

July 25, 2022

Objection Reviewing Officer
U.S Forest Service, Intermountain Region
324 25th Street
Ogden, UT 84401
Via Email: objections-intermtn-regional-office@usda.gov

**Re: OBJECTION Pursuant to 36 C.F.R. § 218.8 to
Aspen Restoration Project, Project #57075, Ashley National Forest.**

To the Objection Reviewing Officer:

The Center for Biological Diversity (“the Center”) and WildEarth Guardians (“Guardians”), collectively “Objectors,” submit these objections to the Ashley National Forest’s draft Decision Notice (DN), Finding of No Significant Impact (FONSI) and final environmental assessment (Final EA) for the Ashley Aspen Project.

Project Objected To

Pursuant to 36 C.F.R. § 218.8(d)(4), the Objectors object to the following project:

Project: Aspen Restoration Project, Project #57075, Ashley National Forest, all units.

Responsible Official and Forest/Ranger District: Susan Eickhoff, Forest Supervisor, Ashley National Forest, all units (Daggett, Duchesne, Uintah, and Wasatch Counties, Utah, and Sweetwater County, Wyoming).

Timeliness

These objections are timely filed. Notice of the draft DN and FONSI was published in the Vernal Express (the newspaper of record) on June 8, 2022.¹

¹ See Public Notice, Vernal Express (June 8, 2022), available in project file and at <https://www.fs.usda.gov/project/?project=57075> (last viewed July 25, 2022). The 45th day after the June 8, 2022 notice, falls on Saturday, July 23, 2022. Pursuant to Forest Service objection regulations, 36 C.F.R. § 218.6(a), “All time periods are computed using calendar days, including Saturdays, Sundays, and Federal holidays. However, when the time period expires on a Saturday, Sunday, or Federal holiday, the time is extended to the end of the next Federal working day as stated in the legal notice (11:59 p.m. in the time zone of the receiving office for objections filed by electronic means such as email or facsimile).” Therefore, the filing deadline for this objection is Monday, July 25, 2022 at 11:59 PM, Mountain Time.

Lead Objector

As required by 36 C.F.R. § 218.8(d)(3), the Objectors designate the “Lead Objector” as follows:

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Interests and Participation of the Objectors

The Center for Biological Diversity is a 501(c)(3) nonprofit organization based in Tucson, Arizona, with staff located across the country including in Salt Lake City, Utah and Denver, Colorado, and has 1.7 million members and online activists. The Center is dedicated to protecting and restoring imperiled species and natural ecosystems. The Center uses science, policy, and law to advocate for the conservation and recovery of species on the brink of extinction and the habitats they need to survive. The Center has and continues to actively advocate for increased protections for species and their habitats across Utah. Center members and supporters use and enjoy the Ashley National Forest, and the lands and waters of the Aspen Restoration Project area for recreation, photography, nature study, and spiritual renewal.

The Center for Biological Diversity believes that the welfare of human beings is deeply linked to nature — to the existence in our world of a vast diversity of wild animals and plants. Because diversity has intrinsic value, and because its loss impoverishes society, we work to secure a future for all species, great and small, hovering on the brink of extinction. We do so through science, law and creative media, with a focus on protecting the lands, forests, waters and climate that species need to survive.

WildEarth Guardians is a 501(c)(3) nonprofit conservation organization headquartered in Santa Fe, NM with offices in several western states. With more than 190,600 members and supporters WildEarth Guardians work to protect and restore wildlife, wild places, wild rivers, and the health of the American West. WildEarth Guardians has a long history of advocating for and supporting Forest Service project that truly restores the ecological integrity of degraded watersheds in order to improve fish and wildlife habitat.

I. THE ASPEN PROJECT VIOLATES THE ROADLESS RULE, AND NEPA, IN ITS EVALUATION OF IMPACTS TO ROADLESS AREAS.²

The national Roadless Area Conservation Rule, adopted in 2001, generally prohibits the cutting, sale or removal of timber from National Forest Service inventoried roadless areas in Utah.³ The

² Objectors raised these issues in their July 9, 2021 comments on the draft EA at pages 25-35.

³ 36 C.F.R. § 294.13(a), published at 66 Fed. Reg. 3244 (Jan. 12, 2001) (“Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.”).

EA nonetheless asserts that the cutting, and removal and/or burning of an unspecified amount of timber from unspecified locations “would be consistent with the Roadless Rule, including the cutting, sale, or removal of generally small diameter timber and that the cutting, sale, or removal must maintain or improve one or more roadless characteristics,” citing 36 C.F.R. § 294.13(b)(1) of the Roadless Rule.⁴ The Ashley National Forest also prepared a “Roadless Evaluation” for the project, and submitted to the Regional Forester a “Roadless Concurrence” form.⁵

A. Proposed Actions within Roadless Areas

As the EA describes, the Aspen Project will involve the cutting, sale, or removal of trees in IRAs:

- Logging and burning treatments over a 10-20 year period across 147,858 acres of IRAs, or 83.2% of the project area.⁶
- No road construction.⁷
- “The use of heavy equipment within aspen stands located in roadless areas will be limited to 1000 feet from existing roads where slope allows (approximately 13,972 acres [or over 20 square miles] across 22 roadless areas).”⁸
- “[D]esign features included in this decision ensure that any mechanical treatment is limited to within 1000 ft of a road less than 40% slope, and only generally small diameter trees will be cut, sold, or removed in IRAs.”⁹ Despite this statement, we could locate nothing in the EA’s appendix for “BMP/Design Criteria” related to tree diameters, large or small trees, or roadless areas. The EA’s appendix containing “Activity Cards” describes actions that would likely involve the cutting, sale, or removal of generally large-diameter trees in IRAs.
 - The activity card for “Selective Cutting and Leave – Machinery or hand tools” identifies two types of logging: (1) “Tree thinning without product removal,” which would cut down “conifer trees within existing aspen stands to reduce

⁴ Aspen Project EA (June 2022) at 7.

⁵ See Ashley National Forest, Roadless Evaluation for Ashley National Forest Aspen Restoration Project (no date) (FS project file); S. Eickhoff, Forest Supervisor, Ashley National Forest, Region 4 Roadless Project Summary and Briefing Sheet, 2001 Roadless Rule, Ashley National Forest Aspen Restoration Project (Oct. 22, 2020) (FS project file).

⁶ Aspen Project EA (June 2022) at 7.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 16. See also Draft Decision Notice (June 2022) at 1 (“Any tool or method used to treat aspen within the IRAs would be consistent with the 2001 Inventoried Roadless Rule, including the cutting, sale, or removal of generally small diameter timber and that the cutting, sale, or removal must maintain or improve one or more roadless characteristics.”)

competition with aspen” with no discussion of the diameter or size of the tree; and (2) “Falling decadent aspen trees,” which would almost certainly involve cutting older (and therefore the largest) trees. The activity card makes clear that these treatments could occur in IRAs.¹⁰

- The activity card for “Selective Cutting Commercial Removal– Machinery or hand tools” states that this prescription would cut down “conifer trees within existing aspen stands to reduce competition with aspen and improve the vigor of residual aspen stand,” and that this activity could occur within 1,000 feet of roads on slopes of less than 40% within IRAs.¹¹ The activity card states that an “objective” of this treatment is to “[r]emove *larger* conifer fuel types within aspen stands.”¹²
- The activity card for “Selective Girdling of Conifers” states that this activity can occur within IRAs, including “outside of 1000 feet from existing roads,” and could include the “mechanical falling of smaller diameter conifer within aspen stands prior to burning.”¹³ However, the card identifies the “method” of implementation as “Hand girdl[ing] *large* diameter conifer.”¹⁴
- Prescribed fire treatments within IRAs could also require the creation of “hand lines” (presumably, fire lines created by hand tools) “wherever needed for containment lines if existing roads or trails or terrain features cannot be used to minimize ground disturbance.... [I]n general line will be 18-24 inch wide scrape to bare mineral soil.”¹⁵

B. Legal Framework: The Roadless Rule

The Roadless Rule provides that, in general, “[t]imber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System.”¹⁶ One exception to this general provision states:

timber may be cut, sold, or removed in inventoried roadless areas if the Responsible Official determines that one of the following circumstances exists. The cutting, sale, or removal of timber in these areas *is expected to be infrequent*.

¹⁰ *Id.* at 63.

¹¹ *Id.* at 64.

¹² *Id.* (emphasis added).

¹³ *Id.*

¹⁴ *Id.* (emphasis added). *See also* Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 61 (“larger trees may be girdled to reduce conifer competition”).

¹⁵ *Id.* at 63.

¹⁶ 36 C.F.R. § 294.13(a).

- (1) The cutting, sale, or removal of *generally small diameter timber* is needed for one of the following purposes and will *maintain or improve one or more of the roadless area characteristics* as defined in § 294.11.
 - (i) To improve threatened, endangered, proposed, or sensitive species habitat; or
 - (ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.¹⁷

The Roadless Rule defines roadless area characteristics as:

Resources or features that are often present in and characterize inventoried roadless areas, including:

- (1) High quality or undisturbed soil, water, and air;
- (2) Sources of public drinking water;
- (3) Diversity of plant and animal communities;
- (4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land;
- (5) Primitive, semi-primitive nonmotorized and semi-primitive motorized classes of dispersed recreation;
- (6) Reference landscapes;
- (7) Natural appearing landscapes with high scenic quality;
- (8) Traditional cultural properties and sacred sites; and
- (9) Other locally identified unique characteristics.¹⁸

The rule requires a highly site-specific analysis, given the regulation's emphasis on "*locally identified* unique characteristics."¹⁹

The Roadless Rule's preamble reinforces the need for such a site-specific analysis.

¹⁷ 36 C.F.R. § 294.13(b)(1) (emphasis added).

¹⁸ 36 C.F.R. § 294.11.

¹⁹ *Id.* (emphasis added).

Because of the great variation in stand characteristics between vegetation types in different areas, a description of what constitutes “generally small diameter timber” is not specifically included in this rule. Such determinations are best made through *project specific* or land and resource management plan *NEPA analyses*, as guided by ecological considerations such as those described below.

The intent of the rule is to limit the cutting, sale, or removal of timber *to those areas that have become overgrown with smaller diameter trees....*

[A]ll such *determinations of what constitutes “generally small diameter timber”* will consider how the cutting or removal of various size classes of trees would affect the potential for future development *of the stand*, and the characteristics and interrelationships of plant and animal communities associated with the site and the overall landscape. *Site productivity due to factors such as moisture and elevational gradients, site aspect, and soil types will be considered, as well as how such cutting or removal of various size classes of standing or down timber would mimic the role and legacies of natural disturbance regimes in providing the habitat patches, connectivity, and structural diversity critical to maintaining biological diversity.* In all cases, the cutting, sale, or removal of small diameter timber will be consistent with maintaining or improving one or more of the roadless area characteristics as defined in § 294.11.²⁰

Vegetative management would focus on removing generally small diameter trees while leaving the overstory trees intact. The cutting, sale, or removal of trees pursuant to 294.13(b)(1) *must be clearly shown through project level analysis to contribute to the ecological objectives described.* Such management activities are expected to be rare and to focus on small diameter trees.²¹

In adopting the Roadless Rule, the Forest Service thus anticipated that logging in IRAs under this specific exception would only occur following a project-level NEPA analysis that evaluated stand-specific conditions.

As the Ninth Circuit Court of Appeals has summarized the Roadless Rule’s requirements:

“[w]hether the [Forest] Service may harvest timber in an inventoried roadless area is a three-step inquiry.” *All. for the Wild Rockies v. Krueger*, 950 F. Supp. 2d 1196, 1214 (D. Mont. 2013), *aff’d sub nom. All. for the Wild Rockies v. Christensen*, 663 F. App’x 515 (9th Cir. 2016). “First, the timber to be harvested must be ‘generally small diameter.’ Second, the harvest must be needed for one of two listed purposes [as defined in 36 C.F.R. § 294.13]. Third, the harvest must

²⁰ Forest Service, Roadless Area Conservation Rule, 66 Fed. Reg. 3244, 3257 (Jan. 12, 2001) (emphasis added).

²¹ *Id.* at 3258 (emphasis added). See also *Los Padres ForestWatch v. United States Forest Serv.*, 25 F.4th 649, 656-57 (quoting same).

maintain or improve one or more of the roadless area characteristics as defined in § 294.11.” *Id.*²²

C. The Forest Service Fails to Address the “Frequency” of Roadless Area Tree Removal.

The Roadless Rule “expects” that tree removal in roadless areas for any purpose will “be infrequent.”²³ The Forest Service fails to address or limit the frequency of logging in roadless areas in the EA, the “Roadless Evaluation” or the “Roadless Concurrence” form. (Neither the words “frequent” or “infrequent” appears in the EA in the context of roadless area logging.) Tree removal – including commercial logging – over a period of up to 20 years across up to 147,858 acres of roadless lands is not “infrequent;” in fact, under the proposal, such logging could be constant and ubiquitous over a vast swath of roadless forest. At an absolute minimum, the Forest Service was required to explain how this project will not violate the Roadless Rule’s provision that logging should be “infrequent.”

The Forest Service’s only response to comments on this issue avoids the question of the frequency of tree removal, and asserts, disingenuously that “Logging is not a part of this proposed project therefore this comment is outside the scope of the proposed action.”²⁴ This ignores the fact that the Roadless Rule provision applies to tree “cut[ting]” and tree “remov[al],” which is this project’s purpose: the cutting and removal of conifer within aspen stands and the cutting and removal of some aspen trees across tens of thousands of acres.

The Forest Service has thus violated not only the Roadless Rule, and has also violated NEPA by failing to respond to comments.

Suggested Remedy: In any subsequent NEPA document undertaken to respond to this Objection, the Forest Service must address, among other things, the frequency of cutting and tree removal in roadless areas contemplated by the Ashley Aspen Project, and cannot approve the project if it concludes such tree removal and cutting would be frequent.

²² *Los Padres ForestWatch v. United States Forest Serv.*, 25 F.4th at 656.

²³ 36 C.F.R. § 294.13(b).

²⁴ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 61.

D. The Forest Service Fails to Ensure that Logging Will Be Limited to “Generally Small Diameter Timber.”

The EA contends that the Aspen Project can authorize logging within IRAs under the Roadless Rule exception for logging of “generally small diameter timber.”²⁵ But the EA does not demonstrate that the project will meet the conditions of this exception.²⁶

The Department of Agriculture in adopting the Roadless Rule explained that “[t]he intent of the rule is to limit the cutting, sale, or removal of timber *to those areas that have become overgrown with smaller diameter trees.*”²⁷ That is not what the Aspen Project would do. Nowhere does the EA assert that the aspen stands are thick with smaller trees. In fact, the EA alleges the opposite – that there are too many *large and old aspen*, and not enough small, young aspen in seral stands:

In the persistent aspen, where mature stands are declining, we are typically seeing successful regeneration. *However, without active treatments in some of these stands, the skew towards a landscape with mature and old stands would continue for long time periods.*

In the seral aspen, *there is an abundance of late seral conditions* and moderate to extensive colonization by conifers. *We are seeing little recruitment of new aspen in these stands* (Figure 2).²⁸

Thus, in both persistent and seral aspen types, the Forest Service intends to treat stands with mature, older, and late seral conditions – large and old trees – in order to make way for the growth of new (small) trees. The EA contains a graph showing that the vast majority of aspen and conifer trees in the project area – those identified for cutting and/or removal – are not small; rather, more than 80% of them fall into the largest size classes – 8” dbh or greater.²⁹ The project’s intent is to remove encroaching conifers (generally large trees) and “decadent” aspen (generally large trees). Thus, the entire purpose of the project appears to be to remove large, not small, trees, contradicting the Roadless Rule.

The specific types of logging the EA identifies appear to target larger trees, or contain no limits on the size of tree to be logged. The activity card for “Selective Cutting and Leave – Machinery

²⁵ Aspen Project EA (June 2022) at 7, 16; 36 C.F.R. § 294.13(b)(1).

²⁶ The Forest Service alleges that “[t]he proposed project is consistent with the 2001 Inventoried Roadless Rule.” *See, e.g.,* Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 33. But merely saying so does not make it true.

²⁷ Forest Service, Roadless Area Conservation Rule, 66 Fed. Reg. 3244, 3257 (Jan. 12, 2001) (emphasis added). *See also Los Padres ForestWatch v. United States Forest Serv.*, 25 F.4th at 656 (quoting same).

