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Comments: [External Email]Comments on Black Diamond Landscape Resiliency and Risk Reduction Project

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Dear Mr. Kuhnel:

Please find attached a corrected PDF version of comments previously submitted on behalf of Rock Smith et al. Additional comments on behalf of the Center for Biological Diversity and the 5 enclosures are provided here as well. Please let me know if you have any issues opening any of these documents.

We appreciate the opportunity to comment on the proposal and look forward to remaining engaged on this issue.

Sincerely,

Allison N. Henderson

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April 3, 2023

Dennis Kuhnel, Canyon Lakes District Ranger
2150 Centre Avenue, Building E
Fort Collins, Colorado 80526

Submitted via email: comments-rm-arapaho-roosevelt-canyon-lakes@usda.gov

Re: Preliminary EA (PEA) Comments on Black Diamond Landscape Resiliency and Risk Reduction Project

Dear Mr. Kuhnel:

Please accept these comments provided by the Center for Biological Diversity regarding the proposed Black Diamond Landscape Resiliency and Risk Reduction Project. These comments supplement the issues and concerns raised in comments submitted by Rocky Smith, Forest Management Analyst et al.

First, we would like to draw the Forest Service's attention to the attached Review conducted by William L. Baker et al. 2023. This landmark review finds a pattern of "falsification of the scientific record" regarding "low-severity model" of dry forests being relatively uniform, low in tree density, and dominated by low- to moderate severity fires and that this model is to be rejected as the scientific body of evidence supports mixed-severity model. The mixed-severity model is that dry forests were heterogeneous, with both low and high tree densities and a mixture of fire severities. As discussed in the Review, this has significant implications for proposed management, and directly questions underlying assumptions, including the Purpose and Need in the PEA about fire severity, which are used as a rationale for the proposed activities. See e.g. PEA at 1, 3, 4-5. This study specifically addresses forests on the Front Range, including within and near the proposed action area. See e.g. id. at 8, 10, 13-14, 28. The Forest Service must address this information and reasoned decisionmaking requires that the proposed action be modified accordingly.

Second, we want to address the application of the National Environmental Policy Act ("NEPA") to the proposed project. The Council for Environmental Quality ("CEQ") issued its first set of NEPA regulations instructing agencies on how to comply with the statute in 1978. 43 Fed. Reg. 55,978 (Nov. 29, 1978) (1978 Rule). These rules addressed, among other things, structure and requirements of NEPA analysis, defined terms such as "cumulative impact," "effects," "major Federal action," and "significantly," as well as providing provisions for public comment and agency planning and decisionmaking. See 40 C.F.R. Parts 1500-08 (2019) (1978 regulations). These regulations had also directed federal agencies to adopt their own implementing procedures to supplement CEQ's procedures and integrate the NEPA process into agencies' specific

programs and processes. See 40 C.F.R. § 1507.3. The Forest Service undertook such action, with these rules found at 36 C.F.R. § Part 220. The 1978 CEQ regulations remained largely unchanged until President Trump in 2017 directed CEQ to identify and propose changes. 82 Fed. Reg. 40,463 (Aug. 24, 2017). CEQ published a final rule July 16, 2020 making wholesale revisions to the regulations, which became effective September 14, 2020. This controversial rulemaking, however, has led the Biden Administration and CEQ to be outspoken and to propose three planned regulatory actions to address the substantial concerns there are with the 2020 Rule.

On January 20, 2021, President Biden signed Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, EO 13990. Federal agency decisions must align with this Executive Order, which prompted CEQ to commence a comprehensive reconsideration of the 2020 Rule to evaluate its legal basis, policy orientation, and conformance with Administration priorities. As a result, CEQ undertake, and is still in the process of three responsive actions. First, the deadline for agencies to develop or revise proposed procedures for implementing the 2020 Rule was extended by two years. Second,

"Phase 1" rulemaking that proposed a narrow set of changes to the 2020 rules was commenced and has been completed. Third, "Phase 2" rulemaking is underway, which proposed broader changes to the 2020 Rule. 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021).

As a result of Phase 1, CEQ amended provisions regarding the purpose and need of a proposed action, agency NEPA procedures for implementing CEQ's NEPA's regulations, and definitions of "effects" to include direct, indirect, and cumulative effects. 87 Fed. Reg. 23,453 (Apr. 20, 2022). The purpose and need "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13.

Effects or impacts means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:
(1) Direct effects, which are caused by the action and occur at the same time and place
(2) Indirect effects, which 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.
(3) Cumulative effects, which hare 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). The Forest Service's proposal to "refine[] further through the implementation process based on limitations such as project design features, suitable land designations, and suitability to treatment type," PEA at 2, prevents NEPA compliant disclosure and analysis of direct, indirect, and cumulative impacts and thus prevents meaningful public comment and reasoned agency decisionmaking. This must be corrected with a legally compliance EIS.
2

CEQ has been clear that while it proceeds with the phased rulemaking, the agency is assisting federal agencies in implementing NEPA in a manner consistent with the statute, case law, Executive Order 13,990, and CEQ's goals. See Appellee's Final Answering Brief, Wild Virginia et al. v. Council of Envtl. Quality et al., No. 21-1839 at 10 (Feb. 18, 2022). Page 28 of the attached court transcript also states that agencies are still implementing the 1978 regulations until they promulgate their own regulations. Consistently, SO 3399, which covers the Forest Service's sister agencies, is clear that "Bureaus/Offices will not apply the 2020 Rule in a manner that would change the application or level of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020." SO 3399 at Sec. 5.

