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Subject: Union County Target Range Project

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Attachments: 2019-09-23 Union County Target Range Objection - Final.pdf

Ms. Jewett:

Attached please find an objection to the Union County Target Range Project filed by the Southern Environmental Law Center on behalf of Georgia ForestWatch and the Sierra Club's Georgia Chapter. Please do not hesitate to contact me if I can answer any questions.

Thank you.

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UNITED STATES OF AMERICA DEPARTMENT OF AGRICULTURE UNITED STATES FOREST SERVICE

In re Objection to the Draft Decision Notice,) Finding of No Significant Impact, and
)

Environmental Assessment for the)

Union County Target Range Project,)

Blue Ridge Ranger District,)

Chattahoochee-Oconee National Forests)

)

) Objection No.

)

Georgia ForestWatch,)

Georgia Chapter of the Sierra Club,) Objectors)

NOTICE OF OBJECTION AND STATEMENT OF REASONS

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Pursuant to 36 C.F.R. [sect] 218.8(d)(3), Georgia ForestWatch is designated as the lead objector.

NOTICE OF OBJECTION

Pursuant to 36 C.F.R. [sect] 218, Georgia ForestWatch (GFW) and the Georgia Chapter of the Sierra Club object to the Draft Decision Notice and Finding of No Significant Impact (FONSI), selecting Alternative 2 of the Union County Target Range August 2019 Environmental Assessment (Final EA) in the Blue Ridge Ranger District of the Chattahoochee-Oconee National Forests. The Decision, FONSI, and underlying EA violate the National Environmental Policy Act (NEPA), Wilderness Act, National Forest Management Act (NFMA), and those statutes[rsquo] implementing regulations. The responsible official for this project is Andrew L. Baker, District Ranger, Blue Ridge Ranger District. Public notice of the objection opportunity was published in the Blue Ridge News Observer on August 7, 2019. This objection is timely.

GFW is a nonprofit organization with a mission [ldquo]to promote sustainable management that leads to naturally diverse and healthy forests and watersheds within the more than 867,510 acres of national forest lands in Georgia; to engage and educate the public to join in this effort; and to promote preservation of this legacy for future generations.[rdquo]1 GFW actively and routinely participates in the management of the Chattahoochee-Oconee National Forests. GFW engaged in the development of the Union County Target Range project. GFW has members who use

1 See <http://gafw.org/>

shooting ranges on the national forest and one or more members that live in close proximity to the location proposed for the Union County Target Range.

The Sierra Club is a national nonprofit organization with a mission to [ldquo]explore, enjoy, and protect the wild places of the earth[rdquo] including Georgia[rsquo]s national forests.² The Georgia Chapter represents the interests of the over 45,000 members and supporters in the state of Georgia.³ The Wildlands & Wildlife Committee of the Georgia Chapter is particularly focused on [ldquo]advocat[ing] for responsible management and protection of our public lands and wild forests.[rdquo]⁴ Like GFW, the Sierra Club has actively engaged in development of the Union County Target Range project. Both the Sierra Club[rsquo]s and GFW[rsquo]s members use areas affected by construction and operation of the shooting range including the Mark Trail and Brasstown Wilderness Areas and the portions of the Appalachian Trail near the project area. The Union County Target Range project will adversely affect GFW, the Sierra Club, and their members (collectively, the [ldquo]conservation groups[rdquo]).

The Southern Environmental Law Center, legal counsel to conservation groups, is a regional nonprofit organization working to conserve natural resources on public lands throughout the Southern Appalachians.

We recognize Georgia[rsquo]s rich heritage of hunting and marksmanship, interests that are shared by many of conservation groups[rsquo] members, and we understand that providing safe target practice opportunities is an appropriate use of national forest lands. But we are discouraged by the agency[rsquo]s approach to this project. The proposed location for this shooting range is only three miles from another shooting range on national forest lands, the Chatuge Range. If the agency sought to identify areas near the national forest that lacked proximity to shooting ranges, this location would fall on the very bottom of that list. More troublingly, numerous commenters including conservation groups asked the agency to assess a project alternative that allowed greater public access to the Chatuge Range, which frequently goes unused. Allowing greater public access to the Chatuge Range, which is operated by a private club and only open to the general public for limited hours, is a commonsense solution to any need for greater access to shooting ranges in this area: it avoids all of the project[rsquo]s harmful impacts, it saves taxpayers money that will otherwise be spent to construct a brand new shooting range in close proximity to the existing Chatuge Range, it retains the value of the wildlife opening that currently occupies the site, and it allows greater public access in virtually the same location. Yet the Forest Service refused to evaluate that alternative. Its refusal violates NEPA and the agency[rsquo]s general obligation to balance multiple uses across the forest.

In its haste to authorize this project the Forest Service also delayed important analyses that must be prepared in order to provide a complete picture of the impacts associated with this

2 See <https://www.sierraclub.org/policy>

3 See <https://www.sierraclub.org/georgia>

4 See <https://www.sierraclub.org/georgia/wildlands>

project. At the top of that list is the agency's assessment of the effect on human safety of operating the range. The agency has proposed orienting this range so that users will shoot up towards the Appalachian Trail — one of the most well-known hiking trails in the world. This is clearly a safety concern. Instead of assessing safety concerns now, the agency attempts to tier the analysis in its Final EA to as-yet-uncompleted safety and stewardship plans. This too violates NEPA, but more importantly, it may lead to dangerous conditions on the Appalachian Trail.

Finally, we would be remiss not to note that the agency's response to public comments is disappointing. Obvious inconsistencies in the agency's analysis that we pointed out in our comments on the Draft EA remain unchanged in the Final EA. The agency's July 2019 [Idquo]Response to 30-day Comments Draft Report[rddquo] is so vague it is of little value. The agency responded to each comment with some combination of the same boilerplate language regardless of the issue the commenter raised. At a time when the Forest Service is attempting to strip the public of its voice in the management of public lands generally, see 84 Fed. Reg. 27544 (June 13, 2019) (new proposed Forest Service NEPA rule), we find this approach deeply troubling.

And certainly the public expects more from its government.

For the reasons that follow, GFW and the Sierra Club request that the Forest Service withdraw its Decision and FONSI and determine a more suitable way to accommodate any increased need for a shooting range either by allowing additional access at the Chatuge Range or by identifying a more appropriate location for a new range that does not threaten violations of the Wilderness Act and involve firing towards the Appalachian Trail.

STATEMENT OF REASONS

I. THE PROJECT DOES NOT COMPLY WITH THE FOREST PLAN

The National Forest Management Act requires that all projects or activities on national forests be consistent with the forest's land and resource management plan (Forest Plan). 16

U.S.C. [sect] 1604(i); see, e.g., *Sierra Club v. Martin*, 168 F.3d 1, 4-5 (11th Cir. 1999); *Cherokee Forest Voices v. U.S. Forest Serv.*, 182 F. App[rsquo]x 488 (6th Cir. 2006). The Forest Service bears the burden of demonstrating that consistency. See *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) overruled on other grounds by

Winter v. Nat. Res. Def. Council, 555 U.S. 7 (2008) (Forest Service must support its conclusions that a project meets the requirements of NFMA and relevant Forest Plan); Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1377 (9th Cir. 1998) ([Idquo]Forest Service must demonstrate that a site-specific project would be consistent with the land resource management plan[rdquo]). The proposed target range is located in

Forest Plan Prescription 7.A, Final EA, 5, but is inconsistent with that prescription[rsquo]s standards for scenery and special uses.⁵

Forest Plan Standard 7.A-013 requires management activities, including special use authorizations such as the proposed shooting range, to [Idquo]meet or exceed[rdquo] a scenic integrity objective of [Idquo]high[rdquo] in the prescription. Forest Plan, 3-117. [Idquo]HIGH scenic integrity refers to landscapes where the valued landscape character [lsquo]appears[rsquo] intact. Deviations may be present but must repeat the form, line, color, texture, and pattern common to the landscape character so completely and at such scale that they are not evident.[rdquo] Visual Handbook, 2-4. Forest Service, National Forest Landscape Management: Volume 2, Chapter 1: "Landscape Aesthetics: A Handbook for Scenery Management." Agriculture Handbook 701 (1996), 2-4 (emphasis added).

The May 2019 Draft EA (Draft EA) disclosed that the agency cannot meet that standard for this project. [Idquo]During the time period in which the proposed range is in use, viewers will see two grassed ranges consisting of tall backstops/berms and an access road that will not be consistent with the existing landscape SIO [scenic integrity objective].[rdquo] Draft EA, 35 (emphasis added). The inconsistency will be even more striking during construction, when contrasts between the shooting range and natural environment will be [Idquo]most prominent,[rdquo] id. at 34, leading to [Idquo]stark visual contrasts,[rdquo] id. at 35. Because the shooting range and access road must [Idquo]remain linear,[rdquo] id. at 35, the Forest Service is unable to [Idquo]repeat the form, line, color, texture, and pattern common to the landscape character so completely and at such scale that [the shooting range is] not evident.[rdquo]

The Final EA cites an August 2019 Nutter and Associates[rsquo] [Idquo]Resource Report for the Human Environment, Proposed Union County Target Range[rdquo] (Human Environment Report) to conclude that constructing the shooting range in compliance with the Built Environment Image Guide (BEIG) will achieve compliance with the scenic integrity standards for the prescription. Final EA, 43. But that is not what that report says. According to that report, outside viewers will be [Idquo]subjected to the linear grassed ranges, baffle structures and other contrasting components of the proposed project that would be required for functionality.[rdquo] Human Environment Report, 17. [Idquo]Other features,[rdquo] [ndash] i.e., features besides the linear grassed ranges, baffle structures and other contrasting components of the proposed project [ndash] [Idquo]will be designed using the [BEIG.][rdquo] Id. (emphasis added). But not the [Idquo]linear grassed ranges, baffle structures and other contrasting components of the proposed project.[rdquo] Id. Those features [Idquo]would be inconsistent with viewer expectations under the High [scenic integrity objective] and the Prescription 7a desired condition.[rdquo] Id. (emphasis added). The Forest Service and its consultants have concluded twice that the project violates Forest Plan standards for scenery in this prescription. Moreover, the Human Environment Report is clear that [Idquo]components of the proposed project[hellip]required for functionality[rdquo] cannot be constructed to meet a scenic integrity

5 We raised these issues on pages 22-23 of our Draft EA comments.

objective of high even with use of mitigating techniques such as BEIG. The shooting range cannot be built in this location and comply with Forest Plan Standard 7.A.-013.

