the public and agency would have, at most, a general, vague idea of what the project might look like when implemented. The decisions which most significantly affect project impacts and objectives, including what treatments to pursue and where, would still be unmade.

That effectively delays actual agency decision making until after a NEPA decision document is signed. But the agency cannot legally make the "critical decision" by signing a site-specific NEPA document now and delay true decision making until a later date when it will consider site-specific factors. When the decision document is signed, the "action" would still be undetermined. That significantly hampers NEPA's "action forcing procedures" requiring agencies to take a "hard look" at the impacts of their actions. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). NEPA requires that site-specific decision documents reflect actual agency decisions made after consideration of alternatives, related impacts, and public involvement, not only the commitment to make a site-specific decision in the future. If the agency pursues this approach, it will have to supplement its current NEPA analysis with site-specific NEPA analysis when decisions are finally made.

This is particularly true of the Foothills project if the agency believes it will not analyze and implement pieces of the project for 10 or more years. Signing a NEPA document now is certainly premature if the agency does not plan to consider and make decisions about site-specific impacts and alternatives for a decade. Nothing bars the agency from completing some NEPA analysis now but additional NEPA will be required when site-specific decisions are reached.

Second, and related, even if the agency's commitment to making site-specific decisions in the future could constitute a "critical decision" reflected in a site-specific NEPA decision document issued now, the approach violates NEPA because it delays site-specific impacts analysis until after the agency decision is made. "The critical inquiry in considering the adequacy of an [environmental analysis] prepared for a large scale, multi-step project is not whether the project's site-specific impact should be evaluated in detail, but when such detailed evaluation should occur." *State of Cal. v. Block*, 690 F.2d at 761. That "detailed evaluation" must occur before or coincident with site-specific decision making, not after. *Friends of Yosemite Valley v. Norton*, 348 F.3d at 801 ("NEPA requires a full evaluation of site-specific impacts [] when a "critical decision" has been made to act on site development.")(emphasis in original). Here, there can be no doubt that completion of a NEPA document purportedly authorizing site-specific timber operations (among other activities) is a site-specific decision. As a result, impacts analysis at all relevant scales must occur before the agency reaches that decision. The agency must either: 1) make the site-specific decision accompanied by the requisite site-specific analysis, or 2) delay both site-specific analysis and decision making. The approach being considered fails to fulfill either of those obligations.

To be clear, our concern is not that the agency is seeking to avoid all site-specific analysis. We understand the agency plans to take site-specific characteristics into account at a later, post-NEPA date. Our concern is timing. The agency does not yet have the information before it necessary to make lawful site-specific NEPA decisions. Just as critically, NEPA provides the legal mechanisms guaranteeing the public's ability to engage with the agency as it makes those decisions. Disjoining NEPA safeguards from actual site-specific decision making potentially robs the public of its ability to weigh in when site-specific decisions are subsequently made in at least two ways. First, without NEPA there is no guarantee the public will be able to participate through commenting or other procedures when site-specific concerns are subsequently taken into account post-NEPA. Second, the agency's administrative objection process is tied to its NEPA procedures. If site-specific analysis is not

contained in a NEPA document the public may lose its ability to hold the agency accountable by objecting to portions of that analysis which in turn may affect citizens' ability to hold the agency accountable in the court system.

The timing issue creates other problems. While the agency may be able to roughly estimate the impacts it expects to see in certain areas, it cannot know what issues the public will raise during site-specific alternatives and impacts analysis. The public can only raise those issues once it understands the action the agency is proposing to take. But the agency is still obligated to respond to those concerns in its NEPA documents. The proposed approach leaves the agency in the impossible position of having to foresee and respond in its current NEPA document to issues raised by the public related to site-specific proposals that will only be made in the future.

We appreciate that the agency has expressed a willingness to collaborate on future decision making, but there is nothing that prevents the agency from reversing course on that commitment due to personnel turnover or other reasons, after a NEPA decision is signed. And there is nothing to ensure that the level of analysis required by NEPA would be replicated at a later date if NEPA's requirements do not apply. If the agency were to change its mind about subsequent collaboration, or fail to perform adequate analysis, the public would have little recourse. The timing of the agency's decision making is problematic both because of the substantive informational shortcomings and also because it shortcuts the public's ability to participate in agency decision making.