²⁸ Aspen Project EA (June 2022) at 10 (emphasis added). *See also* Aspen Project Draft EA (June 2021) at 7 (stating that “New aspen is limited in” seral aspen stands”).

²⁹ Aspen Project Draft EA (June 2021) at Figure 2 (showing the vast majority of seral aspen stands with a preponderance of trees 8” dbh and greater).

or hand tools” identifies two types of logging. “Tree thinning without product removal” would cut down “conifer trees within existing aspen stands to reduce competition with aspen” with no discussion of the diameter or size of the tree.³⁰ But if logging is necessary to remove conifers as competition, these are likely to be larger trees. “Falling decadent aspen trees,” the second type of logging specific under “machinery and hand tool removal” would likely involve cutting older (and therefore the largest) trees.³¹

Further, “Selective Cutting Commercial Removal– Machinery or hand tools” will involve the cutting, sale, or removal of “conifer trees within existing aspen stands to reduce competition with aspen and improve the vigor of residual aspen stand,” an activity that could occur within 1,000 feet of roads on slopes of less than 40% within IRAs.³² The stated “objective” of this treatment is to “[r]emove *larger* conifer fuel types within aspen stands.”³³ Targeting “larger” trees is the opposite of logging “generally small diameter” trees. The Forest Service admits that “Commercial-size trees within 1,000 feet of existing roads and on slopes of less than 40 percent may be sold or removed,” emphasizing that the largest (commercial-sized) trees are likely to be logged.³⁴ The agency also alleges that there is a “high likelihood” that the project will result in the removal of “commercial products and timber byproducts on acres outside of roadless and in roadless within 1,000 feet of existing roads, including the sale of firewood and use of timber for miscellaneous products (furniture).”³⁵

“Selective Girdling of Conifers,” which can occur within IRAs, including “outside of 1000 feet from existing roads,” could include the “mechanical falling of *smaller* diameter conifer within aspen stands prior to burning.”³⁶ However, the activity card identifies the “method” of implementation as “[h]and girdl[ing] *large* diameter conifer.”³⁷ The agency further affirms that “larger trees may be girdled to reduce conifer competition.”³⁸ Given the conflicting statements in the EA and elsewhere, it is impossible to conclude that girdling large diameter conifers will result in the cutting of “generally small diameter” timber. And although this discrepancy was pointed out in comments on the initial EA, the Forest Service declined to respond to the comment (a violation of NEPA) or to reconcile the inconsistency.

The EA’s “BMP/Design Criteria Tables” also describe logging treatments in ways that would appear to violate the Roadless Rule. The tables describe one treatment as involving the

³⁰ Aspen Project EA (June 2022) at 62.

³¹ *Id.* at 62.

³² *Id.* at 64.

³³ *Id.* (emphasis added).

³⁴ Region 4 Roadless Project Summary (Oct. 22, 2020) at 2.

³⁵ Region 4 Roadless Project Summary (Oct. 22, 2020) at 6.

³⁶ Aspen Project EA (June 2022) at 64 (emphasis added).

³⁷ *Id.* (emphasis added).

³⁸ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 61.

“[s]electively cut or remove *all* conifers, aspen or both using hand crews with chainsaws.”³⁹ Another treatment would “[s]electively cut or remove *all* conifers, aspen or both using ground-based mechanized equipment.”⁴⁰ While these table headers may be inartful shorthand, they contain no indication that cutting or removal will be limited to small diameter timber. Similarly, one of the project’s stated purposes is to “[r]educ[e] conifers in aspen-dominated stands.”⁴¹ It does not aim to reduce “generally small diameter conifers,” but potentially any and all conifers in aspen stands, including and especially the largest ones. The fact that “[c]ut material associated with mechanical treatments may be ... [r]emoved, potentially as a commercial sale (e.g. ... post and pole, ... and sawlogs),” indicates that larger trees will be targeted for removal, because larger timber has greater commercial value.⁴²

The Forest Service could have clarified the issue by providing explicit BMPs or design features that limit the size of trees to be removed in IRAs. Despite comments suggesting this approach, the EA failed to do so, without explanation. The few diameter specifications contained in BMPs or Design Features relate to the retention of snags in goshawk habitat and the girth of downed timber.⁴³

Further, the failure to make clear what constitutes a small diameter tree in a specific stand also violated the Roadless Rule. As noted above, the preamble to the Rule states:

*determinations of what constitutes “generally small diameter timber” will consider how the cutting or removal of various size classes of trees would affect the potential for future development of the stand, and the characteristics and interrelationships of plant and animal communities associated with the site and the overall landscape.*⁴⁴

Here, the Ashley National Forest nowhere “determines” what constitutes a small diameter tree. Nor does the EA address any of the factors to make such a determination, putting off the evaluation of which trees will be logged— and determination of compliance with the Roadless Rule – until after the NEPA process is done.

The Forest Service alleges that “[d]esign criteria included in this EA would ensure that only generally small diameter trees will be cut, sold, or removed in IRAs; larger trees may be girdled

³⁹ *Id.* at 29-32 (emphasis added).

⁴⁰ *Id.* at 33-37 (emphasis added). Elsewhere, the EA defines this treatment as “[s]electively cut[ting] conifers, aspen, or both.” *Id.* at 8.

⁴¹ *Id.* at 6.

⁴² *Id.* at 8. *See also* Region 4 Roadless Project Summary (Oct. 22, 2020) at 4 (same).

⁴³ *See id.* at 28, 31, 36, 38, 41, 43 (setting diameter limits on snag retention and downed log woody debris to benefit wildlife or soils).

⁴⁴ Forest Service, Roadless Area Conservation Rule, 66 Fed. Reg. 3244, 3258 (Jan. 12, 2001) (emphasis added).

to reduce conifer competition.”⁴⁵ The Forest Service never identifies what design criteria the agency is referring to, or how those measures ensure that generally small diameter trees will be cut when the vast majority of aspen and conifer are over 7 inches in diameter. One design element, modified for the 2022 EA, does state that the agency should “leave a minimum of 2-5 TPA [trees per acre] of the largest aspen,” but only if the treatment type is “coppice or group selection.”⁴⁶ Further, even if the agency protected the 2-5 largest trees per acre, that does not protect other trees, which may be large diameter though not the largest. Thus, none of these BMPs ensures the removal of generally small diameter trees. Failing to include design elements that limit logging to generally small diameter trees violates the Roadless Rule.⁴⁷

The Forest Service may be tempted to argue that the selective logging and leaving of trees or the girdling of conifers are not prohibited by the Roadless Rule because neither involves the “cutting, sale, or removal of timber,” that is a commercial product for sale. The Roadless Rule however generally prohibits the “cutting” of trees. Further, it would be an unreasonable interpretation of the Rule’s plain language to conclude that the general prohibition on “cutting” of timber nonetheless authorized the killing of trees by girdling across thousands of acres. The point of the Roadless Rule is to leave trees alive and standing as it prohibits the “cutting, sale, or removal” of trees. The Roadless Rule plainly bans cutting trees and leaving them on site. Girdling them and leaving them to fall and decompose amounts to the same thing.

The targeting of old, large conifers in aspen stands not only conflicts with the Roadless Rule, it also appears to contradict Forest Service guidance for restoration of aspen in Utah, which states: “Old-growth conifer trees which predate fire suppression activities and probably coexisted in or near the aspen stand during a more active fire regime are likely to resist fire when retained. *Consideration should be given for retaining these legacy trees.*”⁴⁸ There is no evidence that the Forest Service has given any consideration to identifying or retaining such legacy trees, or that it has disclosed the effects of removing or killing them via girdling.

The Forest Service has also violated NEPA by: (1) failing to respond to these comments; and (2) failing to explain its decision to ignore the best available science concerning the impacts of legacy conifers on fire resistance.

⁴⁵ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 60.

⁴⁶ *Id.* at 31, 36.

⁴⁷ If it is the Forest Service’s position that specific design elements ensure that tree removal and cutting will be limited to “generally small diameter trees,” we respectfully request that any subsequently prepared NEPA document explain precisely which elements the agency refers to, and how those would result in the removal or cutting of only small diameter trees.

⁴⁸ See Guidelines for aspen restoration in Utah, GTR-390 (Ex. 18 to the Center’s Nov. 24, 2019 scoping comments) at 30 (emphasis added). Forest Service regulations permit the incorporation by reference of “[c]omments previously provided to the Forest Service by the objector during public involvement opportunities for the proposed project.” 36 C.F.R. § 218.8(b)(4).

As noted above, the Roadless Rule preamble indicates that before the agency can use the exception permitting logging within IRAs, it must undertake a site-specific analysis to determine the nature of individual stands to be logged. This the EA and the Roadless Evaluation fail to do. The EA makes clear that it will not undertake a site-specific review to identify the what, where, and how of treatments within individual stands in roadless areas *until long after the NEPA review is complete, and only with an ersatz NEPA process*. In fact, the EA makes clear that the Forest Service will approve logging in roadless areas now, and decide the nature of that logging later, precisely the opposite of what both NEPA and the Roadless Rule provide. The EA states of roadless area logging: “A site specific assessment *would* determine the need for treatment in each stand,” making clear that that assessment has not yet occurred, and may not for years in the future.⁴⁹

The Roadless Evaluation published with the EA provides some data about the *values* found within each roadless area in which logging may occur. But it provides almost no information about the precise location, type, (seral? persistent?) or nature of individual aspen stands as the Roadless Rule requires. At best, the Roadless Evaluation indicates the maximum acreage that could be treated mechanically and with prescribed fire for each area, but fails to disclose which type of mechanical treatment would be applied, or the nature and extent of conifer girdling.⁵⁰ This lack of specificity concerning treatments, and the Forest Service’s admission that treatments won’t be designed until after the NEPA process is complete, contradict the agency’s contention that “[t]he Roadless Evaluation ... states specific treatment in each potential IRA.”⁵¹

Nor does the EA provides information about each stand that may be treated or what types of treatment may occur in each stand. Without this information, neither the Forest Service nor the public can be assured that logging will cut or remove generally small diameter timber, or even what constitutes small diameter timber in each stand. Approving this project without that required information violates the Roadless Rule. And because it omits information about the project’s site-specific impacts to roadless areas, the EA also violates NEPA.

A recent federal appeals court decision demonstrates that this project is likely to be found to violate the Roadless Rule. In *Los Padres ForestWatch v. United States Forest Serv.*, 25 F.4th 649 (9th Cir. 2022), the Forest Service approved the Tecuya Ridge logging project in a roadless area, setting a limit of logging trees less than 21 inches diameter at breast height (dbh), arguing that trees of such width constituted “generally small diameter timber.”⁵² The court found that the Forest Service failed to support its conclusion that a 21” dbh tree constituted a “small diameter” tree, noting among other things that “the Forest Service did not attempt to articulate this

⁴⁹ See, e.g., Aspen Project EA (June 2022) at 6.

⁵⁰ See, e.g., Ashley National Forest, Roadless Evaluation for Ashley National Forest Aspen Restoration Project (no date), at 18 (for Roadless Area 0401001, stating “Treatment of aspen in this roadless area could result in up to 6.5 acres (.06% of roadless area) of mechanical treatment and 86.5 acres (0.7% of roadless area) of prescribed fire with mixed burn severities.”).

⁵¹ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 61.

⁵² *Los Padres ForestWatch*, 25 F.4th at 656-57.

explanation or, indeed, provide any information at all on the average dbh of the trees located within the ... Project area.”⁵³ The court therefore found the agency violated the Roadless Rule and remanded the project back to the Forest Service for further explanation as to what constitutes a small diameter tree.⁵⁴

Here, the Ashley National Forest has done *even less* than the Forest Service in *Los Padres ForestWatch*. Neither the Aspen Restoration Project EA nor any of the Ashley National Forest’s supporting documents purport to define what constitutes a “small diameter” tree for any of the stands within the massive project area, let alone within individual roadless areas. Nor does the Forest Service explain how any of the project’s provisions will limit logging to small trees, whatever those might be, while some of those documents indicate just the opposite: that large trees will be targeted for logging. The Forest Service nowhere alleges that the stands proposed for logging are “overstocked” with small diameter trees that must be thinned. And the Forest Service provides no stand-level data at all for the project (including roadless areas) to allow the public or the decision-maker to discern the size of trees in stands in the project area, and the size of trees to be removed. No such data will be gathered until long after the Decision Notice is signed. Thus, as with the project at issue in the *Los Padres ForestWatch* case, a reviewing court is likely to set aside the Aspen Restoration Project as in violation of the Roadless Rule.

Further, because the Aspen Restoration Project is likely to violate the Roadless Rule, the Forest Service must prepare a full environmental impact statement (EIS). Council on Environmental Quality regulations implementing NEPA identify numerous factors that may require an agency to find that an action is likely to have a significant impact, and therefore requires preparation of an EIS. One of those is “[w]hether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment.”⁵⁵ We note that in the draft FONSI’s evaluation of this significance factor, the Forest Service fails to mention compliance (or lack thereof) with the Roadless Rule, though it mentions other laws.⁵⁶

Suggested Remedy: The Forest Service must ensure that the Aspen Project complies with the Roadless Rule’s mandate that cutting and tree removal may only occur where it involves “generally small diameter timber” by:

- defining what constitutes small diameter timber based on a stand specific analysis of areas proposed for treatment;
- generally limiting tree removal and cutting (including girdling) to trees meeting the definition of small diameter;

⁵³ *Id.* at 658.

⁵⁴ *Id.* at 659.

⁵⁵ 40 C.F.R. § 1508.27(b)(10). *See also* Forest Service Handbook 1909.15, Ch. 15 (agency NEPA handbook quoting the CEQ regulations).

⁵⁶ *See* Aspen Project EA (June 2022) at 20-21.

- demonstrating whether and how stands proposed for logging are “overstocked” with small diameter trees; and
- explaining whether and how the agency’s treatments that are aimed at removing large trees comply with the Roadless Rule.

The Forest Service must include this analysis in any subsequently prepared NEPA document, preferably an EIS. If it cannot make the showing required above, it must cancel the project’s timber cutting and removal in roadless areas.

E. The Forest Service Fails to Ensure that Logging Will Maintain or Improve One or More Roadless Area Characteristic.

The exception the Forest Service seeks to invoke to allow logging in IRAs requires that logging “will maintain or improve one or more of the roadless area characteristics.”⁵⁷ The EA asserts that the Forest Service would only undertake IRA logging that would “maintain or improve one or more roadless characteristics,”⁵⁸ but it makes this assertion without evidence, and does not explain how the proposed action would meet this test.

Virtually all roadless area characteristics identified in the Roadless Rule could be degraded by logging, the clearing of fire lines, the use of heavy equipment and skid trails, and pile burning. Further, the analysis outlined above requires a highly site-specific analysis, given the regulation’s emphasis on “*locally identified* unique characteristics.”⁵⁹ Thus, the only way to determine whether a project may comply with these provisions is for the Forest Service to undertake a site-specific analysis that maps the roadless areas at issue, reviews the values of each roadless area threatened by a specific project, and evaluates the impacts of proposed actions. Because the Aspen Project would approve numerous, indeterminate logging actions across numerous roadless areas over decades, the Forest Service cannot ensure compliance with the Roadless Rule exception.

Further, the proposed logging projects will likely degrade, or at least are unlikely to “maintain or improve,” most of the roadless area characteristics. For example, the use of heavy equipment and the use of pile burning, which can scarify soil, is incompatible with maintaining or improving “[h]igh quality or undisturbed soil, water, and air.”⁶⁰ The fact that the BMP/Design Criteria tables include pages of mitigation measures to attempt to prevent damage to hydrology and soils indicates the potential for such impacts.⁶¹ Further, the EA does not address the certain damage caused by logging, mechanized equipment (presumably, motor vehicles operating off-road), fire-line clearing, and pile burning in roadless areas.

⁵⁷ 36 C.F.R. § 294.13(b)(1).

⁵⁸ Aspen Project EA (June 2022) at 7.

⁵⁹ 36 C.F.R. § 294.11.

⁶⁰ *Id.*

⁶¹ Aspen Project EA at 26-46 (Appendix A).

