

Prairie Hills Audubon Society

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October 6, 2026

Director, Ecosystem Management Coordination

USDA Forest Service, 201 14th Street SW, Mailstop 1108, Washington, DC 20250-1124

Submitted via <https://www.regulations.gov>, Docket FS-2025-0001

Re: Comments of Prairie Hills Audubon Society on the Proposed Rescission of the 2001 Roadless Area Conservation Rule, RIN 0596-AD66, 91 Fed. Reg. 53,827 (Aug. 20, 2026). TRANSMITTAL OF ATTACHMENTS FOR THE ADMINISTRATIVE RECORD — SUBMISSION 2 OF 3 (ATTACHMENTS A09–A14)

Dear Director:

This letter transmits the attachments to the comments of Prairie Hills Audubon Society (PHAS) on the proposed rescission of the 2001 Roadless Area Conservation Rule and the associated Draft Environmental Impact Statement. PHAS's comment letter was submitted earlier this evening in a separate submission on this docket. Because of file-size limits on the portal, PHAS is submitting the attachments in several submissions, each led by a copy of this transmittal. This submission contains Attachments A09–A14.

PHAS requests that its comment letter and all of these submissions be treated together as one integrated comment, and that every attached document be placed in the administrative record for this rulemaking and considered in the final EIS and any final rule. The attachments are:

- A01** John Muir Project et al., "Stop the Roadless Rescission. Close the Loopholes." Organizational sign-on letter (2026), signed by PHAS.
- A02** Biodiversity Conservation Alliance et al., Amended Petition to the Wyoming Environmental Quality Council for Designation of an Area Known as Sand Creek as Very Rare or Uncommon (Aug. 12, 2009), endorsed by PHAS.
- A03–A04** Graham, Battaglia & Jain, A Scenario-Based Assessment to Inform Sustainable Ponderosa Pine Timber Harvest on the Black Hills National Forest, RMRS-GTR-422 (USDA Forest Service, 2021), in two parts.
- A05** Coalition letter to the Acting Regional Forester requesting a meeting on unsustainable logging, Black Hills National Forest (Feb. 16, 2021).
- A06** Coalition letter to the Regional Forester following the May 5, 2021 meeting (May 17, 2021).
- A07** Coalition letter: the Forest Service must undertake supplemental environmental review of the Black Hills Resilient Landscapes project and cease using the Mountain Pine Beetle Response project analysis (June 16, 2021).
- A08** Coalition letter to the Regional Forester requesting a meeting concerning the Black Hills National Forest (Jan. 31, 2023).
- A09a–b** Letter to USDA requesting a meeting on unsustainable logging on the Black Hills National Forest (July 12, 2023), in two parts; Part 2 is the attached opportunity-analysis map.
- A10** John Muir Project et al., comments on the Draft EIS for Amendments to Land Management Plans to Address Old-Growth Forests (Sept. 17, 2024).
- A11** PHAS letter to the Grand River Ranger District on grazing improvements and roadless area eligibility, with excerpt of a 1999 appeal (May 27, 2009).
- A12** Complaint, Center for Biological Diversity and Sierra Club v. U.S. Department of Agriculture, No. 3:26-cv-00866 (N.D. Cal., filed Jan. 28, 2026).
- A13** Earthjustice comments on the USDA NEPA Interim Final Rule, Docket USDA-2025-0008 (Aug. 4, 2025).
- A14** PHAS scoping comments on the Forest Service Travel Management Rule rewrite, Docket

FS-2026-0100 (Sept. 23, 2026).

- A15** Sand Creek area: Sierra Club proposed wilderness boundary map, older Forest Service structural-stage map, and photographs by Nancy Hilding.
- A16** PHAS summary of recreation opportunity spectrum and scenic integrity statistics from the 1997 Black Hills National Forest Revised Forest Plan Record of Decision.
- A17** Excerpts from The Economic Impact of Travel in Wyoming, 2020p (Dean Runyan Associates for the Wyoming Office of Tourism): statewide county summary and Crook and Weston County detail.
- A18** National Audubon Society, North American Grasslands and Birds Report (2019).
- A19** Nebraska National Forest Units Land and Resource Management Plan, Chapter 3, Management Area Direction, including Management Area 1.2, Recommended for Wilderness (Amendment 2, 2009).

Sincerely,

Nancy Hilding, President
Prairie Hills Audubon Society

July 12, 2023

Dr. Holmer Wilkes
Under Secretary
Natural Resources and Environment
U.S. Department of Agriculture
1400 Independence Ave. S.W.
Washington, DC 20250

Meryl Harrell
Deputy Under Secretary
Natural Resources and Environment
U.S. Department of Agriculture
1400 Independence Ave. S.W.
Washington, DC 20250
Via email: Meryl.Harrell@usda.gov

Randy Moore
Chief
U.S. Forest Service
U.S. Department of Agriculture 1400 Independence Ave, SW
Washington, DC 20250

RE: Meeting request regarding unsustainable logging on the Black Hills National Forest

Dear Undersecretary Wilkes, Deputy Under Secretary Harrell and Chief Randy Moore,

We are a part of a diverse group of retired USDA Forest Service employees (USFS), conservation organizations, and concerned individuals. The tremendous environmental, social, and economic values of the Black Hills National Forest (BHNF) are threatened by ongoing harm from what USDA's own scientists have concluded is an unsustainable level of logging.

We have direct and informed knowledge of the situation on the Black Hills National Forest and have been working on this issue for many years.

- Dave Mertz, retired in 2017 from his position as the Natural Resource Staff Officer after 6 years on the Black Hills National Forest and a 32 year-long career with the Forest Service as a Forester and Fire Management Officer.
- Blaine Cook, Black Hills National Forest Silviculturist, retired in 2018. He worked on the BHNF for 31 years and has extensive knowledge on the Forest's standing timber inventory.
- Tracy Anderson, Black Hills National Forest Hell Canyon District Ranger for 6 years, retired in 2021. She worked in all of the Forest Service regions except Region 2 with a primary emphasis of managing large and small timber sale programs and leading National Environmental Policy Act (NEPA) teams on a variety of resource projects.

- Mary Zimmerman, served on the Black Hills National Forest Advisory Board (NFAB) for 7 years and was part of an NFAB working group addressing forest health issues. She has been with the Norbeck Society since its inception in 2005 addressing sustainability issues on public lands in the Black Hills Region.

We are very concerned about the timber program and the effects of the extreme deviation from standard forestry on the Black Hills National Forest. The Forest is being substantially overcut which will certainly limit Plan Revision and harvest potential over the long run. The sales volume must be reduced to no more than 64,000 CCF for the next several years until a revised Forest Plan is in place. In the last 25 years, acres affected by logging now exceed those affected by natural mortality of insects and fire. Please see the photos attached at the end of this letter.

In a letter to Regional Forester Frank Beum, dated January 31, 2023 (attached), we detailed several of our concerns and requested a meeting to discuss these issues. In our letter we referenced an August 19, 2021, Briefing Paper from Chris French to the White House (attached) describing the situation on the Black Hills National Forest which said the following:

"In January 2021, [Black Hills National Forest Silviculturist Jeff Underhill did] a final assessment of that recommendation suggested a range of 64,000 to 88,000 CCF [hundred cubic feet] as a sustainable annual sawtimber harvest level. The Rocky Mountain Research Station released GTR 422 in April 2021, which suggested a sustainable annual sawtimber harvest level of 72,400 to 90,500 CCF appeared to be the best option based on multiple scenarios of standing volume, projected growth, and mortality."

However, even the lower volume estimates in these two sources — 64,000 and 72,400 CCF/year — did not account for non-timber multiple use objectives and other Forest Plan constraints that limit logging such as Habitat Structural Stages, Site Index, Cumulative Mean Annual Increment, and steep slopes. To comply with the law and manage the Black Hills as a National Forest rather than an ecologically impoverished industrial tree farm, the agency should therefore be limiting the sale of commercial sawtimber to less than 64,000 CCF per year in order to protect important resources like ecological integrity and recreational opportunities.

Since we sent our letter to Regional Forester Beum, Deputy Regional Forester Jacque Buchanan testified before a Wyoming Joint Agriculture committee on February 28, 2023, that the Forest Service hopes to keep the Black Hills National Forest's timber volume sold target at 120,000 CCF/year until the Forest Plan is revised.

The Forest Plan revision is already months behind schedule, and it could easily take many years to complete. We are deeply concerned about the damage to the BHNF's environmental and other values from continuing unsustainable levels of logging while the Forest Plan is revised.

For background, in response to our January 2023 letter to Regional Forester Beum, we received a letter (attached) which can only be characterized as non-responsive. He did not address any of our concerns. We have tried very hard, for years now, to work within the system to get the Forest Service to abide by the National Forest Management Act and bring the Black Hills National Forest into compliance with the requirements of long-term sustainability of its timber program.

We appreciate that BHNF logging levels in the last year represent a modest reduction from prior years of overcutting. In light of these initial (but insufficient) reductions, the USDA has undertaken dramatic and costly measures to support politically connected lumber mill owners in South Dakota and Wyoming by subsidizing the shipping of logs from California to those who profited from overcutting the BHNF for decades. Despite these extraordinary measures, the Forest Service continues logging at levels the agency's own scientists concluded are unsustainable and therefore unlawful continuing to degrade the Forest's wildlife, waters, and healthy ecosystems. The agency must reduce logging levels now.

Thank you for listening to our concerns. We hope that you will investigate what is going on in Region 2 and the short-sighted direction being provided to the Black Hills National Forest with its timber program.

We specifically request three things:

1. that you direct the Regional Forester's office and the BHNF to immediately set target levels for logging at 62,000 CCF per year or less.
2. a meeting with you so that we can be assured that you fully understand the scope of the problem, its urgency, and have the opportunity to ask any questions that you may have.
3. that Forest Service Chief Randy Moore visit the Black Hills National Forest.

Please direct your response to Mary Zimmerman:
info@norbecksociety.com (605) 381-0013.

Sincerely,

Mary Zimmerman, President
Norbeck Society
P. O. Box 9730
Rapid City, SD 57709
info@norbecksociety.com

Dave Mertz, BHNF Resource Staff Officer
(retired)
Blaine Cook, BHNF Silviculturist (retired)
Tracy Anderson, Hell Canyon District
Ranger, BHNF (retired)
Black Hills Forest Service Retirees
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Randi Spivak
Center for Biological Diversity
Public Lands Policy Director
rspivak@biologicaldiversity.org

Attachments:

2023-01-31 Letter to R2 Forester Beum

French -briefing to the White House

Norbeck response from R2 Forest Beum

“Opportunity Analysis Map” -BHNF- Adobe Acrobat Reader enabled layers

Captioned photos on following pages



Thousands of acres are being clearcut with no possibility for re-forestation.



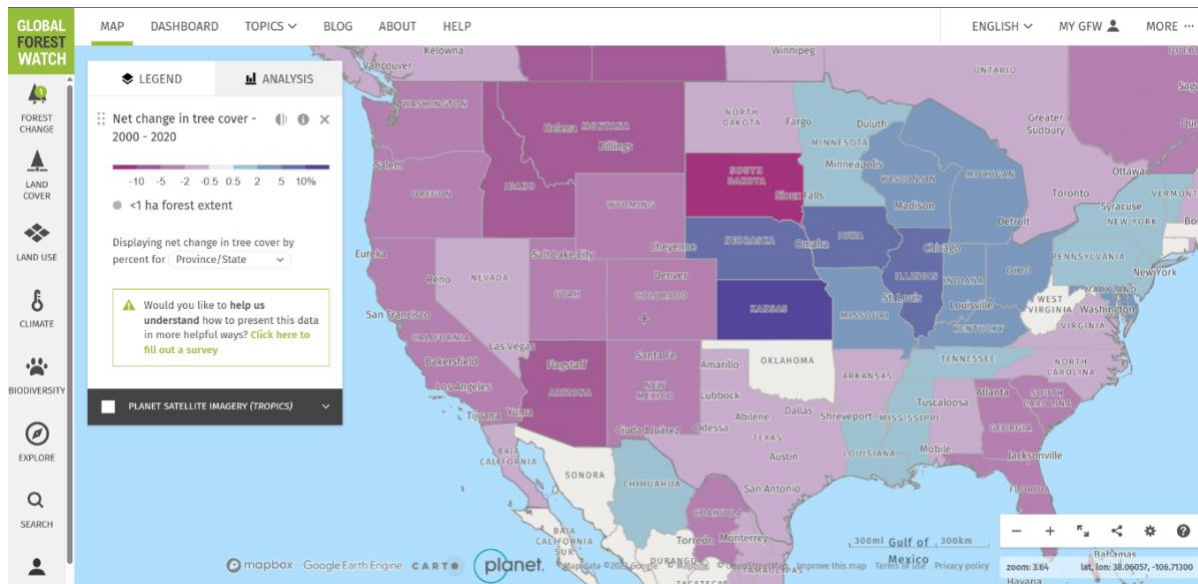
Putting multiple values at risk, unsustainable logging has continued on the Black Hills National Forest despite data showing depletion trends since 2011.



The Black Hills Resilient Landscape Project (BHRL) authorized tens of thousands of acres of overstory removal such as this. Many of the overstory removal trees had not yet reached Culmination of Mean Annual Increment (CMAI) yet as required by NFMA. In other words, these trees had not yet reached their full growth potential. They were cut before their time. In the BHRL EIS, the requirement for CMAI was exempted, thereby exacerbating the problem of timber growth and supply on the Forest.



The Black Hills National Forest is being left with *hundreds of thousands of acres* of thickets of small trees that are very prone to fire and beetles. More logging is not solving the problem; it is creating it.



Unsustainable logging on the Black Hills National Forest is glaring by all accounts including this map from Global Forest Watch which shows South Dakota has lost more tree cover than any other state – nearly 25% tree cover loss in just 11 years (2010 - 2021).

January 31, 2023

Frank Beum, Regional Forester
Jenna Sloan, Director, Ecosystem Planning
U.S. Forest Service, Rocky Mountain Region
1617 Cole Blvd., Building 17
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Frank.Beum@usda.gov
Jenna.sloan@usda.gov

Re: Request for Meeting Concerning Black Hills National Forest

Regional Forester Beum and Ms. Sloan:

On behalf of those listed below, we write to request a meeting or conference call as soon as possible to discuss with you our concerns regarding the timber harvesting program on the Black Hills National Forest (BKNF).

While we appreciate that the Forest Service has reduced levels of logging on the Black Hills which will benefit the numerous natural and recreational values that are degraded by excessive logging, we hope to discuss our concerns that true progress is being stalled, reversed, or delayed until the years-long Forest plan revision is complete. It also appears the Forest is undercutting required environmental review and public involvement by implementing numerous piecemealed logging projects without adequate study of impacts, including cumulative impacts.

The US Forest Service Must Ensure Sustainable Logging Levels. This issue requires an urgent response because logging levels set by the current Forest Plan and recent timber targets are not only destructive but illegal under the National Forest Management Act (NFMA).

The volume of timber cut on the Forest over the last year has trended somewhat towards more sustainable levels, declining in Fiscal Year 2022 to 123,600 CCF, from 172,600 CCF in Fiscal Year 2021. See Forest Products Cut and Sold from the National Forests and Grasslands, <https://www.fs.usda.gov/forestmanagement/products/cut-sold/index.shtml> (last viewed Dec. 12, 2022). The volume of timber sold has also decreased somewhat (down from 173,100 CCF sold in FY 2019 to 112,900 CCF in 2022). *Id.* However, the Rocky Mountain Research Station's 2021 report on sustainable logging on the Black Hills, General Technical Report (GTR) 422, makes clear that logging at these levels is still unsustainable over the long term.

It also appears the agency is intent on allowing timber to be harvested from this National Forest at non-sustainable rates. In particular, we are aware that the USFS has identified a timber volume sold target for the BKNF of 120,000 CCF for FY 2023. We suspect it was selected because it is near the largest volume scenario in GTR 422. Of the 60 scenarios analyzed in GTR 422, only

five were sustainable at the 126,700 CCF level. And every one of those scenarios assumed the suitable timber base on the Forest would be treated as a commercial tree farm, without regard to other Forest uses, wildlife habitat needs, or non-logging Forest Plan constraints.

Indeed, GTR 422 itself acknowledges that the suggested sustainable harvest level range *does not include restrictions* in the Forest Plan meant to protect numerous critical values aside from timber for sale. These include, but are not limited to habitat structural stages, steep slopes, riparian areas and other special areas. GTR 422 also states that *long-term productivity is dependent on care of young trees*, something that is not happening to a meaningful degree on the BKNF. Thus, the agency's best available science and information demonstrates beyond any doubt that 120,000 CCF per year is not truly sustainable when all logging constraints are applied.

Compounding this problem, it appears the 2023 target was predicated on unrealistic assumptions that trees on the Forest would achieve the highest growth rates and the lowest mortality rates. This is unjustifiable and, in our assessment, imprudent. Regarding mortality rates, over the last two years alone the BKNF has experienced significant tree mortality from tornado damage, a pine looper infestation, and wildfires such as last summer's Fish Fire. Mortality rates are *not* low and growth rates are *not* high. In fact, the most recent FIA report "Forests of South Dakota" from 2020, shows that the standing tree inventory volume for the State (where much resides on the BKNF) had an annual net loss of 25 million cubic feet. Inventory levels are *not* improving on the BKNF; they are getting worse every year, and excessive logging is compounding the problem. Authorizing 120,000 CCF of public timber for sale in 2023 will greatly amplify the sustained yield violation, not correct it.

An August 19, 2021 Briefing Paper from Chris French to the White House (attached) described the situation on the Black Hills National Forest and said the following: "In January 2021, a final assessment of that recommendation suggested a range of 64,000 to 88,000 CCF as a sustainable annual sawtimber harvest level. The Rocky Mountain Research Station released GTR 422 in April 2021, which suggested a sustainable annual sawtimber harvest level of 72,400 to 90,500 CCF appeared to be the best option based on multiple scenarios of standing volume, projected growth, and mortality." However, even the lower volume estimates in these two sources — 64,000 ccf and 72,400 ccf/year — did not account for non-timber multiple use objectives and other Forest Plan constraints that limit logging. To comply with the law and manage the Black Hills as a National Forest rather than a tree farm, the agency should therefore be limiting the sale of commercial sawtimber to less than 64,000 ccf per year.

We are calling on you to exercise true leadership on this critical issue and not cave in to short-sighted and selfishly-motivated special interests and politicians who are pushing the agency to continue selling trees at non-sustainable rates. We ask you to immediately instruct the BKNF to bring its timber program into compliance with NFMA's sustained yield mandate in 2023 and not delay it until the Forest Plan revision is completed years from now.

Forest Planning in Progress Does Not Permit the Forest Service to Avoid Complying with the NFMA. While we are pleased with the commencement of Forest Plan revision, it cannot be used as an excuse to delay bringing logging on the Forest to sustainable levels. The continuing search for unsustainable levels of timber to sell has already damaged numerous Forest values. If

the ultimate decision on an appropriate, sustainable harvest level is left to the Forest Plan Revision process, unsustainable sales and harvest could go on for many years. The process is already moving slowly; scoping has not begun, and special interests are attempting to prolong the process. Delaying the sale volume reduction and plan revision will both result in more damage to all values (environmental, social, and economic) held in the Forest *including the long-term prospects of the timber industry*.

The Black Hills NF Must Comply with NEPA for Projects and Timber Sales. We are also concerned that the Black Hills National Forest is skirting compliance with the National Environmental Policy Act by reviewing numerous, simultaneous, overlapping projects via numerous separate environmental assessments and categorical exclusions. Many appear to constitute connected and/or cumulative actions with similar purpose and needs statements that should be considered together.

Please see the table and two maps below this letter. With no scheduled Forest Monitoring and no promised monitoring for recent large projects like the Mountain Pine Beetle Response Project or the Black Hills Resilient Landscapes Project, the public has been left in the dark about whether these large projects are achieving their goals for Habitat Structural Stage diversity, miles of roads, wildlife wellbeing, etc.... Given the current state of the timber program, is the anticipated volume output of the Projects in Table 1 below commensurate with a sustainable timber program? Are environmental, social, and economic values of the Forest in jeopardy? Should the public know more about what is taking place on the Forest?