Finally, it is puzzling to us why the agency would not simply delay its NEPA decision(s) until it has all relevant information if the agency is planning to complete site-specific analysis at a future date anyway. The site-specific analysis does not create additional work for the agency if it plans to complete the analysis regardless. Many of the problems with the proposed approach could be avoided if the agency synchronized its NEPA decision with actual site-specific decision making.

A. Programmatic Environmental Analysis and Tiering

From our perspective, the NEPA approach being considered resembles a programmatic approach where site-specific decisions are tiered to broader, programmatic NEPA analysis. As explained by the CEQ, programmatic reviews "add value and efficiency . . . when they inform the scope of decision and subsequent tiered NEPA reviews."⁵ The Forest is already taking advantage of this approach: the Forest Plan is supported by a programmatic EIS that analyzes the tradeoffs associated with the broad goals and objectives adopted in the Plan. During project development agency staff look for opportunities to meet Plan goals in specific places. For typical projects, which are tiered to the Plan EIS, there is no need to add the intermediate step of a programmatic EA.

Similar to the Forest Plan EIS, our understanding is the Foothills NEPA document will assess impacts on a broad scale across a range of alternatives but defer site-specific decision making authority and impacts consideration. But unlike the Forest Plan EIS and typical projects, the agency does not plan to "tier" site-specific NEPA decisions back to the more general analysis included in the broader Foothills NEPA document. In other words, the approach resembles tiering but omits the crucial final step of committing to decisions in a tiered, site-specific NEPA document.

Courts are clear that effective tiering requires subsequent completion of a site-specific NEPA document. See, e.g., *High Sierra Hikers Ass'n v. U.S. Dep't of Interior*, 848 F. Supp. 2d 5 Council on Environmental Quality, *Effective Use of Programmatic NEPA Reviews* (2014) available at: <https://energy.gov/nepa/downloads/effective-use-programmatic-nepa-reviews-ceq-2014>.

1036, 1049 (N.D. Cal. 2012) ("When utilizing the programmatic approach, agencies must engage in a

[Idquo]tiered[rdquo] process; the agency will first issue the programmatic EIS and then follow up with one or more site-specific EIS as necessary to assess adequately all environmental consequences.[rdquo]). Moreover, [Idquo]the Forest Service cannot tier its analysis to a forthcoming, uncompleted NEPA document.[rdquo] All. for the Wild Rockies v. United States Forest Serv., No.

1:15-CV-00193-EJL, 2016 WL 4581404, at *11 (D. Idaho Aug. 31, 2016). Nor can it tier its analysis to a document that will not be subject to NEPA. See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002). Yet that appears to be the approach being considered here: delaying site-specific considerations until a future date when that analysis will be reflected in a collaboratively developed document that is not subject to NEPA. Such an approach cannot comply with NEPA.

IV. The Agency Cannot Adequately Consider Mitigation Measures Using the Proposed NEPA Approach

Delaying site-specific impacts analysis also makes the agency[rsquo]s consideration of ways to mitigate those impacts inadequate. [Idquo]To be sure, one important ingredient of [environmental analysis] is the discussion of steps that can be taken to mitigate adverse environmental consequences.[rdquo] Robertson v. Methow Valley Citizens Council, 490 U.S. at 351. [Idquo]Implicit in NEPA's demand that an agency prepare a detailed statement on any adverse environmental effects which cannot be avoided should the proposal be implemented is an understanding that the [environmental analysis] will discuss the extent to which adverse effects can be avoided.[rdquo] Id. (internal quotations omitted). [Idquo]More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the action-forcing function of NEPA.[rdquo] Id.

Critically, [Idquo][w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.[rdquo] Id. As a result [Idquo]CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the [environmental analysis], in discussing alternatives to the proposed action, [] consequences of that action, [] and in explaining its ultimate decision.[rdquo] Id.

[Idquo]An agency cannot [] avoid a detailed mitigation analysis simply by postponing it on the basis that the feasibility and success of mitigation would depend on site specific conditions.[rdquo] High Sierra Hikers Ass'n v. U.S. Dep't of Interior, 848 F. Supp. 2d at 1053[ndash]54 (internal quotations omitted) citing S. Fork Band Council of W. Shoshone of Nevada v. United States Dep't of Interior, 588 F.3d 718 (9th Cir.2009) (concluding that EIS did not sufficiently address mitigation measures related to groundwater removal). Similarly, an EA or EIS [Idquo]cannot merely assert a perfunctory description of mitigating measures.[rdquo] Neighbors of Cuddy Mountain, 137 F.3d 1372, 1380 (9th Cir. 1998). [Idquo]A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.[rdquo] Id. Rather, mitigation must be detailed with enough specificity to [Idquo]ensure that environmental consequences have been fairly evaluated.[rdquo] Carmel[ndash]By[ndash]the[ndash]Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1154 (9th Cir.1997).