The undated “Roadless Evaluation” attempts to address the values of roadless lands at stake that could be logged or burned for the Aspen Project, but that document fails to adequately disclose or characterize the project’s potential impacts. First, the Roadless Evaluation contains incorrect or superseded statements that any subsequent analysis should correct. For example, the Roadless Evaluation refers repeatedly to various sections of the “CE form,” citing to the proposed categorical exclusion, which the agency has since abandoned.⁶² The Evaluation also claims for 17 roadless areas that the project will improve habitat for wildlife because “aspen makes up the majority of this roadless area” when the agency’s own data show that characterization to be false.⁶³ Despite comments on the draft EA specifically raising these errors, the Forest Service continues to rely on the flawed Roadless Evaluation, and made no attempt to correct or update it.

The Roadless Evaluation alleges that the “untrammelled” characteristic of each roadless area will not suffer from the use of heavy equipment (with its noise, soil compaction, disturbance of wildlife, etc.) “[d]ue to the relatively small percentage of the area being treated mechanically.”⁶⁴ The Forest Service reaches the conclusion that the area degraded is “relatively small,” despite the fact that the total area degraded by this activity will constitute *more than 20 square miles of roadless lands*, and despite the fact that for at least one IRA, more than 1 in 7 IRA acres will be degraded by heavy mechanical use.⁶⁵

The Roadless Evaluation states for each IRA that logging and burning would degrade scenic values for 3 to 5 years, and fencing “could detract from scenic values for up to 10 years.”⁶⁶ The Forest Service does not explain why degrading scenic values for this significant length of time would not constitute a significant impact, requiring preparation of an EIS. Similarly, the Evaluation admits that “[m]echanical treatments would disturb soils and remove vegetation while prescribed fire would impart a charred appearance on the land and also remove

⁶² See Roadless Evaluation at 4, 5, 7, 11, 15, 20, 23, 24, 26, 27, 29, 30, 32, 33, 35, 36, 40, 43, 44, 47, 52, 53, 58, 59, 62, 63, 65, 66, 69, 70, 74, 77, 78, 82, 83, 86, 87, 90, 91, 95 (citing to various sections of “the CE form”).

⁶³ See *id.* at 26 (for IRA number 0401029 alleging that “Since aspen makes up the majority of this roadless area[,] the treatment of aspen stands now would help to maintain the diversity of tree species into the future” although statistics in the Roadless Concurrence, at 1-2, show that aspen makes up less than half of the area); *id.* at 30 (same for IRA number 0401006); *id.* at 33 (same for IRA number 0401034); *id.* at 36 (same for IRA number 0401004); *id.* at 40 (same for IRA number 0401002); *id.* at 44 (same for IRA number 0401007); *id.* at 47 (same for IRA number 0401005); *id.* at 53 (same for IRA number 0419020); *id.* at 63 (same for IRA number 0401016); *id.* at 66 (same for IRA number 0401015); *id.* at 70 (same for IRA number 0401033); *id.* at 74 (same for IRA number 0401008); *id.* at 78 (same for IRA number 0401013); *id.* at 82 (same for IRA number 0401012); *id.* at 87 (same for IRA number 0401011); *id.* at 91 (same for IRA number 0401010); *id.* at 95 (same for IRA number 0401009).

⁶⁴ See, e.g., Roadless Evaluation at 25.

⁶⁵ See *id.* at 2 (indicating that 15.8% of IRA number 0419022 will be impacted by mechanical treatments).

⁶⁶ See, e.g., *id.* at 25.

vegetation,”⁶⁷ which would undermine the maintenance and improvement of the roadless values of soil, air, and water.

The Roadless Evaluation also fails to address the impacts of fire line construction, which could impact scenic and natural values. Such construction involves the creation of an area up to two feet wide scraped down “to bare mineral soil.”⁶⁸ The Forest Service does not disclose how many miles (or hundreds of miles) of such swaths of denuded land could be built across each IRA. By failing to address comments on the Draft EA raising this issue, the Forest Service also violates NEPA.

Unless and until the Forest Service undertakes a specific analysis of *each specific treatment* within each specific roadless area, it cannot ensure that it will comply with the Roadless Rule. Because neither the EA nor the Roadless Evaluation provides such an analysis, and because the Forest Service makes clear that it will refuse to identify specific treatments until after it has approved the project, the Forest Service will violate the Roadless Rule and NEPA if it proceeds with this project as proposed.

The Forest Service may undertake logging project under the chosen Roadless Rule exception only if the project will: (1) “improve threatened, endangered, proposed, or sensitive species habitat; or ... [2] maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.”⁶⁹ The EA does not appear to allege that logging an undefined amount within roadless areas over an indeterminate length of time “will improve threatened, endangered, proposed, or sensitive species habitat;” indeed, the EA asserts that there will be “no effect” on such species rather than any improvement.⁷⁰ If the agency intended to invoke this reason for the proposed logging, it should have explicitly stated so and provided evidence to support its contentions. The agency failed to do so.

The EA, Roadless Evaluation, and Roadless Concurrence all fail to demonstrate that its undefined treatments will “maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.”⁷¹ The Forest Service does not disclose what an “uncharacteristic wildfire” would entail in such an ecosystem, nor does it analyze the “range of variability that would be expected to occur under natural disturbance regimes of the current climatic period” for any or all of the roadless areas at issue. Because the Forest Service fails to provide the necessary information, it cannot avail itself of this exception to the Roadless Rule.

⁶⁷ See, e.g., *id.* at 4.

⁶⁸ *Id.* at 52.

⁶⁹ 36 C.F.R. § 294.13(b)(1).

⁷⁰ Aspen Project EA (June 2022) at 21.

⁷¹ 36 C.F.R. § 294.13(b)(1).

The agency's response to comments does assert that:

Treatment of aspen stands will maintain and/or enhance the overall health and extent of aspen communities on the Forest and in IRAs. Maintenance and/or enhancement of a diverse composition of native tree species resulting from aspen treatments will maintain and/or improve the naturalness and unique and special features that are considered roadless characteristics.⁷²

However, the EA fails to provide data, science, or studies to support its conclusions. And even if the proposed action could maintain or advance the overall health of aspen communities, the agency fails to demonstrate that tree cutting or removal is necessary to do so.

In addition to these systemic flaws, the Forest Service fails to demonstrate how its use of roads within IRAs will maintain or improve roadless area characteristics. In fact, it is unclear if the proposed road use even complies with the regulatory requirements. Under the Roadless Rule, “[a] road may not be constructed or reconstructed in inventoried roadless areas of the National Forest System” unless a narrow set of exceptions apply.⁷³ The Rule defines both road “maintenance,” which is generally permitted, and “road reconstruction” which is not:

Road maintenance. The ongoing upkeep of a road necessary to retain or restore the road to the approved road management objective.

Road reconstruction. Activity that results in improvement or realignment of an existing classified road defined as follows:

(1) *Road improvement.* Activity that results in an increase of an existing road's traffic service level, expansion of its capacity, or a change in its original design function.

(2) *Road realignment.* Activity that results in a new location of an existing road or portions of an existing road, and treatment of the old roadway.⁷⁴

The Forest Service fails to demonstrate that the proposed road use will not require some treatment to facilitate access, or that such treatment meets the definition of “road maintenance” permitted by the Roadless Rule, rather than “road reconstruction” or construction barred by the Rule.

⁷² Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 60. *See also id.* at 61 (“The long term effects are beneficial to an array of wildlife species. The treatments can improve habitat, provide structural diversity within the aspen stands, and provide a diversity of habitat for a diversity of wildlife.”); *id.* at 62 (“The mechanical and prescribed treatments would create areas of early seral plant species that would increase plant size, age, and species diversity thereby improving animal diversity as well.”).

⁷³ 36 C.F.R. § 294.12(a)

⁷⁴ 36 C.F.R. § 294.11.

Site-specific information, including current on-the-ground route condition, is required to ensure that any use or alteration of travel routes within the project area complies with the Roadless Rule. This is underscored by a 2020 U.S. District Court decision from Montana holding that the Helena-Lewis and Clark National Forest violated the Roadless Rule by failing to ensure that existing routes used for timber harvest in IRAs would not be effectively “reconstructed” under the guise of “maintenance.”⁷⁵ That ruling requires the Forest Service to provide detailed, on-the-ground information concerning road use and “maintenance” to ensure compliance with the Roadless Rule, including but not limited to: which roads will be used, their current condition, and what, if any, physical road work will be necessary to facilitate access for project implementation. The Roadless Rule qualifies road maintenance to mean “ongoing upkeep,” and the Forest Service fails to address whether the routes within the IRA have had “ongoing” maintenance, and, if so, how frequently. The Forest Service fails to disclose the Road Management Objectives for each of the roads within IRAs, which would include a maintenance schedule, the current operational ML and the objective ML. If the roads proposed for use have missed their scheduled maintenance, the agency cannot consider any necessary road treatments as “ongoing upkeep.” Finally, should road maintenance be necessary for project implementation, the Forest Service must demonstrate how such actions maintain or improve roadless area characteristics.

Roadless areas are beloved and staunchly protected by forest advocates because they include the last remnants of undisturbed forests, pure water, critical wildlife habitat and quiet recreation. The Forest Service should tread particularly carefully when proposing management in these areas. This is not to say that the Forest Service cannot demonstrate that some treatments in some roadless areas may be necessary and helpful. But once again the agency has failed to do so here by ignoring the plain language of the law and failing to respond to agency comments or address contrary science.

Suggested Remedy: The Forest Service must, in a subsequently prepared NEPA document, explain in detail whether and how proposed logging in inventoried roadless areas will “maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.” If it cannot do so, the agency must cancel the project’s cutting and tree removal in roadless areas. The agency must also respond to comments.

Further, the Forest Service must clarify that only National Forest System roads will be utilized to implement this project, and only where such roads have received ongoing maintenance and are passable by motor vehicles.

⁷⁵ *Helena Hunters & Anglers Ass’n v. Marten*, 470 F. Supp. 3d 1151, 1169-72 (D. Mont. 2020).

II. THE EA FOR THE ASPEN PROJECT VIOLATES NEPA BECAUSE IT FAILS TO ANALYZE SITE-SPECIFIC IMPACTS, OR DESIGN A SITE-SPECIFIC PROJECT.⁷⁶

A. NEPA Requires Agencies to Take a Hard Look at Site-Specific Impacts.⁷⁷

NEPA is “our basic national charter for protection of the environment.”⁷⁸ In enacting NEPA, Congress recognized the “profound impact” of human activities, including “resource exploitation,” on the environment and declared a national policy “to create and maintain conditions under which man and nature can exist in productive harmony.”⁷⁹

The statute has two fundamental two goals: “(1) to ensure that the agency will have detailed information on significant environmental impacts when it makes decisions; and (2) to guarantee that this information will be available to a larger audience.”⁸⁰ “NEPA promotes its sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of proposed agency action.”⁸¹ Stated more directly, NEPA’s “‘action-forcing’ procedures ... require the [Forest Service] to take a ‘hard look’ at environmental consequences”⁸² *before* the agency approves an action. “By so focusing agency attention, NEPA ensures that the agency will not act on

⁷⁶ Objectors raised this issue in their July 9, 2021 comments on the draft EA at pages 3-9.

⁷⁷ This action is governed by the Council on Environmental Quality’s (CEQ) 1978 regulations. The CEQ issued a final rulemaking in July 2020 fundamentally rewriting those regulations, but the new rules apply only “to any NEPA process begun after September 14, 2020,” or where the agency has chosen to “apply the regulations in this subchapter to ongoing activities.” 40 C.F.R. § 1506.13 (2020). Because scoping on the Aspen Project began in 2019, and the EA nowhere indicates that the Forest Service chose to apply the 2020 rules to this project, the 1978 rules apply. Further, the EA itself relies upon the 1978 regulations, citing them twice. *See* Aspen Project EA (June 2022) at 9 (citing 40 C.F.R. § 1502.21 (1978), which relates to incorporation by reference); *id.* at 19 (citing 40 C.F.R. § 1508.13 (1978) concerning the definition of a FONSI).

⁷⁸ *Center for Biological Diversity v. United States Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (quoting 40 C.F.R. § 1500.1).

⁷⁹ 42 U.S.C. § 4331(a).

⁸⁰ *Env’tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1184 (N.D. Cal. 2004) (quoting *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002)); *see also Earth Island v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003) (“NEPA requires that a federal agency ‘consider every significant aspect of the environmental impact of a proposed action ... [and] inform the public that it has indeed considered environmental concerns in its decision-making process.’”).

⁸¹ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321).

⁸² *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)).

incomplete information, only to regret its decision after it is too late to correct.”⁸³ To ensure that the agency has taken the required “hard look,” courts hold that the agency must utilize “public comment and the best available scientific information.”⁸⁴

NEPA’s review obligations are more stringent and detailed at the project level, or “implementation stage,” given the nature of “individual site specific projects.”⁸⁵ “[G]eneral statements about possible effects and some risk do not constitute a hard look, absent a justification regarding why more definitive information could not be provided.”⁸⁶

NEPA requires site-specificity to fulfill two basic purposes: 1) to ensure agencies are making informed decisions prior to acting; and 2) to ensure the public is given a meaningful opportunity to participate in those decision-making processes.⁸⁷ Federal courts apply these touchstone criteria when evaluating whether a NEPA document is adequately site-specific.⁸⁸

Analyzing and disclosing site-specific impacts is critical because where (and when and how) activities occur on a landscape strongly determines the nature of the impact. As the Tenth Circuit Court of Appeals has explained, the actual “location of development greatly influences the likelihood and extent of habitat preservation. Disturbances on the same total surface area may produce wildly different impacts on plants and wildlife depending on the amount of contiguous habitat between them.”⁸⁹ The Court used the example of “building a dirt road along the edge of an ecosystem” and “building a four-lane highway straight down the middle” to explain how those activities may have similar types of impacts, but the extent of those impacts – in particular

⁸³ *Marsh*, 490 U.S. at 371 (citation omitted).

⁸⁴ *Biodiversity Cons. Alliance v. Jiron*, 762 F.3d 1036, 1086 (10th Cir. 2014) (internal citation omitted).

⁸⁵ *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 923 n.2 (9th Cir. 1999); *see also Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800-01 (9th Cir. 2003); *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 718-19 (10th Cir. 2009) (requiring site-specific NEPA analysis when no future NEPA process would occur); *Colo. Envtl. Coal. v. Ofc. of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1209-10 (D. Colo. 2011) (requiring site-specific NEPA analysis even when future NEPA would occur because “environmental impacts were reasonably foreseeable”).

⁸⁶ *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (citation omitted); *see also Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (holding the Forest Service’s failure to discuss the importance of maintaining a biological corridor violated NEPA, explaining that “[m]erely disclosing the existence of a biological corridor is inadequate” and that the agency must “meaningfully substantiate [its] finding”).

⁸⁷ *Stein v. Barton*, 740 F. Supp. 743, 749 (D. Alaska 1990).

⁸⁸ *See WildEarth Guardians*, 790 F.3d at 921-25 (holding EIS inadequate for failure to disclose the location of moose range); *Or. Nat. Desert Ass’n v. Rose*, 2019 WL 1855419 (9th Cir. 2019) (holding environmental analysis violated NEPA by failing to establish “the physical condition of [roads and trails] and authorizing activity without assessing the actual baseline conditions”).

⁸⁹ *New Mexico ex rel. Richardson*, 565 F.3d at 706.

on habitat disturbance – is different.⁹⁰ Indeed, “location, not merely total surface disturbance, affects habitat fragmentation,”⁹¹ and therefore location data is critical to the site-specific analysis NEPA requires. Merely disclosing the existence of particular geographic or biological features is inadequate – agencies must discuss their importance and substantiate their findings as to the impacts.⁹²

Courts in the Ninth Circuit have taken a similar approach. For example, in 2019 the U.S. District Court for the District of Alaska issued a preliminary injunction in the case *Southeast Alaska Conservation Council v. U.S. Forest Service*, halting implementation of the Tongass National Forest’s Prince of Wales Landscape Level Analysis Project.⁹³ The court did so because the Forest Service’s failure to disclose the site-specific impacts of that logging proposal raised “serious questions” about whether that approach violated NEPA.

