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Comments: A LETTER WITH THE COMMENTS AND EXHIBITS ARE ATTACHED & ARE BEING SENT VIA US MAIL.

Our firm represents the North Cascades Conservation Council (NCCC). We have been asked to submit comments on the draft Environmental Assessment (Draft EA) for the proposed 53,009-acre project area is located on the Methow Valley Ranger District Midnight Restoration Project in the Okanogan-Wenatchee National Forest. These comments incorporate by reference those submitted by Chad Hanson, Marni Koopman, Barry Gall, Evan Frost, and Ernie Niemi and Phillip Fenner, President of North Cascades Conservation Council, and focus on the broader problems and consequences of the United States Forest Service (USFS) attempting to approve a project of the massive scale under the limited analytical framework of an EA.

The Draft EA fails to satisfy USFS's essential legal obligations under NEPA. The agency relies on "condition-based" analysis and management to evade the NEPA mandate to disclose site-specific actions and impacts before the agencies make decisions. As a result of this misplaced approach the USFS has arbitrarily and capriciously failed to consider a reasonable range of alternatives, failed to adequately disclose and analyze the full range of impacts of the Midnight Project, failed to issue an environmental impact statement ("EIS") despite the project's significant environmental impacts, and failed to allow sufficient public participation in the NEPA process.

I. The Forest Service Must Analyze the Midnight Project Via an Environmental Impact Statement

The Ninth Circuit has repeatedly held that "NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences" of their proposed actions. *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 763 (9th Cir. 2014) (internal quotation marks omitted). Agencies must prepare an EIS for federal actions that will "significantly affect[] the quality of the human environment." 42 U.S.C. §4332(2)(C). To determine whether a proposed action will have a significant effect on the quality of the human environment, agencies must prepare an Environmental Assessment (EA) "to aid an agency's compliance with the Act and support its determination of whether to prepare an environmental impact statement or a finding of no significant impact, 40 C.F.R. § 1508.1(h). An EIS is required when this process raises "substantial questions" about whether an agency action will have a significant effect. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); see also *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1238-39 (9th Cir. 2005). "If the agency concludes in the EA that there is no significant effect from the proposed project, the federal agency may issue a finding of no significant impact ('FONSI') in lieu of preparing an EIS." *Native Ecosystems Council*, 428 F.3d at 1239.

Based on the Forest Service's process and decision on the related and adjacent Twisp project, NCCC anticipates that the USFS will determine that the Midnight Project has no significant effects, will issue a FONSI, will not prepare an EIS, and thus will not undertake an adequate analysis of the environmental impacts of the Project or of alternatives to the Project or comply with Okanogan-Wenatchee National Forest National Forest Plan as required by the National Forest Management Act (NFMA).

NEPA requires the USFS to take a hard look at the implementation and consequences of the Midnight Project and ensure that it has, "based [its decision] on a consideration of the relevant factors and provided a convincing statement of reasons to explain why a project's impacts are insignificant." In *Def. of Animals v. U.S. Dep't of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014) (alteration in original) (quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv. (EPIC)*, 451 F.3d 1005, 1009 (9th Cir. 2006)). The term "significant" includes considerations of both the context and the intensity of the possible effects.

"When substantial questions are raised as to whether a proposed project 'may cause significant degradation of some human environmental factor,' an EIS is required." In *Def. of Animals*, 751 F.3d at 1068. "A project is highly controversial if there is a substantial dispute about [its] size, nature, or effect." *Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1179 (9th Cir. 2022) (quoting *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 870 (9th Cir. 2020)).

As demonstrated in the comments submitted by NCCC and its experts, as well as other public comments, which again, are incorporated herein by reference, the proposed Midnight Project effects on the human environment are highly controversial and uncertain, and thus require the preparation of an EIS. The stated primary purpose of the Midnight Project is to reduce the risk of wildfires, restore watersheds, and promote safe fire-suppression activities, but NCCC and its experts have provided substantial scientific evidence and opinions showing that the condition-based management approach to achieving these goals will not work as intended, particularly given the lack of site-specific analysis as required under NEPA. Two critiques of conditions-based management were provided to the USFS by its sister environmental agency, the Environmental Protection Agency (EPA) that succinctly summarize the inherent and systematic defects with condition-based management approach for large scale forest projects in regards to NEPA compliance. These letters are attached and incorporated hereto. Accordingly, this evidence raises substantial questions about the Project's environmental impact, and an EIS is required. See, e.g., *Blackwood*, 161 F.3d at 1212; *Native Ecosystems Council*, 428 F.3d at 1238-39. "A project is 'highly controversial' if there is a 'substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.'" *Native Ecosystems Council*, 428 F.3d at 1240 (alteration in original) (quoting *Blackwood*, 161 F.3d at 1212). "A substantial dispute exists when evidence . . . casts serious doubt upon the reasonableness of an agency's conclusions." In *Def. of Animals*, 751 F.3d at 1069 (quoting *Babbitt*, 241 F.3d at 736). "[M]ere opposition alone is insufficient to support a finding of controversy." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019).