Meeting Request. We are requesting the opportunity to meet with you as soon as possible to discuss these urgent issues. This will allow us to learn about your direction for the BKNF — and to understand what science and law underlies your direction, in light of the Research Station's report and NFMA's mandate that logging on National Forests be sustainable. We would also like to discuss with you the options for an approach that will ensure sustainability while also ensuring effective public involvement and legally compliant analysis.

Thank you for considering our concerns. Please notify us through Mary Zimmerman or Dave Mertz to let us know the soonest time we can meet with you.

Sincerely,

Mary Zimmerman, President
Norbeck Society
P.O. Box 9730
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info@norbecksociety.com

Dave Mertz
Black Hills Forest Service Retirees
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Nancy Hilding, President
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Bart Trucano
Forester, retired
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Sara Johnson, Director
Native Ecosystems Council

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Black Hills Chapter of Dakota Rural Action
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andy.johnson@protonmail.com

ATCH: August 19, 2021 Briefing Paper from Chris French to the White House

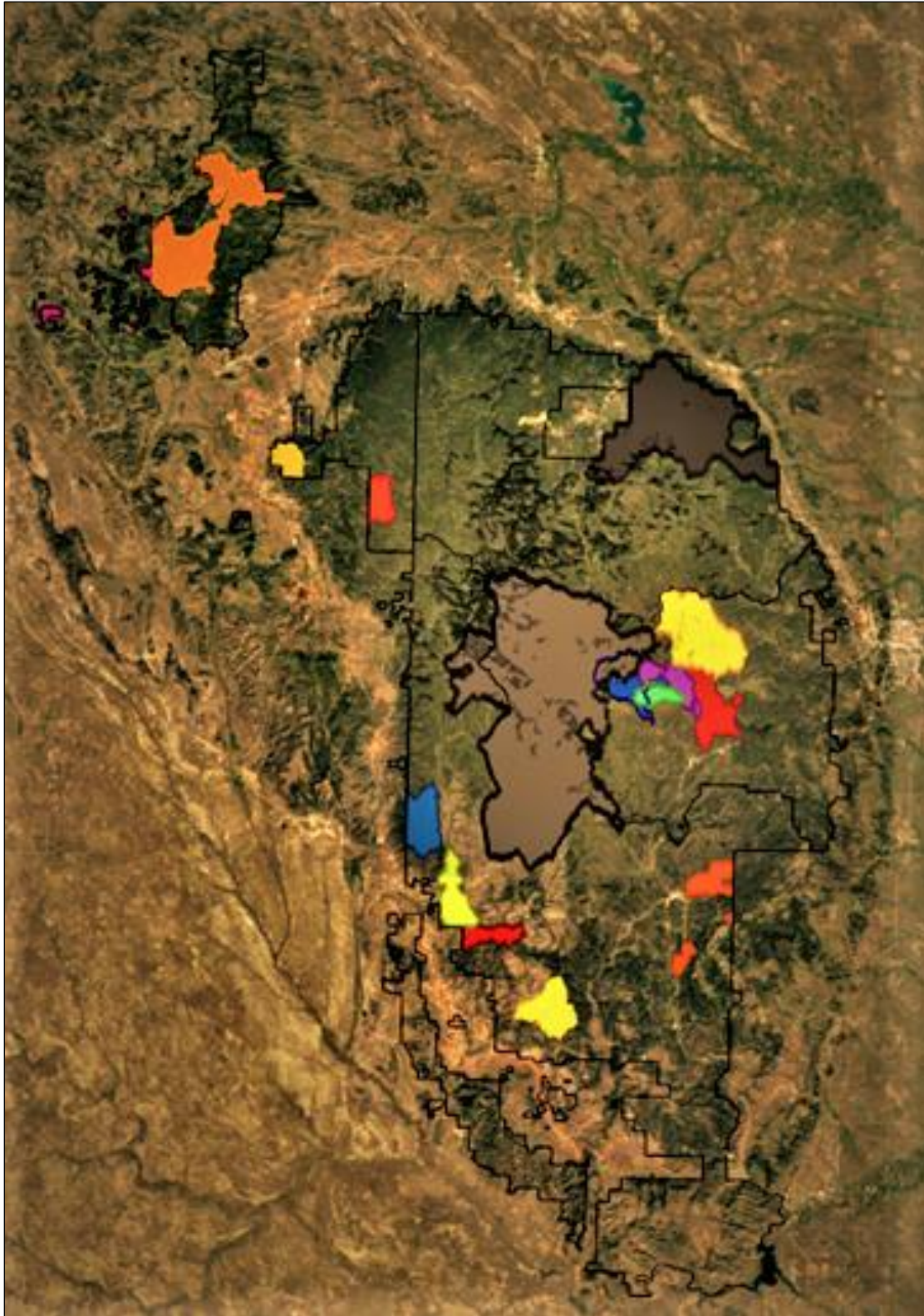
Cc: Jacqueline Buchanan, Deputy Regional Forester, Rocky Mountain Region
Jeff Tomac, Supervisor, Black Hills National Forest

Table 1. BHNF projects from past 4 years
All of these are CEs except the 3 listed last

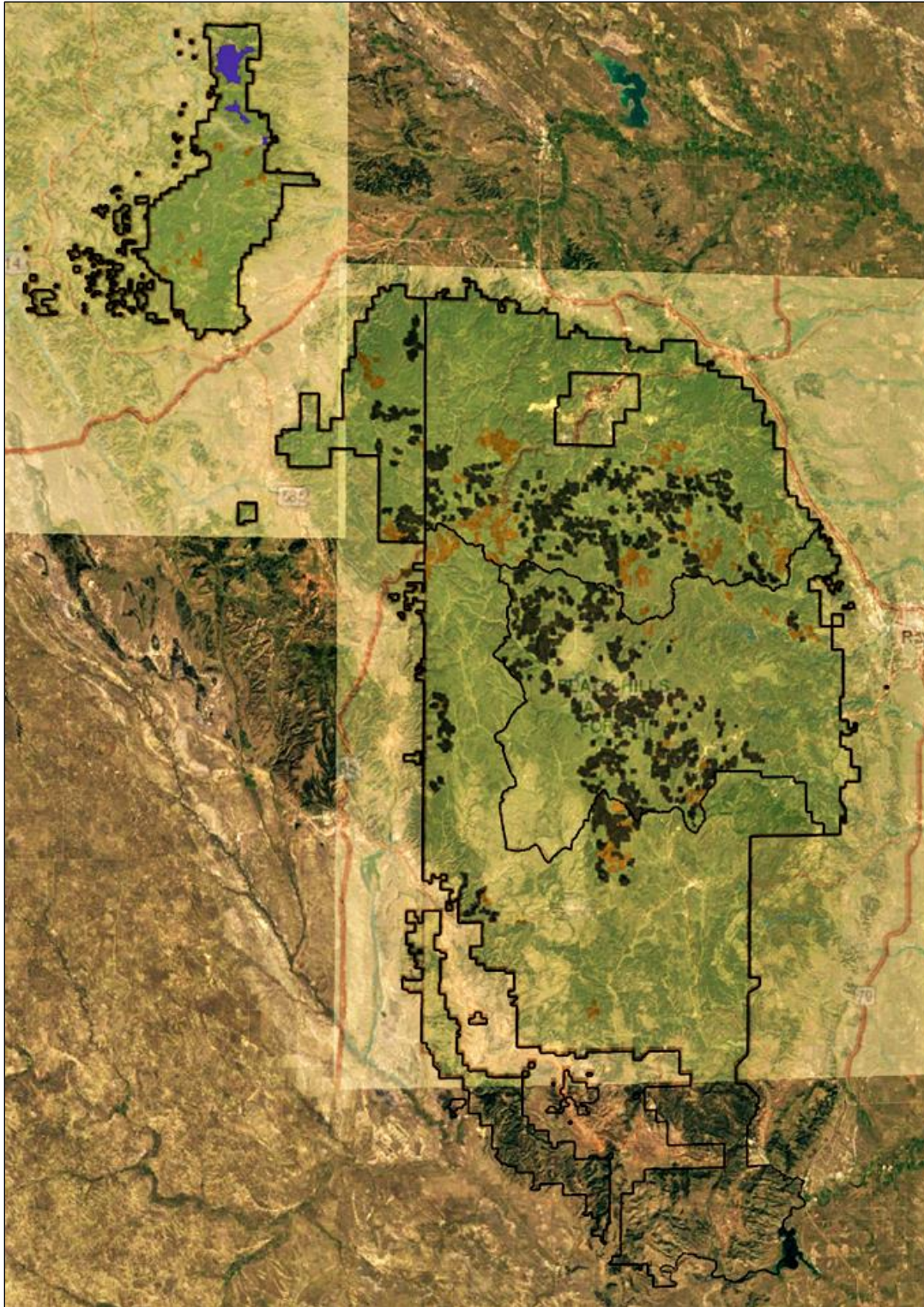
Project name	District	Decision year	commercial treatment acres total acres in project area	EA Purpose and Need or CE clause	Contiguous and/or overlapping with other CEs and EAs?
Teepee	Hell Canyon	2019	2266 4615	CE - Wildfire resilience Section 605 (HFRA) 32.3(4) (16 U.S.C.6591d)	Rx burn from BHRL cited
Alvin	Mystic	2020	744 ~3415 (2060 acres NFS)	CE - Insect and disease Section 8204 of the Agriculture Act of 2014 (public Law 113-79) amended Title VI of HFRA act of 2003 (16 U.S.C.6591 et. Seq.) to add Sections 602 and 603. HFRA Sections 602(d)+603(a)	Theodore Simon
Blacktail	Hell Canyon	2020	2845 (including Summit below) 7876	CE - Wildfire resilience Section 605 (HFRA) 32.3(4) (16 U.S.C.6591d)	BHRL: 420 acres of OR completed (Hop Spring sale) Rx burn and mechanical Rx cited in DM
Summit	Hell Canyon	2020	9870 acres total area	CE - Wildfire resilience Section 605 (HFRA) 32.3(4) (16 U.S.C.6591d)	BHRL- no commercial treatments done, but Rx burn and mechanical treatments cited in DM
Flying Monkeys 1	Hell Canyon	2021	1508 (includes FM2&3 below) ~7138	CE - Insect and disease 603 (HFRA) (16 U.S.C.6591d).	no
Flying Monkeys 2	Hell Canyon	2021			
Flying Monkeys 3	Hell Canyon	2021			
Freeland	Hell Canyon	2021	2573 ~8397	CE - Wildfire resilience Section 605 (HFRA)	BHRL
Simon	Mystic	2021	1383 ~9880 ac. total	CE - TSI and/or wildlife 36 CFR 220.6(e)(6) Timber stand and/or wildlife habitat improvement (req. less than one mile of standard road construction)	Alvin CE Theodore CE Westside BHRL Spruce
Fish	Bearlodge	2022	668 ~3992	CE - Insect and disease 603 (HFRA) (16 U.S.C.6591d) (FSH 1909.15, 32.3(5))	no
Isolated Parcels 1	Bearlodge	2022	Unknown (incl. IP 2b-4d below) 527	CE - unknown	no
Isolated Parcels 2a		2022	40		
Isolated Parcels 2b		2022	40		
Isolated Parcels 2c		2022	120		
Isolated Parcels 3		2022	958		
Isolated Parcels 4a		2022	40		
Isolated Parcels 4bc		2022	120		
Isolated Parcels 4d		2022	40		
Moskee	Bearlodge	2022	1296 ~4423	CE - Restoration objectives or increasing resilience 36 CFR 220.6(e)(25)	BHRL
Theodore	Mystic	2022	1657 ~5954 ac.	CE - Insect and disease Section 602(d)+603(a) (HFRA) (16 U.S.C.6591d)	Westside Alvin Simon Artemis Pactola
Woods	Bearlodge	2022	893 ~28,865	CE - Timber stand improvement and/or wildlife habitat improvement 36 CFR 220.6(e)(6)	BHRL
Artemis	Mystic	2023 in scoping	2900 ~ 10, 162	CE - Insect and disease Section 8204 of the Agriculture Act of 2014 (public Law 113-79) amended Title VI of HFRA act of 2003 (16 U.S.C.6591 et. Seq.) to add Sections 602 and 603. HFRA Sections 602(d)+603(a)	BHRL Theodore CE Pactola CE
Pactola	Mystic	2023 in scoping	2947 ~22,740	CE - Wildfire resilience Section 605 (HFRA)	Westside Artemis Theodore Spruce
Chimera	Northern Hills	~2023 In scoping	18,805 54,450 (38,500 ac of NFS)	EA Wildfire resilience	Spruce EA
Spruce	Northern Hills, Hell Canyon, Mystic	~2023 In scoping	Up to 30,000 ~33,600 – 52,000 acres Spruce	EA P&N difference btwn existing and desired veg. conditions. Spruce Aspen.	BHRL Chimera EA Westside EA Pactola CE Simon CE
Westside	Mystic and Hell Canyon	~2023 In scoping	up to 140,000 ~151,000	EA 36 CFR 218 subparts A and B adaptive management [36 CFR 220.5 (e) (2) and §220.7(b)(2)(iv)]	Spruce EA BHRL Simon CE Theodore CE
			Totaling more than 210,000 acres ~350,000 acres		

Map 1. CEs and EAs listed in Table 1.

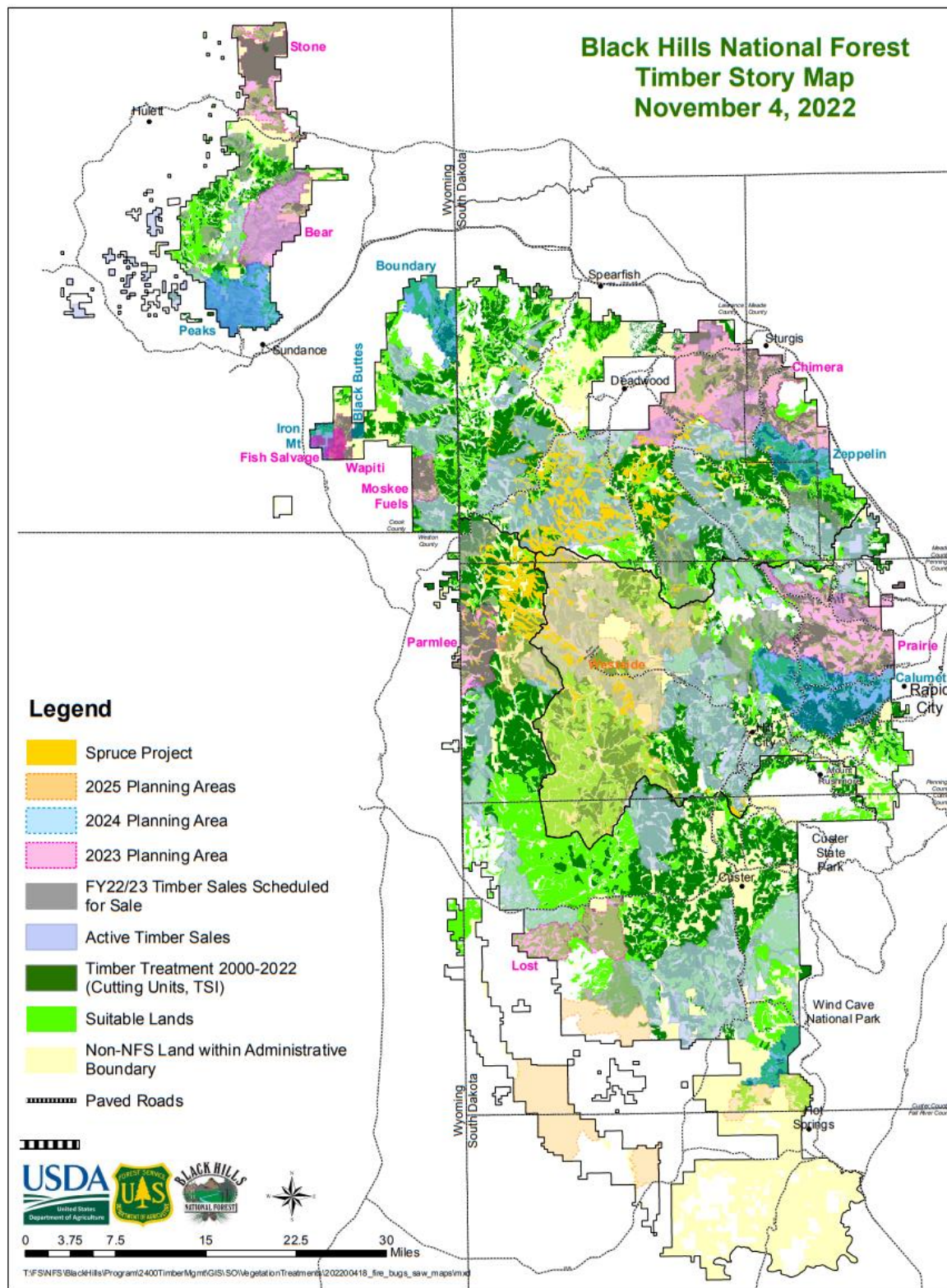
This map depicts CEs (colored polygons) and EAs (Chimera in dark grey, Westside in light grey, and Spruce in black squiggles). All are from the past four years or currently in scoping. Notice overlapping and contiguous nature among many projects.



Map 2. 2018 BHRL Project which occurred in areas recently treated with the MPBR project and other projects, and are also co-occurring with
 CEs or EAs listed in Table 1 and shown on Map 1.
 Black: Cut units, large majority are overstory removal and clearcuts
 Brown: Sold but not cut
 Blue-violet: ~3080 acre “Stone” 2023 planning area for BHRL



Map 3. Black Hills National Forest Timber Story Map, November 4, 2022
 Notice planning area on top of timber sales on top of more analysis and more sales.



From: "Jenkins, Melissa - FS" <melissa.l.jenkins@usda.gov>
To: "Dawe, Christine -FS" <christine.dawe@usda.gov>
CC: "Armstrong, Katherine -FS" <katherine.e.armstrong@usda.gov>
"Snieckus, Mary -FS" <mary.snieckus@usda.gov>
Date: 8/19/2021 2:37:25 PM
Subject: FW: Request from WH re: Black Hills and Black Ram
Attachments: [081821 WH Memo Black Ram.docx](#)
[081921 WH Memo Black Hills Timber Program.docx](#)

Hi Christine – Here you go. Let me know if there are any questions.

Thanks!
Melissa



Melissa L. Jenkins
Acting Deputy Chief of Staff
Forest Service
Office of the Chief
p: 703-605-5346
c: 202-744-9094
melissa.l.jenkins@usda.gov

201 14th Street, SW
Washington, DC 20024
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Caring for the land and serving people

From: Fargo, Anna - FS <anna.fargo@usda.gov>
Sent: Tuesday, August 17, 2021 5:42 PM
To: Dawe, Christine -FS <christine.dawe@usda.gov>; Armstrong, Katherine -FS <katherine.e.armstrong@usda.gov>
Cc: French, Chris- FS <Christopher.French@usda.gov>; Harrell, Meryl - OSEC, Washington, DC <Meryl.Harrell@usda.gov>
Subject: RE: Request from WH re: Black Hills and Black Ram

Got it. Thanks, Christine. We will let you know if there are any questions.



Anna Fargo
Acting Deputy Chief of Staff (8/9 8/17)
Forest Service
Office of the Chief
541-675-5011
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Baker City, OR 97814

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Caring for the land and serving people

From: Dawe, Christine -FS <christine.dawe@usda.gov>

Sent: Tuesday, August 17, 2021 1:51 PM

To: Armstrong, Katherine -FS <katherine.e.armstrong@usda.gov>; Fargo, Anna - FS
<anna.fargo@usda.gov>

Cc: French, Chris- FS <Christopher.French@usda.gov>; Harrell, Meryl - OSEC, Washington, DC
<Meryl.Harrell@usda.gov>

Subject: Request from WH re: Black Hills and Black Ram

Katie and Anne,

WH is asking for memos that have the agency's official line on Black Hills and Black Ram. Apparently they have a meeting with Rick Bass on Monday about Black Ram. I know R1 has been preparing for a briefing for Senators Pingree on Thursday so perhaps can use those materials to put together something short on Black Ram? I think Frank has a paper on Black Hills already. Defer to Chris on what he wants us to communicate about each. If we can get something by end of week that should work.