The district court explained the approach the Forest Service took in the Prince of Wales EIS:

each alternative considered in the EIS “describe[d] the conditions being targeted for treatments and what conditions cannot be exceeded in an area, or place[d] limits on the intensity of specific activities such as timber harvest.” But the EIS provides that “site-specific locations and methods will be determined during implementation based on defined conditions in the alternative selected in the ... ROD ... in conjunction with the ... and Implementation Plan” The Forest Service has termed this approach “condition-based analysis.”⁹⁴

The Prince of Wales EIS made assumptions “in order to consider the ‘maximum effects’ of the Project.”⁹⁵ It also identified larger areas within which smaller areas of logging would later be identified, and approved the construction of 164 miles of road, but “did not identify the specific sites where the harvest or road construction would occur.”⁹⁶

The Court found the Forest Service’s approach contradicted Ninth Circuit precedent including *City of Tenakee Springs v. Block*, 778 F.2d 1402 (9th 1995), concerning logging on the Tongass National Forest. In *City of Tenakee Springs*, the appellate court set aside the Forest Service’s decision to authorize pre-roading in the Kadashan Watershed, without specifically evaluating where and when on approximately 750,000 acres it intended to authorize logging. The district

⁹⁰ *Id.* at 707.

⁹¹ *Id.*

⁹² *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007).

⁹³ *Southeast Alaska Conservation Council v. U.S. Forest Serv.*, 413 F. Supp. 3d 973 (D. Ak. 2019).

⁹⁴ *See id.* at 976-77 (citations omitted).

⁹⁵ *Id.* at 977.

⁹⁶ *Id.*

court evaluating the Prince of Wales project found the Forest Service's approach was equivalent to the deficient analysis set aside in *City of Tenakee Springs*.

Plaintiffs argue that the Project EIS is similarly deficient and that by engaging in condition-based analysis, the Forest Service impermissibly limited the specificity of its environmental review. The EIS identified which areas within the roughly 1.8-million-acre project area could potentially be harvested over the Project's 15-year period, but expressly left site-specific determinations for the future. For example, the selected alternative allows 23,269 acres of old-growth harvest, but does not specify where this will be located within the 48,140 acres of old growth identified as suitable for harvest in the project area. Similar to the EIS found inadequate in *City of Tenakee Springs*, the EIS here does not include a determination of when and where the 23,269 acres of old-growth harvest will occur. As a result, the EIS also does not provide specific information about the amount and location of actual road construction under each alternative, stating instead that "[t]he total road miles needed will be determined by the specific harvest units offered and the needed transportation network."⁹⁷

The district court concluded that plaintiffs in the case raised "serious questions" about whether the Prince of Wales EIS's condition-based management approach violated NEPA because "the Project EIS does not identify individual harvest units; by only identifying broad areas within which harvest may occur, it does not fully explain to the public how or where actual timber activities will affect localized habitats."⁹⁸ After finding the plaintiffs also met the other factors for preliminary injunction, the Court enjoined all logging until a decision on the merits.⁹⁹

In March 2020, the Alaska district court reaffirmed its September 2019 preliminary injunction decision and holding that the Forest Service's condition-based management approach violated NEPA.¹⁰⁰ The court explained that "NEPA requires that environmental analysis be specific enough to ensure informed decision-making and meaningful public participation. The Project EIS's omission of the actual location of proposed timber harvest and road construction within the Project Area falls short of that mandate."¹⁰¹

The district court also concluded that the Forest Service's "worst case analysis" was insufficient, explaining: "This approach, coupled with the lack of site-specific information in the Project EIS, detracts from a decisionmaker's or public participant's ability to conduct a meaningful

⁹⁷ *Id.* at 982 (citations omitted).

⁹⁸ *Id.* at 983.

⁹⁹ *Id.* at 986.

¹⁰⁰ *Southeast Alaska Conservation Council v. United States Forest Serv.*, 443 F. Supp. 3d 995 (D. Ak. 2020).

¹⁰¹ *Id.* at 1009 (citations omitted).

comparison of the probable environmental impacts among the various alternatives.”¹⁰² Consequently, the court concluded that

By authorizing an integrated resource management plan but deferring siting decisions to the future with no additional NEPA review, the Project EIS violates NEPA. The Forest Service has not yet taken the requisite hard look at the environmental impact of site-specific timber sales on Prince of Wales over the next 15 years. The Forest Service’s plan for condition-based analysis may very well streamline management of the Tongass ... however, it does not comply with the procedural requirements of NEPA, which are binding on the agency. NEPA favors coherent and comprehensive up-front environmental analysis to ensure ... that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.¹⁰³

The Ashley Aspen Project is a project-level decision.¹⁰⁴ As a result, any NEPA analysis must include the detailed information and analysis that NEPA and the CEQ regulations require because the Forest Service discloses that there will be no further NEPA analysis beyond the EA. Failure to provide such detailed, site-specific analysis, precludes informed agency decision-making and informed public comment, in violation of NEPA.

NEPA further mandates that the agency provide the public “the underlying environmental data’ from which the Forest Service develop[ed] its opinions and arrive[d] at its decisions.”¹⁰⁵ “The agency must explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.”¹⁰⁶ In the end, “vague and conclusory statements, without any supporting data, do not constitute a ‘hard look’ at the environmental consequences of the action as required by NEPA.”¹⁰⁷

¹⁰² *Id.* at 1013.

¹⁰³ *Id.* at 1014-15 (internal citations and quotations omitted). The Forest Service should not interpret the Alaska District’s decision to somehow endorse the use of condition-based analyses for environmental assessments. Where the exercise of site-specific discretion is material to a project’s environmental consequences, NEPA requires consideration of site-specific proposals and alternatives, regardless of whether the effects are “significant.” 42 U.S.C. § 4332(2)(C), (E).

¹⁰⁴ While the EA envisions further site-specific data collection, monitoring, and project design, it does not anticipate or describe any future NEPA analysis or public involvement consistent with that law.

¹⁰⁵ *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 925 (9th Cir. 2015).

¹⁰⁶ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (citation omitted).

¹⁰⁷ *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006); *see also Ocean Advocates v. Army Corps of Engineers*, 402 F.3d 846, 869 (9th Cir. 2004) (finding that a vague and uncertain analysis is insufficient to meet NEPA’s mandate).

CEQ's regulations establish specific ways agencies must analyze proposed actions, including project-level decisions, including a detailed discussion of direct, indirect, and cumulative impacts and their significance; and an analysis of reasonable alternatives to the proposed action. Such analysis is required for both environmental assessments and EISs.

B. The EA's Approach Violates NEPA.

Although NEPA requires that analysis disclose specific information about the when, where, and how of any agency action, so that the impacts (and alternatives) can be described and weighed, the EA anticipates that none of that information will be gathered before the Forest Service makes a decision authorizing logging and burning over a vast landscape. The Forest Service intends to postpone gathering information about values present at specific sites, and proposing components of site-specific project design, only *after* the NEPA process is complete.¹⁰⁸ This upends NEPA's central purpose that agencies analyze and disclose such information *before* they leap, as the court concluded in *Southeast Alaska Conservation Council*.

The Forest Service proposes a “public outreach” process to solicit public input *after* the NEPA process is complete, perhaps as an attempt to make it appear that the agency will comply with the law:

[D]uring each year of implementation, a public outreach period will be conducted at least 3 months prior to implementation to identify any new information or issues so that, as appropriate, the proposed implementation may be modified or site-specific mitigation may be applied to the proposed treatment sites.¹⁰⁹

The Forest Service does not define this process. How will the Forest Service notify the public, and with what information? How will the Forest Service respond to comments? Will the Forest Service only review “new information”? How would the Forest Service decide whether to modify a proposal? What does it mean to “modify” a proposal when the Forest Service fails to identify which treatment will occur anywhere throughout the project area? How much time would the Forest Service grant the public to provide feedback? How could the public hold the Forest Service accountable if the agency ignores science or fails to respond to comments?

The answers to all of these questions are not apparent because the agency is essentially creating from whole-cloth an ersatz-NEPA process. And despite the public raising almost all of these

¹⁰⁸ See Aspen Project EA (June 2022) at 7 (“*After the analysis is complete*, specific treatment areas would be identified and on-the-ground assessments (Appendix B) would be completed to determine the ecological condition of the aspen stands, the potential for problems with browsing, and other local factors like impacts from dispersed recreation. Based on the site-specific conditions and an interdisciplinary review, the appropriate treatment(s) for the area would be selected” (emphasis added)). See also Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 39 (making same assertion).

¹⁰⁹ *Id.* at 18.

very same questions on the initial EA, the Ashley National Forest failed to provide any of the answers (again violating NEPA).¹¹⁰

While this “process” might result in some information about logging, bulldozing, fire-line clearing, skidding and the like becoming available to officials before a site-specific project proceeds, it fails to ensure that “environmental information is available to ... citizens *before decisions are made*,” as the law requires.¹¹¹

The Forest Service’s NEPA end-run is even more apparent when compared to how the agency will address compliance with the National Historic Preservation Act (NHPA). The EA notes that the agency will undertake a “phased” consultation approach with the State Historic Preservation Office (SHPO), “in which proposed treatment units will [be] consulted on with Utah SHPO and Native American Tribes prior to implementation.”¹¹² It is unclear why the Forest Service will comply with the NHPA concerning proposed treatments units, but is declining to do the same with NEPA, particularly when NEPA itself provides for such a “phased” approach: preparation of a programmatic analysis followed by site-specific NEPA compliance. We urge the Forest Service to comply with NEPA by either undertaking the required site-specific analysis before making a final decision, or preparing a programmatic analysis now to which the agency can tier for subsequent NEPA analysis that addresses site-specific conditions and proposed treatments.

Suggested Remedy: The Forest Service cannot approve the project unless and until the agency, in a subsequently prepared NEPA document, takes a hard look at the site-specific impacts of a specifically-defined project.

¹¹⁰ The agency’s response to comments says only “Please see the defined project in the Proposed Action Section of the EAFONSI,” which is the equivalent of no response. *See Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project* (2022) at 34. We further note that the post-NEPA “process” is far less defined or described than that used by other forests who have adopted condition-based management proposals. For example, the Superior National Forest created a more detailed (but still post-NEPA) process for the Tofte Project involving a step-by-step process that includes a “30-day public participation period on proposed stand treatment list (published on website) with interactive online map,” outside of the NEPA process. Superior National Forest, Tofte Landscape Project, Final EA, Appendix D (2022), attached as Ex. 1. While we do not endorse the Tofte Project process, it shows that the agency can at least provide the public with more information about what such a post-NEPA process will include. It also illustrates that the Forest Service is creating ad hoc processes on the Ashley NF and elsewhere with no uniformity or benefit of agency guidance.

¹¹¹ 40 C.F.R. § 1500.1(b) (1978) (emphasis added).

¹¹² *See Aspen Project EA* (June 2022) at 20 (“The Ashley National Forest and Utah SHPO have agreed to a phased NHPA Section 106 compliance process, in which proposed treatment units will consulted on with Utah SHPO and Native American Tribes prior to implementation. If Historic Properties are identified within the area of potential effect, then mitigation measures will be identified through the consultation process. The implementation of the mitigation measures will prevent adverse impacts to historic properties.”)

III. THE FOREST SERVICE FAILS TO TAKE A HARD LOOK AT THE PROPOSED ACTION'S IMPACTS.¹¹³

NEPA regulations and federal courts require that agencies prepare an environmental impact statement (EIS) in those cases where the major federal action has the potential to result in significant impacts.¹¹⁴

For example, the Ninth Circuit has established a “relatively low threshold for preparation of an EIS,” namely that an EIS must be prepared if a plaintiff raises substantial questions about whether a project will have significant effects.¹¹⁵ “We have held that an EIS must be prepared if ‘substantial questions are raised as to whether a project ... may cause significant degradation to some human environmental factor.’ To trigger this requirement a ‘plaintiff need not show that significant effects will in fact occur,’ [but instead] raising ‘substantial questions whether a project may have a significant effect’ is sufficient.”¹¹⁶

¹¹³ Objectors raised this issue in their July 9, 2021 comments on the draft EA at pages 9-25.

¹¹⁴ This action should be governed by the Council on Environmental Quality’s 1978 regulations, as amended, and so all references to the CEQ regulations are to those in force as of July 14, 2020, unless otherwise noted. Although CEQ issued a final rulemaking in July 2020 fundamentally rewriting those regulations, the 2020 rules apply only “to any NEPA process begun after September 14, 2020,” or where the agency has chosen to “apply the regulations in this subchapter to ongoing activities.” 40 C.F.R. § 1506.13 (2020). The Ashley Aspen Project NEPA process began before September 2020; the Ashley NF issued a scoping notice and solicited public comment in October 2019. *See* Ashley National Forest, Aspen Restoration Project (Oct. 2019), available at https://www.fs.usda.gov/nfs/11558/www/nepa/112519_FSPLT3_4879629.pdf (last viewed July 25, 2022). Thus the 1978 regulations would apply unless the Forest Service has chosen to apply the 2020 regulations. The Forest Service nowhere affirmatively represents that the agency has chosen to apply the 2020 rules to this project, although it does appear to rely on the 2020 regulations for its definition of significant impacts. *See* Ashley Aspen EA at 15 (citing 40 C.F.R. § 1501.3(b), apparently from the 2020 regulations). We request that the Forest Service explicitly state which version of the CEQ regulations – 1978 or 2020 – it intends to rely on or this analysis.

¹¹⁵ *NRDC v. Duvall*, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991).

¹¹⁶ *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis original). *See also* *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864-65 (9th Cir. 2005) (“To trigger this [EIS] requirement a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a project may have a significant effect is sufficient.”) (internal quotations, citations, and alterations omitted); *Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002) (“To prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are “‘substantial questions whether a project may have a significant effect’ on the environment” is sufficient.”) (citations omitted); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

The Tenth Circuit agrees. “If the agency determines that its proposed action may ‘significantly affect’ the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.”¹¹⁷

Where an agency has questions as to whether a federal action has the potential to have significant impacts, the agency prepares an environmental assessment (EA) to “determin[e] whether to prepare an environmental impact statement or a finding of no significant impact.”¹¹⁸ Even where a proposal will not have significant impacts, NEPA nonetheless requires consideration of alternatives when there are “unresolved conflicts concerning alternative uses of available resources” via an EA.¹¹⁹ If an agency “decides not to prepare an EIS,” and instead to prepare an EA, “it must put forth a convincing statement of reasons” that explains why the project will impact the environment no more than insignificantly. This account proves crucial to evaluating whether the [agency] took the requisite ‘hard look.’”¹²⁰

A. The Forest Service Fails to Define the Project.

The Forest Service’s failure to precisely define which treatment methods it will use and where it will use them make it difficult to understand what the project area will look like once the treatments occurs, and thus fails to take the hard look that NEPA mandates.

For example, one of the “actions” that the agency may take is “[p]rotection from browsing (including, but not limited to wildlife proof fencing, 6-8’ high).”¹²¹ But the agency provides no metric to evaluate when such “protection” would be necessary, thus giving neither the public nor the decision-maker any idea of when, whether and how this measure might protect aspen or otherwise impact the environment, or how many miles (or thousands of miles) of fencing may be built.¹²² While the agency proposes that browsing impacts be evaluated *post-treatment*, the project does not require any concrete action once thresholds are exceeded, only suggesting that

¹¹⁷ *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 429 (10th Cir. 1996) (citation omitted) (emphasis added).

¹¹⁸ 40 C.F.R. § 1508.9.

¹¹⁹ 42 U.S.C. § 4332(2)(E).

¹²⁰ *Ocean Advoc.*, 402 F.3d at 864. *See also Blue Mountains*, 161 F.3d at 1212 (If the agency decides not to prepare an EIS, the agency must supply a “convincing statement of reasons” to explain why the action will not have a significant impact on the environment); *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (“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”) (citation and quotations omitted); 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13.

¹²¹ Aspen Project EA (June 2022) at 8.

¹²² The agency’s response to comments similarly states: “Fencing is a proposed action to eliminate grazing as needed within aspen stands,” without providing any metric for how the agency would determine when it is “needed.” Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 35.

“[i]f ... thresholds are exceeded, *consider* additional management actions to protect the aspen regeneration and how the scale and timing of future treatments *may* be adjusted to avoid heavy browsing pressure.”¹²³ The agency proposed “threshold,” if exceeded, thus does not *require* a response, nor does the agency specify any response. One therefore cannot predict what actions the agency will undertake, what impacts those actions will cause, and when or whether certain mitigation measures will be implemented or in fact will mitigate the potentially significant impacts. The Ashley National Forest neither acknowledged nor responded to this specific comment. Further, the agency’s failure to provide a required response stands in contrast to the Monroe Mountain Project on the Fishlake National Forest, and analyzed in 2014, where the Forest Service did provide specific additional management actions, at least one of which the agency was required to adopt when browsing thresholds were exceeded.¹²⁴

The EA states: “Based on the monitoring results, additional management actions (from the list of treatments) *may* be implemented if needed to achieve restoration objectives.”¹²⁵ But the EA does not identify what criteria it would use to determine “the most effective management option,” nor what “monitoring results,” or thresholds would trigger “additional management actions (from the list of treatments),” or when or why such additional treatments would be needed. Because the Forest Service fails to explain when, where, or why management actions may occur, it cannot rationally conclude that its actions cannot have significant impacts.