Similarly, Forest Plan Standard 7.A.-001 allows special uses in the prescription but only if they are [ldquo]consistent and compatible with the goals and objectives of this area.[rdquo] Forest Plan, 3-

116. This project cannot meet that standard because, as discussed above, is it inconsistent with scenic integrity objectives of the prescription including Standard 7.A.-013. The project is also inconsistent with other goals and objectives of the area.

Prescription 7.A is to remain [ldquo]natural appearing and include a variety of landscape characters, ranging from natural appearing to pastoral and historic/cultural.[rdquo] Id. at 3-115. [ldquo]Road corridor improvements and interpretive facilities will be evident changes to the natural environment, but these human-made alterations will fit well with the character of the surrounding landscape.[rdquo] Id. Recreation in the prescription [ldquo]consists primarily of driving for pleasure and enjoying the views.[rdquo] Id. And the prescription is intended to provide [ldquo]good-to-optimal habitat conditions for species favoring mid- to late successional forested conditions.[rdquo] Id. at 3-116.

The proposed shooting range is inconsistent with all of those objectives. As disclosed in the Draft EA, Final EA, and Human Environment Report, the shooting range will neither appear natural nor fit within landscape characters [ldquo]ranging from natural appearing to pastoral and historic/cultural.[rdquo] The shooting range violates scenic integrity objectives, so it de facto does not [ldquo]fit well with the character of the surrounding landscape.[rdquo] The shooting range is outside the expected recreational use of the area and will make it more difficult to [ldquo]enjoy the views.[rdquo] And far from providing [ldquo]good-to-optimal habitat,[rdquo] the Forest Service predicts species will flee the area to escape the shooting range. Final EA, 31-32. Because the proposed use is not [ldquo]consistent and compatible with the goals and objectives of this area[rdquo] it also violates Forest Plan Standard 7.A.-001.

This project violates Forest Plan Standards 7.A.-001 and 7.A.-013 in this location. It must be moved or the agency must amend its Forest Plan.

II. THE PROJECT VIOLATES THE WILDERNESS ACT

The Draft EA, Final EA, and FONSI lack any analysis or representation that this project complies with the requirements of the Wilderness Act [ndash] and for good reason: the project cannot be squared with the

agency's mandates under that statute.⁶

Congress has decided that areas it designates as Wilderness will be [qu]administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, [and] the preservation of their wilderness character.[qu] 16 U.S.C. [sect] 1131(a). [qu][E]ach agency administering any area designated as wilderness shall be responsible for preserving the

⁶ We raised this issue in our Draft EA comments pages 20-22.

wilderness character of the area and shall so administer such area . . . to preserve its wilderness character.[qu] Id. [sect] 1133(b).

Forest Service regulations incorporate these requirements. [qu]National Forest Wilderness shall be so administered as to . . . preserve and protect its wilderness character.[qu] 36 C.F.R. [sect]

293.2. Specifically, [qu]National Forest Wilderness resources shall be managed to promote, perpetuate, and, where necessary, restore the wilderness character of the land and its specific values of solitude.[qu] Id. When [qu]resolving conflicts in resource use[qu] involving Wilderness Areas, [qu]wilderness values will be dominant.[qu] Id.

The Forest Service Manual also recognizes that [qu][w]ilderness is a unique and vital resource[qu] and instructs the Forest Service to [qu][m]anage the wilderness resource to ensure its character and values are dominant and enduring.[qu] FSM 2300. This includes managing [qu]wilderness . . . to ensure that each wilderness offers outstanding opportunities for solitude.[qu] Id. When the Forest Service is faced with [qu]alternatives among management decisions, wilderness values shall dominate over all other considerations except where limited by the Wilderness Act.[qu] FSM 2300, [sect] 2320.3.

[qu][A]n agency's duty to preserve . . . wilderness character under . . . the Wilderness Act may apply to agency activity that occurs outside of the boundaries of the wilderness area.[qu] Izaak Walton League of Am., Inc. v. Kimbell, 516 F. Supp. 2d 982, 989 (D. Minn. 2007), judgment entered, No. CIV. 06-3357 JRT/RLE, 2008 WL 141728 (D. Minn. Jan. 11, 2008), amended, No.

CV 06-3357 (JRT/RLE), 2008 WL 11383666 (D. Minn. May 21, 2008), and aff'd, 558 F.3d 751

(8th Cir. 2009). [Idquo][T]he key question in determining whether agency action violates[rdquo] the Wilderness Act based on activities occurring outside the wilderness boundary [Idquo]is whether that action degrades the wilderness character of a designated wilderness area.[rdquo] Id. To answer that question, courts [Idquo]look to various factors including the nature of the agency activity, the existing character of the wilderness area, and the extent to which the essential, natural characteristics of the wilderness area are changed by the agency activity in question.[rdquo] Id. Specific to sound impacts, [Idquo]where the agency activity does not increase or exacerbate the existing sound impact on the wilderness area, such activity would not degrade the wilderness character of the area.[rdquo] Id.

But [Idquo]agency activity that results in noise that is louder, more constant, more frequent, or of a different quality, is more likely to degrade the wilderness character from its present condition and thus violate [the Wilderness Act].[rdquo] Id.

The Forest Service administers two Wilderness Areas impacted by this project: the Mark Trail Wilderness and the Brasstown Wilderness. The Brasstown Wilderness was designated in 1986. Pub. L. No. 99-555, 100 Stat. 3129 (1986). The Mark Trail Wilderness was designated in 1991. Pub. L. No. 102-217, 105 Stat. 1667 (1991). Both areas are to be managed [Idquo]in accordance with the provisions of the Wilderness Act.[rdquo] See id. Because the Forest Service administers these areas, it is [Idquo]responsible for preserving the wilderness character of the area[s] and shall so administer such area[s] . . . to preserve [their] wilderness character.[rdquo] 16 U.S.C. [sect] 1133(b). This includes [Idquo]promot[ing], perpetuat[ing], and, where necessary, restor[ing] the wilderness character

of the land and its specific values of solitude,[rdquo] 36 C.F.R. [sect] 293.2, and [Idquo]ensur[ing that] its character and values are dominant and enduring,[rdquo] FSM 2300.

The Draft EA and Final EA establish that the proposed shooting range will disrupt the wilderness character of the Brasstown and Mark Trail Wilderness Areas in violation of the Wilderness Act.

Assessing whether an activity violates the Wilderness Act is a two-step process. To provide a baseline for comparison purposes, agencies first look at the [Idquo]existing character of the wilderness area.[rdquo] Izaak Walton, 516 F. Supp. 2d at 989. The Mark Trail and Brasstown Wilderness Areas offer some of the most outstanding wilderness qualities in Georgia. Compared to other wilderness areas in the state, these two have [Idquo]a higher solitude quality.[rdquo] Final EA, 38.

Intrusions on solitude values will be particularly acute in these pristine areas.

Next, agencies consider [Idquo]the extent to which the essential, natural characteristics of the wilderness area are changed by the agency activity in question.[rdquo] Izaak Walton, 516 F. Supp. 2d at 989. Specific to sound impacts, this includes considering whether the activity [Idquo]results in noise that is louder, more constant, more frequent, or of a different quality[rdquo] than ambient sounds in the wilderness area. Id.

Here, unquestionably operation of the shooting range will result in [Idquo]noise that is louder, more constant, more frequent, or of a different quality[rdquo] than existing sounds in the wilderness area. The Draft EA concluded that [Idquo][t]he production of noise [from the shooting range] in the designated wilderness areas . . . is contrary to the solitude quality that is expected as part of the character of these areas.[rdquo] Draft EA, 32. [Idquo]Operation of the range will generate noise above and different from ambient noise . . . [and] [t]his noise will extend into the adjacent wilderness areas.[rdquo] Id. at 33. The noise impact will be so significant that [Idquo][b]ackpackers would likely choose other wilderness areas to visit and remain wary of areas on the Mark Trail Wilderness closest to the range.[rdquo] Id. at 32. The same is true of hunters and anglers. Id. This in turn

[Idquo]would potentially cause an increase of density of user per acre to other wilderness areas.[rdquo] Id.

The Final EA confirms these findings. [Idquo]The production of noise in the designated Mark Trail and Brasstown Wilderness Areas . . . is contrary to the quality of solitude that is expected as part of the character of these areas.[rdquo] Final EA, 40. [Idquo]Backpackers may choose other wilderness areas to visit and remain wary of areas on the Mark Trail and Brasstown Wilderness Areas closest to the range.[rdquo] Id. at 41. Hunters and anglers are also likely to avoid the area. Id.

The agency pseudo-distances itself from these findings by suggesting that the predicted noise impacts are acceptable because they will not be harmful to [Idquo]human health,[rdquo] but that is not the applicable standard. See Final EA, 36. As the agency administering these two Wilderness Areas, the Forest Service is required to preserve their wilderness character. 16 U.S.C. [sect] 1133(b). Opportunity for solitude is an important wilderness characteristic. See id. [sect] 1131(b); 36 C.F.R. [sect]

293.2.7 The Draft EA and Final EA establish that the proposed shooting range will result in noise that is so significantly [Idquo]louder, more constant, more frequent, [and] of a different quality[rdquo] than the current ambient noise in the [Idquo]higher solitude[rdquo] Brasstown and Mark Trail Wilderness Areas that people (and wildlife) will avoid portions of the areas entirely. The noise will be [Idquo]contrary to the quality of solitude that is expected as part of the character of these areas.[rdquo] Final EA, 40. This violates the Wilderness Act.