Christine Dawe, Acting Chief of Staff
Office of the Under Secretary
Natural Resources and Environment
United States Department of Agriculture (USDA)
406-370-8865
christine.dawe@usda.gov

NRE/FORREST SERVICE BRIEFING PAPER
AUGUST 19, 2021

Topic: Black Ram Project – Kootenai National Forest
From: Chris French, Deputy Chief, National Forest System
(202) 205-1677– chris.french@usda.gov

Issue: Black Ram Project

Background: The Black Ram project is on the Three Rivers Ranger District of Kootenai National Forest, northwest of Troy, Montana, in an area known as the Yaak. The purpose of the project is to:

- Reduce the potential for high intensity wildfire while promoting desirable fire behavior characteristics and fuel conditions in the Wildland Urban Interface and other areas with values at risk.
- Promote resilient vegetation conditions by managing for landscape-level vegetation patterns, structure, patch size, fuel loading and species composition.
- Maintain or improve watershed conditions to provide water quantity, water quality, stream channel conditions, and native aquatic species habitat that support ecological functions and beneficial uses.
- Provide forest products that contribute to the sustainable supply of timber products from National Forest System Lands.

The project is the result of extensive public involvement and government to government consultation with Tribes throughout the project's development and analysis. The local collaborative group (Kootenai Forest Stakeholders Coalition) did not come to agreement on the project and did not submit comments as a group.

- An Environmental Assessment was completed in July 2019, and a Draft Decision Notice and Finding of No Significant Impact were released in September 2020. We received over 240 form letters objecting to the project which were generated by a member of the Yaak Valley Forest Council (YVFC). We also received about 60 comments in support of the project. There were 28 unique comment letters.
- The project area analyzed includes over 95,000 acres on the approximately 2.2-million acre forest. The project proposes 3,904 acres of timber harvest, 7,550 acres of prescribed burning, 580 acres of thinning within stands that are considered old growth, 3.3 miles of new road construction (0.8 mile in old growth stands), and 52 miles of road rehabilitation treatments (long-term storage and decommissioning) that provide watershed benefits.
- Of the 3,904 acres of commercial timber harvest, 2,444 acres are regeneration harvest, including 1,748 acres of clearcuts with reserve trees, and 1,460 are intermediate harvest. The regeneration harvest is designed to emulate some of the characteristics of wildfire by breaking up the continuity of the forest canopy.
- The proposed thinning treatment activities in old growth timber stands are intended to improve the resistance and resilience of old growth stands to disturbances and stressors, such as wildfires, insects, and diseases. An additional 1,551 acres of treatments are proposed within recruitment potential old growth stands that will increase the sizes of old growth stands (or patches of contiguous old growth) over time.
- The project will sustain 67 jobs and \$3.2 million in total labor income on an annual average basis over the anticipated 9-year life of the project.
- Government to Government consultation with the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes began before the purpose and need were established and has been ongoing throughout the project. Consultation outcomes helped us shape the project. The Kootenai Tribe of Idaho recently objected in writing to statements claiming a lack of proper tribal consultation.

- We are working with the U.S. Fish and Wildlife Service (USFWS) to finalize terms and conditions related to the threatened grizzly bear and its habitat. When those discussions are complete, the USFWS will issue a Biological Opinion (BO). We will consult with Tribes on the final BO and then finalize, sign, and issue the Decision Notice.

Recommendation: Continue working with USFWS to finalize Biological Opinion and sign Decision Notice.

Rationale:

- Under 4 percent of the project area includes timber harvest, 37 percent of the project area is within the Wildland Urban Interface, and 2,137 acres of white pine restoration is proposed.
- YVFC expectations in their communication directly conflict with the project purpose and need as well as the 2015 Forest Plan and the KFSC guidelines.
- The impacts that would result from modifying the project based on YVFC comments include the delay of planned vegetation treatments, the delay of Decision due to change in analysis and proposed treatments, and repercussions associated with not following the 2015 Forest Plan.

NRE/FORREST SERVICE BRIEFING PAPER
AUGUST 19, 2021

Topic: Black Hills National Forest Next Steps

From: Chris French, Deputy Chief, National Forest System
(202) 205-1677– chris.french@usda.gov

Issue: The Black Hills National Forest (BKNF) has been working towards accomplishing their current 175,000 CCF (hundred cubic feet) timber target in Fiscal Year (FY) 2021. Due to newly identified National Environmental Policy Act (NEPA) concerns, the BKNF is now projecting they will accomplish no more than 147,000 CCF overall in FY 2021, with sawtimber volume at 133,000 CCF. The Rocky Mountain Region is developing a path forward for a sustainable, science-based timber program on the BKNF over the next three years considering the NEPA concerns, the recently released General Technical Report 422 (GTR 422) from the Rocky Mountain Research Station, the pending forest plan revision effort, the Black Hills National Forest Advisory Board recommendation, and impacts to the associated timber industry infrastructure.

Background: There is high and polarized interest in the timber program for the BKNF, including heightened interest from Tribes. Sustainable timber harvest levels have been analyzed by several entities over the last year. In October 2020, the Black Hills National Forest Advisory Board (NFAB) put forward a non-unanimous recommended annual sawtimber harvest level of 181,000 CCF. At the request of the South Dakota State Forester, BKNF staff assessed the NFAB's recommendation. In January 2021, a final assessment of that recommendation suggested a range of 64,000 to 88,000 CCF as a sustainable annual sawtimber harvest level. The Rocky Mountain Research Station released GTR 422 in April 2021, which suggested a sustainable annual sawtimber harvest level of 72,400 to 90,500 CCF appeared to be the best option based on multiple scenarios of standing volume, projected growth, and mortality. Other scenarios analyzed in GTR 422 considered a sustainable level of up to 126,700 CCF. The reconciliation report which will address comments from stakeholders for GTR 422 is slated to be released in August 2021.

The current BKNF Plan was published in 1997, and last amended in 2008. The Forest will initiate the assessment phase of forest plan revision this summer and is preparing a public engagement strategy. In the interim, the Region will establish sustainable targets for FY 2022 through FY 2024 that will enable the BKNF to effectively plan a program of work during forest plan revision and provide transparency to industry to inform business decisions until revision is complete. The intent is to balance the need to supply wood fiber to industry and ensure long term resource sustainability.

The region has found potentially significant vulnerability with operating outside mapped Commercial Treatment Areas (CTAs) identified in the Black Hills Resilient Landscape (BHRL) decision which impacted the FY 2021 timber sale program. Timber sales are being repackaged, but not all will be viable after being modified. This will impact the outyear program as well.

The BKNF will complete a Supplemental Information Report (SIR) for the BHRL decision to consider new information, determine whether the original Environmental Impact Statement will need to be supplemented, and consider what volume will be offered over the next three years under that decision. In addition, the BKNF will evaluate new vegetation treatment options and initiate the appropriate level of environmental compliance for all new proposed actions.

The major mill owner has approximately 170,000 CCF left to harvest under contract and a milling capacity of approximately 190,000 CCF annually. Timber industry advocates have stated any reduction below 175,000 CCF will result in further impacts to industry (closure was announced on a mill in Hill City, South Dakota, in summer 2021). The views of the State Foresters of South Dakota and Wyoming are aligned with that of the timber industry. Environmental advocates support significant reductions in the BKNF timber program.

Next Steps: Looking to the future, sound forest stewardship will likely require adjustments to the BKNF timber program. However, long-term forest sustainability will also require a viable timber industry to help maintain forest health and resilience while providing jobs in the rural economy. We are focused on both the short- and long-term future of the Black Hills and are committed to working together with all concerned to find a path forward that ensures we have a healthy forest for all to enjoy its many benefits long into the future.

The BKNF will ensure the long-term sustainability of the timber resource by using the best available environmental, social, and economic science to inform future management during forest plan revision. The following actions are being considered to manage the timber program for FY 2021 through FY 2024:

- For FY 2021 sale program, repackage BHRL sales to include only stands completely within the CTAs and offer planned sales outside of BHRL decision.
 - Based on this reduction in volume and considering volume that can be carried forward in FY 2021, the forest will achieve no more than 147,000 CCF, with 133,000 CCF in sawtimber.
 - Communicate to the public that this is the last year of implementation for the Pine Beetle Response (PBR) decision.
- Proceed with a SIR based on new information for the BHRL project.
 - Narrowly focus the SIR on implementing work within the CTAs only.
 - The forest is working to determine how much volume would be offered in the CTAs over the next three years.
- Continue to evaluate vegetation management treatment opportunities on the BKNF and initiate the appropriate level of environmental compliance for all new proposed actions.
 - By moving forward with new decisions and completing the BHRL SIR, we will limit litigation risk associated with BHRL and have decisions that better reflect the current conditions on the landscape.
 - The goal would be to have new implementable decisions by mid FY 2022.
- Based on the assessment of treatment opportunities and considering the Forest Inventory and Analysis data, the Rocky Mountain Research Station GTR, and NFAB recommendation, determine the timber program levels over the next three years. Initially, 125,000 to 145,000 CCF annually was being considered over the next three fiscal years to balance the upper end of the GTR scenarios and the need to support industry in the area. However, initial assessments of available volume by the forest are 15 percent below these levels.
 - Any timber program level over the next three years will balance the need to adjust timber volume to a long-term sustainable future while factoring in environmental, social, and economic considerations, serving as a bridge until all factors can be fully analyzed during forest plan revision.
- As soon as possible, conduct a series of virtual engagements with Congressional offices, Tribes, States, and stakeholders to share FY 2022-2024 program levels, initiation of a SIR for the BHRL project, the status of active decisions, and the intent to begin the forest plan assessment phase this summer.
- Publish a Notice of Intent to begin the assessment phase of plan revision for the Black Hills Land and Resource Management Plan in summer 2021. The plan revision process will be open and transparent with robust public involvement. The long-term timber program will be determined through this planning process.
- Improve relationships with Tribes by gauging their interest in developing an agreement to assist the BKNF with critical precommercial thinning work to keep forests healthy and productive and increase growth of trees into the sawtimber size class.



File Code: 1950
Date: February 28, 2023

Mary Zimmerman
President, Norbeck Society
P.O. Box 9730
Rapid City, SD 57709

Dear Ms. Zimmerman,

Thank you for your letter of January 31, 2023, regarding vegetation management on the Black Hills National Forest.

The Forest is working to finish the assessment phase of revision and anticipates beginning public engagement for the plan development phase this summer. While the Forest is working through the plan revision effort, they will continue to implement current land management plan goals and objectives to meet landscape-scale outcomes such as addressing restoration needs, forest health, hazardous fuels, and wildlife habitat. The use of timber sales is a critical tool in achieving these goals, but also providing forest products to the local and regional economy.

I encourage you to stay engaged with ongoing project level planning and the broader plan revision effort and communicate directly with the Black Hills National Forest supervisor about your concerns. As you know, public participation is critical for the Forest Service to make informed decisions, and your engagement is a welcome and necessary part of that process.

Again, thank you for your writing and for your interest in the management of our National Forests. If you have additional comments or questions, please contact Bryan Karchut, Acting Forest Supervisor, at bryan.karchut@usda.gov.

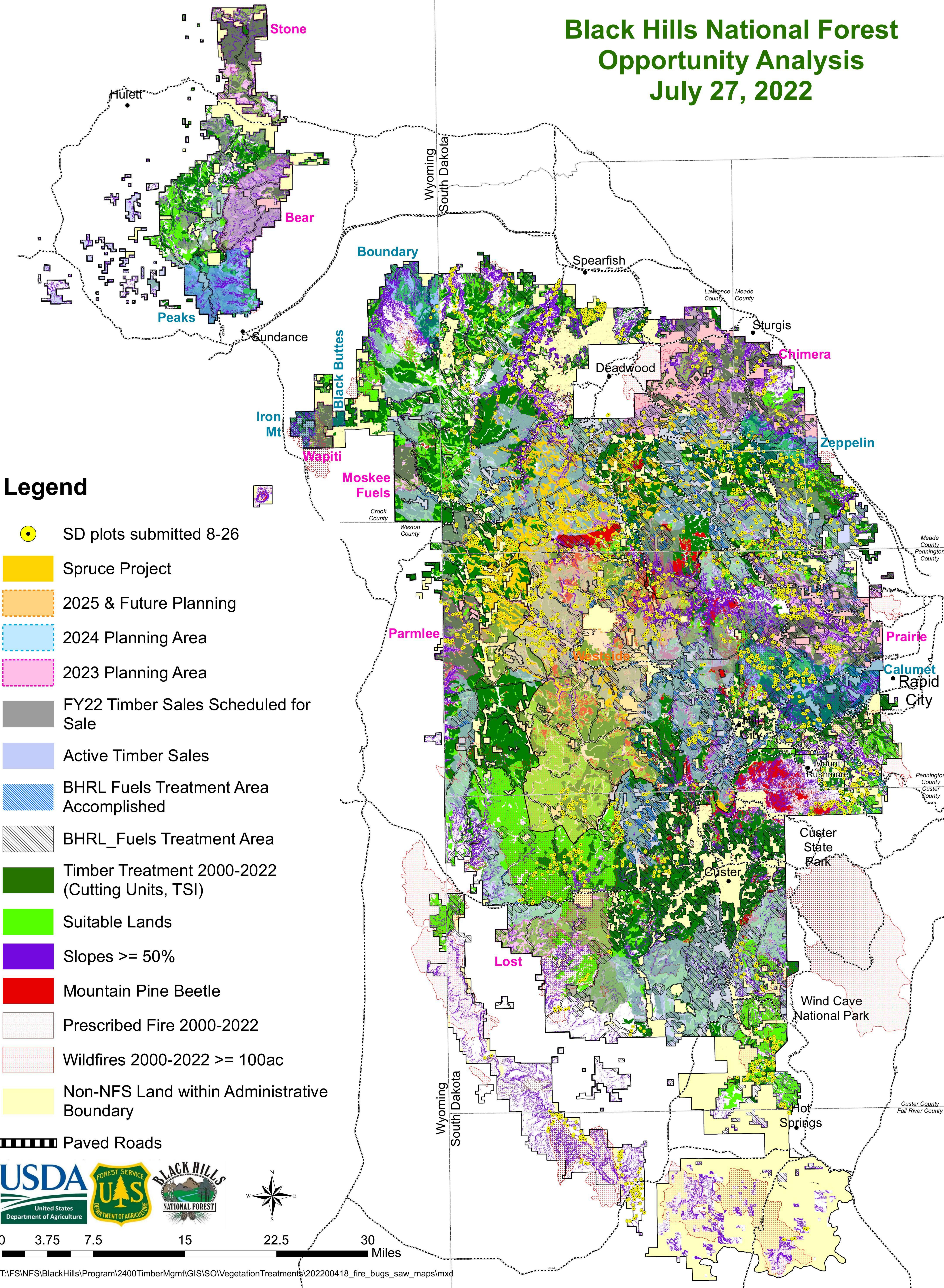
Sincerely,

FRANK
BEUM
FRANK R. BEUM
Regional Forester

Digitally signed by
FRANK BEUM
Date: 2023.02.28
13:01:12 -07'00'



Black Hills National Forest Opportunity Analysis July 27, 2022





17 September 2024

Dear Agriculture Secretary Vilsack,

On behalf of the undersigned organizations, we submit these comments on the Draft Environmental Impact Statement (DEIS) for your proposed *Amendments to Land Management Plans to Address Old-Growth Forests Across the National Forest System*. We urge you to fully protect all mature and old-growth trees and forests on national forest lands from logging. The DEIS is seriously flawed.

The DEIS as currently written is one-sided and misleading, and omits large bodies of scientific evidence that contradict the claims and assumptions the DEIS uses to promote ongoing and increased logging in mature and old-growth forests, including logging of mature and old-growth trees. No amendment at all would be preferable to one that would increase logging of these highly biodiverse and carbon-rich forests based on a false and skewed presentation of scientific evidence. All mature and old-growth forests must be fully protected from logging, under any name, as [over 200 scientists](#) have urged. Immediately below we raise the core substantive flaws with the DEIS, followed by a detailed elaboration on most of these points. We focus in particular on the DEIS's allowance of logging and post-fire logging in mature and old-growth forests, so long as the Forest Service uses one or more of several euphemisms for such logging, including public safety, wildfire management, and forest health.

- The DEIS plans to nearly double logging levels—and associated carbon removals—in mature and old-growth forests over the coming decades (DEIS Threats Analysis, Figure 19), making the DEIS more of a logging plan than a forest protection plan.
- The DEIS fails to include a reasonable range of alternatives. It excludes mature forests, which leaves out most of the carbon-rich forests in the Western US and nearly all of such forests in the Eastern US, where very little old-growth remains due to historic and ongoing logging. It allows logging, including sale and removal of mature and old-growth trees, in old-growth forests under a series of deceptive euphemisms such as forest health

and wildfire management. And the DEIS provides no permanent protection for mature or old-growth forests. A reasonable range of alternatives would include a preferred alternative that would include both mature and old-growth forests, close all logging loopholes and prohibit the sale and removal of trees for lumber or biomass from all mature and old-growth forests, and ensure that the protections from logging under such an alternative are permanent and continue to apply regardless of future natural processes and events like fire, drought and insects, and windthrow. The DEIS fails to recognize the enormous body of science finding that mature and old-growth forests remain carbon-rich following such natural processes, even when most or all trees are killed, and the [resulting wildlife habitat is unique and highly biodiverse](#).

- The DEIS fails to faithfully implement President Biden’s [April 2022 Executive Order](#) on mature and old-growth forest conservation, which promised to “conserve America’s mature and old-growth forests on Federal lands”. The Executive Order noted that these forests “play an irreplaceable role in reaching net-zero greenhouse gas emissions” and promised to “retain and enhance carbon storage” in mature and old-growth forests on federal lands. Yet the DEIS relies upon hypothetical modeling studies that use flawed and discredited assumptions to promote the false notion that removing carbon from forests through logging will somehow magically increase forest carbon storage (DEIS, pp. 75-76; DEIS Ecological Impacts Analysis, p. 44). [Hundreds of climate scientists and ecologists](#) have debunked these false claims. The DEIS omits mention of research finding that [thinning emits about 3 times more CO2 per acre than wildfire alone](#). The DEIS also conceals the fact that using trees from mature/old-growth forests for energy production, which the DEIS promotes, emits [38% to 65% more CO2 into the atmosphere than burning coal](#), for equal energy produced, and it fails to mention research finding that [thinning kills significantly more trees than it prevents from being killed](#).
- The DEIS’s Threats Analysis is highly misleading and incomplete with regard to climate change effects; nowhere in the DEIS or its associated reports does the Forest Service include an analysis of the impact of its proposed logging, and increased logging, of mature and old-growth trees and forests on forest carbon storage, or carbon emissions and sequestration. This is a major flaw, especially given that the Forest Service’s own research shows that increased logging, as the DEIS proposes, [would substantially undermine atmospheric carbon draw down](#), increase atmospheric carbon, and compromise our ability to achieve net-zero emissions, while moving the other direction and ending all logging on all US national forests would reduce atmospheric carbon by 85 million tons of CO2 every year. Further, the Threats Analysis omits mention of the fact that field-based research has found that even big fires [only consume less than 2% of tree carbon](#), while thinning projects remove far more carbon—most of which is quickly emitted into the atmosphere and [only a small portion of which ends up as lumber](#) in a human structure. Based on the analysis in Ingerson (2007), less than one-fifth of the carbon in trees removed from forests through logging ends up in a wood product like dimensional lumber—the remainder ends up in the atmosphere almost immediately, mostly burned for dirty energy in biomass facilities or as hog fuel at lumber mills (e.g., branches, tree tops, bark, round parts, mill residues).