The EA also includes “Activity Cards” as an appendix to the EA. The EA does not explain the purpose or use of these “cards,” stating only: “Treatment actions would target the most effective management option and be followed by post-treatment monitoring – see Appendix D for activity cards.”¹²⁶ Neither the EA, response to comments, or draft Decision Notice describes what these cards mean or how they may or may not constrain the project, or guide Forest Service implementation. Despite raising this precise issue in comments on the prior draft EA, the Ashley National Forest declined to respond, violating NEPA.

The EA also fails to provide a sufficient basis for the need for specific treatments, nor does it effectively describe why certain treatments would be chosen over others. Critically, the EA does not distinguish between the major *causes* of lack of recruitment in “persistent aspen” (i.e., aspen with no or insignificant component of conifers) and “aspen-conifer.” The causes of lack of recruitment are different for the two community types: usually excessive browsing in persistent aspen, as opposed to lack of fire leading to overtopping/shading by conifer in aspen-conifer. Although the EA cites O’Brien, *et al.* 2010 and Kitchen, *et al.* 2019,¹²⁷ those documents

¹²³ Aspen Project EA (June 2022) at 50 (emphasis added).

¹²⁴ See, e.g., Fishlake NF, Monroe Mountain Aspen Project Final EIS, Appendix C (2014) at 21 (“If percent browse threshold is exceeded in a treatment area(s) grazed by both wild ungulates and livestock (typically after 2 years posttreatment), the USDA Forest Service undertakes one or more of the following adaptive management responses in order to achieve balanced livestock and wildlife use, while avoiding exceeding browse thresholds”), attached as Ex. 2.

¹²⁵ Aspen Project EA (June 2022) at 8 (emphasis added).

¹²⁶ *Id.* at 8.

¹²⁷ *Id.* at 7.

emphasize the importance of addressing the underlying causes of lack of regeneration or recruitment. This the EA fails to do, once again ignoring comments to address this issue.

Suggested Remedy: The Forest Service cannot approve the project unless and until the agency, in a subsequently prepared NEPA document, takes a hard look at the site-specific impacts of a specifically-defined project. At a minimum, the Forest Service must explain the purpose of activity cards.

B. The EA Fails to Describe Baseline Conditions.

NEPA documents must “succinctly describe the environment of the area(s) to be affected or created by the alternative under consideration.”¹²⁸ NEPA also requires the action agency to set an appropriate baseline detailing the nature and extent of the resources in the area: “The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process.”¹²⁹ “Without establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA.”¹³⁰

Without baseline data, neither the public nor the agency can understand the effects of the proposed action or craft and analyze alternatives and mitigation measures to protect these values. As such, the Forest Service must identify the environmental baseline and affected environment, as well as the scope of impacts and where those impacts are most likely to be felt.

Because the EA contains so little information about the location and nature of forest, recreation, wildlife, wetland, riparian habitat conservation areas, and other resources within the project area, the agency fails to comply with NEPA’s baseline data requirement. For example, the EA fails to map or describe where elk/deer ungulate populations are high, moderate, or low, an important consideration for planning which treatment areas are likely to require fencing.

The failure to include baseline data is puzzling because the EA notes that over 30 years, 1,171 long term study plots have been established in aspen stands and impacts from various activities monitored.¹³¹ “Several” plots are within aspen stands that have had previous treatments such as prescribed fire, salvage, or clear cutting.¹³² The EA apparently provides no data from these study plots, and it discloses no comparisons between those that were previously treated and those that were not. The EA fails to include: site-specific assessment of the current condition of aspen forest types; assessment of stand structure for the individual stands; characterization of understory conditions; analysis of livestock impacts to recruitment; and a description of the desired future conditions and the ecological basis of those or how aspen stands are deviating

¹²⁸ 40 C.F.R. § 1502.15 (1978 & 2020).

¹²⁹ See Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* 41 (January 1997).

¹³⁰ *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

¹³¹ Aspen Project EA (June 2022) at 7.

¹³² *Id.*

from those conditions. Despite requesting this specific information be required in our comments on the draft EA, the Ashley National Forest declined to address this issue, violating NEPA.

Suggested Remedy: In any subsequently prepared NEPA document, the Forest Service must include baseline, site-specific information about the project area so that the public can better understand and appreciate the values at issue and how the proposed action and alternatives may impact those values.

C. The EA Fails to Take a Hard Look at Potentially Significant Transportation Impacts.

The Forest Service uses the general term “road” to describe access to the project, which the regulations define as “[a] motor vehicle route over 50 inches wide, unless identified and managed as a trail.”¹³³ This may permit the Forest Service to implement this project by opening existing closed roads, and even use unauthorized roads. The number and length of unauthorized roads is highly uncertain and extremely concerning given that a 2017 Ashley National Forest assessment found that “[t]he amount of unauthorized user created routes mainly from motorized use has been increasing,” and “[t]he increase in unauthorized user created routes increases resource damage.”¹³⁴ The EA does not disclose the number or location of user-created roads the Forest Service may utilize, making it impossible to determine the precise nature of road impacts, but likely having significant impacts. Though the EA includes pages of project design criteria, those criteria do not preclude the use of unauthorized roads to implement this project. The agency should have directed the removal of unauthorized routes wherever found.

The Forest Service’s response to this comment is puzzling. The agency states: “This comment [concerning the use of unauthorized routes] does not address the proposed action or project area and therefore is outside the scope of the project.”¹³⁵ The agency responds to another related question: “No roads are proposed to be added, repaired, reconstructed, or relocated for this project.”¹³⁶ Further, the agency states “mechanical treatment is limited to within 1000 ft of a road less than 40% slope.”¹³⁷ Here we note the Forest Service does not restrict treatments to National Forest System roads, but rather all roads. At the same time, the Forest Service never says that the project will not use unauthorized routes. The agency could clear up any misunderstanding by simply making that statement and clarifying treatments will only occur on system roads that are passable by motor vehicles and have received ongoing maintenance as required under the Roadless Rule. So far, it has declined to do so.

¹³³ 36 C.F.R. § 212.1.

¹³⁴ Mortenson, Valton. 2017. Ashley National Forest Assessment Infrastructure Report. p. 7. Available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564538.pdf (last viewed July 25, 2022), attached as Ex. 3.

¹³⁵ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 58.

¹³⁶ *Id.*

¹³⁷ Aspen Project EA (June 2022) at 16 (emphasis added).

The EA also fails to address the impacts of utilizing system roads in dire need of repair, reconstruction or relocation. “The Ashley National Forest annual roads budget has decreased from approximately \$1.07 million in 2005 to \$706,000 in 2015, a 34 percent reduction.”¹³⁸ Further, the total estimated annual funding needed for road maintenance and operation totals \$5.5 million, meaning the Ashley National Forest has a total annual road maintenance backlog of \$4.8 million dollars, representing an 87% shortfall.¹³⁹ The lack of adequate funding for maintenance means the Forest Service cannot meet its road management objectives, a shortfall which can cause adverse environmental effects such as increased stream sedimentation due to poor drainage and even mass wasting. This is especially true for high-clearance roads that this project will likely use; such routes total 898 miles forest-wide. The current condition of the agency’s road system suggests any road use associated with this project – especially log hauling – may result in rutting, erosion, spread of exotic weeds, etc., particularly because the Forest Service does not intend to reconstruct roads that may be in need of repair to facilitate the hauling of logs and heavy equipment. We cannot imagine any scenario where the agency utilizes inadequately maintained roads, and yet commits no resources to repair or otherwise treat the road to address resource concerns. It is more likely, the Forest Service intends to characterize its road work as routine maintenance where, in fact, such actions constitute repair or reconstruction.

These effects are unanalyzed, but likely and are specific to the currently open, but poorly maintained, ML 2 roads. More resource damage will likely occur if the Forest Service opens any of its closed roads since they are often in a stored condition due to resource concerns and require reconstruction for project utilization. Where roads are in an ML 1 status to mitigate resource damage, opening them will further create uncertain conditions, and potential damage to soils, watersheds, and wildlife habitat, requiring disclosure in any subsequently prepared NEPA document.

Further, the Forest Service states that project activities will include the use of new and existing skid trails or other “user created travel ways” to implement vegetative treatments.¹⁴⁰ No matter the degree of best management practices (BMPs), construction and use of an unknown number, length, and location of skid trails increases the project’s potential impacts to the degree that it is likely the skid trails will have significant environmental consequences, requiring either disclosure in an EA, or preparation of an EIS. The Forest Service’s only response on this issue was to assert that “Use of skid trails will be determined at each stand throughout the proposed project and will follow the design criteria and BMPs if they are needed.”¹⁴¹ This in no way discloses the impacts that skid trails may have, violating NEPA.

Suggested Remedy: In any subsequently prepared NEPA document, the Forest Service must disclose the project’s impacts on the road system. We further urge the Forest Service in any subsequently prepared NEPA to fully disclose the status of its road

¹³⁸ Mortenson, Valton. 2017. Ashley National Forest Assessment Infrastructure Report. p. 5.

¹³⁹ *Id.* at 4-5.

¹⁴⁰ Aspen Project EA (June 2022) at 38.

¹⁴¹ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 58.

system, including those roads that do not currently meet their Road Management Objectives, especially where roads may have deferred maintenance.

D. The EA Fails to Take a Hard Look at Potentially Significant Impacts to Northern Goshawk.

The Forest Service’s “leap first-look later” approach is especially evident in regards to the potential harm this project poses to the Northern goshawk and their habitat. The Forest Service asserts that its proposed BMPs and design criteria will properly address any negative consequences to the species without providing supporting evidence.¹⁴² This is insufficient to comply with the agency’s legal requirements under the National Forest Management Act to maintain viable populations and maintain biodiversity, or to take a hard look at potential impacts per NEPA. Rather, the Forest Service provides no analysis at all.

The goshawk is a Regional Forester Sensitive Species for the Forest Service’s Intermountain Region (Region 4), and goshawks occur on the Ashley National Forest. Timber harvest has historically been the primary threat to the species, including in Utah. Before the 1980s, when most large ponderosa pine trees were harvested, goshawk nests had been observed in ponderosas on the Ashley National Forest; this is no longer true.¹⁴³ The failure to leave enough large trees on the landscape during timber harvesting remains a threat.¹⁴⁴

We are concerned that the proposed project will fail to protect the goshawk’s habitat needs, including the retention of large trees, snags, and dense forest cover. Protections are required for nesting, foraging, and non-breeding season habitat.

While goshawks in Utah use a variety of coniferous and deciduous forests, aspen is among the most important cover types for the species in the state. Aspen trees are used for nesting, and lodgepole pine is also important for goshawk in Utah.¹⁴⁵ Any vegetation management activities have the potential to negatively impact goshawk habitat by destroying and degrading important forest nesting and foraging structural conditions and harming individuals by disturbing nests. The proposed project presents a level of risk to northern goshawks and their habitat that may not be mitigated by BMPs and design criteria.

¹⁴² Aspen Project EA (June 2022) at 9 (“to accomplish [project] objectives while also maintaining the appropriate level of resource protection, resource specialists have provided Best Management Practices (BMPs) and project design criteria for each treatment type”).

¹⁴³ See R. T. Graham *et al.*, Forest Service, Rocky Mountain Research Station, The northern goshawk in Utah: habitat assessment and management recommendations. Gen. Tech. Rep. RMRS-GTR-22 (1999), attached as Ex. 2 to the Center’s Nov. 24, 2019 scoping comments.

¹⁴⁴ S. Rodriguez *et al.*, “Timber harvest and tree size near nests explains variation in nest site occupancy but not productivity in northern goshawks (*Accipiter gentilis*),” Forest Ecology and Management 374: 220-229 (2016), attached as Ex. 3 to the Center’s Nov. 24, 2019 comments.

¹⁴⁵ See Graham, The northern goshawk in Utah: habitat assessment and management recommendations.

Dominant tree species used by goshawks vary throughout their range in North America, but other habitat requirements are similar across regions.¹⁴⁶ Nesting habitat tends to be characterized by mature to old forest conditions, with large trees and closed canopy (60%-80%), and moderately dense to dense stands.¹⁴⁷ Adults tend to select one of the largest trees within a forest stand for nesting.¹⁴⁸ Goshawks likely prefer dense cover to protect chicks from inclement weather conditions and predators.¹⁴⁹ Thus, simply protecting snags in nesting habitat is inadequate. Goshawks will typically hunt on the edges of dense, closed forests, but often kill in more open areas.¹⁵⁰ Woody debris is essential to provide habitat for prey species, particularly small mammals.¹⁵¹ Wintering habitat tends to be more varied in Utah, for example, pinyon-juniper ecosystems may be used.¹⁵²

Goshawks have large home ranges that surround nest sites, and the home range size of males is generally larger than females. The more food available, the smaller the home range.¹⁵³ Based on research in the Southwest, home range sizes roughly average 6,000 acres. In Idaho, male home ranges were found to be as large as 15,000 acres.¹⁵⁴ Moser and Garton concluded that conservation of goshawk habitat at the home range scale is important and stated: “When managing for male and female goshawk foraging habitat, managers should seek to minimize the proportion of openings (VSS 1-2) and moderately closed forests (VSS 3) at the home-range scale.”¹⁵⁵

¹⁴⁶ U.S. Fish and Wildlife Service, Northern Goshawk Status Review (June 1998), attached as Ex. 4 to the Center’s Nov. 24, 2019 scoping comments.

¹⁴⁷ FWS, Northern Goshawk Status Review (Ex. 4 to the Center’s Nov. 24, 2019 scoping comments); Graham, The northern goshawk in Utah: habitat assessment and management recommendations (Ex. 2 to the Center’s Nov. 24, 2019 scoping comments).

¹⁴⁸ FWS, Northern Goshawk Status Review (Ex. 4 to the Center’s Nov. 24, 2019 scoping comments).

¹⁴⁹ Rodriguez, “Timber harvest and tree size near nests” (Ex. 3 to the Center’s Nov. 24, 2019 scoping comments).

¹⁵⁰ Graham, The northern goshawk in Utah: habitat assessment and management recommendations (Ex. 2 to the Center’s Nov. 24, 2019 scoping comments).

¹⁵¹ FWS, Northern Goshawk Status Review (Ex. 4 to the Center’s Nov. 24, 2019 scoping comments).

¹⁵² J. Underwood, *et al.*, “Winter movement and habitat use of northern goshawks breeding in Utah,” *Studies in Avian Biology*, 31:228 (2006), attached as Ex. 5 to the Center’s Nov. 24, 2019 scoping comments.

¹⁵³ B. Moser & E. Garton, “Northern goshawk space use and resource selection,” *Journal of Wildlife Management*, 83(3): 705-713 (2019), attached as Ex. 6 to the Center’s Nov. 24, 2019 scoping comments.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

In Utah, northern goshawks hunt a variety of prey species, including squirrels and lagomorphs, and a range of bird species.¹⁵⁶ Woodpeckers, including northern flickers, three-toed woodpeckers, and others are on the menu.

The proposed action includes “coppice” cutting of aspen, a type of clearcutting, as one potential treatment that could occur anywhere and everywhere within the project area.¹⁵⁷ This logging would occur as part of treatments that would “[s]electively cut or remove *all* conifers, *aspen* or both using hand crews with chainsaws,” and “[s]electively cut or remove *all* conifers, *aspen* or both using ground-based mechanized equipment.”¹⁵⁸ Such treatments could effectively remove all goshawk habitat within aspen stands, an impact the EA neither disclosed nor addressed.

Proposed BMPs and design criteria would mean little in the face of wide-spread coppice cutting. For example, a design criteria directing that “[w]ithin goshawk territories, leave a minimum of 600 snags/100 acres (6 snags/acre) 8” dbh > 15 feet tall.”¹⁵⁹ Leaving six snags per acre will not provide nest security or good hunting or fledging habitat for goshawk. Another criteria “[p]rohibits vegetative treatments within active northern goshawk nest areas (approximately 30 acres) during nesting periods (March 1–September 30).”¹⁶⁰ This “protective” measure would allow each entire 30-acre nesting area to be clearcut when the nest is not in use. In short, there are no protections proposed for unoccupied nests, even though goshawks are known to reuse breeding sites.