III. THE FOREST SERVICE DID NOT COMPLY WITH ITS SPECIAL USE REGULATIONS

The Forest Service continues to ignore applicable regulations as it processes this special use application.⁸ Those regulations establish two levels of screening for special use applications. See 36 C.F.R. [sect] 251.54(e). If a proposed use fails to meet the initial screening level criteria, it [Idquo]shall not receive further evaluation and processing.[rdquo] Id. [sect] 251.54(e)(2). Likewise, the Forest Service [Idquo]shall reject any proposal[rdquo] that does not meet the second level screening criteria. Id. [sect] 251.54(e)(5). This proposal does not meet several of the initial and second level screening criteria yet the Forest Service continues to process it, in violation of its regulations.

No special use may be approved if the proponent cannot [Idquo]provide sufficient evidence . . . that [it] has, or prior to commencement of construction will have, the technical and financial capability to construct, operate, maintain, and terminate the project for which an authorization is requested.[rdquo] Id. [sect] 251.54(d)(3); see also [sect] 251.54(e)(5)(iv). Neither Union County nor the Union County Gun Club has provided evidence that it has or will have the technical and financial capability to construct, operate, maintain, and terminate the proposed shooting range.

Apparently, the county has refused to provide [Idquo]design plans,[rdquo] [Idquo]construction details,[rdquo] or [Idquo]engineering drawings or plans[rdquo] to the Forest Service. See Human Environment Report, App[rsquo]x A, 4. If the County does not know what it is going to build, it cannot know if it has the technical and financial capability to build it. This is not a theoretical concern. As explained below, see infra Section V.E, the Forest Service has failed to take a [Idquo]hard look[rdquo] at various impacts associated with this project. Properly accounting for those impacts may change the financial and technical demands of the project.

Instead, the Forest Service[rsquo]s analysis relies on a made-up project description that is [Idquo]intended for proposed project evaluation purposes only.[rdquo] Id. at 1. We take this to mean that there is no commitment that the actual project will resemble the design used for [Idquo]project evaluation purposes only.[rdquo] The design is

intended only [ldquo]to aid in the review process.[rdquo] Id. That approach falls short on numerous levels, including that it cannot provide assurance that the County or Gun Club has the technical and financial capability to construct and operate the shooting range because the project description may not be an accurate depiction of what is ultimately constructed.

7 And one the Forest Service has routinely used to disqualify areas from potential wilderness consideration. See Forest Plan, Final Environmental Impact Statement, App[rsquo]x C.

8 We raised this issue on pages 23-25 of our Draft EA comments.

It is unclear even if the County or Gun Club has the financial capability to operate the shooting range as described in the manufactured project description. That design includes a [ldquo]dedicated Range Safety Officer[rdquo] who will be onsite [ldquo]during operation hours.[rdquo] Id. at 2. Who is going to pay this person? Is this going to be a Forest Service employee? A county employee?

Nothing in the agency[rsquo]s analysis indicates whether the County or Gun Club has the financial capability to take on that and other obligations.⁹

Similarly, while the analysis in the Final EA underestimates the amount of grading that will have to occur, it admits that at least 4,000 cubic yards of soil will have to be brought to the site to construct berms. Id. at 5. Fill dirt in Marietta, Georgia costs approximately \$18 per cubic yard.¹⁰ At that price, 4,000 cubic yards will cost \$72,000. Nothing in the agency[rsquo]s analysis indicates that the County or Gun Club has demonstrated that it can take on those types of costs.

If they cannot make that showing, the Forest Service is required to reject the proposal. See 36 C.F.R. [sect] 251.54(e)(5).

Proposals must also be [ldquo]consistent with the laws, regulations, orders, and policies establishing or governing National Forest System lands, with other applicable Federal law, and with applicable State and local health and sanitation laws,[rdquo] 36 C.F.R. [sect] 251.54(e)(1)(i), and [ldquo]consistent or [hellip][capable of being] made consistent with standards and guidelines in the applicable forest [plan][rdquo] id. [sect] 251.54(e)(1)(ii); see also [sect] 251.54(e)(5)(i) (requiring special uses to be consistent [ldquo]with the purposes for which the lands are managed[rdquo]). As explained in our previous comments and in this objection, the proposal is not consistent with several laws, regulations, and the Forest Plan.

The Forest Service was required to stop processing this application until it received the assurances required by

its special use regulations. Without those assurances in hand, it will remain in violation of its regulations if it continues to move forward with approving this project.

IV. THE FOREST SERVICE HAS NOT COMPLIED WITH THE ENDANGERED SPECIES ACT

The Forest Service must ensure that its actions are [ldquo]not likely to jeopardize the continued existence of any endangered species or threatened species.[rdquo] 16 U.S.C. [sect] 1536(b). It has failed to fulfill that obligation for two species here.¹¹

First, the Forest Service asserts that small whorled pogonia will not be impacted by the project because [ldquo]land disturbing activities have continuously occurred on the site and further activity would not occur within any of the existing or historic colony sites.[rdquo] Final EA, 25. The fact that the project will not be implemented in an [ldquo]existing or historic colony site[rdquo] does not mean that the project will not impact the species. The Forest Service only considered impacts to small whorled pogonia in the first place because of its [ldquo]occurrence in the project vicinity, or . . .

⁹ Another concern is who will pay to insure the proposed shooting range.

¹⁰ See <https://www.georgialandscapesupply.com/bulk-landscaping-materials/fill-dirt/fill-dirt---18-per-yard/2>

¹¹ We raised this issue on pages 19-20 of our Draft EA comments.

potential to occur within the district.[rdquo] Final EA, 22. Restated, the plant may be present on the project site. Because it has the potential to occur on the project site, the Forest Service should conduct surveys to determine if the species may be impacted, not ignore that possibility because the species has not been documented (nor likely searched for) in this location previously.¹² That approach would turn the Endangered Species Act (ESA) on its head: species would continually be illegally [ldquo]taken[rdquo] because agencies would not know they were present as a result of not looking for them.

Comments from the Georgia Department of Natural Resources (DNR) echo this requirement. According to DNR, [ldquo][a]lthough we have no records of the federally threatened small whorled pogonia (*Isotria medeoloides*) within the vicinity of the project, the proposed action lies within the potential range and habitat for this species.[rdquo] DNR Draft EA comments, 3. As a result, they [ldquo]recommend that surveys on site and within the immediate vicinity of the action area be conducted.[rdquo]

The Forest Service also cannot depend on the fact that [ldquo]land disturbing activities have continuously occurred[rdquo] on the site to excuse its obligation to look for the species. The Georgia Biodiversity Portal, maintained by DNR, explains that areas with significant past disturbance in the form of [ldquo]nearby heavy logging, homesite or road clearing activity[rdquo] are ideal sites for small whorled pogonia.¹³ The Fish and Wildlife Service describes ideal habitat similarly.¹⁴ Moreover, as explained by DNR, small whorled pogonia [ldquo]may go undetected for several seasons due to its tendency as an orchid to lie dormant for extended periods.[rdquo] Id. In other words, even if the species could have been harmed by past land disturbing activities, there is no guarantee those activities would have impacted individual plants because of their tendency to lie dormant. To meet its ESA obligations, the Forest Service needs to determine if the species is present on this site through surveys.

Second, when an activity [ldquo]may affect listed species,[rdquo] the Forest Service must engage in formal Section 7 consultation with the Fish and Wildlife Service. 50 C.F.R. [sect] 402.14(a). The Final EA concludes that the project [ldquo]may affect summer roosting Indiana bats by disturbing them with logging equipment . . . [and that] a potential for harassment and harm does exist.[rdquo] Final EA, 23 (emphasis original). Because the project [ldquo]may affect[rdquo] Indiana bats, the Forest Service must formally consult with the Fish and Wildlife Service, which it has not done. The FONSI points to [ldquo]consultation letters from the [Fish and Wildlife Service],[rdquo] FONSI, 7, but that letter clearly states that [ldquo][i]t does not apply to the following ESA-protected species that also may occur in the Action area: . . . Indiana Bat, *Myotis sodalis* (Endangered) . . . If the Action may affect other federally listed species besides the northern long-eared bat . . . additional

¹² This also fails to meet NEPA[rsquo]s hard look standard.

¹³ See

https://georgiabiodiversity.org/natels/profile.html?es_id=16584&fus_tab_id=1HsRRHkW2qqMS1MunY5KMrvThVR_5C8sAX2-pFapk&group=plant

¹⁴ See <https://www.fws.gov/southeast/wildlife/plants/small-whorled-pogonia/>

consultation between you and this Service office is required.[rdquo] Letter from Fish and Wildlife Service to Krishna Faw (April 15, 2019) (emphasis original). The Forest Service must consult with the Fish and Wildlife Service over impacts to Indiana bat.

V. THE FOREST SERVICE HAS NOT COMPLIED WITH NEPA

[Idquo]Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality.[rdquo] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989) (citation omitted). [Idquo]To ensure that this commitment is infused into the ongoing programs and actions of the Federal Government, the act also establishes some important action- forcing procedures[rdquo] that federal agencies must follow. Id. (quotation omitted). The Forest Service failed to meet its obligations in that regard here.

A) The Forest Service Failed to Make Important Information Available to the Public

NEPA has at least two purposes: [Idquo](1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public.[rdquo] N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1072 (9th Cir. 2011) (emphasis added). That information must be provided to [Idquo]citizens before decisions are made and before actions are taken.[rdquo] 40 C.F.R. [sect] 1500.1. And the [Idquo]information must be of high quality.[rdquo] Id. As we pointed out on pages 2-3 of our Draft EA comments, the agency failed to meet that obligation here.

The agency incorporated two categories of information by reference into its analysis. First, the agency incorporated [Idquo]material specifically cited[rdquo] in the EA. Final EA, 5. We were able to determine what those materials were because they are cited in the agency[rsquo]s documents. Second, the agency incorporated material [Idquo]otherwise used in preparation[rdquo] of the EA. Id. As opposed to the first category of information, which was cited in the EA, this second category is explicitly not cited. We do not know what those materials are. We asked the agency for those materials when the same sentence was included in the Draft EA and were told that the materials did not exist. See Draft EA comments, Attachment 2. Now the agency has included the same vague incorporation by reference in its Final EA. What documents [Idquo]otherwise used in preparation[rdquo] of the EA is it incorporating? We have submitted a Freedom of Information Act request but the agency has not provided materials to date. As best we can tell, the agency is relying on materials [Idquo]otherwise used in preparation[rdquo] of its NEPA documents, but not cited therein, and has not disclosed what those materials are. This falls short of the obligation to make relevant information available to the public.