- The Threats Analysis presents a highly misleading and inadequate presentation of supposed threats to mature and old-growth forests. For example, Figure 21 of the Threats Analysis shows that logging, including both thinning and post-fire logging, impacts a comparable amount of mature and old-growth forest as fire up to 1000 feet from roads, and impacts considerably more mature and old-growth forest than fire within 300 feet of roads. Logging can only occur within a relatively short distance from roads, since helicopter logging has been wildly uneconomical for many years now, and rarely ever happens anymore. Moreover, forests that are further than 1000 feet from roads are generally comprised of Wilderness Areas, Roadless Areas, and other areas that are generally off-limits to logging by statute, regulation, forest plan standards, or other administrative restrictions. By including tens of millions of acres of mature and old-growth forest that are generally or entirely off-limits to logging, the DEIS Threats Analysis profoundly dilutes the scale of the effect of logging on mature and old-growth forests relative to fire. A meaningful, and non-misleading, comparison of fire versus logging would have to be limited to areas where both fire and logging can occur, which is mostly within a few hundred feet, or several hundred feet, from roads. In addition, the DEIS's Threats Analysis further dilutes the effect of logging on mature and old-growth forests, relative to fire, by including forest types in which logging rarely occurs, simply because the trees are not merchantable for lumber, including tens of millions of acres of pinyon-juniper forests. This led to an even more misleading presentation of “threats”, and comparison of logging versus fire.
- The DEIS claims that logging, under the guise of “removing hazardous fuels”, will curb wildfires (DEIS Ecological Impacts Analysis, p. 44), but improperly omits mention of the [dozens of scientific studies](#), including by many US Forest Service scientists, finding that denser, mature/old forests tend to burn at lower, not higher, severities in wildfires, while thinning and other logging conducted ostensibly as hazardous fuels reduction often exacerbates wildfires by eroding the cool, shady microclimate provided by denser forests with high canopy cover. As [one recent study by US Forest Service scientists](#) found:

“Thinned forests have more open conditions, which are associated with higher temperatures, lower relative humidity, higher wind speeds, and increasing fire intensity. Furthermore, live and dead fuels in young forest or thinned stands with dense saplings or shrub understory will be drier, making ignition and high heat more likely, and the rate of spread higher because of the relative lack of wind breaks provided by closed canopies with large trees.”

Nor is the DEIS's repeated claim—that mature and old-growth forests must be logged supposedly to prepare them for fire—scientifically credible. Regardless of forest density or time since the previous fire, [many studies](#) by the Forest Service's own scientists show that managed wildfire or prescribed fire can easily be applied, during natural fire season, without any prior tree removal. If lower-intensity fire is desired, such fires simply need to be conducted during mild to moderate fire weather. As [published research](#) by US Forest Service scientists has concluded, “managed wildfire...is usually more efficient, cost-effective, and ecologically beneficial than mechanical treatments.”

- The DEIS ignores or unacceptably downplays the [health impacts and cumulative effects](#) of this increase in logging on communities, especially environmental justice communities that are disproportionately impacted by this industry. The DEIS promotes logging mature and old-growth forests for “energy production” (DEIS, p. 75), but conceals the fact that, for equal energy produced, using trees for energy production emits even more pollution than burning fossil fuels: 5.2 times more nitrogen oxides; 30 times more volatile organic compounds; 7 times more ammonia; 3.2 times more sulfur dioxide; and 12.5 times more PM2.5 particulates.

Public Safety

Previous mechanical thinning and post-fire logging is wildly ineffective and counter-productive as a wildfire management and community protection approach.

The images below, from the Washington Post, show the devastation of the town of Greenville, after the Dixie fire swept up from the southwest, moving rapidly northeast through vast areas that had been mechanically thinned and post-fire logged under the guise of fuel reduction and wildfire management, before destroying most of the towns of Greenville and Canyon Dam, along with the smaller town of Indian Falls.





A scorched business in central Greenville on Thursday.
STUART M. PALLEY FOR THE WASHINGTON POST



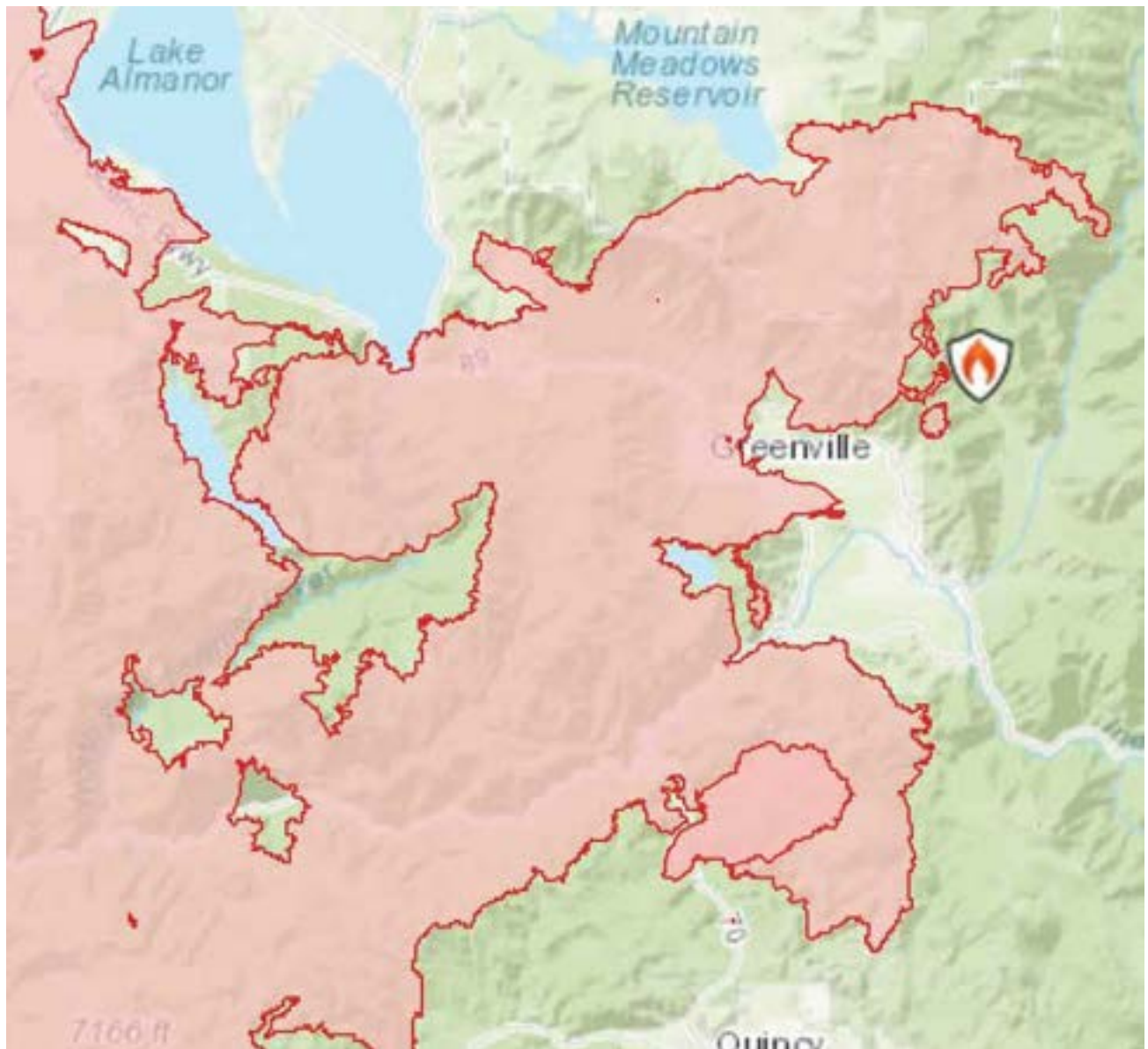
The damaged central business district.

STUART M. PALLEY FOR THE WASHINGTON POST



The images below, from Google Earth, show numerous large areas of pre-fire mechanical thinning and earlier post-fire logging (after the 2012 Chips fire around Butt Valley Reservoir) on the Plumas National Forest, southwest, south, and southeast of the Greenville, Canyon Dam, and Indian Falls areas, through which the Dixie fire swept before destroying most of the homes and businesses. For each location a pair of images is shown—one after mechanical thinning but before the Dixie fire, and the other after the Dixie fire. GPS coordinates of the imagery locations are shown at the bottom right margin of each. Most of the mechanically thinned and post-fire logged forests burned at high intensity, as the post-fire images show.

The images below represent all areas of mechanical thinning and/or post-fire logging of any significant size that could be identified as occurring within 15 years or so prior to the 2021 Dixie fire, and which were within the path of the fire as it approached Greenville, Canyon Dam, and Indian Falls. As the images show, the Dixie fire burned mostly or entirely at high intensity through all such areas. For spatial context, each of these images shows an area that is several thousand acres in size.



Dixie fire perimeter map showing the area on August 7, 2021, immediately after the fire, moving from the southwest to the northeast, destroyed Greenville and Canyon Dam. The map is from the inter-agency wildfire site, Inciweb: <https://inciweb.wildfire.gov>

Image Pair #1: Extensive previous post-fire logging on the Plumas National Forest, northeast of Butt Valley Reservoir, and a short distance southwest of Canyon Dam. The first image is from July 2, 2017, after post-fire logging, and the second is from August 7, 2021, just one day after the Dixie fire burned through this area and destroyed Canyon Dam.

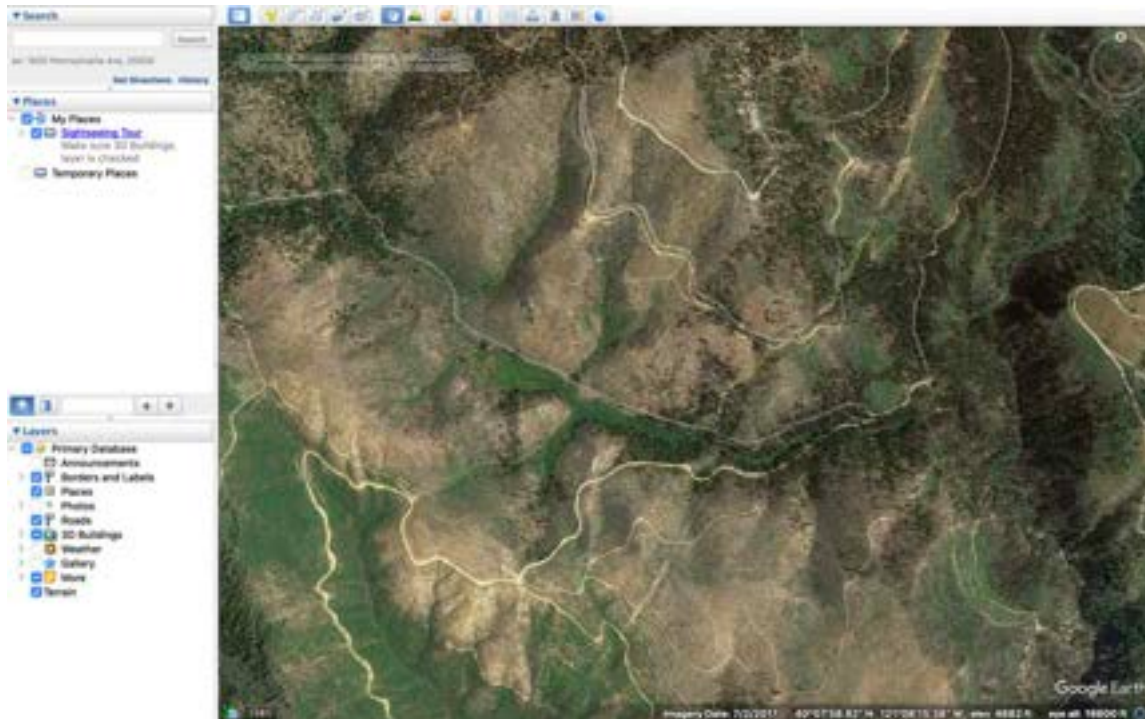


Image Pair #2: A large area that was mechanically thinned south of Canyon Dam. The first image is from May 24, 2009, after thinning, and the second image is from July 7, 2022 (note the almost total absence of live, green trees remaining in the thinned areas after the Dixie fire).

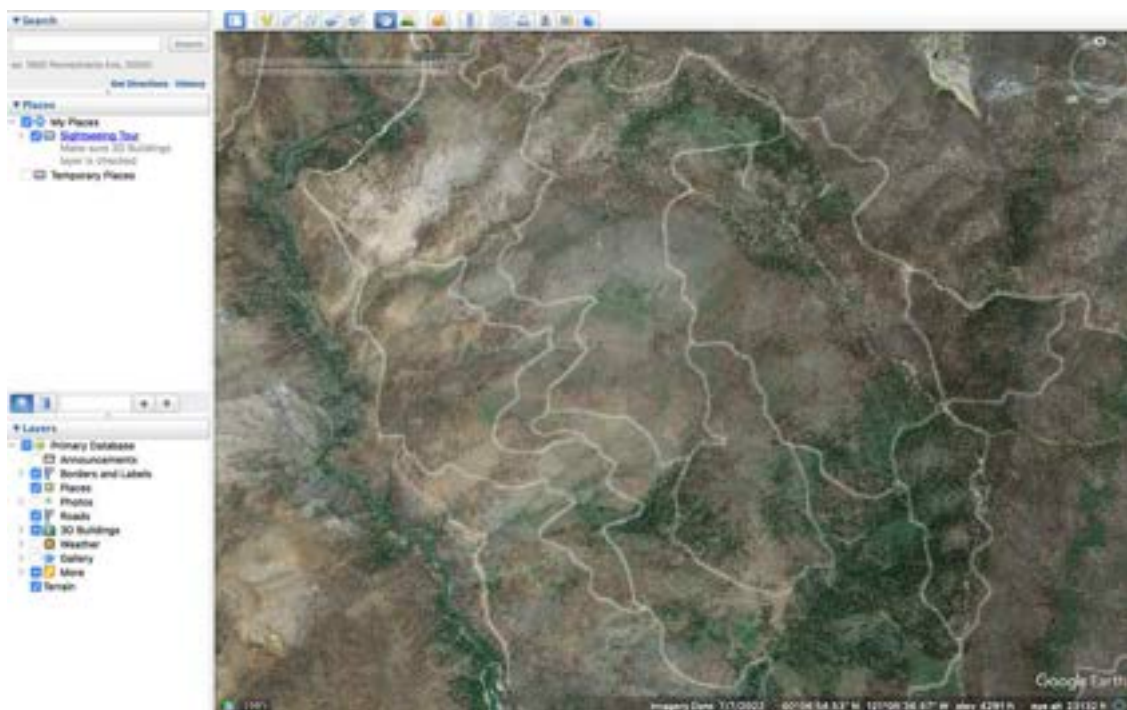
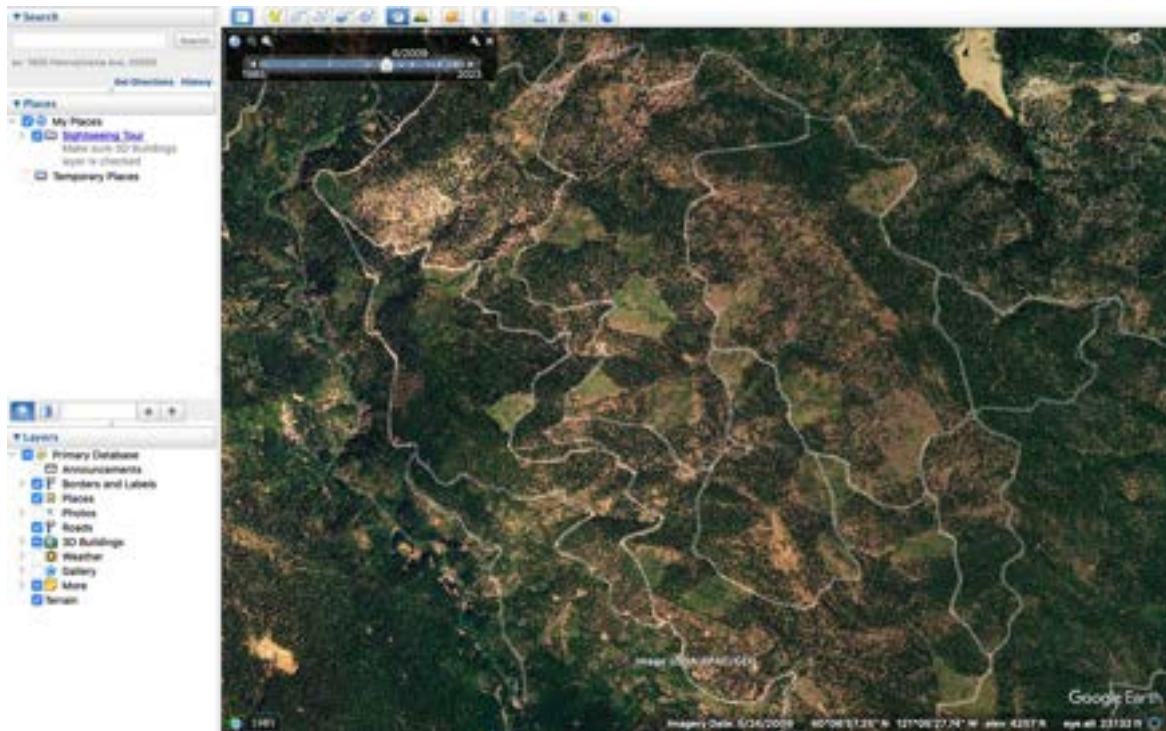


Image Pair #3: Mechanical thinning on the Plumas National Forest, south of Indian Falls. The first image is from May 24, 2009, after thinning, and the second is from July 7, 2022, after the Dixie fire. Note that nearly all of the thinned forest burned at high intensity, with 100% tree mortality in most areas.

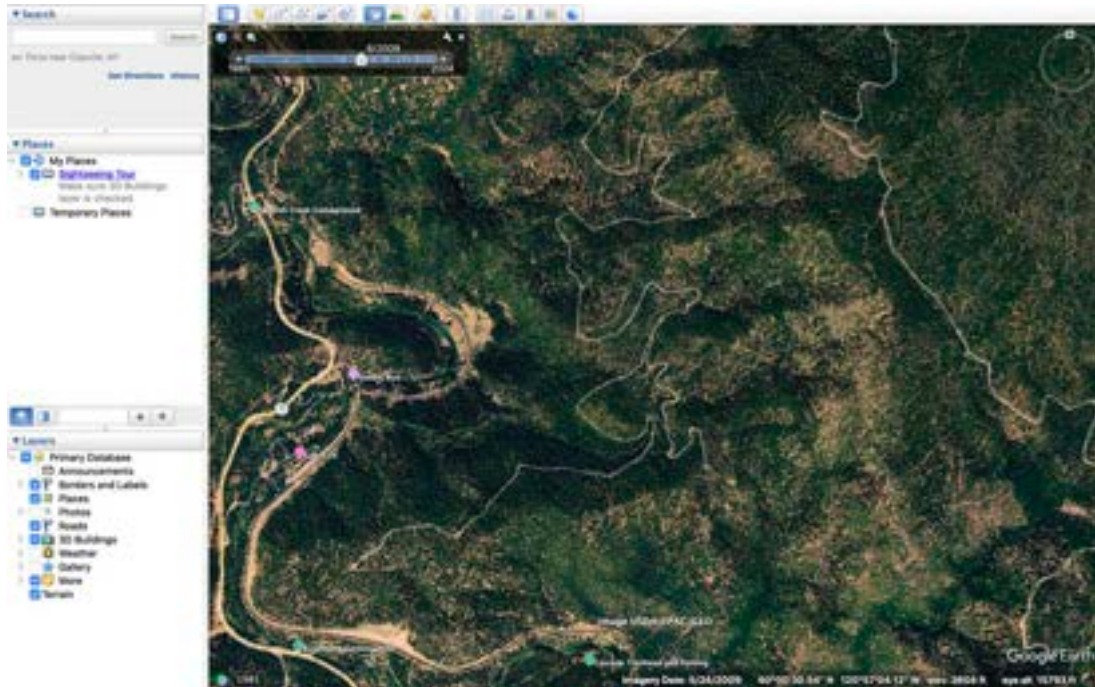


Image Pair #4: Mechanical thinning south of Greenville on the Plumas National Forest. The first image is from May 24, 2009. The second is from July 7, 2022, showing almost complete high-intensity fire effects in the thinned area.