Moreover, 6 snags/acre is unlikely to retain enough snags for goshawks, other raptors, and snag-dependent prey species, such as woodpeckers. These species as well as the red squirrel and mountain bluebird also depend on snags. Woodpeckers are not only prey for goshawks but primary cavity excavators, keystone species, on whom a host of secondary cavity users depend. Though goshawks are not known to depend on tree cavities for nesting, the presence of woodpeckers in goshawk habitat must be maintained.

Studying how woodpeckers select trees for excavating nests, Lorenz *et al.* concluded that most snag recommendations set density targets too low because they don’t account for the snag

¹⁵⁶ Graham, The northern goshawk in Utah: habitat assessment and management recommendations (Ex. 2 to the Center’s Nov. 24, 2019 scoping comments).

¹⁵⁷ See Aspen Project EA (June 2022) at 31, 36 (authorizing “coppice” logging of aspen, a type of clearcutting). See also Forest Service, Reforestation Glossary (defining “Coppice Regeneration Method” as “An even-aged method of regenerating a stand in which the trees in the previous stand are cut and the majority of regeneration is from sprouts or root suckers”) available at <https://www.fs.fed.us/restoration/reforestation/glossary.shtml> (last viewed July 25, 2022).

¹⁵⁸ *Id.* at 29-37 (emphases added).

¹⁵⁹ *Id.* at 28, 31.

¹⁶⁰ *Id.* at 28, 32.

requirements of primary cavity excavators.¹⁶¹ The paper concludes: “the felling or removal of snags for any purpose ... should not be permitted where conservation and management of PCEs [primary cavity excavators] or SCUs [secondary cavity users] is a concern.”¹⁶² Further, woodpecker studies indicate, “if one of every 20 snags (approximately 4 percent) has suitable wood, and there are five to seven species of woodpeckers nesting in a given patch, approximately 100 snags may be needed each year for nesting sites alone.”¹⁶³ Hutto has suggested that snag retention post-disturbance should perhaps be 50% higher than Forest Service guidelines.¹⁶⁴

We note further that the proposed action fails to include BMPs or design elements consistent with Forest Plan guidelines adopted to protect goshawk. The 2000 Forest Plan Amendment that applies to “all management areas containing goshawk habitat” includes “standards and guidelines that will be implemented [which] are designed to protect goshawk habitat during all management activities, particularly in the nest and post-fledgling areas.”¹⁶⁵ The Aspen Project fails to include or address many of the plan amendment’s provisions, including:

- (g) (Guideline) Planned vegetative management treatments (excluding unplanned and unwanted wildland fire) in the mature and/or old structural groups in a landscape that is at or below the desired percentage of land area in mature and old structural stages (40% conifer, 30% aspen), should be designed to maintain or enhance the characteristics of these structural stages. Within these landscapes, the percentage of land area in mature and old structural stages treated should not move out of the mature and old structural stage.
- (j) (Guideline) - Vegetative treatments designed to maintain or promote a VSS 4, 5 and/or 6 group, the percent of the group acreage covered by clumps of trees with interlocking crowns should typically range from 40-70% in post-fledgling and foraging areas, and 50-70% in nest areas.

¹⁶¹ T. Lorenz *et al.*, “The role of wood hardness in limiting nest site selection in avian cavity excavators,” *Ecological Applications*, 25(4): 1016-1033 (2015), attached as Ex. 7 to the Center’s Nov. 24, 2019 scoping comments.

¹⁶² *Id.* at 1030.

¹⁶³ N. Vizcarra & T. Lorenz, “Woodpecker woes: the right tree can be hard to find,” *Science Findings* 199, Forest Service, Pacific Northwest Research Station. 5: 199, attached as Ex. 8 to the Center’s Nov. 24, 2019 scoping comments.

¹⁶⁴ R. Hutto, “Toward meaningful snag-management guidelines for postfire salvage logging in North American conifer forests,” *Conservation Biology*, 20(4): 984-993 (2006), attached as Ex. 9 to the Center’s Nov. 24, 2019 scoping comments.

¹⁶⁵ Forest Service, Decision Notice and FONSI of the Forest Plans in Utah for the Northern Goshawk Project (Mar. 14, 2000) at 2, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5277393.pdf (last viewed July 25, 2022), and attached as Ex. 4.

- (o) (STANDARD) When an active nest area has been identified, identify 2 alternate nest areas and 3 replacement nest areas.
- (p) (Guideline) Each nest area (active, alternate and replacement) should be approximately 30 acres (total of approximately 180 acres) in size when sufficient suitable habitat exists. If sufficient amounts of suitable habitat are not present, use existing suitable habitat that is available.
- (q) (Guideline) Alternate nest areas should be identified in suitable habitat with similar vegetative structures as the active nest areas. Replacement nest areas should be identified in habitat which will develop similar vegetative structures as the active nest area at the time the active and alternate nest areas are projected to no longer provide adequate nesting habitat.
- (s) (Guideline) In active nest areas (approximately 30 acres; i.e. Guideline (p)), restrict Forest Service management activities and human uses for which Forests issue permits during the active nesting period (does not include livestock permits) unless it is determined that the disturbance is not likely to result in nest abandonment. If the disturbance is likely to result in abandonment, a biological evaluation (BE) must be completed.
- (u) (Guideline) Identify a Post-Fledgling Area (PFA) which encompasses the active, alternate and replacement nest areas and additional habitat needed to raise fledglings. A PFA should be approximately 420 acres in size (exclusive of nest area acres) when sufficient suitable habitat exists. If sufficient amounts of suitable habitat are not present, use existing suitable habitat that is available.
- (v) (Guideline) Forest vegetative manipulation within the PFAs should be designed to maintain or improve the same habitat features as discussed for the goshawk home range (i.e., stand structure, snags, down logs, nest trees important in the life histories of the goshawk and its prey species common to the geographic location), except:
 - i) Openings, as defined in glossary and Reynolds *et al.*, created as a result of mechanical vegetative treatments (does not include wildland fire) should not exceed the following by cover type ... Aspen and Lodgepole pine Follow current management direction
 - ii) Management activities should be restricted during the active nesting period. The active nesting period will normally occur between March 1st and September 30th.
 - iii) Where timber harvest is prescribed to achieve desired forest conditions, plan the transportation system to minimize disturbance to the PFAs.
- (w) (Guideline) Through the landscape assessment process identify plant communities important to goshawk prey species that contain seed, mast, and foliage components that are important to these prey species.¹⁶⁶

¹⁶⁶ *Id.* at Appendix CC-4 – CC-7.

These standards and guidelines emphasize the importance of: managing goshawk post-fledgling areas (PFAs), which the EA does not mention at all; managing alternative nest sites, similarly unmentioned; and the necessity for preparing a biological evaluation for management actions within goshawk habitat, which it is unclear whether the Forest Service will address at the time when treatments are actually designed.

And while the EA states that BMPs for goshawk and other wildlife “are based on law, regulation, and policy as well as years of experience and professional judgement from implementing these types of projects,”¹⁶⁷ one document they are apparently not based on is the project’s Biological Evaluation (BE) for wildlife, which specifically identifies many of the Forest Plan standards and guidelines as BMPs.¹⁶⁸ The EA inexplicably fails to include all of the BMPs from the BE. For example, the BE includes the following as a BMP “Required for the Project”:

Vegetative treatments [must be] designed to maintain or promote a VSS 4, 5 and/or 6 group, the percent of the group acreage covered by clumps of trees with interlocking crowns should typically range from 40-70% in post-fledgling and foraging areas, and 50-70% in nest areas. To manage outside this range, it should either be shown that the range is not within PFC for the site, and that it is determined that managing outside the range will be consistent with landscape needs of the goshawk and its prey.¹⁶⁹

The EA does not contain this BMP (among others) from the BE, and does not explain why.

As another example, the EA includes the following BMP and design criteria for various tree removal treatments:

Prohibit vegetative treatments within active northern goshawk nest areas (approximately 30 acres) during nesting periods (March 1 –September 30).¹⁷⁰

But the BE requires more, stating:

¹⁶⁷ Aspen Project EA (June 2022) at 9.

¹⁶⁸ P. Manders & B. Christensen, Ashley Aspen Restoration Wildlife Biological Evaluation (Jan. 2021) at 6-7, 12-13 (“Wildlife BE”). Note that the Wildlife BE also includes mitigation measures not explicitly identified in the Forest Plan that the EA similarly failed to incorporate. For example, the Wildlife BE includes a measure to: “Prohibit fence construction within active northern goshawk nest areas (approximately 30 acres) and PFA’s (approximately 420 acres surrounding the nest area) during nesting periods (March 1 –September 30).” *Id.* at 6. The EA contains no similar measure.

¹⁶⁹ Wildlife BE at 6.

¹⁷⁰ Aspen Project EA (June 2022) at 28, 31, 37, 41, 44.

Prohibit vegetative treatments within active northern goshawk nest areas (approximately 30 acres) and PFA's (approximately 420 acres surrounding the nest area) during nesting periods (March 1 –September 30).¹⁷¹

The EA omits the italicized language above from the BE without explanation. However, the EA *must* include the BE's mitigation measures in full if the agency intends to rely on the BE's conclusion that the project "May Impact Individuals, but Will Not Likely Contribute to a Trend Towards Federal Listing or Loss of Population Viability" for goshawk.¹⁷²

Further, because the proposed action provides a menu of treatments, and does not identify which one, or several treatments, could occur where, and coppice cutting aspen and conifer is not otherwise limited by the proposed action, it is foreseeable that the entirety (or large chunks) of nesting areas in aspen forest PFAs could be chain-sawed or burned. Such an action would clearly have the potential to violate the Forest Plan and significantly impact the northern goshawk (not to mention other wildlife and other aspects of the environment). The agency's draft finding of no significant impact for a proposal that could allow such damaging treatments is thus arbitrary and capricious. Further, the Forest Service must ensure that actions that may harm the goshawk do not violate the Forest Plan and the National Forest Management Act provisions to protect biodiversity and species viability, which, because the Decision Notice fails to adopt the BMPs identified in the BE, the agency cannot do.

The agency's response to comments asserts measures required to protect goshawk in the Goshawk Plan Amendment and in the BE for the project will be adopted as part of site-specific logging design, and so the Forest Service's actions are legal and will ensure that goshawk remain viable on the Ashley National Forest:

This is a programmatic EA and specific areas for treatment have not yet been selected. As such, the design criteria/BMPs include the standards and guidelines from the Goshawk Amendment to the Forest Plan and these will be followed. As stated in the BE, these standards and guidelines will protect nesting goshawks, PFA's, and maintain goshawk habitat regardless of what areas are selected to be treated within the aspen stands.... Regardless of the [goshawk's stable to slightly decreasing population] trend, the BE makes it clear that following the standards guidelines from the Goshawk Amendment (BMP's) will not affect the trend in goshawk populations on the Forest.¹⁷³

This explanation fails on several grounds. First, the statement that "[t]his is a programmatic EA" is false, because when an agency prepares a programmatic NEPA document, it is generally assumed that the agency will prepare a site-specific NEPA document later that relies on the programmatic NEPA document. That is not the case here, where the Forest Service assumes that it can implement logging and burning over tens of thousands of acres for years to come without

¹⁷¹ Wildlife BE at 6 (emphasis added).

¹⁷² *Id.* at 1.

¹⁷³ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 10. *See also id.* at 11-14 (repeating same statement).

further NEPA compliance, and without defining the precise nature of the project without implementing it.

Second, the response to comments states that “the design criteria/BMPs include the standards and guidelines from the Goshawk Amendment to the Forest Plan.” Neither the design criteria nor the BMPs explicitly mention, let alone incorporate, the standards and guidelines from the Goshawk Amendment, as the discussion above demonstrated. The BMPs and design criteria in the project EA are less specific and less protective than those in the Forest Plan’s Goshawk Amendment (or even the BE). If the Ashley National Forest wants to explicitly incorporate the Goshawk Amendment’s BMPs into project BMPs and design criteria, it could have done so. But it did not; it adopted fewer, weaker protections.

Third, the response to comments asserts: “As stated in the BE, these standards and guidelines will protect nesting goshawks.” But the EA fails to incorporate the BE’s standards and guidelines.

The agency response to comments also contends that “EA BMPs clearly refer to the Wildlife BA/BE in the protective measures that are being taken for the Goshawk and the forest’s other sensitive species.”¹⁷⁴ This, too, is false. The BMPs and design criteria for goshawk, in Appendix A of the final EA, nowhere mention the BA/BE. And even if the design criteria did refer to BA/BE, the proposed action must also comply with the Forest Plan Goshawk Amendment, which the project proposal does not.

In addition, the Forest Service must utilize goshawk survey methodology consistent with the best available science, including, for example, the comprehensive protocol, “Northern Goshawk Inventory and Monitoring Technical Guide” by Woodbridge *et al.*¹⁷⁵ Also, USDA Forest Service 2000 states:

A common thread in the interviews was the lack of a landscape approach in providing goshawk habitat well distributed across the Forest (Squires, Reynolds, Boyce). Reynolds was deeply concerned that both alternatives focus only on 600 acres around known goshawk nests. He was concerned that this direction could be keeping the goshawk population artificially low. *Because goshawks move around within their territories, they are very difficult to find (Reynolds). There might be more goshawks on the Forest than currently known (Squires). One or two years of goshawk surveys is not enough (Reynolds). Some pairs may not lay eggs for five*

¹⁷⁴ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 14.

¹⁷⁵ See B. Woodbridge *et al.*, Northern goshawk inventory and monitoring technical guide, U.S. Forest Service Gen. Tech. Rep. WO-71 (2006), attached as Ex. 11 to the Center’s Nov. 24, 2019 scoping comments, available at https://www.fs.fed.us/rm/pubs_series/wo/wo_gtr071.pdf (last viewed July 25, 2022).

*years (Reynolds). To get confidence in identifying nesting goshawk pairs, four to six years of surveys are needed (Reynolds).*¹⁷⁶

However, the Forest Service authorizes its field staff to conduct potentially *no surveys at all* of territory occupancy within suitable habitat, relying instead on unidentified “GIS data.”¹⁷⁷ Further, the Forest Service does not acknowledge or address existing monitoring data concerning the presence of goshawk within the 177,000+ project area.

Scientific studies indicate analysis must be conducted for adverse impacts in a roughly 6,000- to perhaps 14,000-acre northern goshawk home ranges or PFAs, neither of which are recognized or provided protection by the EA’s BMPs and design criteria. Reynolds *et al.*’s goshawk guidelines recommend ratios of (20%/20%/20%) each in the mid-aged forest, mature forest, and old forest Vegetative Structural Stage (VSS) classes for PFAs and foraging areas, and calls for 100% in VSS classes 5 & 6 and 0% in VSS classes 1-4 in nest areas.¹⁷⁸

This differs from the Ashley Forest Plan Amendment, which contains a guideline that directs:

[v]egetative treatments designed to maintain or promote a VSS 4, 5 and/or 6 group, the percent of the group acreage covered by clumps of trees with interlocking crowns should typically range from 40-70% in post-fledgling and foraging areas, and 50-70% in nest areas. To manage outside this range, it should either be shown that the range is not within PFC for the site and the biological evaluation process determines that managing outside the range will be consistent with landscape needs of the goshawk and its prey. Use the best information available and deemed most reliable to make determinations. Groups are made up of multiple clumps of trees. Groups should be of a size and distribution in a

¹⁷⁶ Forest Service, “Expert interview summary for the Black Hills National Forest Land and Resource Management Plan Amendment,” (2000) at 77 (emphasis added), attached as Ex. 12 to the Center’s Nov. 24, 2019 scoping comments, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm9_011876.pdf (last viewed July 22, 2022).

¹⁷⁷ Aspen Project EA (June 2022) at 36, 41 (“The presence or absence of northern goshawks will be determined based on existing GIS data and/or field surveys (as needed) after a specific treatment area has been identified.” (emphasis added)).