Other information the agency relies on is not [Idquo]high quality.[rdquo] 40 C.F.R. [sect] 1500.1. The Forest Service[rsquo]s analysis relies on a project description attached as Appendix A to the Nutter and

Associates[rsquo] reports.¹⁵ But that appendix is clear that because shooting range [Idquo][d]esign plans and projected usage . . . were not provided by the county,[rdquo] Nutter and Associates simply developed a project description on their own. See Human Environment Report, App[rsquo]x A, 1. The appendix [Idquo]does not constitute a project design or operation plan.[rdquo] Id. The [Idquo]description is intended for proposed project evaluation purposes only.[rdquo] Id. (bold and underline in original). There is no guarantee that the project description in Appendix A, which underpins the analysis in the Final EA, represents what will actually be built on this site. The Forest Service cannot conduct its NEPA analysis without knowing what will actually be constructed.

Additionally, this project design description was developed based on several sources. Id. But the Forest Service has already decided it will not abide by all of those sources. For example, the U.S. Department of Energy[rsquo]s Range Design Criteria used to develop the range in Appendix A recommends that ranges be [Idquo]oriented to the north or slightly to the northeast[rdquo] to avoid firing into the sun. DOE, Range Design Criteria, 4 (2012). The map accompanying the Final EA reveals that the range is oriented to the southeast [ndash] into the sun. Department of Energy and National Rifle Association guidance used to develop Appendix A recommend that shooting ranges not exceed two-percent grade, but the proposal will not comply with that requirement either. See

Final EA, 12. It remains unclear exactly what the project design will look like.

If Union County has not provided a shooting range design, the agency's obligation is to wait until it has that information to conduct its NEPA analysis. The Forest Service cannot complete its analysis using a placeholder design. Failure to use accurate information about what will be constructed on this site undermines the agency's effects analysis and does not constitute "high quality information."

B) Forest Service Approval of Alternative Two is Arbitrary Because it Does Not Meet the Project Purpose and Need

NEPA documents must include a statement of purpose and need, which "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. [sect] 1502.13; see FSH 1909.15 [sect] 11.21. Purpose and need statements play a critical role because "the available reasonable alternatives are dictated by the underlying purpose of the proposed action." *Wilderness Soc. v. U.S. Forest Serv.*, 850 F. Supp. 2d 1144, 1163 (D. Idaho 2012). Agencies may reject alternatives "that do not meet the purposes and needs of the project." *BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709, 715 (10th Cir. 2010). But agencies are also not free to choose alternatives that do not meet the purpose and need for a project. In violation of NEPA, that is what the agency has done here.¹⁶

¹⁵ Because this appendix was not developed until July 2019, we did not have an opportunity to raise this issue in our Draft EA comments.

¹⁶ We raised this issue on pages 8-11 of our Draft EA comments.

"The purpose and need" for the proposed project is to provide a "secure public target shooting facility." Final EA, 3 (emphasis added). What is being proposed is not a public target shooting facility — it is a private target shooting facility. Most of the public will not have access to the target range. The range would be operated by "the Union County Gun Club, a private entity." Human Environment Report, App[ri]x A, 2. According to the Union County Gun Club By-laws, "[i]ndividual Membership is required for each person authorized to use the range."¹⁷ This bears underscoring: to use the range you must be a member of the Union County Gun Club which is a private entity. This is not a public target range.

Nutter and Associates's reports suggest that the fact that "there are varying levels of membership for the Union County Gun Club" somehow converts this into a public facility. See Human Environment Report, App'x A, 2. The operative word of that suggestion is "membership," i.e., one must be a member of the private Union County Gun Club to use the range — it is not open to the general public.

The agency's treatment of the Chatuge shooting range confirms the same. The Chatuge shooting range is located on public lands but is operated by a private entity and is only "open to public use for two hours on the second Sunday of each month." Final EA, 3. The Chatuge shooting range is only 16 miles from Blairsville, GA, but the Forest Service considers the Darnell Shooting Range to be "the nearest public facility" to Blairsville even though it is 53 miles away. *Id.* (emphasis added). If the Darnell Shooting Range (53 miles away) is the nearest public shooting range to Blairsville then clearly the Forest Service does not consider the Chatuge range (16 miles away) to be a public range. The proposed Union County Target Range is not a public range either. Both would be operated by private entities. The Union County Gun Club has not committed to allow public access at all; the Chatuge Gun Club currently allows public access for two hours per month. Alternative Two does not meet the stated purpose of providing a public shooting range, and its selection is unreasonable and arbitrary.

C) The Forest Service Failed to Consider the Viable Alternative of Amending the Special Use Authorization for the Chatuge Range to Allow Greater Public Access

It is arbitrary for an agency to choose a project alternative that is unreasonable because it does not fulfill the purpose of the agency action and it is also arbitrary for an agency to completely ignore reasonable project alternatives. NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42

U.S.C. [sect] 4332(E). "This provision applies whether an agency is preparing an EIS or an EA." *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012); see also *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) ("the consideration of alternatives requirement is of wider scope than the EIS requirement"). The Forest Service has recognized

17 See http://www.unioncountyguncub.com/By_Laws_Rev4_2019v_posted_3_2019.pdf

this requirement: [ldquo]agencies are required by NEPA to rigorously explore and objectively evaluate all reasonable alternatives.[rdquo] FONSI, 6. The failure to consider a [ldquo]viable but unexamined alternative[rdquo] renders an EA inadequate. *Alaska Wilderness Recreation and Tourism Association v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (internal quotations omitted); accord *Dubois v.*

USDA, 102 F.3d 1273, 1289 (1st Cir. 1996), cert. denied 521 U.S. 1119 (1997).

Conservation groups requested [ldquo]that the Forest Service consider as a project alternative amending the terms of the special use permit for the Chatuge Gun Club so it is open to the public more frequently, rather than constructing an entirely new gun range[rdquo] in both their scoping comments and comments on the Draft EA. See Draft EA comments, 11. Other commenters made the same request. Conservation groups explained why that alternative was reasonable and nothing in the Forest Service[rsquo]s analysis or response to comments indicates otherwise. See id.

With no explanation, the Forest Service has refused to consider this alternative at all, rendering its EA inadequate.

D) The Forest Service[rsquo]s Evaluation of the [ldquo]No Action[rdquo] Alternative is Arbitrary

As the Forest Service recognized, it is required to consider a [ldquo]no action[rdquo] alternative as part of its alternatives analysis. FONSI, 6. The no-action alternative serves the important role of providing [ldquo]a baseline against which the proposed action and its alternative may be measured.[rdquo] *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1244 (W.D. Wash. 2009). To serve that role, the no action alternative must rely on accurate baseline data. [ldquo]Without [accurate baseline] data, an agency cannot carefully consider information about significant environment impacts ... resulting in an arbitrary and capricious decision.[rdquo] *N. Carolina Wildlife Fed[rsquo]n v. N. Carolina Dep[rsquo]t of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (citation omitted; brackets original); see *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012) ([ldquo]A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision.[rdquo]). Here, the agency erred because there is no evidence that its no-action alternative relies on accurate baseline data.

The no-action alternative assumes that [ldquo]local residents frequently use privately owned lands in Union County for target practice or dispersed areas across the national forest[rdquo] and that as a result, [ldquo]unsafe conditions may exist.[rdquo] Final EA, 3. Conservation groups asked the Forest Service to disclose the information it was basing those conclusions on and the Forest Service did not respond. See Draft EA comments, 9-10. If the Forest Service does not have information indicating that public and privately owned lands are frequently being used for target practice, thereby creating unsafe conditions, then it does not have an accurate [ldquo]baseline against which the proposed action and its alternative may be measured.[rdquo] *Conservation Nw.*, 674 F. Supp. 2d at 1244. This is a critical determination because if frequent dispersed target practice is not occurring then this project may not be necessary at all. Without any information suggesting the no-action alternative reflects real-world conditions, the agency[rsquo]s analysis of that alternative is arbitrary and unsupported by evidence related to this project.

The agency[rsquo]s baseline data also seems to assume that the nearest public shooting range is the Darnell Shooting Range which is approximately 53 miles away from Blairsville, necessitating an hour-and-15-minute drive. Final EA, 3; see Draft EA comments, 8. The agency compares this baseline to Alternative Two and implies Alternative Two will better serve the community because it is only 12 miles away, requiring only a 15-minute

drive. But the Darnell Shooting Range is not the closest public shooting range. The public [ldquo]Panthertop Shooting range is approximately a 21-mile drive[rdquo] from Blairsville [ndash] well over twice as close as the Darnell Shooting Range. Id. Using an accurate baseline in the no-action alternative may reveal that the shooting range is not sufficiently justified because at most it would save a Blairsville resident only ten or fifteen minutes of driving time by driving 12 miles to the proposed location rather than 21 miles to the Panthertop shooting range. By assuming that the Darnell Shooting Range is the closest public shooting range, the no-action alternative significantly overstates the benefit of Alternative Two in terms of driving time.

E) The Forest Service Failed to Take a Hard Look at Multiple Environmental Impacts

The [ldquo]sweeping policy goals announced in [sect] 101 of NEPA are [] realized through a set of [lsquo]action-forcing[rsquo] procedures that require that agencies take a [lsquo]hard look[rsquo] at environmental consequences, and that provide for broad dissemination of relevant environmental information.[rdquo] Methow Valley, 490 U.S. at 350 (citations omitted). Those procedures must be completed [ldquo]before decisions are made in order to ensure that those decisions take environmental consequences into account.[rdquo] Wilderness Watch & Pub. Employees for Env'tl. Responsibility v.

Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004) (referencing NEPA[rsquo]s [ldquo]hard look[rdquo] requirement).