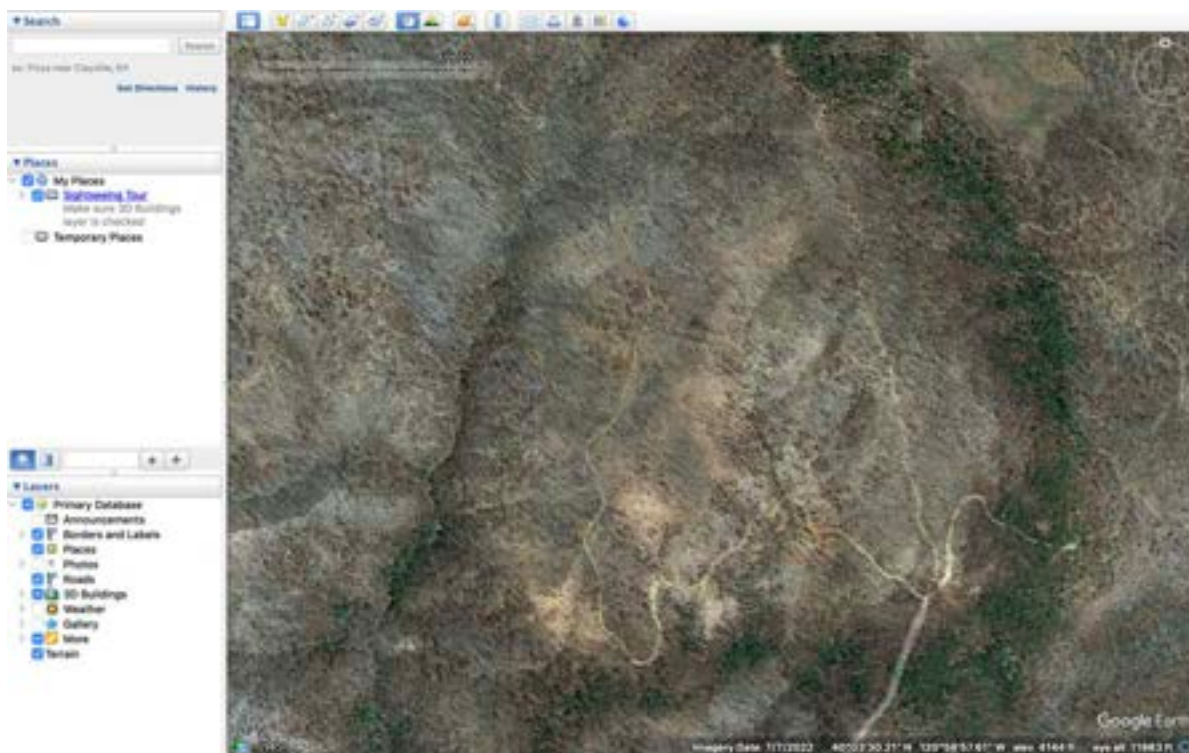
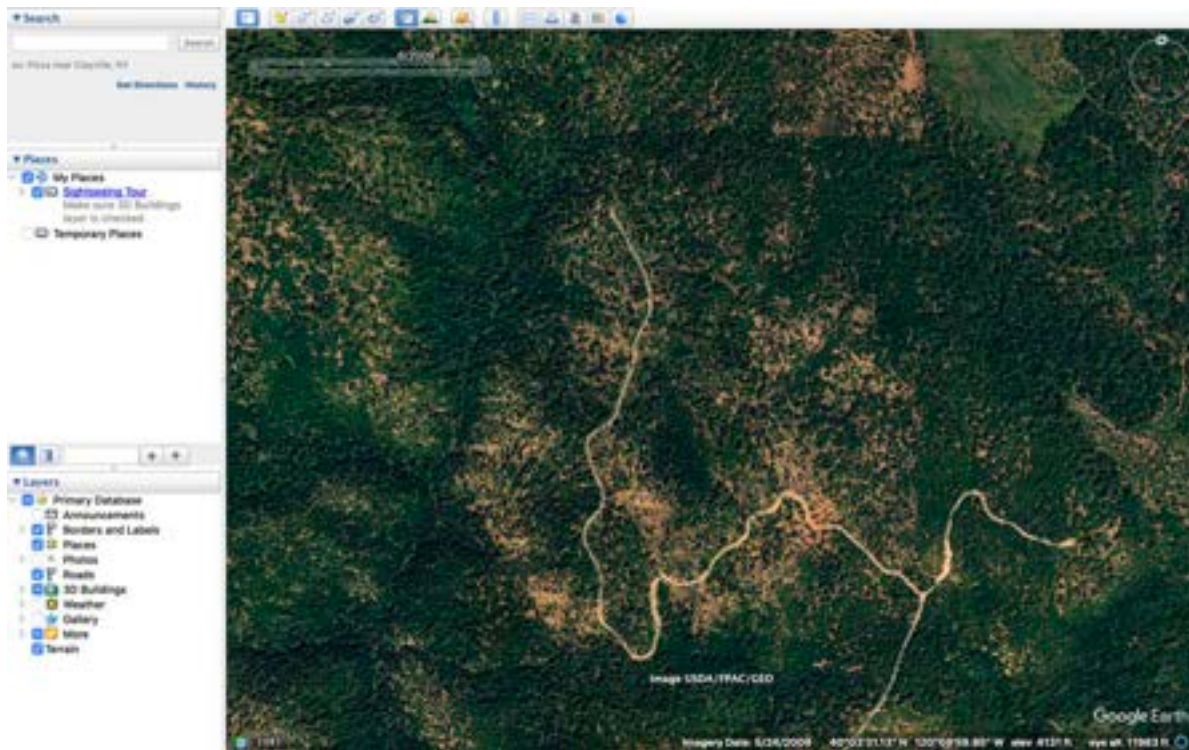


Image Pair #5: Postfire logging and mechanical thinning west of Greenville and south of Canyon Dam on the Plumas National Forest. The first image is from May 24, 2009, and the second is from July 7, 2022, after the Dixie fire. Once again, note that the thinned area is heavily dominated by high-intensity fire.

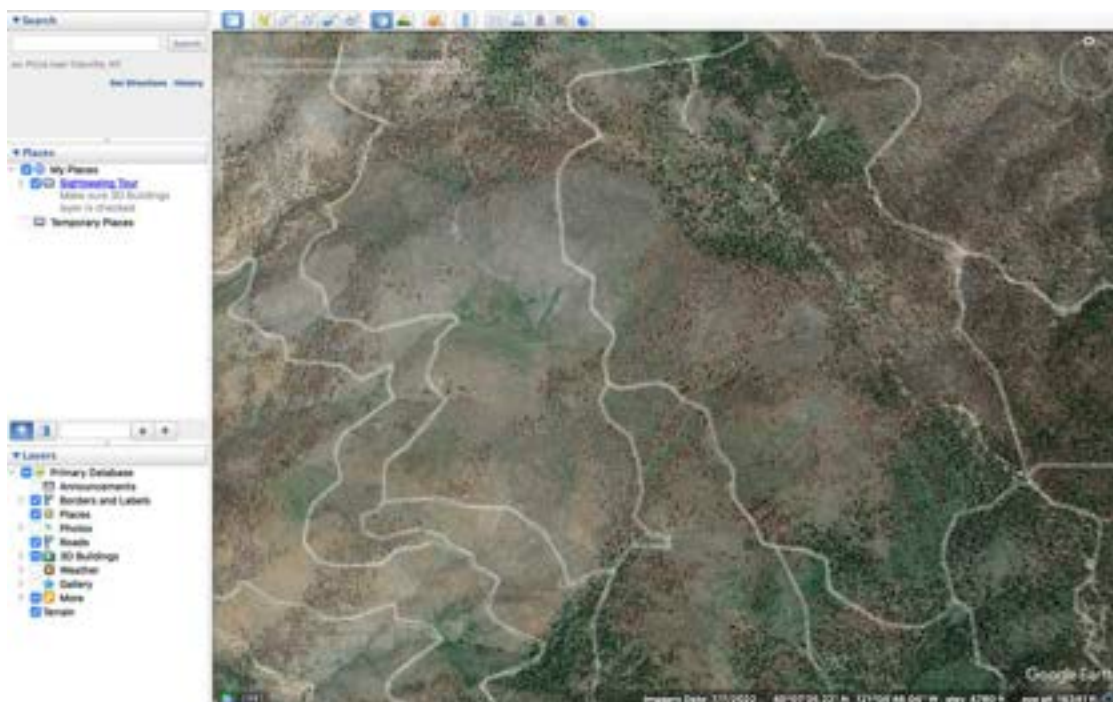
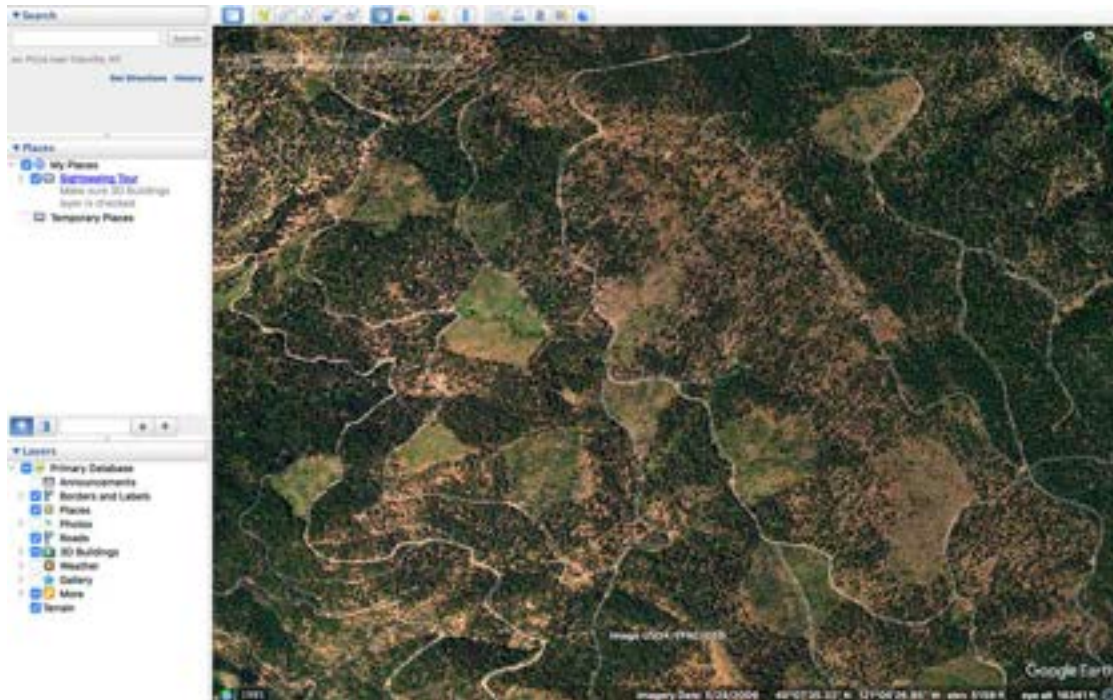
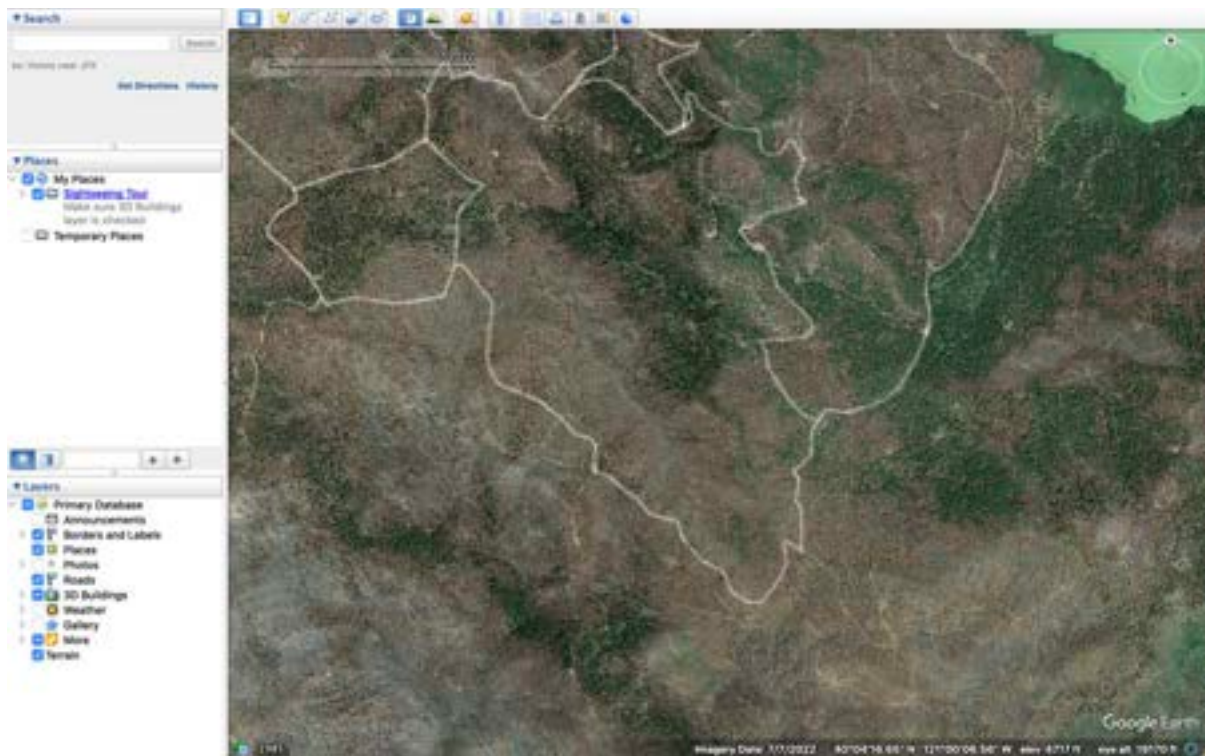
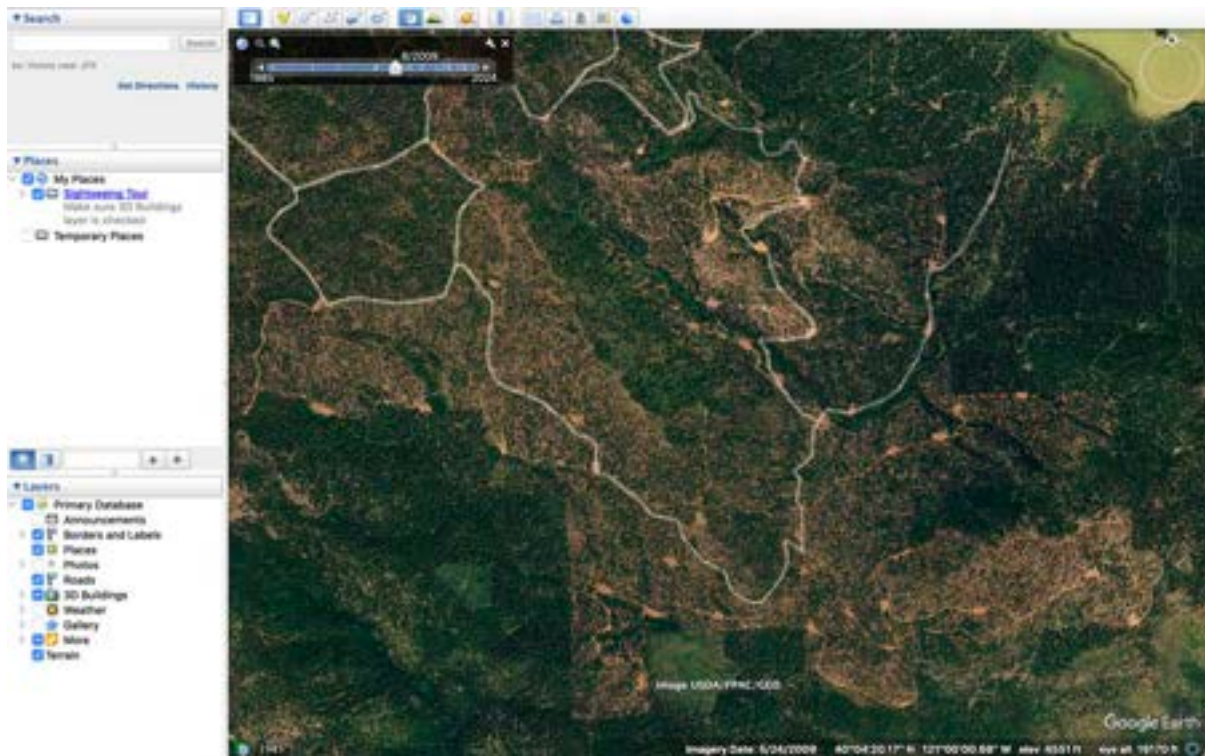


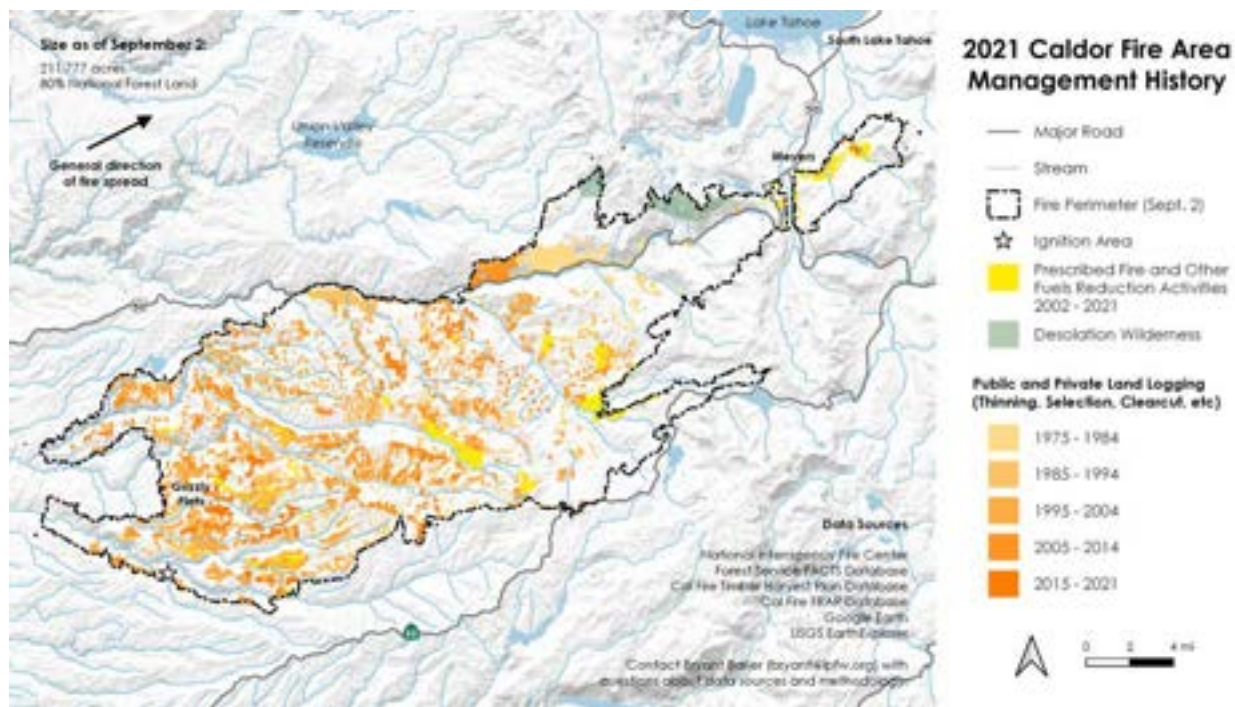
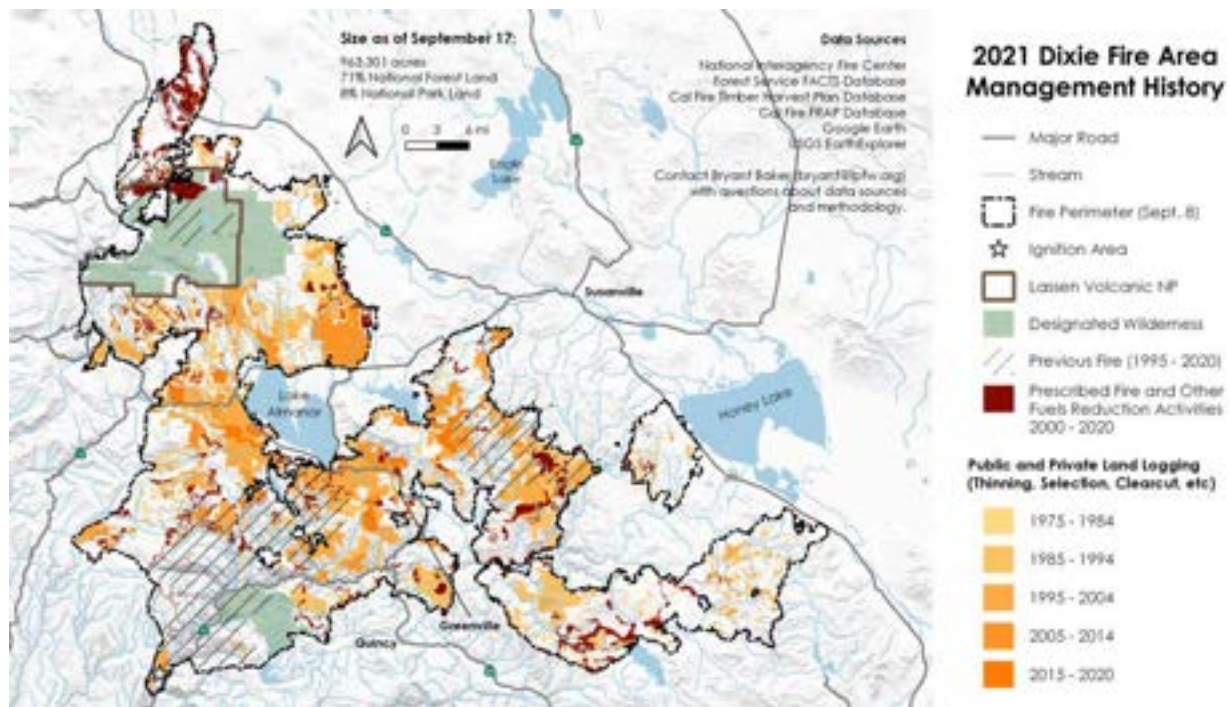
Image Pair #6: Mechanical thinning on private timberlands south of Greenville. The first image is from May 24, 2009, and the second is from July 7, 2022, after the Dixie fire, with the thinned areas heavily dominated by high-intensity fire.