¹⁷⁸ R. Reynolds *et al.*, Management recommendations for the Northern goshawk in the southwestern United States. Rocky Mountain Forest and range Experiment Station and Southwest Region Forest Service, U.S. Forest Service Gen. Tech. Rpt. RM-217 (1992), attached as Ex. 13 to the Center’s Nov. 24, 2019 scoping comments, available at https://www.fs.fed.us/rm/pubs_rm/rm_gtr217.pdf (last viewed July 22, 2022); *see also* R. Reynolds *et al.*, “Northern goshawk habitat: an intersection of science, management, and conservation,” *Journal of Wildlife Management*, 72(4): 1047-1055 (2008) at 1248 (providing continued support for these guidelines), attached as Ex. 14 to the Center’s Nov. 24, 2019 scoping comments. We recognize that these guidelines were developed in the southwestern U.S. in different forest types, but they still appear to represent the best available science concerning goshawk.

landscape that is consistent with disturbance patterns defined in Regional or local proper functioning condition assessments (PFC). Clumps typically have 2 to 9 trees in the VSS 4, 5 or 6 size class with interlocking crowns.¹⁷⁹

In addition, Reynolds *et al.* 1992 recommend logged openings of no more than 2 acres in size or less in PFAs, depending on forest type, and logged openings of no more than 1-4 acres or less in size in the foraging areas, depending on forest type.¹⁸⁰ Clough (2000) noted that in the absence of long-term monitoring data, a very conservative approach to allowing logging activities near active goshawk nest stands should be taken to ensure that goshawk distribution is not greatly altered.¹⁸¹ This indicates that the full 180-acre nest area management scheme recommended by Reynolds *et al.* (1992) should be used around any active goshawk nest.¹⁸² Removal of any large trees in the 180-acre nesting area would contradict the Reynolds *et al.* (1992) guidelines. Crocker-Bedford (1990) noted:

After partial harvesting over extensive locales around nest buffers, reoccupancy decreased by an estimated 90% and nestling production decreased by an estimated 97%. Decreases were probably due to increased competition from open-forest raptors, as well as changes in hunting habitat and prey abundance.¹⁸³

Moser and Garton (2009) reported that all goshawk nests examined in their study area were found in stands whose average diameter of overstory trees was over 12.2 inches and all nest stands had > 70% overstory tree canopy.¹⁸⁴ Given the Forest Service proposes no analysis and provides no evidence supporting its design criteria, any assertions that project activities will sustain the viability of the northern goshawk forest-wide or otherwise meet the biodiversity goals of the National Forest Management Act, or will avoid potentially significant impacts to the species, are arbitrary and capricious, and a violation of NFMA and NEPA. The agency's failure to respond to comments on this issue also violate NEPA. And because the proposed action

¹⁷⁹ Forest Service, Ashley National Forest Plan Amendment, Appendix CC, at page CC-5.

¹⁸⁰ R. Reynolds *et al.*, Management recommendations for the Northern goshawk in the southwestern United States (Ex. 13 to the Center's Nov. 24, 2019 scoping comments) at 5, 16.

¹⁸¹ L. Clough, Nesting Habitat Selection and Productivity of Northern Goshawks in West-Central Montana, M.S. Thesis, University of Montana, 87 pp. (2000), attached as Ex. 15 to the Center's Nov. 24, 2019 scoping comments.

¹⁸² R. Reynolds *et al.*, Management recommendations for the Northern goshawk in the southwestern United States (Ex. 13 to the Center's Nov. 24, 2019 scoping comments) at 22.

¹⁸³ D. Crocker-Bedford, "Goshawk reproduction and forest management," Wildlife Society Bulletin; v. 18, no. 3, pp. 262-269 (1990), at 267, attached as Ex. 16 to the Center's Nov. 24, 2019 scoping comments.

¹⁸⁴ Moser & Garton, "Northern goshawk space use and resource selection" (Ex. 6 to the Center's Nov. 24, 2019 scoping comments) at 3. *See also* Hayward, G. D., and R. E. Escano, "Goshawk nest-site characteristics in western Montana and northern Idaho," Condor: v. 91, no. 2, pp. 476-479 (1989) attached as Ex. 17 to the Center's Nov. 24, 2019 scoping comments.

threatens to violate NFMA, the agency's action has potentially significant impacts, requiring the Forest Service to prepare an EIS.

Suggested Remedy: In any subsequently prepared NEPA document, the Forest Service must adopt Goshawk Amendment and BE design criteria into the NEPA document and Forest Service decision document, and must demonstrate that the agency is using the best available science.

In preparing the NEPA document, and in undertaking subsequent surveys before and after implementing individual project components, the Forest Service should utilize goshawk survey methodology consistent with the best available science, including, for example, the comprehensive protocol, "Northern Goshawk Inventory and Monitoring Technical Guide" by Woodbridge *et al.*

E. The EA Fails to Take a Hard Look at the Potentially Significant Impacts of Livestock Grazing.

Livestock present a significant threat to healthy aspen regeneration. A 2019 Forest Service technical report concluded that "excessive browsing by wild or domestic ungulates" represents one of the "few root causes for aspen decline in Utah."¹⁸⁵ "Heavy browse pressure on regeneration after aspen canopy removal (i.e., fire or clearcut) can result in depletion of root reserves and *permanent loss of aspen* in a matter of a few years."¹⁸⁶ That report also concluded that overuse by livestock was likely to worsen as the climate heats up: "The extent and severity of this driver [that is, excessive browsing] of aspen instability are likely to expand in the future as average snowpack decreases (longer grazing season) and the frequency and severity of drought increase with changing climate."¹⁸⁷ Studies of the Pando clone of aspen in Utah demonstrate that livestock threaten regeneration far more than wild ungulates.¹⁸⁸

The EA identifies "[p]rotection from livestock using permitted grazing practices (e.g. temporarily resting pastures or allotments, or using fencing, water and or supplements to distribute livestock away from aspen stands)" as an action that the agency could use to manage aspen stands.¹⁸⁹ The project will require post-implementation data gathering concerning

¹⁸⁵ S. Kitchen *et al.*, Guidelines for aspen restoration in Utah with applicability to the Intermountain West, Forest Service Gen. Tech. Rep. RMRS-GTR-390 (2019) at 24, 25, attached as Ex. 18 to the Center's Nov. 24, 2019 scoping comments, available at https://www.fs.fed.us/rm/pubs_series/rmrs/gtr/rmrs_gtr390.pdf (last viewed July 22, 2022).

¹⁸⁶ *Id.* at 26 (emphasis added).

¹⁸⁷ *Id.* at 27.

¹⁸⁸ J. Ratner, *et al.*, What's Eating the Pando Clone? (June 2019), attached as Ex. 19 to the Center's Nov. 24, 2019 scoping comments.

¹⁸⁹ Aspen Project EA (June 2022) at 8, 71.

regeneration. But the EA fails to set hard triggers for when to undertake adaptive management in response to excessive browsing.¹⁹⁰

The EA's response to comments explains the agency's failure to require action when "thresholds" are exceeding by alleging that "[s]etting 'triggers' for grazing would be outside of the scope of the project. However, the range areas within the proposed project area will be monitored throughout."¹⁹¹ Monitoring damage is not the same as preventing or remediating damage, and so there is no guarantee that significant impacts can be avoided, especially where the agency asserts that fixing the problem is "outside of the scope of the project." As noted above, the Forest Service's 'maybe we'll do something to limit browse damage' approach is inconsistent with the measures adopted for the Monroe Mountain project, without explanation.

Further, each item on the EA's menu of actions will have a cascade of other impacts, any of which could be significant. Fencing out aspen stands may result in increased livestock damage to areas outside the fence as AUMs are concentrated in a smaller area. It is also likely financially costly. Eliminating grazing from aspen stands may also require permit modifications (including a reduction of AUMs), or changes to pastures, actions that the Forest Service has typically concluded require preparation of an EA.

The use of water or supplements to redistribute livestock also has the potential to have significant impacts. Peer-reviewed studies show that attempts to lure cattle away from riparian areas are largely ineffective.¹⁹² If the Forest Service has evidence that artificially provided water actually results in reducing impacts to aspen regeneration, we urge the agency to make that information available to the public. Despite a request to do so in our comments on the draft EA, the agency provided no such evidence. Further, using water to redistribute livestock often

¹⁹⁰ The EA identifies target browsing levels but state that "[i]f these thresholds are exceeded" the agency need only "*consider* additional management actions to protect the aspen regeneration;" "[t]he thresholds should be adapted as necessary on the basis of observed success in stand recruitment." *Id.* at 50 (emphasis added). In other words, exceeding the "thresholds" may not result in any agency action. Nor is any precise action identified.

¹⁹¹ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 64.

¹⁹² See L.D. Bryant, *Response of Livestock to Riparian Zone Exclusion*, Journal of Range Management, Vol. 35, No. 6 (Nov. 1982), pp. 780-785 (concluding that "Neither salt placement nor alternate water location away from the riparian zone influenced livestock distribution appreciably."), attached as Ex. 20 to the Center's Nov. 24, 2019 scoping comments. See also J. Carter *et al.*, *Upland Water and Deferred Rotation Effects on Cattle Use in Riparian and Upland Areas*, Rangelands, Vol. 39 (2017), 112, 117 (concluding, based on a four year study of an allotment in Utah that "Upland water developments and supplements do not overcome the propensity of cattle to linger in riparian areas, resulting in overgrazing and stream damage, and therefore do not lead to recovery of these damaged systems."), attached as Ex. 21 to the Center's Nov. 24, 2019 scoping comments; R.L. Gillen, Cattle Distribution on Mountain Rangeland in Northeastern Oregon, Journal Of Range Management 37(6), November 1964, pp. 549-53 ("Water distribution was not correlated with grazing patterns in uplan[d] plant communities."), attached as Ex. 22 to the Center's Nov. 24, 2019 scoping comments.

involves the development of natural springs or the construction of miles of pipeline, both of which have potentially significant financial and ecological costs (the latter of which include making water less available for wildlife and/or degrading aquifers and riparian areas). In a landscape where livestock are nearly ubiquitous, upland sites where grazing is currently precluded or limited by water scarcity are often the only places where relatively undisturbed, native vegetation can be found. Historically, the provision of livestock water to such sites has caused livestock to degrade upland soils, vegetation, wildlife habitat, scenery, and aesthetic qualities.¹⁹³

Because measures to reduce damaging livestock impacts may themselves result in damage outside of protected areas, the Forest Service must disclose these impacts to take the hard look required by NEPA.

In addition, because many of these measures – fencing areas, building pipelines – may be costly, the Forest Service must disclose how these “improvements” will be paid for and who will pay them. The fact that these socio-economic impacts have the potential to be significant provides a further basis for preparing at least an EA.

Rather than commit to addressing these potential impacts, the Forest Service dismisses them in part because “Livestock Grazing is outside of the scope of the project.”¹⁹⁴ The agency also alleges that “design criteria have been made to protect areas so there would not be any long term damage,” though the EA does not explain how “*consider[ing]* additional management actions to protect the aspen regeneration” once browse thresholds are exceeded will “protect” areas.¹⁹⁵

Suggested Remedy: In any subsequently prepared NEPA document, the agency must take a hard look at the impacts of livestock grazing on the proposed action, and must adopt mitigation measures that will ensure that livestock grazing will not interfere with new aspen growth. The subsequent NEPA document must also disclose how mitigation measures to limit grazing – fencing, providing water at other locations – may have their own environmental impacts.

F. The EA Fails to Take a Hard Look at Noxious Weed Control.

When first proposed, the Forest Service intended to rely on the categorical exclusion that involves “[t]imber stand and/or wildlife habitat improvement activities *that do not include the*

¹⁹³ See, e.g., Laurence A. Stoddart, *et al.*, *Range Management*, Third Edition (1975) (concentration of livestock at water sources on arid rangelands causes severely denuded areas); Joan E. Scott, *Do Livestock Waters Help Wildlife?*, in *Environmental, Economic, and Legal Issues Related to Rangeland Water Developments*, Proceedings of a Symposium (1997), pp. 493-507, attached as Ex. 23 to the Center’s Nov. 24, 2019 scoping comments.

¹⁹⁴ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 64.

¹⁹⁵ Aspen Project EA (June 2022) at 50 (emphasis added).

use of herbicides or do not require more than 1 mile of low standard road construction.”¹⁹⁶ Neither the Scoping Report nor the EA make clear whether the agency will use herbicides.

Ground disturbance – caused by the use of heavy equipment, scraping of skid trails and landings, and fire – across the potentially vast area envisioned by the proposed action is likely to create conditions conducive to the spread of noxious weeds. To address this fact, the BMPs and design elements include, for many of the management actions proposed, language requiring “treatment” of noxious weeds through undefined means.

All noxious and invasive plant populations found within the project area will be treated prior to project implementation. For at least three years after a project is completed, treat invading noxious weeds as needed on areas impacted by ground disturbing operations.¹⁹⁷

The Forest Service does not explain what sort of treatment would be applied, nor do the BMPs and design elements explicitly forbid the use of herbicides. We note that the Ashley National Forest in 1994 explicitly *declined* to adopt an integrated weed management plan that prohibited the use of herbicides, and instead adopted one that approves a number of pesticides including the controversial chemicals glyphosate and dicamba, about which much new information has been developed since the now-27-year-old weed management plan was issued.¹⁹⁸ The Forest Service must make clear whether “treatments” of noxious weeds will require herbicides, identify which ones, explain whether it will consider new information concerning weed management that has been developed since 1994, and consider and disclose the effectiveness and impacts of non-herbicide noxious weed treatments.

In response to comments, the Forest Service provides no new information and declines to even address the issue of whether it will use herbicides and what chemicals it may employ. Instead the agency responds that the “EA was created along with BMPs and design criteria designated for this project in relation to noxious weed treatment.”¹⁹⁹ This is a non-answer because the BMP and design criteria state only that noxious weeds will be “treated,” without explaining how or with what, or whether the agency has considered new information concerning the dangers of various herbicides. The Forest Service’s failure to address this issue, or to respond meaningfully to comments, violates NEPA.

¹⁹⁶ Ashley NF, Scoping Report, Ashley Aspen Restoration Project (Oct. 2019) at 5; 36 C.F.R. § 220.6(e)(6) (emphasis added).

¹⁹⁷ Aspen Project EA (June 2022) at 24, 29, 36, 39.

¹⁹⁸ Ashley National Forest, Decision Notice and Finding Of No Significant Impact, Noxious Weed Management (Mar. 22, 1994) at 3-4, available at https://www.fs.usda.gov/nfs/11558/www/nepa/71715_FSPLT2_025940.pdf (last viewed Nov. 24, 2019).

¹⁹⁹ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 54.

Suggested Remedy: In any subsequently prepared NEPA document, the Forest Service should disclose whether it intends to use herbicides; if so, which ones; and whether new information in the nearly 30 years since preparation of the Ashley National Forest's Noxious Weed Management plan require supplementation.

IV. THE FOREST SERVICE SHOULD ANALYZE A RANGE OF REASONABLE ALTERNATIVES.²⁰⁰

A properly drafted EA or EIS requires the agency to discuss appropriate alternatives to the proposed project.²⁰¹ Even where impacts are “insignificant,” the Forest Service must still consider alternatives.²⁰² The agency's treatment of alternatives must also be measured against the standards in 42 U.S.C. § 4332(2)(E) and 40 C.F.R. § 1508.9(b) (requiring the agency to study, develop and discuss appropriate alternatives and to briefly describe those alternatives in environmental assessments).²⁰³

Consideration of a range of reasonable alternatives is necessary to ensure that the agency has before it and takes into account all possible approaches to, and potential environmental impacts of, a particular project. Importantly, NEPA's alternatives requirement ensures that the “most intelligent, optimally beneficial decision will ultimately be made.”²⁰⁴

As federal courts have recognized, “[c]learly, it is pointless to ‘consider’ environmental costs without also seriously considering action to avoid them.”²⁰⁵ “[T]he heart” of an environmental analysis under NEPA is the analysis of alternatives to the proposed project, and agencies must evaluate all reasonable alternatives to a proposed action.²⁰⁶ An agency must gather “information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned.”²⁰⁷ Thus, agencies must “ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at

²⁰⁰ Objectors raised this issue in their July 9, 2021 comments on the draft EA at pages 38-39.

²⁰¹ *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002), citing 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b).

²⁰² *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) (agency's duty to consider alternatives “is both independent of, and broader than,” its duty to complete an environmental analysis); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) (duty to consider alternatives “is operative even if the agency finds no significant environmental impact”).

²⁰³ *Davis*, 302 F.3d at 1120.

²⁰⁴ *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

²⁰⁵ *Id.* at 1128.