This [ldquo]hard look[rdquo] must include [ldquo]some quantified or detailed information[rdquo] supporting the conclusions of an EA. Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004) (citations omitted). An [ldquo]agency has satisfied the [lsquo]hard look[rsquo] requirement if it has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.[rdquo] Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers, 833 F.3d 1274, 1285 (11th Cir.

2016)(citation omitted). The [ldquo]hard look[rdquo] requirement is violated when [ldquo]the agency failed entirely to consider an important aspect of the problem.[rdquo] Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1216 (11th Cir. 2002). Here, the agency failed to take a hard look at multiple environmental impacts.

1) The Forest Service Failed to Take a Hard Look at Impacts of Grading and Earth Movement During Construction of the Range

Soil loss is an important environmental impact associated with this project. The site[rsquo]s soil [ldquo]loss rate is projected to increase considerably over existing conditions[rdquo] as a result of the project. Final EA, 16. To assess soil loss the agency relies on the RUSLE model. Id. But as we pointed out on pages 12-13 of our Draft EA comments, the model and the agency[rsquo]s accompanying analysis only considers the [ldquo]period of time where the target range is in operation, following

completed construction.[rdquo] Id. at 16. Determining the amount of grading and earth movement that will accompany construction of the shooting range is an essential component of any serious attempt to analyze the environmental impacts of soil loss and stream sedimentation as a result of this project. Yet the Final EA, like the Draft EA, fails to provide any meaningful analysis of the amount of earth movement and resulting soil loss that would take place during construction.

Proper consideration of soil loss caused by construction of this project may lead the Forest Service to choose a different project alternative or at least enhance mitigation for the chosen alternative. According to the Final EA,

soil loss needs to remain below [ldquo]4 tons/acre/year[rdquo] to stay below the level where [ldquo]soil productivity is expected to be degraded.[rdquo] Id. Operation of the shooting range on its own is predicted to result in loss of [ldquo]3.9 tons/acre/year[rdquo] [ndash] barely below the 4 tons/acre/year threshold. Construction of the shooting range[mdash]the project phase when soil loss is likely to be most significant[mdash]may cause the project to exceed the 4 tons/acre/year threshold. If that represents an unacceptable level of soil loss, it may lead the Forest Service to choose a different project alternative or develop new mitigation measures for this project.¹⁸

Similarly, the Forest Service[rsquo]s analysis generally acknowledges that soil loss from construction of the range will affect local water quality. The use of BMPs may not prevent [ldquo]stormwater runoff and sediment that is detached and transported[hellip]as a non-point source[hellip][from] reach[ing] the downgradient stream during construction and decommissioning of the site, which would lead to a short-lived increase in surface water turbidity.[rdquo] Final EA, 17 (emphasis added). Indeed, the Final EA concludes that a construction-related increase in non- point source sediment pollution to the nearby stream system is [ldquo]likely.[rdquo] Id. at 18. While the Service[rsquo]s general acknowledgement that construction will likely result in soil loss and stream degradation is a good start toward taking a hard look at these impacts, the Forest Service stops there. Simply disclosing that water quality will be affected in a general sense is insufficient to meet the hard look standard; the agency must consider how much sediment will be introduced into the stream. By using the RUSLE model to estimate soil loss, the agency seems to acknowledge the necessity of that analysis. The Forest Service[rsquo]s shortcoming is that the agency must conduct the analysis for both construction and operation of the shooting range, not only the latter.

The agency[rsquo]s chief defense for refusing to conduct this analysis appears to be its assertion that [ldquo]grading is projected to be minimal, such that the existing slope of the site would be maintained.[rdquo] Nutter and Associates, Soil and Water Resources Report, App[rsquo]x A, 5. The Final EA does not elaborate on what [ldquo]minimal[rdquo] means; rather, the Forest Service[rsquo]s analysis indicates that a significant amount of earth movement will be required to construct the range. The Final EA notes that the average slope of the project site is 6.5%, Final EA, 12, but the agency[rsquo]s own

¹⁸ This may also be a [ldquo]significant impact[rdquo] necessitating preparation of an EIS.

analysis of soil loss for the completed range assumes that the post-construction site will have a slope of 4.1%, Soil and Water Resources Report, App[rsquo]x B, 3.

This inconsistency necessarily creates one of two problems. First, if the RUSLE model was run assuming an average slope of 4.1%, but the site will actually be graded to 6.5%, then the model does not actually reflect site conditions. Rerunning the model using the appropriate slope may reveal that the project will exceed the [ldquo]4 tons/acre/year[rdquo] threshold to prevent soil degradation. Or second, if the site will actually be graded from a 6.5% slope to a 4.1% slope, then significant grading will have to occur[mdash]contrary the Final EA[rsquo]s assertion that grading will be [ldquo]minimal.[rdquo]

The conservation groups[rsquo] Draft EA comments provided an estimate that grading the project site to a 4% average slope would require removal of approximately 30,000 cubic yards of soil. Draft EA comments, 13. The Final EA does not attempt to explain that this estimate is inaccurate or why the Forest Service continues to assert that grading for the project would be minimal [ldquo]such that the existing slope of the site would be maintained.[rdquo] Nowhere does the Final EA clearly state what the slope of the post-construction site would be. If the agency does not know what the final slope will be, it has not taken a hard look at this issue.

The Final EA[rsquo]s unsupported, conclusory statement that grading will be [ldquo]minimal[rdquo] cannot substitute for a quantitative analysis of how much grading will actually occur and what the environmental impacts of this soil disturbance will be, particularly in light of information presented elsewhere in the Final EA which suggests that grading will in fact be significant.

Absent an adequate analysis of soil movement and erosion, it is not sufficient for the Forest Service to dismiss the [ldquo]potential impacts[rdquo] of stream sedimentation during construction as [ldquo]short lived, and subject to regulatory compliance.[rdquo] Final EA, 17. An environmental impact may be temporary and yet also severe, and the severity of an impact is not adequately assessed by asserting that it is [ldquo]subject to regulatory compliance.[rdquo] To comply with NEPA, the Forest Service must provide [ldquo]some quantified or detailed information[rdquo] that supports its analysis of earth movement, soil loss, and stream impacts during construction. Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 993.

Finally, forthright disclosure of the amount of grading that will occur is also necessary to assess other environmental impacts. For instance, if substantial grading does occur the Forest Service must consider and disclose where soil removed to achieve a specific grade will be stored and how it will be transported. It is also necessary to assess other societal impacts such as how much this will cost. All of these considerations are missing from the Final EA.

2) The Forest Service Failed to Take a Hard Look at Impacts of Constructing a Parking Lot and Access Road

The conservation groups[rsquo] Draft EA comments pointed out that the Forest Service failed to provide any analysis of environmental impacts from construction of the parking lot and access

road for the proposed shooting range. See Draft EA comments, 12. The Final EA does not correct this error.

The Draft EA acknowledged that use and maintenance of the completed access road may result in soil loss and stream sedimentation; it did not acknowledge similar impacts from use and maintenance of the parking lot. See Draft EA, 15. But neither the Draft nor the Final EA attempted to assess environmental impacts of soil loss or sedimentation during construction of these project components.

The closest the Final EA comes to analyzing the impacts of road and parking lot construction is providing a brief overview of each process in the project description. See Soil and Water Resources Report, App[rsquo]x A, 4.

This description states that construction of the access road [ldquo]would involve tree and boulder/rock removal, grubbing and filling as needed with appropriate materials, grading and shaping, temporary installation of erosion and sediment control measures, and permanent installation of necessary drainage structure(s).[rdquo] Id.

Construction of the parking lot would [ldquo]include boulder and rock removal, grading and shaping, gravel laying and temporary installation of erosion and sediment control measures.[rdquo] Id. Like construction of the range itself, for the road and parking lot, the description merely concludes that [ldquo][g]rading is projected to be minimal, such that the existing slope of the site would be maintained[hellip].[rdquo] Id.

The Final EA acknowledges the possibility of soil loss and stream sedimentation during construction of road and parking lot, but it goes no further than to say that [ldquo][a]s is the case with other site features[hellip]soil loss does not necessarily indicate sedimentation in the stream[hellip].Potential impacts in the construction and decommissioning periods would be short- lived, and subject to regulatory compliance.[rdquo] Final EA, 18. As with the Final EA[rsquo]s failure to assess the volume or impacts of soil movement, discussed above, the Forest Service may not dismiss potential environmental impacts by referring to them as [ldquo]short-lived and subject to regulatory compliance.[rdquo] The agency must instead provide some quantitative or detailed analysis supporting its conclusion.

3) The Forest Service Failed to Take a Hard Look at the Impacts of Noise from Operation of the Proposed Shooting Range

Like the Draft EA, the Final EA acknowledges that noise from operation of the shooting range will cause impacts to biological and recreation resources in the areas surrounding the project site, including along the Russell-Brasstown Scenic Byway, the Appalachian Trail, and within the Mark Trail and Brasstown Wilderness Areas.¹⁹ The Final EA[rsquo]s analysis of these impacts is deficient in multiple ways.

First, the Forest Service failed to consider or even acknowledge the results of a live-fire test submitted to the agency by GFW in scoping and Draft EA comments. The GFW test was

¹⁹ We raised this issue on page 15 of our Draft EA comments.

conducted using an objective measuring device and the results clearly indicated that noise levels along the Appalachian Trail would be significantly higher than those projected in the acoustic analysis the Forest Service commissioned. See Draft EA Comments, 15; see also GFW Scoping comments, 3; see also Human Environment Report, App[rsquo]x B. By comparison, the test completed by the Forest Service is admittedly [ldquo]subjective[rdquo] Final EA, 34, and the [ldquo][l]isteners represented during testing included local residents, USDA-Forest Service employees, Union County Gun Club[rsquo]s members, and the Union County

Sheriff's office, Forest Service, Draft Summary Report Live Fire Test (Dec.11, 2018), 2. The latter three entities in that list are the primary backers of this project and their subjective analysis may trend in favor of approving the project. Despite the limitations of the Forest Service's live fire test results, the Final EA does not attempt to explain why GFW's results do not warrant additional analysis or otherwise alter the Forest Service's conclusion that noise from the range will not have a significant impact on the Appalachian Trail.