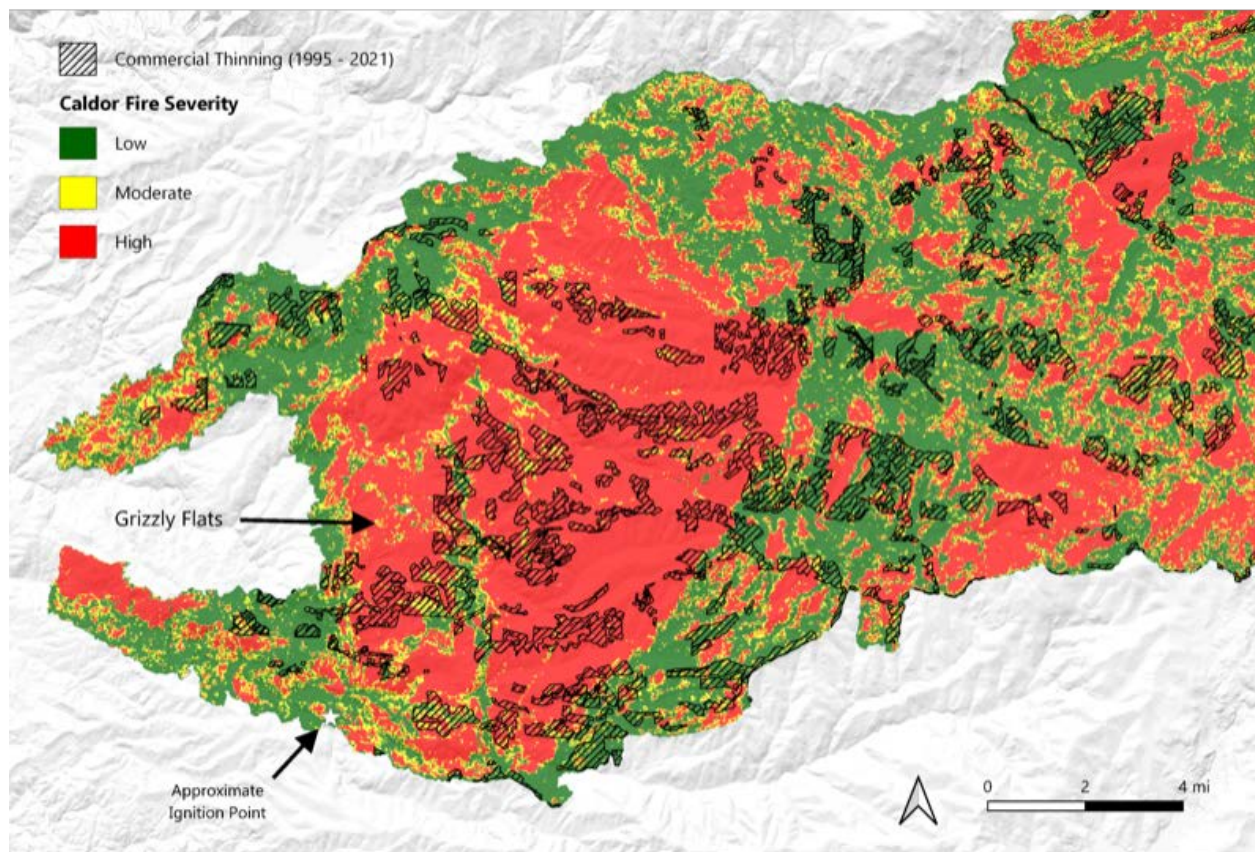


USFS fails to address or acknowledge the large body of scientific evidence, including Forest Service studies, finding that thinning plus prescribed fire also increases wildfire rate of spread, intensity, and overall tree mortality. The USFS also fails to address the science finding that post-fire logging exacerbates wildfires. USFS also improperly downplays and dodges science finding that thinning beyond about 100 feet from homes provides no additional protection from wildfire.

The approach of the DEIS, and its logging loopholes, is the same approach that the Forest Service has pursued for many years, except the DEIS promotes this approach on a much bigger scale. In brief, it involves mechanical thinning and post-fire logging of vast forest areas distant from communities based on the claim that this will either directly stop fires from reaching towns or indirectly stop fires by making fires burn much more slowly and so much less intensely that fire suppression crews can easily halt the fire before it reaches a community. This approach is a proven failure, as we have seen in Paradise (Camp fire of 2018), Greenville (Dixie fire of 2021), Grizzly Flats (Caldor fire of 2021), and Berry Creek and Feather Falls (North Complex fire of 2020), among others. Please see the maps below showing large areas of thinning and other so-called fuel-reduction logging around towns that were largely destroyed by the Camp fire, Dixie fire, and Caldor fire, respectively.







The DEIS fails to adequately analyze the potential fire effects to the forest and adjacent communities due to mechanical thinning that includes widespread removal of thousands of mature trees, and the potential for “thinning” and other logging to increase, not decrease, fire severity, based on science submitted here and as recognized by the Ninth Circuit Court of Appeals in the 2020 *BARK v. U.S. Forest Service* case (https://scholar.google.com/scholar_case?case=8163889612711152072&q=BARK+v+forest+service&hl=en&as_sdt=2006). The Ninth Circuit’s reasoning is included here:

First, the effects of the Project are highly controversial and uncertain, thus mandating the creation of an EIS. See 40 C.F.R. § 1508.27(b)(4) & (5) (listing relevant factors for whether an EIS is required, including if the project's effects are "highly controversial" and "highly uncertain"). The stated primary purpose of the CCR Project is to reduce the risk of wildfires and promote safe fire-suppression activities, but Appellants identify considerable scientific evidence showing that variable density thinning will not achieve this purpose. Considering both context and intensity, as required by 40 C.F.R. § 1508.27, this evidence raises substantial questions about the Project's environmental impact, and an EIS is required. See, e.g., *Blackwood*, 161 F.3d at 1212; *Native Ecosystems Council*, 428 F.3d at 1238-39.

"A project is 'highly controversial' if there is a 'substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.'" [*Native Ecosystems Council*, 428 F.3d at 1240](#) (alteration in original) (quoting [*Blackwood*, 161 F.3d at 1212](#)). "A substantial dispute exists when evidence ... casts serious doubt upon the reasonableness of an agency's conclusions." *In Def. of Animals*, 751 F.3d at 1069 (quoting [*Babbitt*, 241 F.3d at 736](#)). "[M]ere opposition alone is insufficient to support a finding of controversy." [*WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 \(9th Cir. 2019\)](#).

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

Substantial expert opinion presented by the Appellants during the administrative process disputes the USFS's conclusion that thinning is helpful for fire suppression and safety. For example, Oregon Wild pointed out in its EA comments that "[f]uel treatments have a modest effect on fire behavior, and could even make fire worse instead of better." It averred that removing mature trees is especially likely to have a net negative effect on fire suppression. Importantly, the organization pointed to expert studies and research reviews that support this assertion.

Bark also raised this issue: "It is becoming more and more commonly accepted that reducing fuels does not consistently prevent large forest fires, and seldom significantly ⁸⁷¹~~871~~ reduces the outcome of these large fires," citing an article from *Forest Ecology and Management*. Bark also directed the USFS to a recent study published in *The Open Forest Science Journal*, which concluded that fuel treatments are unlikely to reduce fire severity and consequent impacts, because often the treated area is not affected by fire before the fuels return to normal levels. Bark further noted that, while "Bark discussed [during the scoping process] the studies that have found that fuel reduction may actually exacerbate fire severity in some cases as such projects leave behind combustible slash, open the forest canopy to create more ground-level biomass, and increase solar radiation which dries out the understory[,] [t]he EA did not discuss this information."

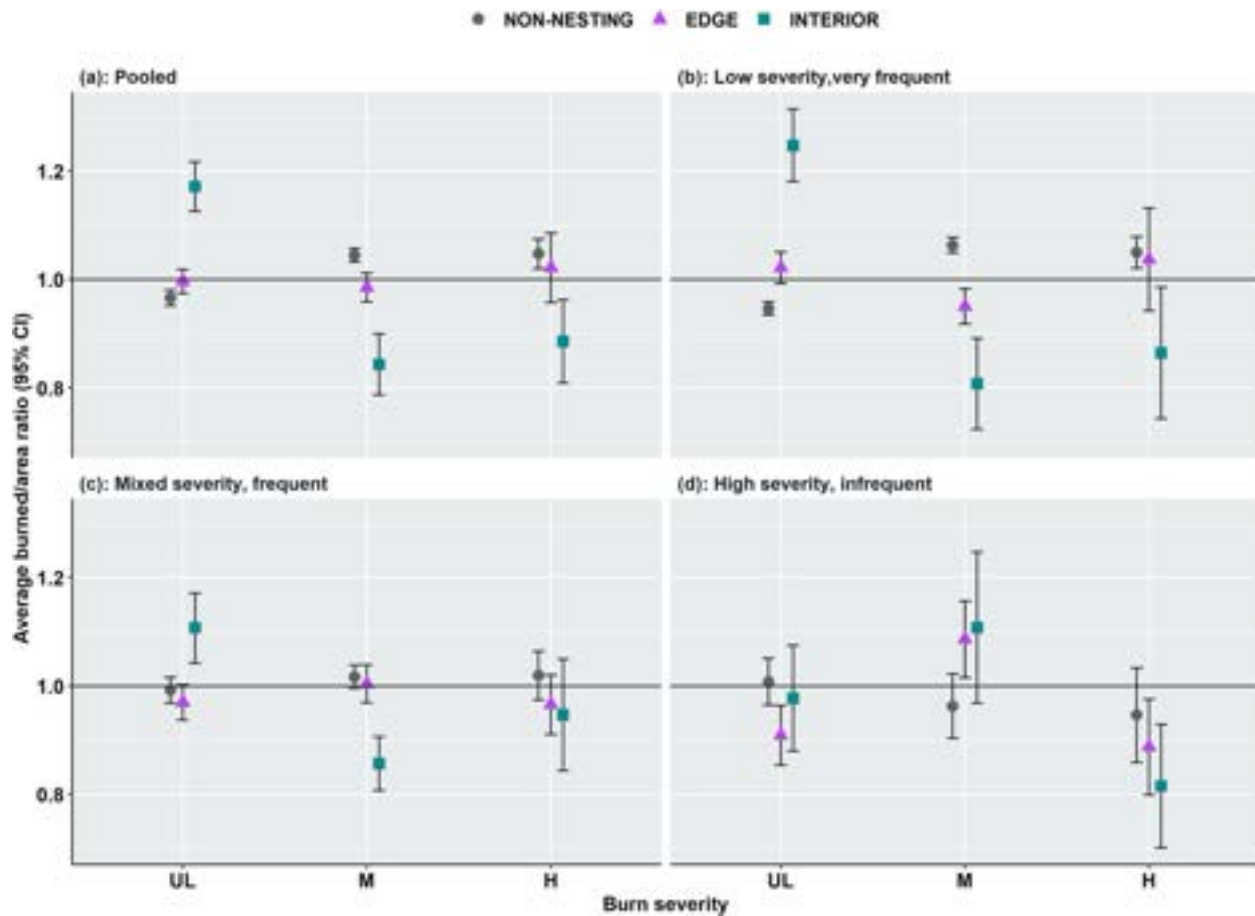
Oregon Wild also pointed out in its EA comments that fuel reduction does not necessarily suppress fire. Indeed, it asserted that "[s]ome fuel can actually help reduce fire, such as deciduous hardwoods that act as heat sinks (under some conditions), and dense canopy fuels that keep the forest cool and moist and help suppress the growth of surface and ladder fuels...." Oregon Wild cited more than ten expert sources supporting this view. Importantly, even the Fuels Specialist Report produced by the USFS itself noted that "reducing canopy cover can also have the effect of increasing [a fire's rate of spread] by allowing solar radiation to dry surface fuels, allowing finer fuels to grow on ... the forest floor, and reducing the impact of sheltering from wind the canopy provides."

The effects analysis in the EA did not engage with the considerable contrary scientific and expert opinion; it instead drew general conclusions such as that "[t]here are no negative effects to fuels from the Proposed Action treatments." Appellants thus have shown a substantial dispute about the effect of variable density thinning on fire suppression. Although it is not our role to assess the merits of whether variable density thinning is indeed effective in the project area to prevent fires, or to take sides in a battle of the experts, *see Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992), NEPA requires agencies to consider all important aspects of a problem. *See WildEarth Guardians*, 759 F.3d at 1069-70. Throughout the USFS's investigative process, Appellants pointed to numerous expert sources concluding that thinning activities do not improve fire outcomes. In its responses to these comments and in its finding of no significant impact, the USFS reiterated its conclusions about vegetation management but did not engage with the substantial body of research cited by Appellants. This dispute is of substantial consequence because variable density thinning is planned in the entire Project area, and fire management is a crucial issue that has wide-ranging ecological impacts and affects human life. When one factor alone raises "substantial questions" about whether an agency action will have a significant environmental effect, an EIS is warranted. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005) ("We have held that one of [the NEPA intensity] factors may be sufficient to require preparation of an EIS in appropriate circumstances."). Thus, the USFS's decision not to prepare an EIS was arbitrary and capricious. *See Blackwood*, 161 F.3d at 1213 (holding that conflicting evidence on the effects of ecological intervention in post-fire landscapes made a proposed project highly uncertain, thus requiring an EIS).

We note that describing mixed-conifer and ponderosa pine forest as having frequent-fire low-severity regimes is outdated and misleading, as it is based on the now-discredited notion that fire return intervals from fire-scar studies are an accurate method to assess historical fire frequencies. Far more detailed and comprehensive analyses have determined that historical fire frequencies in dry forests of the western U.S., such as ponderosa pine and dry mixed-conifer forests, were about 39 years on average (e.g., Baker 2017), and actual fire frequencies (fire rotation) were about 4 times longer than the misleading fire return interval concept suggested (Crompton et al. 2022 Table 1).

What about the effect of mechanical thinning on wildfire severity in mixed-conifer and ponderosa pine forests? The Forest Service's own scientists (Lesmeister et al. 2021) recently conducted a massive, landmark 30-year study—a substantial portion of which was conducted in such forests—and found that, in these forest types (most frequent fire regime), the densest forests with the highest biomass, highest canopy cover, and highest tree densities, on average had lower wildfire severities when fires occurred when compared to more open, lower-density forests resulting from mechanical thinning and other logging operations (see Figure 4b from Lesmeister et al. 2021 below). The Forest Service scientists concluded that more open forests with lower biomass had higher fire severity, because the type of open, lower-biomass forests resulting from

thinning and other logging activities have “hotter, drier, and windier microclimates, and those conditions decrease dramatically over relatively short distances into the interior of older forests with multi-layer canopies and high tree density...”



(Figure 4 from Lesmeister et al. 2021—values above 1.0 are relatively more likely, and values below 1.0 are relatively less likely)

Notably, Lesmeister et al. (2021) made the same finding in their analysis of more mesic forests, including mesic mixed-conifer forests.

Other Forest Service scientists, in Lydersen et al. (2014), reported the following finding in the 257,000-acre Rim fire of 2013:

“Density of small to intermediate size trees (20–40 cm dbh in the analysis with all plots and both 40–60 cm and 60–80 cm dbh in the analysis excluding plots burned on a plume-dominated day) were also related to Rim Fire severity, with **plots with a greater small tree density tending to burn with lower severity.**”

The very largest scientific analysis ever conducted in dry forests on the subject of tree removal and wildfire severity, Bradley et al. (2016), found that forests completely protected from tree removal had the lowest fire severity, while forests with some limited tree removal allowed had higher levels of fire severity, and forests with the fewest environmental protections and the most tree removal had the highest fire severity. The authors concluded the following:

“We found forests with higher levels of protection [from tree removal] had lower severity values even though they are generally identified as having the highest overall levels of biomass and fuel loading. Our results suggest a need to reconsider current overly simplistic assumptions about the relationship between forest protection and fire severity in fire management and policy.”

Hanson (2021) made similar findings in dry forests in the approximately 380,000-acre Creek fire of 2020 in the southern Sierra Nevada, reporting that, based on the Forest Service’s own data, forests with previous logging under the rubric of “fuel reduction”—specifically, mechanical thinning and post-fire logging—had overall higher fire severity than unmanaged forests.

More recently, scientists have begun looking at another key question regarding mechanical thinning and wildfire severity in dry forests, related to overall combined tree mortality from thinning itself and subsequent wildfire. These studies have found that mechanical thinning kills more trees than it prevents from being killed in mature and old dry forests, including Baker and Hanson (2022) (pertaining to the Caldor fire of 2021 in the northern Sierra Nevada), and DellaSala et al. (2022) (pertaining to the Wallow fire of 2011 in Arizona). Baker and Hanson (2022) explained why some studies have erroneously reported that mechanical thinning is effective as a wildfire management approach:

“Despite controversy regarding thinning, there is a body of scientific literature that suggests commercial thinning should be scaled up across western US forest landscapes as a wildfire management strategy. This raises an important question: what accounts for the discrepancy on this issue in the scientific literature? We believe several factors are likely to largely explain this discrepancy. First and foremost, because most previous research has not accounted for tree mortality from thinning itself, prior to the wildfire-related mortality, such research has underreported tree mortality in commercial thinning areas relative to unthinned forests. Second, some prior studies have not controlled for vegetation type, which can lead to a mismatch when comparing severity in thinned areas to the rest of the fire area given that thinning necessarily occurs in conifer forests but unthinned areas can include large expanses of non-conifer vegetation types that burn almost exclusively at high severity, such as grasslands and chaparral. Third, some research reporting effectiveness of commercial thinning in terms of reducing fire severity has been based on the subjective location of comparison sample points between thinned and adjacent unthinned forests. Fourth, reported results have often been based on theoretical models, which subsequent research has found to overestimate the effectiveness of thinning. Last, several case studies draw conclusions about the effectiveness of thinning as a wildfire management strategy when the results of those

studies do not support such a conclusion, as reviewed in DellaSala et al. (2022).”
(internal citations omitted)

Finally, with regard to the common misconception that mature and old-growth stands are “overgrown”, and have too many smaller trees relative to historical forests, Baker et al. (2023) meticulously documented the fact that this notion stems from a pattern of scientific omissions in studies funded by the Forest Service. This pattern of omissions of peer-reviewed, published reply articles, which refuted and discredited U.S. Forest Service response articles, created a “falsification” of the scientific record regarding historical forest density and fire regimes. The corrected record shows that historical forests were much denser on average than assumed by the Forest Service and were shaped by mixed-severity fire, not merely low-severity fire.