Accordingly, the Forest Service here must also act consistently with direction from the Biden Administration and CEQ, which requires applying NEPA consistent with the implementation and application under the 1978 regulations. As addressed in the Rocky Smith et al. comments that were submitted this same day, the PEA does not fully comply with NEPA, including but not limited to, reasonable range of alternatives, effectiveness of proposed mitigation, an Environmental Impact Statement (EIS) is necessary due to significance (indeed the agency's own assessment agrees that significance is present, see e.g. Black Diamond Landscape Resiliency and Risk Reduction Project - Botanical Effects Analysis at 1 (stating there is potential for a

significant environmental effect). See also PEA at 74 (stating that ESA listed species are likely to be adversely affected) and PEA Water Resources Analysis at 1 (stating that there is potential for significant environmental effect to water resources). See also WRA at 22 (stating uncertainty in predicting outcomes). See e.g. Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998) (holding that if the extent of impacts are uncertain, a full EIS is required.) and Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) (requiring a full EIS for a fire salvage sale because the impacts were controversial and unknown). It is imperative that the Forest Service in addressing these issues applies NEPA consistently with the 1978 regulations, which requires conducting a NEPA compliance EIS.

The Purpose and Need of the proposed action must also be revisited to address proposed alternatives to the single action alternative and address the falsified scientific record that is the foundation for this proposal. 40 C.F.R. § 1502.13.

While it is evident that an EIS is required, even for an EA that results in a Finding of No Significant Impact, agencies must analyze reasonable range of alternatives because "nonsignificant impact does not equal no impact. Thus, if an even less harmful alternative is feasible, it ought to be considered." Ayers v. Espy, 873 F. Supp. 455, 473 (D. Colo. 1994) (internal citation omitted). When an agency considers reasonable alternatives, it "ensures that it has considered all possible approaches to, and potential environmental impacts of, a particular project; as a result, NEPA ensures that the most intelligent, optimally beneficial decision will ultimately be made." Wilderness Soc'y v. Wisely, 524 F. Supp. 2d 1285, 1309 (D. Colo. 2007) (quotations & citation omitted). "The existence of a viable but unexamined alternative renders an alternatives analysis, and the EA which relies upon it, inadequate." Diné Citizens Against Ruining Our Env't, 747 F. Supp. 2d 1234, 1256 (quoting New Mexico ex rel. Richardson, 565 F.3d at 709). The agency's obligation to consider reasonable alternatives applies to citizen-proposed alternatives. See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,

538 F.3d 1172, 1217-19 (9th Cir. 2008) (finding EA deficient, in part, for failing to evaluate a specific proposal submitted by petitioner); Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1171 (10th Cir. 1999) (agency's "[h]ard look" analysis should utilize "public comment and the best available scientific information") (emphasis added).

Courts hold that an alternative may not be disregarded merely because it does not offer a complete solution to the problem. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972). Even if additional alternatives would not fully achieve the project's purpose and need, NEPA "does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multipurpose project." Town of Matthews v. U.S. Dep't. of Transp., 527 F. Supp. 1055 (W.D. N.C. 1981). If a different action alternative "would only partly meet the goals of the project, this may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater

environmental impact." North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1542 (11th Cir. 1990).

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

To ensure that the agency has taken the required "hard look," courts hold that the agency must

utilize "public comment and the best available scientific information." Biodiversity Cons. Alliance v. Jiron, 762 F.3d 1036, 1086 (10th Cir. 2014) (internal citation omitted). Here, the Forest Service fails to provide adequate information that supports the widespread use of specific proposed treatments. Specifically, as we explained in scoping comments, Rocky et al. comments, and herein, the agency fails to demonstrate its proposed action will effectively achieve the intended purposes stated in the PEA at 3-4 and meet the stated needs to support its vegetative treatments as it relates to promoting resilient vegetative conditions, reducing the potential for high intensity wildfire and enhancing wildlife habitat. These purposes rely on unsupported assumptions and/or scientifically controversial information that the Forest Service fails to appropriately address in the PEA, which therefore necessitates more detailed analysis in an environmental impact statement. The Forest Service must provide support for the claimed needs for this project, especially where existing science contradicts the agency's assumptions. In the very least, the Forest Service must explain why best available science refuting its assumptions does not apply to this project.

The Forest Service's very general analysis and failure to provide specific information about the conditions of the areas proposed for treatment falls short of the "hard look" that NEPA requires. As stated in Neighbors of Cuddy Mountains v. U.S. Forest Serv., 137 F.3d 1372, 1379-80 (9th Cir. 1998), "[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 . . . Nor is it appropriate to defer consideration of cumulative impacts to a future date." Here, PEA provides broad strokes for the large area slatted to be subject to activities in a way that makes it impossible to truly understand site-specific and cumulative effects. Determining

impacts is then further convoluted due to the Forest Service's proposal that the ultimate management decisions flow from a "Management Action Alternatives Framework," which would be fed at a later point in time the forest conditions to then determine the treatment. See PEA at 15. But the agency can't kick the can down the road in this manner to escape site-specific and proper direct, indirect, and cumulative impact analysis. See e.g. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) ("[A]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.").

Lastly, while the Forest Service states that the no action alternative is the "baseline against which to compare and analyze the action alternatives," PEA at 12, this is not necessarily the same as the baseline as this can be different than the no action alternative. See, e.g. , FSH 1909.15, 14.2; Council on Environmental Quality's (CEQ) Forty Most Asked Questions (1981), #3 (explaining "[t]here are two distinct interpretations of 'no action'"; one is '"no change' from current management direction or level of management intensity," and the other is if "the proposed activity would not take place"). The Forest Service must clearly articulate what the baseline conditions are to fully comply with this NEPA mandate and relying on the no action alternative without explaining how these are the same is insufficient.

We thank you for this opportunity to comment and look forward to remaining engaged on this project.

Sincerely,

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Encl. (5)