Nor does the Final EA meaningfully respond to public comments asserting that the Forest Service's acoustic analysis and live-fire tests were inadequate. Commenters—including the conservation groups—pointed out that in evaluating noise impacts to the Appalachian Trail, the Forest Service failed to conduct a live-fire test with observers at the locations along the Trail that are the most acoustically exposed to the project site. Nor did the Forest Service's live fire tests simulate the repeated discharging of weapons, as would be expected at a target range. Many commenters asserted that their use and enjoyment of the Appalachian Trail and the Wilderness Area would be severely impaired by the constant noise of a gun range. Yet the Final EA does not address the alleged deficiencies in its analysis, and it dismisses the impacts to hikers as a temporary annoyance. Final EA, 36. Even more confusingly, the agency's Response to 30-day Comments asserts that the live fire test was outside the scope of the project. If the Forest Service is refusing to consider the results of the live fire tests then it is not taking a hard look at the impact of noise from the shooting range on the adjacent Wilderness Areas, Scenic Byway, and Appalachian Trail.

Second, the Forest Service continues to rely on its unsubstantiated assertion that certain design features of the proposed range would effectively mitigate noise impacts from gunfire.

The Final EA repeatedly cites the project description found in the Human Environment Report in support of the statement that noise impacts would be minimized through the installation of backstop and berm barriers, an overhead baffle at the shooting stalls, and prescribed vegetative plantings. Final EA, 35, 36, 40. Yet the acoustic analysis commissioned by the Forest Service and prepared by Conway & Owen contradicts the assertion that vegetative plantings will be effective in mitigating sound impacts to hikers on the Appalachian Trail: rolling terrain will reduce the effectiveness of foliage as the depressed areas of the sound path will provide limited attenuation since line of sight passes above the trees. Human Environment Report, App'x B, 1 (emphasis added) (further concluding that foliage factors are limited). Contrary to the Final EA, the Conway & Owen analysis concludes vegetative plantings will be ineffective at limiting noise impacts to hikers on surrounding trails.

Moreover, the project description cited by the Final EA only lists general measures for minimization/mitigation of potential impacts. Id., App'x A, 6. It does not provide data or analysis that support the Service's assertions about the effectiveness of these measures. In fact, nowhere in the Final EA does the Forest Service present data or analysis relevant to whether these measures will actually function to mitigate noise impacts. Without analytical data to support proposed mitigation measures, they do not amount to anything more than a mere listing of good management practices that is insufficient for NEPA purposes. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998), overruled on other grounds by *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008)) (internal quotations omitted).

Third, the Forest Service arbitrarily limited the spatial boundaries of its noise analysis for the Mark Trail Wilderness to those sections that overlap with the Appalachian Trail. The Final EA explains that for analysis of potential impacts of the project on recreational resources, areas in the Mark Trail Wilderness and along the A.T. have been narrowed to the small section of the A.T. between Cold Springs Gap and Chattahoochee Gap. Final EA, 38. While it may be true that the Appalachian Trail is the most popular

hiking trail in the Mark Trail Wilderness Area, the Forest Service's decision to limit its analysis of noise impacts to the Appalachian Trail is not consistent with a "hard look." In response to the Draft EA, multiple commenters noted that the Jack's Knob Trail, which also passes through the Mark Trail Wilderness Area, would be significantly impacted by noise from the proposed shooting range, in part because sections of it are outside the sound shadow of Turkeypen Mountain. Yet the Final EA ignores these concerns, as well as noise impacts to other sections of the Mark Trail Wilderness Area. In some ways, the less-used areas of the Mark Trail Wilderness away from the Appalachian Trail provide the highest solitude values and will be most profoundly impacted by the project. The agency's decision to exclude those impacts from its analysis fails the hard look standard.

Fourth, the Forest Service's effort to downplay impacts by concluding that backpackers on impacted areas of the Appalachian Trail will simply camp elsewhere is an assumption that is called into question by the agency's own analysis. On one hand, the Final EA concludes that "backpackers [on the Appalachian Trail in the Mark Trail Wilderness] may decide to camp further away out of ear shot of the target range." Final EA, 41. Elsewhere, however, the Final EA acknowledges that while there are "many remote and undeveloped campsites" along the 14.5-mile stretch of Appalachian Trail that runs from Hogpen Gap to Unicoi Gap, "there is a campsite at Chattahoochee Gap due to a spring water source over the ridge and campers at this site are likely to hear gun fire during the daytime operations of the range." Id. at 35. The Appalachian Trail crosses Chattahoochee Gap within the Mark Trail Wilderness Area, in between Hogpen Gap and Unicoi Gap.

The Forest Service's analysis thus correctly implies that campsites along the Appalachian Trail are not fungible—some are utilized because of their proximity to resources that backpackers need, like water. Yet the Final EA does not attempt to analyze whether it is in fact feasible for backpackers to "decide to camp further away and out of ear shot of the target range";

such an assessment would require the Forest Service to evaluate whether there are characteristics of the "many remote and undeveloped campsites" that may limit their ability to accommodate increased numbers of backpackers. Final EA, 35.

In sum, the agency failed to take a hard look at noise impacts from the shooting range by neglecting to consider the live fire test results offered by GFW, by neglecting to conduct a live-fire test at locations along the Appalachian Trail that are most acoustically exposed to the project site, by relying on proposed mitigation measures without presenting any data to support the assertion that they will be effective, by ignoring information in its own analysis suggesting that "vegetative plantings" will not mitigate sound impacts to the Appalachian Trail, by arbitrarily restricting its analysis of impacts to the Mark Trail Wilderness Area to the narrow strip of the Appalachian Trail, and by failing to adequately assess whether it is feasible for backpackers to simply camp elsewhere along the Appalachian Trail.

4) The Forest Service Failed to Take a Hard Look at Impacts to the Safety of Hikers on the Appalachian Trail and in Other Areas Surrounding the Proposed Shooting Range

A critical concern for any firing range is its impact on human safety.²⁰ The Final EA is plain that "[s]afety conditions would change as a result of the proposed project. There are concerns from stray bullets in the direction of the proposed range towards the A.T. A similar concern exists for visitors that might unintentionally traverse the proposed site." Final EA, 40. But instead of assessing impacts to human safety from operation of the range now, the Forest Service proposes to delay that analysis until it develops a "site-specific operations and safety plan" at some point in the future. Id. In other words, rather than taking a hard look at the risk that hikers along the Appalachian Trail or elsewhere in the forest will be struck by stray bullets and then

assessing whether there are measures that could appropriately mitigate this risk, the Forest Service simply asserts that a non-existent, non-NEPA [ldquo]operations and safety plan[rdquo] will solve the problem. The Final EA does not discuss any details of this plan, nor does it discuss the risk to downrange hikers from bullets that are inadvertently (or intentionally) fired over the earthen berms and backstop, or which ricochet off of the sloped shooting lanes. This does not meet the hard look standard.²¹

Many Draft EA comments expressed concern that the Forest Service failed to adequately assess the safety risks to downrange users of the national forest. Yet in response to these comments, the Forest Service offered only that [ldquo][a] facility specific Health and Safety Plan will be developed and is subject to USFS approval.[rdquo] Response to 30-Day Comments. This is effectively an attempt to tier the Forest Service[rsquo]s analysis of safety impacts to the analysis and mitigation discussed in a future Health and Safety Plan.

20 We raised this issue on pages 16-18 of our Draft EA comments.

21 This relates to other hard look failures. For instance, to assess safety the Forest Service needs to know the slope of the range which, as explained above, appears undecided. Ranges with 2%, 4.1%, and 6.5%+ gradient all present

different safety considerations.

The Council on Environmental Quality[rsquo]s NEPA regulations encourage agencies to tier NEPA analyses to other past, relevant NEPA analyses that are still applicable as a way to cut down on repetitive analysis. But there are two relevant limitations on this practice. First, only [ldquo]subsequent document[s][rdquo] can tier back to earlier documents. See 40 C.F.R. [sect] 1502.20. Tiering is a one-way street; analyses can tier back to earlier, relevant analyses but cannot tier forward to uncompleted analyses. An attempt to tier forward is simply a failure to take a hard look at impacts during the NEPA process. Second, a [ldquo]NEPA document cannot tier to a non-NEPA document[rdquo] because the non-NEPA document may not provide the same opportunities for public participation or require the same level of environmental analysis. *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 998; see *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir.

2002) ([ldquo]tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA[rdquo]); *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1219 (9th Cir. 2008) ([ldquo]the FSEIS's cumulative effects analysis is insufficient because it cannot tier to a non-NEPA document[rdquo]); *W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1133 (D. Nev. 2008) ([ldquo]An agency is not permitted to tier to a document that has not been subject to NEPA review[rdquo]).

[U]nlawful tiering occurs when a NEPA document refers to a more general non-NEPA document in order to explain and evaluate the environmental impact of the decision in question. All. for Wild Rockies v. Kimbell, 310 F. App'x 106, 109 (9th Cir. 2009). That is exactly what the agency has done here for its assessment of impacts to human safety [ndash] that analysis will not occur until a [facility specific Health and Safety Plan will be developed. See Response to 30-day Comments (emphasis added). That safety plan is a non-NEPA document that is yet to [be developed. The agency cannot tier its analysis of effects on safety to that document. It must conduct that analysis now to meet NEPA's hard look requirement.

This shortcoming affects other portions of the agency's analysis. For instance, if the agency considered safety impacts now, as required by NEPA, and determined that this site posed substantial risks, it might choose a different project alternative.

In addition, the Forest Service's Final EA fails to take a hard look at safety impacts by neglecting to explain the agency's decision to deviate from the recommended safety guidelines for shooting ranges published by the National Rifle Association and the U.S. Department of Energy. In Draft EA comments, the conservation groups pointed out that the Forest Service's design for the target range seemed to propose a range slope of approximately 4%, despite NRA and DOE recommendations that shooting ranges have slopes of less than 2%. Draft EA comments, 13. Multiple public comments raised the concern that sloped shooting lanes would cause bullets fired short of their targets to ricochet at a steeper angle, thereby increasing the risk that they would clear the safety berms and potentially strike someone downrange. Alternatively, having shooters fire upslope at targets may encourage them to fire too high [ndash] directly over the safety berm.