²⁰⁶ *Colo. Env't'l Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999), quoting 40 C.F.R. § 1502.14.

²⁰⁷ *Greater Yellowstone*, 359 F.3d at 1277, citing *Colo. Env't'l Coalition*, 185 F.3d at 1174; see also *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1528 (10th Cir. 1992).

environmental factors, and to make a reasoned decision.”²⁰⁸ Informed and meaningful consideration of alternatives is critical to the NEPA statutory scheme, ensuring that agency decisionmakers assess a project’s costs, benefits, and environmental impacts in the correct context.²⁰⁹ This requirement also ensures that decisionmakers “have before them and take into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.”²¹⁰

To comply with these NEPA mandates, the Forest Service must “rigorously explore and objectively evaluate all reasonable alternatives” to a proposed action.²¹¹ “Section 102(2)(E) of NEPA requires that agencies ‘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. § 4332(2)(E) (emphasis added).... While a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities. 42 U.S.C. § 4332(2)(E).”²¹² The Forest Service cannot dismiss an alternative from analysis unless it shows that the proposal is too remote, speculative, or impractical or ineffective, or too similar to an alternative already considered.²¹³

Here, the Forest Service must rigorously explore and objectively evaluate alternatives including, but not limited to:

- (1) An alternative that eliminates heavy equipment use in all roadless areas, which, under the proposed action, can occur within 1,000 feet from existing roads where slope allows. Eliminating this treatment would impact 13,961 acres, less than one-tenth of proposed treatment areas, but would reduce impacts to recreationists, soils, scenery and other resources while permitting the agency to use all the rest of the proposed treatment tools within IRAs. It would thus permit the agency to meet project objectives on all, or the vast majority, of the project area, while resulting in the Forest Service treating all roadless lands consistently and uniformly.
- (2) An alternative that implements a minimum road system and removes unauthorized roads and trails;

²⁰⁸ *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 371 (D.C. Cir.1981) citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

²⁰⁹ See *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 729-30 (9th Cir. 1995).

²¹⁰ *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (emphasis in original).

²¹¹ 40 C.F.R. § 1502.14(a); accord 42 U.S.C. § 4332(2)(C)(iii).

²¹² *Ayers v. Espy*, 873 F. Supp. 455, 473 (D. Colo. 1994).

²¹³ *High Country Conservation Advocates v. United States Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020) (setting aside Forest Service decision for failing to consider reasonable alternative).

- (3) An alternative that identifies with precision which proposed treatment options will be applied to which specific areas, based on the collection of site-specific information.

The Forest Service fails to acknowledge or respond to these proposed alternatives, violating NEPA. The agency acknowledges and declines to examine an alternative that would have eliminated all treatments in roadless areas.²¹⁴

The Forest Service seems to imply that it need not analyze an alternative that would limit mechanized treatments in roadless areas because the agency's proposed action would limit such treatments to within 1,000 feet of roads.²¹⁵ The agency may thus be alleging that an alternative barring mechanized uses in roadless areas is "too similar" to the action alternative.

But if that is the agency's position: (1) the agency never says so explicitly; and (2) that position is incorrect. There is a significant difference between protecting 20 square miles of roadless areas by preventing any mechanical uses (and thus most commercial tree removal), and the proposed action, which allows mechanical treatments and commercial tree removal and the skid trails and damage to soil and water that will accompany those activities, regardless of the mitigation the agency asserts it will implement.

Further, the agency never explains why it cannot, as an alternative, disclose the where, when, and how of proposed treatments as required by NEPA.

Suggested Remedy: In any subsequently prepared NEPA document, the Forest Service should analyze a range of reasonable alternatives, including the three identified above, or explain, in compliance with law, why it is justified in failing to do so.

V. THE FOREST SERVICE FAILED TO EVALUATE THE POTENTIAL FOR CUMULATIVE EFFECTS.²¹⁶

NEPA regulations identified three types of impacts – direct, indirect, and cumulative. NEPA's legislative history is replete with additional references to the complexity of environmental impacts, the consequences of "letting them *accumulate* in slow attrition of the environment" and the "ultimate consequences of quiet, creeping environmental decline," all of which Congress concluded required an analysis of proposed impacts beyond the immediate, direct effects of an action.²¹⁷ For 50 years, CEQ interpreted the law to accomplish just that.

²¹⁴ See Aspen Project EA (June 2022) at 9.

²¹⁵ *Id.* at 6; Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 38 ("An appropriate amount of alternatives were considered. specified [sic] roadless areas and limited heavy equipment use in roadless areas except in areas within 1000 feet of existing system roads. Added design criteria to protect roadless character in these buffer locations from the heavy equipment use.").

²¹⁶ Objectors raised this issue in their July 9, 2021 comments on the draft EA at pages 40-45.

²¹⁷ 115 Cong. Rec. 29070 (October 8, 1969) (emphasis added); see also, S. Rep. No. 91-296, 91st Cong., 1st Sess. (July 9, 1969) at 5 (bemoaning the fact that "[i]mportant decisions concerning

NEPA's statutory text indicates that agencies should address cumulative environmental effects. The evaluation of a proposed project must include a "detailed statement" on "the environmental impact of the proposed action," including "*any* adverse environmental effects which cannot be avoided should the proposal be implemented."²¹⁸ The evaluation must examine "the environmental impact of the proposed action" "*to the fullest extent possible*."²¹⁹ The evaluating agency must also seek out other agencies' expertise regarding "*any* environmental impact involved."²²⁰ The statute requires agencies to "recognize the *worldwide and long-range character* of environmental problems."²²¹

Further, the statute itself anticipates that agencies will consider impacts that, like climate pollution and climate change, may accrete from numerous projects with small individual impacts to harm our "biosphere."²²²

Within a few months of its establishment, CEQ reinforced the need to address all environmental impacts, including cumulative effects. "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to *the overall, cumulative impacts of the action* proposed (and of *further actions contemplated*)."²²³ CEQ published interim guidance in 1971 that confirmed this mandate.²²⁴ The guidance explained that the requirement in Section 102(2)(C) of NEPA to identify "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" in the detailed statement (now known as an EIS) required the agency "to assess the

the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."), attached as Ex. B to Objectors' July 9, 2021 comments on the draft EA.

²¹⁸ 42 U.S.C. § 4332(2)(C)(ii) (emphasis added).

²¹⁹ *Id.* §§ 4332 (emphasis added), 4332(2)(C)(i).

²²⁰ *Id.* § 4332(2)(C) (emphasis added).

²²¹ *Id.* § 4332(2)(F) (emphasis added).

²²² 42 U.S.C. § 4321 (NEPA's purpose is "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and *biosphere*" (emphasis added)).

²²³ Council on Environmental Quality: Statements on Proposed Federal Actions Affecting the Environment; Interim Guidelines, April 30, 1970, Section 5(b) (filed with Fed. Reg. May 11, 1970), available in *Environmental Quality, The First Annual Report of the Council on Environmental Quality* (1970) at 288, available at <https://www.slideshare.net/whitehouse/august-1970-environmental-quality-the-first-annual-report-of> (last viewed July 22, 2022).

²²⁴ CEQ, *Statements On Proposed Federal Actions Affecting The Environment Guidelines*, 36 Fed. Reg. 7,724 (April 23, 1971), attached as Ex. C to Objectors' July 9, 2021 comments on the draft EA.

action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.”²²⁵

Some of the earliest Federal court decisions, issued years before CEQ adopted its 1978 regulations, hold that NEPA *requires* disclosure of cumulative effects. The Second Circuit ruled in 1972:

In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will “significantly” affect the quality of the human environment the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including *the cumulative harm* that results from its contribution to existing adverse conditions or uses in the affected area.

Hanly v. Kleindienst, 471 F.2d 823, 830-31 (2d Cir. 1972) (emphasis added)). Following *Hanly*, the Second Circuit reiterated the importance of disclosing cumulative impacts.

As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the *accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources*. ‘*Important decisions concerning the use and the shape of man’s future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.*’ S. Rep. No. 91-296, 91 Cong., 1st Sess. 5 (1969). NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach *so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted* as the price to be paid for the major federal action under consideration.

Natural Resources Defense Council v. Callaway, 524 F.2d 79, 88-89 (2d Cir. 1975) (emphasis added) (citation omitted).

The Ninth Circuit in 1975 further explained:

while “foreseeing the unforeseeable” is not required, an agency must use its best efforts to find out all that it reasonably can: It must be remembered that the basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by

²²⁵ *Id.* at 7,725 (interpreting 42 U.S.C. 4332(2)(C)(iv)).

labeling any and all discussion of future environmental effects as “crystal ball inquiry.” Nor does characterization of industrial development as a “secondary” impact aid the defendants. As the Council on Environmental Quality only recently pointed out, consideration of secondary impacts may often be more important than consideration of primary impacts.

Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects, these secondary or induced effects may be more significant than the project’s primary effects.

....

While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable. If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate. As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase.²²⁶

The Supreme Court in 1976 endorsed the Second and Ninth Circuits’ view that the statute requires disclosure of cumulative effects.

[W]hen several proposals for coal-related actions that will have *cumulative or synergistic environmental impact upon a region* are pending concurrently before an agency, their environmental consequence must be considered together. Only through *comprehensive* consideration of pending proposals can the agency evaluate different courses of action.

Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976) (emphasis added) (citation omitted).

CEQ guidance has underscored that agencies must disclose cumulative effects in EAs.²²⁷

²²⁶ *City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975) (quoting *Scientists’ Institute for Public Information v. A. E.C.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) and CEQ, Fifth Annual Report of the Council on Environmental Quality, 410-11 (Dec. 1974), available at <https://www.slideshare.net/whitehouse/august-1974-the-fifth-annual-report-of-the-council-on-environmental-quality> (last viewed July 22, 2022)).

²²⁷ See Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* 4 (January 1997) (“adequate consideration of cumulative effects requires that EAs address them fully”).

B. The Forest Service Fails to Address the Potential for Significant Cumulative Effects.

This proposed action is likely to have significant impacts when viewed together with projects that overlap or adjoin the Aspen Project area. The Surface Transportation Board released a Final EIS last year on a proposal to build a rail line between the Uinta Basin and Kyune, Utah, and one alternative would build the line through aspen forest near Highway 191 in the Indian Canyon area within the south unit of the Duchesne Ranger District.²²⁸ The Ashley National Forest approved the railway right-of-way earlier this month.²²⁹ Clearcutting and rail line construction and operation through aspen forest in the Duchesne south unit, together with the Aspen Project's proposed clearcutting and burning in that same area, could, when combined, result in significant environmental harm to wildlife, hydrology, scenery, and other values, and to other roadless area characteristics.²³⁰ The Utah Basin Railway EIS does not appear to have addressed the Aspen Project,²³¹ so the Ashley NF cannot rely on that document to disclose the cumulative effects of both projects.

Further, the Roadless Evaluation prepared for this project notes that multiple roadless areas impacted by the Aspen Project have been leased for oil and gas, or have been impacted by exploratory drilling, and that the potential for future drilling in some areas is "high."²³² Although the Forest Service discloses the likelihood of future drilling, and of recreational and livestock

²²⁸ See Surface Transportation Board, Final Environmental Impact Statement for the proposed Uinta Basin Railway (Aug. 2021), Chapter 3.15, attached as Ex. 5, and available at https://icfbiometrics.blob.core.windows.net/uinta-basin/03_15_Cumulative_Impacts_FEIS.pdf (last viewed July 25, 2022).

²²⁹ See Ashley National Forest, Record of Decision for the Uinta Basin Railway Project (July 2022) attached as Ex. 6.

²³⁰ The Aspen Project EA identifies potentially treatment areas within the Indian Canyon area near where the railway will be built. See Aspen Project EA (June 2022) at 57, 61 (maps identifying aspen that could be treated under the EA within Indian Canyon along and near Highway, in the same area where the Forest Service); Ashley National Forest, Record of Decision for the Uinta Basin Railway Project (July 2022) (Ex. 6) at 10 (showing location of railway right of way within Indian Canyon).

²³¹ See Surface Transportation Board, Final Environmental Impact Statement for the proposed Uinta Basin Railway (Aug. 2021), Chapter 3.15, attached hereto as Ex. 5.

²³² See, e.g., Roadless Evaluation at 88 (stating re: Roadless Area 0401011 "The eastern half of the roadless area is covered by portions of three oil and gas leases, and wells have been proposed."); *id.* at 90 (stating re: Roadless Area 0401010 "Oil and gas leases cover most of the area, there are wells present, and additional oil and gas developments are proposed."); *id.* at 92 (stating re: Roadless Area 0401010 "Oil and gas exploration and development potential is high. Over 95 percent of the area is covered by portions of four oil and gas lease. Several oil wells have been drilled."), *id.* at 94 (stating re: Roadless Area 0401009 "Portions of six oil and gas leases cover parts of the roadless area, and applications have been filed for exploratory wells. Four plugged and abandoned oil and gas wells exist within or immediately adjacent to the roadless area.").

grazing use in many of the roadless areas, the agency never addresses the potential for cumulative effects on the areas' values of all of these activities, as NEPA mandates, nor does it address reasonably foreseeable future impacts from, for example, the drilling of leased roadless lands.

Despite the potential for significant cumulative impacts to a variety of resources from the project when viewed together with reasonably foreseeable railway construction, livestock grazing, oil and gas production, and recreation, the Aspen Project EA contains no analysis of cumulative impacts.

The Forest Service NEPA Handbook, 1909.15, Chapter 15.3, describes the framework the agency should use “in the development of a meaningful cumulative effects analysis for project proposals:”

1. Define the affected spatial area for each resource where effects (direct and indirect) may be caused by the proposed activities.
2. Define the temporal boundaries for each resource from the proposed activities (How long will the effects last?).
3. Document the rationale and sources for the spatial and temporal boundaries of the affected area for each resource.
4. Describe the effects that overlap in time and space for past, present, and reasonably foreseeable future actions (activities), regardless of ownership, that may combine with effects of the proposed activities and result in cumulative effects. Note that cumulative effects can be additive or synergistic to the point of being greater than the sum of the parts.
5. Briefly describe any key assumptions made in the analysis and any information gaps that may exist. Cite pertinent references, monitoring results, and so on.

The Ashley National Forest did none of these for the Aspen Project. Importantly, the EA fails to define a cumulative effects area, nor does it identify foreseeable projects that may have overlapping impacts, or explain why those suggested by the Objectors will have no cumulative impacts when viewed together with those of the proposed action.

The Forest Service responds to these issues with the blanket statement that “[t]he EA addresses adequate direct, indirect, and cumulative effects,” without addressing which impacts, or where the EA purportedly does so.²³³ This conclusion is false, and the agency’s failure to disclose cumulative effects of other reasonably foreseeable actions together with the proposed action violates NEPA.

²³³ Aspen Project, Consideration of Comments for Ashley National Forest Aspen Restoration Project (2022) at 34.

Suggested Remedy: In any subsequently prepared NEPA document, the Forest Service must: Identify the spatial and temporal boundaries for a cumulative impacts analysis; identify those actions (including, e.g., the Uinta Basin Railway, foreseeable oil and gas drilling, livestock grazing, etc.) that may, when taken together with the proposed action, have synergistic impacts on resources within those spatial and temporal boundaries; and disclose those effects.

CONCLUSION.

The Center for Biological Diversity and WildEarth Guardians request a meeting to discuss potential resolution of issues raised in this objection, pursuant to 36 C.F.R. § 218.11(a).

We hope that the Forest Service will use the objection process and such a meeting as opportunities to engage with stakeholders, including Objectors, to develop a project that is legally and ecologically sound.

Sincerely,



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TABLE OF EXHIBITS

- Exhibit 1. Superior National Forest, Tofte Landscape Project, Final EA, Appendix D (2022)
- Exhibit 2. Fishlake NF, Monroe Mountain Aspen Project Final EIS, Appendix C (2014)
- Exhibit 3. Mortenson, Valton. 2017. Ashley National Forest Assessment Infrastructure Report.
- Exhibit 4. Forest Service, Decision Notice and FONSI of the Forest Plans in Utah for the Northern Goshawk Project (Mar. 14, 2000)
- Exhibit 5. Surface Transportation Board, Final Environmental Impact Statement for the proposed Uinta Basin Railway, Chapter 3.15 (Aug. 2021)
- Exhibit 6. Ashley National Forest, Record of Decision for the Uinta Basin Railway Project (July 2022)