The Draft EA explained that the Midnight Project will use variable density, including overstory, thinning to address wildfire concerns. In variable density thinning, selected trees of all sizes . . . would be removed." This process would assertedly make the treated areas "more resilient to disturbances such as large-scale high-intensity fire occurrence because of the reductions in total stand density. Variable density thinning will occur in the entire Project area.

The copious evidence presented by NCCC and its experts dispute the USFS's conclusion that thinning is helpful for fire suppression and safety. For example, Evan Frost, a professional terrestrial/forest ecologist with Wildwood Consulting LLC points out in his incorporated EA comments that "the Midnight EA fails to provide a sound ecological justification for why removing large/old trees -- which generally contribute very little to fire hazard and fire spread -- constitute a restorative action." In other words, removing mature trees could have a net negative effect on fire suppression. NCCC has cited to multiple additional expert studies and research reviews that support this assertion.

Mr. Frost also pointed out in his comments that with respect to fuel reduction "[i]t is quite possible that the benefits of retaining existing large trees outweighs the likely downsides and the minimal (if any) fire/fuel benefits that may be associated with their removal. But since the agency did not develop such an alternative or analyze and disclose the full range of potential tradeoffs, neither the public nor the decision-maker can make an informed evaluation of this issue. The agency did attempt to explain why an alternative with lower tree diameter limits was dropped from consideration, but the rationale presented -- that this would "decrease stand diversity" and "limit development of late-successional habitat" (Draft EA, p. 9) -- does not make any sense."

The effects analysis in the EA does not engage with the substantial contrary scientific and expert opinion; it instead draws general conclusions that its preferred alternative, unlike the limited no action alternative, will not have negative long-term impacts on fire resilience. This dispute is of substantial consequence because variable density thinning in one form or another is planned in the entire Project area, and fire management is a crucial issue that has wide-ranging ecological impacts and affects human life and property. When one factor alone raises "substantial questions" about whether an agency action will have a significant environmental effect, an EIS is warranted. See *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). Thus, a decision by the USFS not to prepare an EIS will be arbitrary and capricious. See *Blackwood*, 161 F.3d at 1213 (holding that conflicting evidence on the effects of ecological intervention in post-fire landscapes made a proposed project highly uncertain, thus requiring an EIS).

II. The Final EA Fails to Fully Disclose and Analyze the Direct, Indirect, and Cumulative Impacts of the Twisp Restoration Project

While the USFS is allowed to combine its direct, indirect, and cumulative effects analysis under the current NEPA regulations, the Draft EA fails to identify and meaningfully analyze the cumulative impacts of the Midnight Project.

In other words, the cumulative effects analysis is still required. "Cumulative effects [] are 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 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.40 C.F.R. §1508.1(g)(3). "[I]n considering cumulative impact, an agency must provide 'some quantified or detailed information; ... [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.'" *Ocean Advocates*, 402 F.3d at 868 (alterations in original) (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998)). "This cumulative analysis 'must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.'" *Id.* (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002)) (internal quotation marks omitted). We have held that cumulative impact analyses were insufficient when they "discusse[d] only the direct effects of the project at issue on [a small area]" and merely "contemplated" other projects but had "no quantified assessment" of their combined impacts. *Klamath- Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004).

The draft EA largely ignores the fact that the Midnight Project and the adjacent Twisp Restoration Project (TRP) were once encompassed as single project analyzed under one EA. When the original TRP was bifurcated into two ostensibly different projects, its EA failed to disclose that the Midnight Project was in the planning phase, and thus the TRP's environmental, social, and economic impacts would effectively be tripled by the far larger Midnight Project. Specifically, the draft EA fails to disclose adequately the combined pending impacts of the Midnight Project and the TRP to water quality, recreation usability, wildlife habitat, and other environmental factors as a consideration in the Draft EA. It also fails to address the ongoing impacts of the Mission Project-especially the Buttermilk Creek section-which is within the Twisp River Watershed.