The NEPA approach being considered cannot comply with these requirements. At most the agency can only produce a [Idquo]mere listing of mitigation measures[rdquo] because at the time the NEPA decision is signed no site-specific analysis or decision will have been made. The agency cannot provide site-specific mitigation measures if it has not taken site-specific concerns into account; it will only be able to provide a general list of mitigation measures which could be applied depending on chosen treatments and depending on site-specific characteristics which may affect their efficacy. Generally listing mitigation measures available to the agency is the [Idquo]perfunctory description of mitigation measures[rdquo] found illegal in Neighbors of Cuddy Mountain. NEPA requires more. The agency must perform a detailed mitigation analysis before making a site-specific decision.

V. The Proposed Approach to NEPA Cannot Result in a Finding of No Significant Impact

If the agency chooses to move forward with this approach despite the problems outlined above it cannot support its decision with a Finding of No Significant Impact (FONSI). A [“]finding of no significant impact[”] (FONSI), [] briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment.[”] Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 757[–]58, (2004). But if impact analysis has not occurred [–] delayed until a future date when the agency takes site-specific characteristics into account [–] the agency is incapable of determining that an action (or host of actions) will not have a significant impact on the human environment. In short, the agency cannot find the action will not have significant impacts if it does not yet know what those impacts may be.

VI. Practical Considerations Counsel Against the Proposed NEPA Approach While the above highlights some of our primary legal concerns we also want to raise

some practical concerns about the proposed NEPA approach. For years, forest stakeholders in Georgia have provided a wealth of information to the Forest Service regarding impacts of proposed projects on specific places. That information led to positive changes to projects supported by both the public and the agency. In some instances, on-the-ground information provided by stakeholders led the Forest Service to rethink planned projects entirely. For instance, the 2011 Forest Health Stewardship Project in the Blue Ridge Ranger District proposed thinning over 6,000 acres of over-stocked pine stands. Forest stakeholders reviewed as many stands as possible during the scoping period and found that the stands not only were not over- stocked but had a minimal (or nonexistent) pine component. The project was ultimately reduced to approximately 700 acres that better met the project purpose. In-field inspection by citizens saved the Forest Service considerable time and expense that would have been wasted when the agency could not implement the project as planned.

Similarly, at the August 24, 2017 [“]NEPA for Citizens[”] meeting the agency used identification of the amount of riparian buffer necessary to protect a specific stream as an

example of the ideal type of information the public would provide during the NEPA process. That is exactly the type of information stakeholders in Georgia have been providing for years.

But the proposed approach to NEPA would rob the public of the opportunity to provide that high-quality, site-specific information. Much of the information submitted to the Forest Service through the NEPA process is collected through in-field inspection. Stakeholders would be incapable of conducting meaningful site inspections for even a small percentage of the area considered for treatment as part of the Foothills project due to its size. Instead of working with stakeholders to incorporate this critical information into project development the Forest Service would have to collect the information independently (at increased cost to the agency since the public would not be providing the information for free) or forego use of the information in NEPA analysis.

We realize that the agency is legally capable of considering large forest management projects, but the size of the Foothills project, the lack of treatment specificity, and the fast pace at which the project is moving make it impossible to conduct meaningful site inspections for most of the project during the NEPA process. NEPA requires the agency to consider relevant issues we bring to its attention as a result of our on-the-ground observations. If NEPA[’s] protections do not apply to site-specific concerns, our ability to have that back-and-forth with the agency, leading to better projects and more robust engagement on the national forests, could be eliminated.

Additionally, the approach would force stakeholders (and the agency) to attempt to disclose relevant site-specific information for impacts that may not occur for 10 or 15 years when treatments are finally implemented and site-specific conditions may be quite different. At most, forest users would only be able to provide broad concerns or suggestions about the proposed action but would be prevented from providing the site-specific information (e.g., necessity of stream buffers) the agency says it values. The agency[’s] NEPA analysis would suffer as a result but perhaps more problematically the public[’s] ability to participate in public lands management would

be handicapped. We cannot overemphasize this point: NEPA is what protects the public's ability to participate in agency decision making; the NEPA approach being considered by the Chattahoochee strips away those protections by making site-specific decisions without site-specific analysis or public feedback.