The Final EA does not address these concerns, nor does it attempt to explain the discrepancy between the slope of the proposed range and the guidelines except to say that [t]he grade of the shooting lanes as proposed would be greater than the 2 percent grade recommended in the U.S. Department of Energy and NRA Guidelines. The National Shooting Sports Foundation guidelines recommend that the ranges be [s]relatively flat.[rdquo] Human Environment Report, App'x A, 5. If anything, the Final EA suggests this is more of a concern than was apparent when the Forest Service published the Draft EA, because the Final EA suggests that the Forest Service may construct a shooting range with a 6.5% slope. The Forest Service's failure to address this aspect of potential safety impacts also violates the [hard look] standard.

5) The Forest Service Failed to Take a Hard Look at Impacts of Lead Management

Similar to the Forest Service's improper reliance on a non-existent, non-NEPA [safety and operations plan] as a stand-in for analysis of safety impacts to hikers, the Final EA also illegally tiers to a non-existent, non-NEPA document referred to as an [Environmental Stewardship Plan] (ESP) instead of taking hard look at the need for and impacts of lead reclamation.²² Lead contamination and reclamation is one of the [key issues associated with this project.] Final EA, 6-7. The Forest Service plans to address that issue through [management practices for managing lead accumulation, abatement and removal.] Id. at 7. Indeed, the [most important [best management practice] to minimize lead migration is implementation of a lead reclamation program.] Id. at 19. But the agency admits that it does not know what lead reclamation program will be used because [s]pecific methodologies would be highlighted in the ESP,] which will not be developed until [the proposed action is selected.] Id. 19, 7. If the Forest Service is asserting that lead contamination will not have a significant environmental impact, it must assess that impact and ways to mitigate it (through BMPs or otherwise) as part of its NEPA analysis now, not wait until it prepares an ESP.

The Final EA's reference to EPA's Best Management Practices for Lead at Outdoor Target Ranges (2001) does not save its analysis. Those guidelines do not prescribe a particular set of lead mitigation and

reclamation measures but instead present a range of options that may or may not be appropriate in any given circumstance. In addition, the EPA guidelines suggest that removal of lead that is buried in soil beneath the shooting lanes or in earthen berms [ldquo]may require lengthy reclamation[rdquo] during which the earthen structures are demolished and soil under the shooting lanes is scraped to a depth of several inches. Id. at III-2, 13-14. Depending on what reclamation program the agency chooses, there may be additional environmental impacts on soil loss, stream sedimentation, or scenery that are not disclosed in the agency[rsquo]s analysis. NEPA requires the agency to accurately assess the full suite of impacts associated with lead contamination and reclamation now rather than wait until the project is being implemented and an ESP is prepared.

22 We raised this issue on pages 14-17 of our Draft EA comments.

6) The Forest Service Failed to Take a Hard Look at Impacts on Property Values

Another effect on the human environment associated with shooting range construction is the effect on nearby private property values. The Final EA acknowledges that this is a concern but ultimately concludes [ldquo]it is not supported by scientific research[rdquo] and stops its analysis of the issue. But the materials cited by the Forest Service do not support that conclusion.²³ With no evidence suggesting this is a nonissue, the Forest Service is obligated to take a hard look at the effects of its project on private property values.

The Forest Service cites a law review article to support its allegation that there is no scientific research linking shooting range construction to changes in property values. Final EA,

8. To the contrary, that article provides that [ldquo][s]hooting ranges may infringe upon [the interests of adjoining landowners] by creating noise, lead pollution, annoyance, depressed property values, trespass, fear, and potentially physical harm.[rdquo] J. Remakel, 31 Hamline Law Rev. at 229 (emphasis added). The law review article does not support the agency[rsquo]s position.

Second, the agency states that it [ldquo]searched the literature and consulted with social scientists and legal experts and could not find scholarly research providing a direct and statistically significant link that shooting ranges devalue surrounding property[rdquo] and then cites a 2010 personal communication.

This too falls short because the statement appears to have just been copied from the 2013 Clay County Shooting Range EA on the Nantahala National Forest. See Forest Service, Clay County Shooting Range EA (2013), 9 (using identical language). Construction of that shooting range was litigated and a contested issue was whether the Forest Service took a hard look at impacts on property values from constructing the shooting range. The court found that [ldquo]the Forest Service did not simply refuse to consider the effect of a shooting range on property values

. . . the agency gave at least some consideration to this issue, noting that it had [lsquo]searched the literature and consulted with social scientists and legal experts.[rsquo][rdquo] McGuinness v. United States Forest Serv., 741 F. App'x 915, 928 (4th Cir. 2018). In other words, the court gave the agency the benefit of the doubt that it had actually [ldquo]searched the literature.[rdquo] That does not appear to be the case here; as indicated by the citation, the agency appears to have simply copied that statement verbatim from the Clay County Shooting Range EA. That cannot meet the hard look standard.

23 We could not have raised this issue in our Draft EA comments because the materials provided to support the agency[rsquo]s conclusions were not provided until the Final EA. When the agency said it [ldquo]searched the literature[rdquo] in its Draft EA, we assumed that to be true. The Final EA indicates that was copied from the 2013 Clay County Shooting Range EA.

F) The Forest Service[rsquo]s Response to Comments Does not Cure its Hard Look Deficiencies and Fails to Meet the Agency[rsquo]s Obligation to Respond to Public Comments

Forest Service regulations require it to respond to public comments as part of the NEPA process. Whether completing an EA or EIS, the agency [ldquo]shall coordinate and integrate NEPA review and relevant environmental documents with agency decisionmaking by[hellip] (2) Considering environmental documents, public and agency comments (if any) on those documents, and agency responses to those comments[.][rdquo] 36 C.F.R. [sect] 220.4(c)(2) (emphasis added). The agency must then include those written [ldquo]environmental documents, comments, and responses in the administrative record.[rdquo] Id. [sect] 220.4(c)(3).²⁴

Courts have found the same. [ldquo]To be adequate, an EA, like an EIS, must . . . respond to public comments concerning the project.[rdquo] Pacific Coast Federation of Fisherman[rsquo]s Associations

v. U.S. Dept. of Interior, 929 F.Supp.2d 1039 (E.D. Ca. 2013) (citing Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture, 681 F.2d 1172, 1178(9th Cir. 1982). NEPA does not permit an agency preparing an EA [ldquo]to ignore significant questions raised in public comments or shunt them aside with [lsquo]mere conclusory statements.[rsquo][rdquo] Norwalk Harbor Keeper v.

U.S. Dept. of Transportation, No. 3:18-cv-0091 (SRU) 2019 WL 2931641 at *11 (D. Conn. July 8, 2019)(quoting Foundation for North American Wild Sheep, 681 F.2d at 1179).

This does not mean that the Forest Service must respond in detail to every written comment it receives. But when the public raises a substantial concern, the agency is not free to ignore it; it must respond either by altering its analysis or by directly responding to the comment explaining why the unchanged analysis is sufficient.

This obligation is related to the requirement to take a [ldquo]hard look[rdquo] at environmental impacts and to evaluate the need to complete an EIS. [ldquo][A]n agency may use a convincing and objective analysis to reject criticisms and refuse to prepare a full EIS.[rdquo] W. Watersheds Project v. USDA APHIS Wildlife Servs., 320 F. Supp. 3d 1137, 1139 (D. Idaho 2018). But even when an agency responds [ldquo]in detail to the criticisms, [if] their reasons for rejecting them were not convincing and objective[hellip][then] the agency failed to take the required [lsquo]hard look[rsquo] at the concerns.[rdquo] Id.

Foundation for American Wild Sheep provides a helpful illustration of the Forest Service[rsquo]s obligation to respond to comments when preparing an EA. In that case, the Forest Service prepared an EA in connection with a special use authorization to reconstruct and use an old Forest Service road. Of particular importance was the project[rsquo]s potential impact on a population of bighorn sheep that lived near the road. Public commenters raised a number of

24 We could not have raised this issue in our Draft EA comments because the agency had not yet responded to those comments.

serious concerns in comments on the Draft EA about the road[rsquo]s impact to the sheep, but the Forest Service swept those concerns under the rug and ultimately issued a FONSI.

The Ninth Circuit found that the Forest Service's decision not to prepare an EIS violated NEPA because the agency completely failed to address "certain crucial factors" that were raised in public comments but never addressed in the EA. *Foundation for North American Wild Sheep*, 681 F.2d at 1178. "For the most part, the Final EA did not respond in other than a conclusory fashion to the comments previously received." *Id.* at 1176 n 15. Significant concerns raised in comments were "ignored or, at best, shunted aside with mere conclusory statements." *Id.* at 1179. The court concluded that the Forest Service "failed to consider numerous issues obviously relevant to a determination of the likely effect of reopening [the road] on the environment" and struck down the FONSI. *Id.* at 1183.

Here, approximately 60 comments were received by the Forest Service in response to the Draft EA, including those submitted by conservation groups. A review of these comments reveals that the Forest Service's Draft EA contained omissions of both data and analysis that are "essential to a truly informed decision [of] whether or not to prepare an EIS." *Foundation for North American Sheep*, 681 F.2d at 1178.

Many of the 52 comments that were critical of the project and the Draft EA focused on the same issues: the Draft EA's lack of analysis concerning potential safety impacts to hikers on the Appalachian Trail; the inadequacy of the Draft EA's analysis concerning noise impacts to Appalachian Trail, the nearby wilderness areas, and private property; concerns about lead contamination; and the lack of public need for a shooting range in Union County given the proximity of other ranges, including the Chatuge Range that is only 3 miles from the proposed project location. This is not fly specking; the comments raise fundamental questions about whether the Forest Service's analysis was sufficient to form the basis of a "truly informed" decision. To comply with NEPA, the Forest Service was obligated to provide meaningful responses, either by responding directly to the comments, by modifying the project, by considering new alternatives, or by supplementing its draft analysis.