The Draft EA states that:

"Effects analyses completed for this project considered direct, indirect, and cumulative effects together rather than as separate categories of effects. The IDT considered the impacts of past actions when describing the affected environment for each resource indicator in Alternative 1. The IDT considered several ongoing and reasonably foreseeable future actions as potential cumulative effects depending on their resource-specific analysis if they overlapped in time and space with the effects of this project, including prescribed burning across the district; firewood gathering; recreation uses (developed and dispersed camping, boating, hiking, biking, hunting, skiing, snowmobiling, fishing); road maintenance and brushing on NFS roads; limited hazard/danger tree abatement; grazing on the allotments in the project area; mushroom gathering in Cedar Creek Fire perimeter; thinning, prescribed fire, transportation- related actions, and aquatic restoration treatments in the Mission Restoration and Twisp Restoration project areas; large wood, beaver dam analog, and culvert and aquatic organism passage installations in the Twisp Aquatic Restoration Project; aquatic restoration treatments outside of NFS lands in the Twisp River drainage; ongoing invasive plant treatments and special use permits, including outfitters, lands permits (waterlines, roads, ditches); and proposed thinning and prescribed fire treatments on nearby Washington Department of Natural Resources lands in the Alder Creek and Poorman Creek drainages." Accordingly, the cumulative impact analysis is insufficient because there is no meaningful analysis of any of these identified projects. The table gave no information about any of the projects listed; it merely named them. The section of the Draft EA analyzing the cumulative effects on vegetation resources did not refer to any of these other projects. Nor are there any specific factual findings that would allow for informed decision-making. The Draft EA simply concluded that there are no direct or indirect effects that would cumulate from other projects due to the minimal amount of connectivity with past treatments and that the Project would have a beneficial effect on the stands by moving them toward a more resilient condition that would allow fire to play a vital role in maintaining stand health, composition and structure. These are the kind of conclusory statements, based on "vague and uncertain analysis," that are insufficient to satisfy NEPA's requirements. *Ocean Advocates*, 402 F.3d at 869.

Overall, there is nothing in the EA that could constitute "quantified or detailed information" about the cumulative effects of the Project. *Ocean Advocates*, 402 F.3d at 868 (internal quotation marks omitted). The USFS's analysis

creates substantial questions about whether the action will have a cumulatively significant environmental impact. Therefore, this factor also requires the USFS to conduct an EIS. See 40 C.F.R. § 1508.27(b)(7).

III. The Purpose and Need Statement Improperly Limits the Range of Alternatives to Merely Two, the Proposed Action and No Action

The Draft EA pays merely lip service to the primary limiting rule governing purpose and need statements, namely, they cannot preordain a project's outcome. *Id.* A prime example of the Ninth Circuit applying this "preordained" limitation on purpose and need statements is *National Parks & Conservation Ass'n (National Parks) v. Bureau of Land Management*, 606 F.3d 1058 (2010). *National Parks* involved a decades-long endeavor by a private mining operation to acquire land around one of its mines for a landfill via a land exchange. *Id.* at 1062. After many years, the proposal reached the Bureau of Land Management ("BLM") for the NEPA process. *Id.* at 1063. BLM ultimately produced a final environmental impact statement with a purpose and need statement that consisted primarily of the private entity's goals, not necessarily BLM's goals. *Id.* at 1070. The Circuit held this express incorporation of private goals was not inherently unreasonable under all circumstances, *id.* at 1070-71, but the court determined the purpose and need statement was drawn too narrowly, *id.* at 1072. The court reasoned that BLM adopting the private entity's interests "as its own" resulted in a purpose and need statement that was "so narrowly drawn as to foreordain approval of the land exchange." *Id.*

Another example comes from *Environmental Protection Information Center (EPIC II) v. U.S. Forest Service*, 234 Fed. Appx. 440 (2007). In *EPIC II*, the Circuit examined a forest-thinning project approved by the Forest Service via an environmental assessment. *Id.* at 442. The environmental assessment analyzed only the no-action alternative and the preferred alternative, which by itself was not necessarily fatal to the agency's NEPA process. See *id.* ("[T]here is no numerical floor on alternatives to be considered[.]" (internal quotation marks and citation omitted)). Still, the Circuit held that the Forest Service failed to consider a reasonable range of alternatives for two reasons. *Id.* at 442-44. First, the Forest Service's rejection of alternatives aside from the preferred action meant the Forest Service failed to give "full and meaningful consideration" to reasonable alternatives. *Id.* at 443 (internal quotation marks and citation omitted). Second, the Forest Service included a purpose and need statement that precluded all other alternatives aside from the preferred action. *Id.*; see also *id.* at 444 ("Defining a project objective as 'to cover the costs of the forest-thinning by selling timber' eliminates any project that does not provide for a commercial sale.").

Here, it appears that the draft EA for the Midnight Project and the purpose and need statement were prepared to foreclose any action alternative aside from the preferred action. NCCC respectfully requests that at least one other alternative be developed to provide both the agency and the public with meaningful options other than simply the preferred action, one that identifies the significant concerns, as well as incorporates the viable alternative strategies, provided by NCCC experts.

Thank you for your consideration.