Second, an approach to NEPA that leaves the agency flexibility to select from a variety of treatments at a later date forces the agency to do a [ldquo]worst case scenario[rdquo] impacts analysis because the NEPA decision document would legally authorize this [ldquo]worst case scenario.[rdquo]

[ldquo]Worst case scenario[rdquo] analysis would not make NEPA more efficient if the agency does not intend to implement the [ldquo]worst case scenario.[rdquo] It would make NEPA less efficient. For instance, if the agency analyzed the impact of thinning 10,000 acres while only intending to thin 2,500 of those acres (which would be identified at a later date) it would be forced to complete impacts analysis on 7,500 acres that would never receive a thinning treatment. It would be much more efficient for the agency to identify the 2,500 acres it intends to treat first, and then assess impacts on only those 2,500 acres.⁶

Third, the approach is likely to elicit inefficiencies in another way [ndash] it may make members of the public more likely to object and sue. Publication of EAs and EISs with site-specific impact consideration [ldquo]gives the public the assurance that the agency has indeed considered environmental concerns in its decision making process.[rdquo] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Those assurances will disappear if the agency delays site-specific impact consideration and decision making until after the NEPA process is complete. It will force the public to make a decision: either object/sue the agency over the failure to provide assurances that environmental concerns were taken into consideration by including requisite alternatives and site-specific impacts analysis in an EA or EIS, or forego their legal rights under NEPA to ensure those concerns are taken into account assuming the agency will do so at some point in the future.

We do not highlight that concern threateningly. But it puts the public in the untenable position of exercising their rights or risk waiving them. The public cannot rely on a third option of waiting to review any site-specific analysis the agency completes in the future because, under the proposed model, that analysis and decisions that stem from it would not be subject to NEPA. And NEPA is what guarantees the public's ability to be involved. The approach being considered unnecessarily raises the stakes of deciding whether to object because objecting may represent the last opportunity to be involved in agency decision making across thousands of acres over 10 or 15 years. We understand that the Forest Service cannot always prioritize avoiding objections but the agency should not implement a process that incentivizes objecting. Our sense is that instead of leading to NEPA efficiencies, this approach will only draw out the NEPA process through objections and potentially lawsuits.

Fourth, the approach is likely to result in unfounded expectations both by those who would like to see more timber harvesting and by those who would like to see less. Using the example above, the public is likely to form unrealistic expectations regarding what the agency intends to be a 2,500-acre thinning project if the agency includes impacts analysis for 10,000 acres in its NEPA documents. Some individuals may be unnecessarily concerned about the effects associated with 10,000 acres of timber harvesting if only 2,500 acres will actually occur. Others may feel misled when the 10,000-acre project only results in 2,500 acres of harvest. The lack of clarity about the agency's intentions may foster disagreement and finger-pointing if each side perceives the agency is not following through with commitments. This matters because inciting disagreement amongst forest stakeholders will only make it more difficult to build trust and convene collaborative groups moving forward.

Fifth, site-specific NEPA analysis completed now is likely to grow stale if the agency will not implement aspects of the project for a significant number of years. [ldquo]For purposes of NEPA compliance, relying on data that is too stale to carry the weight assigned to it may be arbitrary and capricious.[rdquo] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 936 (D. Or. 2016)(finding agency reliance on stale NEPA documents was [ldquo]unreasonable, arbitrary, and capricious[rdquo])(internal quotations omitted); see *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2004)(finding six-year-old data, without updated habitat surveys, was too stale).

[I]f the Council on Environmental Quality, which promulgates the NEPA regulations, has emphasized that NEPA documents more than five years old should be [carefully reexamined] for supplementation. Id. (citing Council on Environmental Quality, Executive Office of the President, Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations, 46 Fed. Reg. 18026[ndash]01 at *18036 (1981)). Given the scale of the Foothills project it seems very likely that NEPA analysis completed now will become stale before a significant portion of the project is implemented. That is not only legally problematic but may result in the agency having to complete portions of its analysis twice.