Below is a summary of numerous scientific sources in key subject areas that implicate both the impacted environment as well as public safety. Key findings are quoted and/or summarized, and sources authored or co-authored by U.S. Forest Service scientists are indicated in bold.

The only effective way to protect homes from fire is home-hardening and defensible space pruning within 100 to 200 feet of homes or less.

Cohen, J.D. (**U.S. Forest Service**). 2000. Preventing disaster: home ignitability in the wildland-urban interface. *Journal of Forestry* 98: 15-21.

The only relevant zone to protect homes from wildland fire is within approximately 135 feet or less from each home—not out in wildland forests.

Gibbons P, van Bommel L, Gill MA, Cary GJ, Driscoll DA, Bradstock RA, Knight E, Moritz MA, Stephens SL, Lindenmayer DB (2012) Land management practices associated with house loss in wildfires. *PLoS ONE* 7: Article e29212.

Defensible space pruning within less than 130 feet from homes was effective at protecting homes from wildfires, while vegetation management in remote wildlands was not. A modest additional benefit for home safety was provided by prescribed burning less than 500 meters (less than 1641 feet) from homes.

Syphard, A.D., T.J. Brennan, and J.E. Keeley. 2014. The role of defensible space for residential structure protection during wildfires. *Intl. J. Wildland Fire* 23: 1165-1175.

Vegetation management and removal beyond approximately 100 feet from homes provides no additional benefit in terms of protecting homes from wildfires.

Tree removal is not necessary prior to conducting prescribed fire in forest wildlands or as an additional community buffer.

Decades of scientific studies have proven that, even in the densest forests that have not experienced fire in many decades, prescribed fire can be applied without prior tree removal, as demonstrated in the following studies:

Knapp EE, Keeley JE, Ballenger EA, Brennan TJ. 2005. Fuel reduction and coarse woody debris dynamics with early season and late season prescribed fire in a Sierra Nevada mixed conifer forest. *Forest Ecology and Management* 208: 383–397.

Knapp, E.E., and Keeley, J.E. 2006. Heterogeneity in fire severity within early season and late season prescribed burns in a mixed-conifer forest. *Int. J. Wildland Fire* 15: 37–45.

Knapp, E.E., Schwilk, D.W., Kane, J.M., Keeley, J.E., 2007. Role of burning on initial understory vegetation response to prescribed fire in a mixed conifer forest. *Canadian Journal of Forest Research* 37: 11–22.

van Mantgem, P.J., A.C. Caprio, N.L. Stephenson, and A.J. Das. 2016. Does prescribed fire promote resistance to drought in low elevation forests of the Sierra Nevada, California, USA? *Fire Ecology* 12: 13-25.

van Mantgem, P.J., N.L. Stephenson, J.J. Battles, E.K. Knapp, and J.E. Keeley. 2011. Long-term effects of prescribed fire on mixed conifer forest structure in the Sierra Nevada, California. *Forest Ecology and Management* 261: 989–994.

A large and growing body of scientific evidence and opinion concludes that commercial thinning and post-fire logging conducted under the guise of fuel reduction makes wildfires spread faster and/or burn more severely, and this puts nearby communities at greater risk.

Calkin, D.E., Barrett, K., Cohen, J.D., Finney, M.A., Pyne, S.J., and Quarles, S.L. **(co-authored by U.S. Forest Service)**. 2023. Wildland-urban fire disasters aren’t actually a wildfire problem. *Proceedings of the National Academy of Sciences of the United States of America*. 120: e2315797120.

The authors noted that wildfires are driven by climate and climate change, and criticized the current federal management approach embodied in the 2022 Wildfire Crisis Strategy, and in the 2021 Infrastructure Act and 2022 Inflation Reduction Act, that is focused on thinning tens of millions of acres of public, private, and Tribal forests in the western U.S. The authors concluded that we must recognize that wildfire in forests and other wildlands is not only inevitable, but also there is an “ecological necessity” that wildfires occur for native biodiversity benefits. The scientists concluded that the “best way” to protect homes and lives is to focus attention and resources directly on communities, using proven methods to make them fire safe, noting that the current approach is leading to more, not fewer, losses of homes and lives. They promoted “direct funding and technical assistance to communities”, instead of spending many billions of dollars managing forests distant from homes.

USFS (U.S. Forest Service) (2022). Gallinas-Las Dispensas Prescribed Fire Declared Wildfire Review. U.S. Forest Service, Office of the Chief, Washington, D.C.

Thinning followed by burning caused a massive fire that destroyed communities.

Thinning reduced canopy cover, increasing growth of combustible grasses; associated pile burning caused a huge wildfire, spreading rapidly through thinned areas, burning many homes.

Lesmeister, D.B., et al. (co-authored by U.S. Forest Service). 2019. Mixed-severity wildfire and habitat of an old-forest obligate. *Ecosphere*10: Article e02696.

Denser, older forests with high canopy cover had lower fire severity and “buffer the negative effects of climate change” regarding wildfires.

“Thinned forests have more open conditions, which are associated with higher temperatures, lower relative humidity, higher wind speeds, and increasing fire intensity. Furthermore, live and dead fuels in young forest or thinned stands with dense saplings or shrub understory will be drier, making ignition and high heat more likely, and the rate of spread higher because of the relative lack of wind breaks provided by closed canopies with large trees.”

Lesmeister, D.B., et al. (co-authored by U.S. Forest Service). 2021. Northern spotted owl nesting forests as fire refugia: a 30-year synthesis of large wildfires. *Fire Ecology* 17: Article 32.

More open forests with lower biomass had higher fire severity, because the type of open, lower-biomass forests resulting from thinning and other logging activities have “hotter, drier, and windier microclimates, and those conditions decrease dramatically over relatively short distances into the interior of older forests with multi-layer canopies and high tree density...”

Reilly, M.J., et al. (co-authored by U.S. Forest Service). 2022. Cascadia Burning: The historic, but not historically unprecedented, 2020 wildfires in the Pacific Northwest, USA. *Ecosphere* 13: e4070.

Weather conditions primarily determined fire severity, and forest density was not a factor.

“We found minimal difference in burn severity among stand structural types related to previous management in the 2020 fires. Adaptation strategies for similar fires in the future could benefit by focusing on ignition prevention, fire suppression, and community preparedness, as opposed to fuel treatments that are unlikely to mitigate fire severity during extreme weather.”

North, M.P., S.L. Stephens, B.M. Collins, J.K. Agee, G. Aplet, J.F. Franklin, and P.Z. Fule (**co-authored by U.S. Forest Service**). 2015. Reform forest fire management. *Science* 349: 1280-1281.

“...fire is usually more efficient, cost-effective, and ecologically beneficial than mechanical treatments.”

Lydersen, J. M., M. P. North, and B. M. Collins (**co-authored by U.S. Forest Service**). 2014. Severity of an uncharacteristically large wildfire, the Rim Fire, in forests with relatively restored frequent fire regimes. *Forest Ecology and Management* 328:326–334.

In the Rim fire of 2013, the authors found that mature mixed-conifer and ponderosa pine forests with “a greater small tree density tend[ed] to burn with lower severity.”

Meigs, G.W., et al. (**co-authored by U.S. Forest Service**). 2020. Influence of topography and fuels on fire refugia probability under varying fire weather in forests of the US Pacific Northwest. *Canadian Journal of Forest Research* 50: 636-647.

Forests with higher pre-fire biomass are more likely to experience low-severity fire.

Thompson, J.R., Spies, T.A., Ganio, L.M. (**co-authored by U.S. Forest Service**). 2007. Reburn severity in managed and unmanaged vegetation in a large wildfire. *Proceedings of the National Academy of Sciences of the United States of America* 104: 10743–10748.

“Areas that were salvage-logged and planted after the initial fire burned more severely than comparable unmanaged areas.”

Thompson, J.R., Spies, T.A. (**co-authored by U.S. Forest Service**). 2009. Vegetation and weather explain variation in crown damage within a large mixed-severity wildfire. *Forest Ecology and Management* 258: 1684-1694.

Mature forests with higher canopy cover had lower fire severity.

Thompson, J., and T.A. Spies (**co-authored by U.S. Forest Service**). 2010. Exploring Patterns of Burn Severity in the Biscuit Fire in Southwestern Oregon. *Fire Science Brief* 88: 1-6.

“Areas that burned with high severity...in a previous wildfire (in 1987, 15 years prior) were more likely to burn with high severity again in the 2002 Biscuit Fire. Areas that were salvage-logged and planted following the 1987 fire burned with somewhat higher fire severity than equivalent areas that had not been logged and planted.”

Graham, R., et al. (**U.S. Forest Service**). 2012. Fourmile Canyon Fire Findings. Gen. Tech. Rep. RMRS-GTR-289. Fort Collins, CO: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station. 110 p.

Thinned forests “were burned more severely than neighboring areas where the fuels were not treated”, and 162 homes were destroyed by the Fourmile Canyon Fire (see Figs. 45 and 46).

Morris, W.G. (U.S. Forest Service). 1940. Fire weather on clearcut, partly cut, and virgin timber areas at Westfir, Oregon. *Timberman* 42: 20-28.

“This study is concerned with one of these factors - the fire-weather conditions near ground level - on a single operation during the first summer following logging. These conditions were found to be more severe in the clear-cut area than in either the heavy or light partial cutting areas and more severe in the latter areas than in virgin timber.”

Countryman, C.M. (U.S. Forest Service). 1956. Old-growth conversion also converts fire climate. *Fire Control Notes* 17: 15-19.

Partial cutting (thinning) increases wildfire severity, due to microclimate impacts, regardless of whether or how the slash debris is treated.

“Although the general relations between weather factors, fuel moisture, and fire behavior are fairly well known, the importance of these changes following conversion and their combined effect on fire behavior and control is not generally recognized. The term ‘fireclimate,’ as used here, designates the environmental conditions of weather and fuel moisture that affect fire behavior. It does not consider fuel created by slash because regardless of what forest managers do with slash, they still have to deal with the new fireclimate. In fact, the changes in wind, temperature, humidity, air structure, and fuel moisture may result in greater changes in fire behavior and size of control job than does the addition of more fuel in the form of slash.”

“Conversion which opens up the canopy by removal of trees permits freer air movement and more sunlight to reach the ground. The increased solar radiation in turn results in higher temperatures, lower humidity, and lower fuel moisture. The magnitude of these changes can be illustrated by comparing the fireclimate in the open with that in a dense stand.”

“A mature, closed stand has a fireclimate strikingly different from that in the open. Here nearly all of the solar radiation is intercepted by the crowns. Some is reflected back to space and the rest is converted to heat and distributed in depth through the crowns. Air within the stand is warmed by contact with the crowns, and the ground fuels are in turn warmed only by contact with the air. The temperature of fuels on the ground thus usually approximates air temperature within the stand.”

“Temperature profiles in a dense, mixed conifer stand illustrate this process (fig. 2). By 8 o'clock in the morning, air within the crowns had warmed to 68° F. Air temperature near the ground was only 50°. By 10 o'clock temperatures within the crowns had reached 82° and, although the heat had penetrated to lower levels, air near the surface at 77° was still cooler than at any other level. At 2:00 p.m., air temperature within the stand had become

virtually uniform at 87°. In the open less than one-half mile away, however, the temperature at the surface of pine litter reached 153° at 2:00 p.m.”

“Because of the lower temperature and higher humidity, fuels within the closed stand are more moist than those in the open under ordinary weather conditions. Typically, when moisture content is 3 percent in the open, 8 percent can be expected in the stand.”

“Moisture and temperature differences between open and closed stands have a great effect on both the inception and the behavior of fire. For example, fine fuel at 8-percent moisture content will require nearly one-third more heat for ignition than will the same fuel at 3-percent moisture content. Thus, firebrands that do not contain enough heat to start a fire in a closed stand may readily start one in the open.”

“When a standard fire weather station in the open indicates a temperature of 85° F., fuel moisture of 4 percent, and a wind velocity of 15 m.p.h.--not unusual burning conditions in the West--a fire starting on a moderate slope will spread 4.5 times as fast in the open as in a closed stand. The size of the suppression job, however, increases even more drastically.”

“Greater rate of spread and intensity of burning require control lines farther from the actual fire, increasing the length of fireline. Line width also must be increased to contain the hotter fire. Less production per man and delays in getting additional crews complicate the control problem on a fast-moving fire. It has been estimated that the size of the suppression job increases nearly as the square of the rate of forward spread. Thus, fire in the open will require 20 times more suppression effort. In other words, for each man required to control a surface fire in a mature stand burning under these conditions, 20 men will be required if the area is clear cut.”

“Methods other than clear cutting, of course, may bring a less drastic change in fireclimate. Nevertheless, the change resulting from partial cutting can have important effects on fire. The moderating effect that a dense stand has on the fireclimate usually results in slow-burning fires. Ordinarily, in dense timber only a few days a year have the extreme burning conditions under which surface fires produce heat rapidly enough to carry the fire into the crowns. Partial cutting can increase the severity of the fireclimate enough to materially increase the number of days when disastrous crown fires can occur.”

SNEP (co-authored by U.S. Forest Service). 1996. Sierra Nevada Ecosystem Project, Final Report to Congress: Status of the Sierra Nevada. Vol. I: Assessment summaries and management strategies. Davis, CA: University of California, Davis, Center for Water and Wildland Resources.

“Timber harvest, through its effects on forest structure, local microclimate, and fuel accumulation, has increased fire severity more than any other recent human activity.”

Chen, J., et al. (**co-authored by U.S. Forest Service**). 1999. Microclimate in forest ecosystem and landscape ecology: Variations in local climate can be used to monitor and compare the effects of different management regimes. *BioScience* 49: 288–297.

When moving from open forest areas, resulting from logging, and into dense forests with high canopy cover, “there is generally a decrease in daytime summer temperatures but an increase in humidity...”

The authors reported a 5° C difference in ambient air temperature between a closed-canopy mature forest and a forest with partial cutting, like a commercial thinning unit (Fig. 4b), and noted that such differences are even greater than the increases in temperature predicted due to anthropogenic climate change.

Dombeck, M. (**U.S. Forest Service Chief**). 2001. How Can We Reduce the Fire Danger in the Interior West. *Fire Management Today* 61: 5-13.

“Some argue that more commercial timber harvest is needed to remove small-diameter trees and brush that are fueling our worst wildlands fires in the interior West. However, small-diameter trees and brush typically have little or no commercial value. To offset losses from their removal, a commercial operator would have to remove large, merchantable trees in the overstory. Overstory removal lets more light reach the forest floor, promoting vigorous forest regeneration. Where the overstory has been entirely removed, regeneration produces thickets of 2,000 to 10,000 small trees per acre, precisely the small-diameter materials that are causing our worst fire problems. In fact, many large fires in 2000 burned in previously logged areas laced with roads. It seems unlikely that commercial timber harvest can solve our forest health problems.”

Hanson, C.T. 2021. Is “Fuel Reduction” Justified as Fire Management in Spotted Owl Habitat? *Birds* 2: 395-403.

Thinning followed by burning and post-fire logged areas had higher overall fire severity.

“Within the forest types inhabited by California Spotted Owls, high-severity fire occurrence was not higher overall in unmanaged forests and was not associated with the density of pre-fire snags from recent drought in the Creek Fire, contrary to expectations under the fuel reduction hypothesis. Moreover, fuel-reduction logging in California Spotted Owl habitats was associated with higher fire severity in most cases. The highest levels of high-severity fire were in the categories with commercial logging (post-fire logging, private commercial timberlands, and commercial thinning), while the three categories with lower levels of high-severity fire were in forests with no recent forest management or wildfire, less intensive noncommercial management, and unmanaged forests with re-burning of mixed-severity wildfire, respectively.”

Baker, B.C., and C.T. Hanson. 2022. Cumulative tree mortality from commercial thinning and a large wildfire in the Sierra Nevada, California. *Land* 11: Article 995.

Thinning followed by burning increases overall fire severity.

“Similar to the findings of Hanson (2022) in the Antelope Fire of 2021 in northern California, in our investigation of the Caldor Fire of 2021 we found significantly higher cumulative severity in forests with commercial thinning than in unthinned forests, indicating that commercial thinning killed significantly more trees than it prevented from being killed in the Caldor Fire...Despite controversy regarding thinning, there is a body of scientific literature that suggests commercial thinning should be scaled up across western US forest landscapes as a wildfire management strategy. This raises an important question: what accounts for the discrepancy on this issue in the scientific literature? We believe several factors are likely to largely explain this discrepancy. First and foremost, because most previous research has not accounted for tree mortality from thinning itself, prior to the wildfire-related mortality, such research has underreported tree mortality in commercial thinning areas relative to unthinned forests. Second, some prior studies have not controlled for vegetation type, which can lead to a mismatch when comparing severity in thinned areas to the rest of the fire area given that thinning necessarily occurs in conifer forests but unthinned areas can include large expanses of non-conifer vegetation types that burn almost exclusively at high severity, such as grasslands and chaparral. Third, some research reporting effectiveness of commercial thinning in terms of reducing fire severity has been based on the subjective location of comparison sample points between thinned and adjacent unthinned forests. Fourth, reported results have often been based on theoretical models, which subsequent research has found to overestimate the effectiveness of thinning. Last, several case studies draw conclusions about the effectiveness of thinning as a wildfire management strategy when the results of those studies do not support such a conclusion, as reviewed in DellaSala et al. (2022).” (internal citations omitted)

DellaSala, D.A., B.C. Baker, C.T. Hanson, L. Ruediger, and W.L. Baker. 2022. Have western USA fire suppression and megafire active management approaches become a contemporary Sisyphus? *Biological Conservation* 268: Article 109499.

Thinning followed by burning increases overall fire severity.

With regard to a previous U.S. Forest Service study claiming that commercial thinning effectively reduced fire severity in the large Wallow fire of 2011 in Arizona, DellaSala et al. (2022, Section 5.1) conducted a detailed accuracy check and found that the previous analysis had dramatically underreported high-severity fire in commercial thinning units, and forests with commercial thinning in fact had higher fire severity, overall.

DellaSala et al. (2022, Section 5.2) also reviewed several U.S. Forest Service studies relied upon by Prichard et al. (2021) for the claim that commercial thinning is an effective fire management approach and found that the actual results of these cited studies did not support that conclusion.

Beschta, R.L.; Frissell, C.A.; Gresswell, R.; Hauer, R.; Karr, J.R.; Minshall, G.W.; Perry, D.A.; Rhodes, J.J. 1995. Wildfire and salvage logging. Eugene, OR: Pacific Rivers Council.

“We also need to accept that in many drier forest types throughout the region, forest management may have set the stage for fires larger and more intense than have occurred in at least the last few hundred years.”

“With respect to the need for management treatments after fires, there is generally no need for urgency, nor is there a universal, ecologically-based need to act at all. By acting quickly, we run the risk of creating new problems before we solve the old ones.”

“[S]ome argue that salvage logging is needed because of the perceived increased likelihood that an area may reburn. It is the fine fuels that carry fire, not the large dead woody material. We are aware of no evidence supporting the contention that leaving large dead woody material significantly increases the probability of reburn.”

Morrison, P.H. and K.J. Harma. 2002. Analysis of Land Ownership and Prior Land Management Activities Within the Rodeo & Chediski Fires, Arizona. Pacific Biodiversity Institute, Winthrop, WA. 13 pp.

Previous logging was associated with higher fire severity.

Donato DC, Fontaine JB, Campbell JL, Robinson WD, Kauffman JB, Law BE. 2006. *Science* 311: 352.

“In terms of short-term fire risk, a reburn in [postfire] logged stands would likely exhibit elevated rates of fire spread, fireline intensity, and soil heating impacts...Postfire logging alone was notably incongruent with fuel reduction goals.”

Hanson, C.T., Odion, D.C. 2006. Fire Severity in mechanically thinned versus unthinned forests of the Sierra Nevada, California. In: Proceedings of the 3rd International Fire Ecology and Management Congress, November 13-17, 2006, San Diego, CA.

“In all seven sites, combined mortality [thinning and fire] was higher in thinned than in unthinned units. In six of seven sites, fire-induced mortality was higher in thinned than in unthinned units...Mechanical thinning increased fire severity on the sites currently available for study on national forests of the Sierra Nevada.”