But the agency did not choose any of those paths. Some concerns were entirely ignored while others were "shunted [] aside with mere conclusory statements." *Norwalk Harbor Keeper*, 2019 WL 2931641 at *11.

For instance, conservation groups and other commenters requested that the Forest Service consider a project alternative of allowing increased public access at the Chatuge Shooting Range, rather than build a new shooting range only three miles away. In response, the Forest Service stated that "[a]lternatives analyzed are summarized in the Environmental Assessment." But the alternatives analyses in the Draft and Final EAs are practically the same. Commenters requested that the Forest Service consider an alternative that was not included in the Draft EA and in response the Forest Service referred them back to the same insufficient analysis which is virtually replicated in both the Draft and Final EAs. This circular reasoning amounts to simply ignoring conservation groups' (and others') comments.

As a second example, conservation groups questioned the project's consistency with the Wilderness Act. The Forest Service dismissed that concern in conclusory fashion simply stating that the project "is consistent with applicable laws and regulations" even though its analysis reaches the opposite conclusion.

Perhaps the most striking example is that the public raised numerous concerns about the effect of orienting a shooting range to fire towards the Appalachian Trail. The Draft EA sought to delay consideration of that concern until the agency prepared a site-specific Health and Safety Plan. Conservation groups pointed out that delaying that analysis until after the NEPA process was complete was insufficient to justify a finding of no significant impact — the agency would have no basis to conclude that the impact would be insignificant because it had not completed the analysis to know what the impact would be. As in *Foundation for North American Wild Sheep*,

this [ldquo]crucial factor[rdquo] was simply shunted aside with the same explanation used in the Draft EA: [ldquo]A facility specific Health and Safety Plan will be developed and is subject to USFS approval.[rdquo] The agency used this same approach to respond to concerns about lead contamination and earth moving [ndash] they too will be addressed in a future [ldquo]environmental stewardship plan.[rdquo] These responses are insufficient to meet the hard look standard and provide the basis for a FONSI.

None of the agency responses are [ldquo]convincing and objective.[rdquo] W. Watersheds Project, 320 F. Supp. 3d at 1139. In addressing the 60 public comments, the Forest Service simply recycled an assortment of approximately 15 boilerplate sentences which are cut-and-pasted into different arrangements. The sentences could have been written before receiving and without reading the comments. They fail to grapple with the issues raised by the public in any meaningful way.

In at least one instance, the agency did not respond directly to public comment but did make minor revisions to its EA based on concerns raised in public comments. However, this effort also falls short because while the agency may have changed its phrasing to respond to comments, the underlying analysis still indicates that the issue at the heart of the comments is unchanged.

Conservation groups pointed out that the project was inconsistent with Forest Plan standards for scenery in Prescription 7.A. In the Draft EA, the Forest Service acknowledged that [ldquo]during the time period in which the proposed range is in use, viewers will see two grassed ranges[hellip]and an access road that will not be consistent with the existing landscape SIO [scenic integrity objective][rdquo] applicable to the project site. The Final EA, however, simply eliminates this admission without explanation and without changing the project design, instead concluding that [ldquo]the objectives outlined in Prescription 7A and the SIO of High would be maintained[hellip].[rdquo] Final EA 43. It is not [ldquo]convincing and objective[rdquo] for the agency to reach one conclusion in its Draft EA but then reverse that conclusion in its Final EA to reach a more convenient outcome, even though its analysis did not meaningfully change. More to the point, the agency[rsquo]s new conclusion in its Final EA does not reflect its analysis. The report it cites for the new conclusion still

maintains that the range will be [ldquo]inconsistent with viewer expectations under the High [scenic integrity objective] and the Prescription 7a desired condition.[rdquo] Human Environment Report, 17.

In sum, the Forest Service has violated NEPA by failing to adequately respond to public comments that raised serious questions about the Draft EA[rsquo]s analysis of various [ldquo]critical factors.[rdquo] Because the Final EA and the Forest Service[rsquo]s formal response to comments either ignore these comments or [ldquo]shunt them aside with mere conclusory statements,[rdquo] the agency has violated NEPA.

G) The Forest Service[rsquo]s Decision to Not Prepare an EIS is Arbitrary and Unsupported by the Agency[rsquo]s Analysis

An EIS must be prepared for all [ldquo]major Federal actions significantly affecting the quality of the human environment.[rdquo] 42 U.S.C. [sect] 4332(C). [ldquo][A]n agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS.[rdquo] Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (citing 40 C.F.R. [sect] 1508.9). If the agency finds the impact of the project is not significant, it may forego the EIS and proceed with the project under a Finding of No Significant Impact. But [ldquo]an agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant.[rdquo] Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir. 1988) (quotations omitted).

[Idquo]When the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared.[rdquo] Nat[rsquo] Audubon Soc. v. Hoffman, 132 F.3d 7, 13 (2d Cir. 1997). [Idquo][A] party challenging the agency's decision not to prepare an EIS must show only that there is a substantial possibility that the action may have a significant impact on the environment, not that it clearly will have such an impact.[rdquo] Id. at 18.

As explained above, the Forest Service has failed to take a hard look at multiple environmental impacts associated with the project. See supra Section V.E. Because it has not taken a hard look, it has no basis to conclude that impacts will not be significant. The agency has not supplied a [Idquo]convincing statement of reasons why potential effects are insignificant.[rdquo] Save the Yaak, 840 F.2d at 717.25

To the contrary, the evidence before the agency indicates that [Idquo]there is a substantial possibility that the action may have a significant impact on the environment.[rdquo] Nat'l Audubon Soc., 132 F.3d at 18.

The [Idquo]significance[rdquo] of an impact is determined based on [Idquo]context[rdquo] and [Idquo]intensity.[rdquo] 40

C.F.R. [sect] 1508.27. [Idquo]Context[rdquo] refers to the setting of the proposed action. See id. [sect] 1508.27(a). [Idquo][I]n the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole.[rdquo] Id. Because this is a site-specific action, effects are evaluated locally.

25 We raised this issue on pages 5-8 of our Draft EA comments.

[Idquo]Intensity[rdquo] [Idquo]refers to the severity of impact.[rdquo] Id. [sect] 1508.27(b). The Council on Environmental Quality provided 10 factors to consider when analyzing the [Idquo]intensity[rdquo] of an action. Id. [Idquo]The presence of one such factor may be sufficient to deem the action significant.[rdquo] Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 373 F. Supp. 2d 1069, 1079 (E.D. Cal. 2004). The Forest Service addresses these factors in its FONSI but its conclusions for three factors are unsupported by the record, rendering its FONSI arbitrary.

First, when evaluating intensity, the Forest Service must consider the [Idquo][u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.[rdquo] 40

C.F.R. [sect] 1508.27(b)(3). The Forest Service dismissed this concern in its FONSI stating that there [Idquo]will be no significant effects on unique characteristics of the area, because there are no park lands, prime farmlands,

wetlands, wild and scenic rivers, or ecologically critical areas in the project area.[rdquo] FONSI, 7 (emphasis added). This misstates the appropriate standard in two ways. First, the regulation requires the Forest Service to consider the unique characteristics of the area and then provides examples of unique characteristics: i.e., [ldquo]such as[rdquo] [ndash] [ldquo]proximity to historic or cultural resources, park lands[hellip][rdquo] This list is not a limitation; it provides examples. But the Forest Service used it to conclude that there are no unique characteristics of the area because those provided as examples are not present. See id. (stating there will be no significant effects [ldquo]because there are no park lands[hellip][rdquo]) (emphasis added). The Forest Service must consider the unique characteristics of an area even if those characteristics are not the ones specifically listed in the regulation. Second, the consideration of the unique characteristics of the area is not limited to just [ldquo]the project area[rdquo] but must at least include areas directly or indirectly affected by the project.

There are at least four areas with unique characteristics that will be affected by this project [ndash] two Wilderness Areas, the Appalachian Trail, and the Russel-Brasstown Scenic Byway. The Final EA reveals that the project may have a significant effect on those areas. See supra Sections II, V. Specific to Wilderness, a [ldquo]heightened sensitivity to the environmental impact [of sound impacts] on adjacent wilderness . . . underscores the need for a more detailed analysis in an EIS.[rdquo] Izaak Walton, 516 F. Supp. 2d at 996. The Forest Service[rsquo]s finding that [ldquo]there will be no significant effects on unique characteristics of the area[rdquo] is unsupported.

Second, the Forest Service concluded that there [ldquo]will be no significant effects on public health and safety.[rdquo] FONSI, 7; see 40 C.F.R. [sect] 1508.27(b)(2). But the agency has not completed its assessment of the impact of the project on public safety, instead delaying that consideration until it prepares a site-specific safety and operations plan. There is no record to support the agency[rsquo]s statement that there will not be a significant effect on public safety, rendering that determination arbitrary.

Finally, the FONSI states that the proposed shooting range [ldquo]will not violate Federal, State, or local laws or requirements for the protection of the environment[rdquo]; that [ldquo][a]pplicable laws and regulations were considered in the EA[rdquo]; and that the action is consistent with the Forest

Plan. FONSI, 7; see 40 C.F.R. [sect] 1508.27(b)(10). Each portion of this statement contradicts the evidence before the agency. The EA indicates operation of the shooting range will violate the Wilderness Act. See supra Section II. Compliance with the Wilderness Act was never considered in the EA. And the EA establishes that the proposed action is inconsistent with Forest Plan standards in Prescription 7.A. See supra Section I. The Forest Service[rsquo]s findings to the contrary are arbitrary.

The Forest Service[rsquo]s application of the intensity factors for evaluating the significance of environmental impacts is arbitrary because it is unsupported by the evidence before the agency. As a result, its FONSI is arbitrary.

REQUEST FOR RELIEF

For the reasons stated, the Forest Service[rsquo]s EA, Decision Notice, and FONSI violate NEPA, NFMA, and the Wilderness Act. Accordingly, the Forest Service should withdraw this project. If the Forest Service nonetheless intends to proceed with this project, it must supplement its analysis to satisfy its legal obligations.

Date: September 23, 2019

Signed for Objectors

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