Additionally, it is probable that the Chattahoochee-Oconee Forest Plan will be revised during the lifespan of the Foothills project as contemplated. If the revised Forest Plan changes requirements applicable to particular areas identified for treatment, the project will have to be re-assessed to ensure it is compliant with new plan requirements. *Cherokee Forest Voices v. United States Forest Serv.*, 182 F. App'x 488 (6th Cir. 2006). This too risks significant duplication of work with almost no efficiency gain. The agency has adequate time to perform lawful NEPA analysis for projects that will not be implemented for a decade or more.

VII. Potential Ways to Comply with NEPA Moving Forward

Despite these obstacles we believe there are paths forward that allow the agency to make use of the wealth of data collected so far as part of the Foothills project, take advantage of NEPA efficiencies, and lawfully meet its NEPA obligations.

The first option is to simultaneously move forward with broad landscape-scale analysis and site-specific analysis fulfilling all NEPA obligations for the Foothills project at once. This path requires the agency to complete all site-specific analysis and alternatives consideration now; a commitment to consider impacts and alternatives in the future will not suffice. Those considerations must be reflected in a NEPA decision document giving the agency authority to begin implementing the project.

Of potential paths forward, this approach most closely resembles the model used in the [Four Forest Restoration Initiative] (4Fri) project which the agency has held up as an example of efficient NEPA. Of course, development of the first 4Fri EIS, including alternatives consideration and impacts analysis, took nearly four years.⁷ The Foothills project is significantly smaller than 4Fri and we would not expect the NEPA process to take as long, but the agency and the public do not have the information in front of them to be able to move forward with a decision document for the entire Foothills project at this point (and likely will not for a significant amount of time). This approach presents a tradeoff: meeting all NEPA obligations at once but delaying project implementation to perform the requisite analysis. As noted, assuming the agency plans to consider site-specific impacts at some future point after a NEPA document is signed, a delay in issuing the NEPA decision until that analysis is complete does not generate additional work for the agency. It only ensures that the site-specific analysis proposed to be completed later will be captured in the agency's environmental analysis and decision document as required by NEPA.

A second approach is to break up the work being contemplated in the Foothills project into a series of smaller, more typical EAs or EISs. The agency could shape projects using information collected during the Foothills collaborative meetings and use the Foothills Restoration Plan as a starting point for assessing cumulative impacts. This approach makes sense particularly if the agency is contemplating implementing portions of the Foothills project five or more years in the future. This approach also ensures flexibility to adapt future decisions in the event the Forest Plan is revised while the series of projects is being developed.

A third option is to complete a programmatic environmental analysis now and then tier subsequent site-specific environmental assessments to it in the future. The agency can gain NEPA efficiencies using this approach by using information collected during the collaborative process to (1) narrow priorities for future actions, (2) identify

limitations on those actions in order to ensure that they will not have cumulatively significant impacts, and (3) assess landscape-scale impacts of the prioritized actions. That broad-level analysis would not have to be replicated in the future but could be stepped down to more concise environmental analysis documents assessing the site-specific impact of the actions considered in the programmatic document. As an example, the programmatic analysis could assess the need for early- successional habitat across the forest or Foothills area; then site-specific decisions assessing the impact of creating ESH in a specific area could be tiered to the programmatic analysis. Or, building on the approach being considered, the agency may be able to complete programmatic analysis on the treatment-prescribing checklist, then tier that analysis to site-specific decisions.

The fourth approach is a hybrid of the second and third approaches. The agency could move forward with programmatic analysis now and simultaneously perform smaller, site-specific analysis for a portion of the project. This would allow the agency to gain NEPA efficiencies associated with programmatic analyses while also moving forward more expeditiously with implementing portions of the project. The CEQ Guidance on Effective Use of Programmatic NEPA Review endorses exactly this approach.⁸ As with the third approach, additional environmental analysis documents could be tiered to the programmatic analysis in the future.

We welcome further conversations about these or other approaches to NEPA and how the agency can gain procedural efficiencies while complying with NEPA's requirements. We appreciate the agency's investment in collaborative approaches and want the Foothills project to be successful. At the same time, we want to be straightforward that we do not believe the approach to NEPA being considered, as we understand it, complies with applicable requirements. Moreover, it is unclear if the approach will produce project planning efficiencies or have the opposite effect. Finally, we want to reiterate that we are bringing these concerns to the agency's attention in an effort to resolve them now and allow the Foothills project to move forward at a productive pace. We look forward to further discussing these matters with you in November. If there are questions or concerns we can address in the meantime please do not hesitate to let us know.