Platt, R.V., et al. 2006. Are wildfire mitigation and restoration of historic forest structure compatible? A spatial modeling assessment. *Annals of the Assoc. Amer. Geographers* 96: 455-470.

“Compared with the original conditions, a closed canopy would result in a 10 percent reduction in the area of high or extreme fireline intensity. In contrast, an open canopy [from thinning] has the opposite effect, increasing the area exposed to high or extreme fireline intensity by 36 percent. Though it may appear counterintuitive, when all else is

equal open canopies lead to reduced fuel moisture and increased midflame windspeed, which increase potential fireline intensity.”

Cruz, M.G, and M.E. Alexander. 2010. Assessing crown fire potential in coniferous forests of western North America: A critique of current approaches and recent simulation studies. *Int. J. Wildl. Fire.* 19: 377–398.

The fire models used by the U.S. Forest Service falsely predict effective reduction in crown fire potential from thinning:

“Simulation studies that use certain fire modelling systems (i.e. NEXUS, FlamMap, FARSITE, FFE-FVS (Fire and Fuels Extension to the Forest Vegetation Simulator), Fuel Management Analyst (FMAPlus), BehavePlus) based on separate implementations or direct integration of Rothermel’s surface and crown rate of fire spread models with Van Wagner’s crown fire transition and propagation models are shown to have a significant underprediction bias when used in assessing potential crown fire behaviour in conifer forests of western North America. The principal sources of this underprediction bias are shown to include: (i) incompatible model linkages; (ii) use of surface and crown fire rate of spread models that have an inherent underprediction bias; and (iii) reduction in crown fire rate of spread based on the use of unsubstantiated crown fraction burned functions. The use of uncalibrated custom fuel models to represent surface fuelbeds is a fourth potential source of bias.”

DellaSala et al. (2013) (letter from over 200 scientists):

“Numerous studies also document the cumulative impacts of post-fire logging on natural ecosystems, including...accumulation of logging slash that can add to future fire risks...”

DellaSala et al. (2015) (letter from over 200 scientists):

“Post-fire logging has been shown to eliminate habitat for many bird species that depend on snags, compact soils, remove biological legacies (snags and downed logs) that are essential in supporting new forest growth, and spread invasive species that outcompete native vegetation and, in some cases, increase the flammability of the new forest. While it is often claimed that such logging is needed to restore conifer growth and lower fuel hazards after a fire, many studies have shown that logging tractors often kill most conifer seedlings and other important re-establishing vegetation and actually increases flammable logging slash left on site. Increased chronic sedimentation to streams due to the extensive road network and runoff from logging on steep slopes degrades aquatic organisms and water quality.”

Bradley, C.M. C.T. Hanson, and D.A. DellaSala. 2016. Does increased forest protection correspond to higher fire severity in frequent-fire forests of the western USA? *Ecosphere* 7: article e01492.

In the largest study on this subject ever conducted in western North American, the authors found that the more trees that are removed from forests through logging, the higher the fire severity overall:

“We investigated the relationship between protected status and fire severity using the Random Forests algorithm applied to 1500 fires affecting 9.5 million hectares between 1984 and 2014 in pine (*Pinus ponderosa*, *Pinus jeffreyi*) and mixed-conifer forests of western United States, accounting for key topographic and climate variables. We found forests with higher levels of protection [from logging] had lower severity values even though they are generally identified as having the highest overall levels of biomass and fuel loading.”

Dunn, C.J., et al. 2020. How does tree regeneration respond to mixed-severity fire in the western Oregon Cascades, USA? *Ecosphere* 11: Article e03003.

Forests that burned at high-severity had lower, not higher, overall pre-fire tree densities.

Moomaw et al. (2020) (letter from over 200 scientists:

<https://johnmuirproject.org/2020/05/breaking-news-over-200-top-u-s-climate-and-forest-scientists-urge-congress-protect-forests-to-mitigate-climate-crisis/>):

“Troublingly, to make thinning operations economically attractive to logging companies, commercial logging of larger, more fire-resistant trees often occurs across large areas. Importantly, mechanical thinning results in a substantial net loss of forest carbon storage, and a net increase in carbon emissions that can substantially exceed those of wildfire emissions (Hudiburg et al. 2013, Campbell et al. 2012). Reduced forest protections and increased logging tend to make wildland fires burn *more* intensely (Bradley et al. 2016). This can also occur with commercial thinning, where mature trees are removed (Cruz et al. 2008, Cruz et al. 2014). As an example, logging in U.S. forests emits 10 times more carbon than fire and native insects combined (Harris et al. 2016). And, unlike logging, fire cycles nutrients and helps increase new forest growth.”

Moomaw et al. (2021) (letter from over 200 scientists: <https://bit.ly/3BFtIAg>):

“[C]ommercial logging conducted under the guise of “thinning” and “fuel reduction” typically removes mature, fire-resistant trees that are needed for forest resilience. We have watched as one large wildfire after another has swept through tens of thousands of acres where commercial thinning had previously occurred due to extreme fire weather driven by climate change. Removing trees can alter a forest’s microclimate, and can often increase fire intensity. In contrast, forests protected from logging, and those with high carbon biomass and carbon storage, more often burn at equal or lower intensities when fires do occur.

Bartowitz, K.J., et al. 2022. Forest Carbon Emission Sources Are Not Equal: Putting Fire, Harvest, and Fossil Fuel Emissions in Context. *Front. For. Glob. Change* 5: Article 867112.

The authors found that logging conducted as commercial thinning, which involves removal of some mature trees, substantially increases carbon emissions relative to wildfire alone, and commercial thinning “causes a higher rate of tree mortality than wildfire.”

Evers, C., et al. 2022. Extreme Winds Alter Influence of Fuels and Topography on Megafire Burn Severity in Seasonal Temperate Rainforests under Record Fuel Aridity. *Fire* 5: Article 41.

The authors found that dense, mature/old forests with high biomass and canopy cover tended to have lower fire severity, while more open forests with lower canopy cover and less biomass burned more severely.

Baker, W.L., C.T. Hanson, M.A. Williams, and D.A. DellaSala. 2023. Countering Omitted Evidence of Variable Historical Forests and Fire Regime in Western USA Dry Forests: The Low-Severity-Fire Model Rejected. *Fire* 6: Article 146.

A pattern of omissions of peer-reviewed, published reply articles, which refuted and discredited U.S. Forest Service response articles, created a “falsification” of the scientific record regarding historical forest density and fire regimes. The corrected record shows that historical forests were much denser on average than assumed by the Forest Service and were shaped by mixed-severity fire, not merely low-severity fire.

Inadequate Analysis of Impacts to Spotted Owls

There is no more iconic indicator species for old-growth forests, and the ecological health of these forests, than the spotted owl.

Current research confirms severe adverse impacts to spotted owls from post-fire logging, and neutral or positive effects from big wildfires in the absence of post-fire logging (Hanson et al. 2018, Lee 2020, Hanson et al. 2021). Two subspecies of the spotted owl are already listed under the ESA (northern and Mexican), and the U.S. Fish and Wildlife Service recently proposed **(see attached 60-day comments on the proposed listing, which we incorporate herein by reference)** to list the California spotted owl as threatened in the Sierra Nevada, and noted that mechanical thinning has an adverse impact on the owls. An EIS must be prepared to analyze these impacts.

If the DEIS’s logging loopholes remain, it would convert vast areas of suitable spotted owl habitat to unsuitable. USFS attempts to justify this by assuming that a wildfire would convert some areas of suitable habitat to unsuitable. However, high-intensity fire patches are highly suitable foraging habitat for spotted owls, so long as they are not subjected to post-fire logging (e.g., Lee 2020, Hanson et al. 2021, USFS 2023).

Bond et al. (2009) accounted for distance from nest sites and they found that spotted owls preferentially select high-intensity fire areas up to 1500 meters away from nest sites, including in areas much more than 100 meters into the interiors of high-intensity fire patches. Bond et al.

(2009), Hanson et al. (2018), and Hanson et al. (2021) find that mature/old forest that experienced high-intensity fire, and becomes complex early seral forest habitat (“snag forest habitat”) is suitable spotted owl habitat, specifically suitable foraging habitat. The DEIS misrepresents the science, and improperly minimizes disclosure of impacts, by only considering lower-intensity fire areas in dense mature/old forest as suitable spotted owl habitat.

The US Fish and Wildlife Service’s proposal to list the California spotted owl under the Endangered Species Act acknowledges serious harm to spotted owls from mechanical thinning and post-fire logging, yet the DEIS does not adequately address this. For example:

On p. 62 of the USFWS listing proposal, USFWS admits that “mechanical thinning can decrease California spotted owl occupancy and is negatively correlated with reproduction (Tempel et al. 2014a, p. 2089; Stephens et al. 2014, p. 903; Tempel et al. 2022, p. 19)”, and further concludes on p. 62 that “there is evidence of reduced foraging in fuel treatment areas” and “Thinning may have negative short-term effects on prey species by increasing the risk of predation by removing above-ground cover and reducing canopy connectivity, and thinning may remove suitable nesting substrates...”

On p. 63, USFWS admits that “California spotted owls inhabit areas of low-medium severity fire, patchy high-severity fire, and areas with dead trees; therefore, salvage logging likely reduces the amount of habitat available for California spotted owls (Gutiérrez et al. 2017, p. 276).” USFWS further admits, on p. 63, that there is evidence that “California spotted owl occupancy decreases with salvage logging (Lee et al. 2013, p. 1327; Lee and Bond 2015, p. 228; Hanson and Chi 2021, p. 5)”, and that “Salvage logging can be a threat to California spotted owls when their habitat components of large trees, coarse woody debris, and habitat heterogeneity are removed from the landscape, resulting in a decrease in occupancy at the population level.” USFWS also admits, at the top of p. 64, that the Sierra Nevada Forest Plan Amendment even allows salvage logging in CSO PACs that are occupied by CSOs after fires, so long as the Forest Service merely claims that the territory is no longer suitable for CSOs postfire, which the agency can do under the forest plan amendment even if CSOs are nesting and reproducing (Lee and Bond 2015, Hanson et al. 2018).

The DEIS fails to adequately disclose and address the adverse impacts to spotted owls and their habitat that would result from the logging loopholes and the failure of all alternatives to actually protect mature and old-growth forests from logging, both mechanical thinning and post-fire logging.

The DEIS Does Not Adequately Analyze Increased Tree Mortality Caused by Thinning

In Sierra Nevada forests, the Forest Service has recently improperly relied on a Forest Service study, North et al. (2022), that has been thoroughly discredited and has been found to represent a “falsification of the scientific record” (Baker et al. 2023).

First, North et al. (2022) relies on previous studies by Collins and Stephens, which reported that there were only 20 to 30 trees per acre in historical Sierra Nevada forests, based on circa 1911 Forest Service field surveys. However, as we found in Baker et al. (2018), the Collins and

Stephens work omitted the small-tree data in those historical datasets and failed to use correction factors that the Forest Service itself, a century ago, repeatedly stated were needed to avoid severe underestimations of forest density. The surveys were based on visually estimated distance from the transect line, but surveyors consistently overestimated distance (e.g., they would see 30 or 40 feet to their left and right but would assume they were seeing 66 feet left and right), causing a huge underestimation of forest density. Our findings in Baker et al. (2018) are uncontested by the Forest Service.

Second, North et al. (2022) misleadingly claimed that "current" forests have 150 to 200 trees per acre, but inexplicably used data from 2011 to represent supposed "current" conditions, and failed to mention that over 90% of their study areas have burned in mixed-intensity wildfires since 2011, and that a large portion of the live trees that existed a decade ago are now snags and downed logs.

The bottom line is that North et al. (2022) severely underreported historical forest density by using previous historical density estimates that have been discredited and superseded, and overreported current live tree forest density by using 2011 as their "current" condition, despite the fact that fire and drought since 2011 have dramatically reduced live tree density in their study areas.

Further, studies that have claimed success of such projects on reducing bark beetle mortality generally do not consider the treatment-caused mortality when considering the concept of a successful treatment. For instance, Fettig et al (2012) examined the effect on bark beetle-induced tree mortality of various levels of thinning in comparison to unthinned areas in mixed-conifer forests in the Sierra Nevada. While they stated that “[i]n the present study, bark beetle-caused tree mortality was relatively low the decade after thinning, never reaching a level that would be considered epidemic for either *P. jeffreyi* or *P. ponderosa*...” the authors did not consider the initial mortality event caused by the thinning treatment itself. Their measure of success was whether the level of tree mortality in thinned stands was less than that in the unthinned stands, but apparently mortality was only significant to success if caused by bark beetles. When analyzing the data they present, it is actually quite simple to glean that the overall mortality (i.e. mortality from thinning plus mortality from subsequent bark beetles) in the three thinning treatments was substantial (109 – 289 trees killed per hectare on average) compared to the overall mortality in the unthinned stands (approximately 13 trees killed per hectare on average). Granted, the number of trees killed by bark beetles was slightly lower in the thinning units (3 – 11 trees killed per hectare on average) compared to the unthinned stand (13 trees killed per hectare on average), but this pales in comparison to overall number of trees killed due to the thinning itself (see Figure 1). Another way to view this is, approximately 289 trees per hectare were killed in the most intensive treatment by the thinning itself in order to prevent 10 trees from being killed in the future by bark beetles.

Six et al. (2014) notes a similar pattern:

“Although more trees were killed overall in control units during the outbreak, all controls still retained a greater number of residual mature trees than did thinned stands as they entered the post-outbreak phase.”

And a separate study in ponderosa pine forests in the Black Hills similarly demonstrated that far more trees were killed through the actual thinning process than through a subsequent bark beetle outbreak that was more severe than that experienced in the study by Fettig et al. (2012). Negron et al (2017) examined stands in which the overall mortality (again, mortality caused by thinning plus mortality caused by bark beetles) was 242.6 trees killed per acre on average in thinned stands compared to 87.7 trees killed per acre in unthinned stands. As with other similar studies, the treatment was the primary source of mortality in the stand rather than bark beetles. By the end of the outbreak, not only were there more trees in the unthinned stands (203.2 trees per acre on average) compared to the thinned stands (55 trees per acre on average) as well as more basal area (which could be considered a proxy for both biomass and carbon storage; 67.8 square feet per acre compared to 32.3 square feet per acre).

In Sierra Nevada mixed-conifer and ponderosa pine forests after the major drought occurring approximately 2012-2017, Restaino et al. (2019) reported, in Figures 3 and 4, mixed effects of increasing forest basal area on tree mortality from drought and native bark beetles, with no clear relationship. Restaino et al. (2019), in Figure 5, reported that thinned forests had approximately the same or higher tree mortality from drought/beetles compared to unthinned forests for three of the four conifer species studied. Only one of the four conifer species studied, ponderosa pine, had slightly lower probability of mortality in thinned forests than in unthinned forests, but the difference was only 15% on average, while Figure 2a of the study showed that thinning itself killed about 35% of the forest basal area before the drought occurred; thus thinning once again killed more trees than it prevented from being killed, even for the one conifer species out of four for which the thinned areas had somewhat lower probability of tree mortality.

North et al. (2022) fails to divulge or disclose the fact that mechanical thinning, conducted ostensibly to reduce stand densities and reduce competition-related tree mortality, kills far more trees than it prevents from being killed.

Moreover, Baker and Hanson (2022) establish that mechanical thinning kills significantly more trees than it prevents from being killed, when tree mortality from thinning and tree mortality from subsequent wildfire are both taken into account.

Sincerely,

A handwritten signature in blue ink that reads "Chad Hanson". The signature is fluid and cursive, with the first name "Chad" and last name "Hanson" clearly legible.

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Grand River National Grassland Allotment 1-5 Vegetative Management Environmental Assessment.

Grazing improvements and roadless area eligibility

To Joby Timm,

Below find an excerpt cut out from a 1999 Sierra Club appeal I wrote long ago for a NNF oil and gas leasing EA. The version of the appeal I had was saved as a text file and formatting was lost. The larger appeal has been clipped to take out for you, the citations about interior fences and roadless areas in them. To my knowledge the Grasslands during forest planning, disqualified, areas from inventoried roadless status, due to amount of interior fencing (if they had more than 1 mile interior fence per section, they failed) .

This might have relevance to Allotments 1-5 Vegetative Management, if any areas in it could ever be eligible for roadless area qualifications -- If so then the increase in fence miles and stock tanks/water lines might cause an area to be considered ineligible in the future, thus foreclosing future options. We disagree with this filter (interior fencing as filter) that the Grasslands used, but they used it. Thus you need to review the old FEIS appendix with all the proposed roadless areas in it and see if any proposed but disqualified roadless areas are in the project.

If so, discuss the impacts of more grazing improvements within them on any future roadless eligibility during a future roadless area review at the next Plan revision. Also discuss any areas with 5,000 miles with out real roads that could become to be

considered roadless, with different travel management or other management decisions.
Would the extra grazing improvements hurt their future chances?

If any such areas exist on the project, please include an alternative where the improvements are withheld in those areas, to insure they remain consistent with roadless area eligibility.

Thanks,

Nancy Hilding

In Re Appeal of the Record of Decision Notice and	)
Finding of No Significant Impact for	)
Oil and Gas Leasing Oglala National Grassland	)
and Portions of the Buffalo Gap National Grassland	)
as signed by Nebraska National Forest Supervisor	)
Mary Peterson on 7/19/99	)

)
)
)

Sierra Club	)
Appellant	)

APPEAL NO.

NOTICE OF APPEAL

STATEMENT OF REASONS

RELIEF REQUESTED

DATED this 10th day of Sept, 1999

EXCERPT

In the response to comments the Forest Service maintains that there are no unroaded areas in the leasing planning area. and amends the EA to say "In accordance with 36 CFR

219.17 and following criteria outlined in the Forest Service Handbook 1909.12.7, the roadless area assessment for the Northern Great Plains planning effort shows there are no unroaded areas in the project boundary meeting the inventory criteria. (see also Draft Environmental Impact Statement for the Land and Resource Management Plan, Nebraska National Forest Units, pp 3-252 to 3-254)" The Forest Service is improperly segregating these roadless areas from the roadless area inventory by claiming too much fencing is located within them, for them to qualify for roadless area status (see pg. C-5 of the Draft Plan EIS Appendices). Forest Service regulations for wilderness allow fences within wilderness and there is no limitation on the amount of fencing within a wilderness provided in statute. It would seem inappropriate to have higher standards for an inventoried roadless area than that which is required for wilderness.

Apparently the Forest Service is using a clause in the Forest Service Handbook (FSH 1909.12.7) to segregate roadless areas into two categories: "official" inventoried roadless areas meeting roadless area inventory criteria, which are listed in table C-3 and public proposed wilderness - inventoried roadless areas. which are in table C-4 (at page C 5 and 6 of DEIS appendix.) It disqualifies the roadless areas in table C-4 from the category - roadless areas that meet the roadless area criteria- that the Grassland Forest Planners have created.

Forest Planning regulations at 36 CFR 219.17 don't make this distinction or establish these two categories. The planning regulations require that roadless areas within the National Forest System shall be evaluated for recommendation as potential wilderness areas during the planning process.

Neither in fact does the cited sections of the FSH. (See 36 CFR 219.17) create these two categories, The Forest Service use of 1909.12.7 to create these categories may be a precedent setting act.

The Forest Service Handbook says:

"7.11 Inventory Criteria: Roadless areas qualify for placement on the inventory of potential wilderness if , in addition to meeting the statutory definitions of wilderness, they meet one or more of the following criteria:

1. They contain 5,000 acres or more,
2. they contain less than 5,000 acres but.....
3. They do not contain improved roads maintained for travel by the standard passenger-type vehicles, except as permitted in areas east of the 100th meridian (sec 7.11b)." (emphasis added)

"7.11a Criteria for Including Improvements. Roadless areas may qualify for inventory as potential wilderness even though they include the following types of areas or features....

5. National Grasslands. National Grasslands may have structures or evidence of vegetative manipulation resulting from past management practices. National Grassland roadless areas containing the following features may be inventoried:
 - a. Vegetation type conversions that are reverting to native vegetation with minimal evidence of cultivation.
 - b. Less than 1 mile of interior fence per section.

...

7. Minor structural range improvements (FSM 2240.5) such as fences or water troughs. Exclude areas where nonstructural range improvements are readily visible and apparent. Areas with spray or burning projects are permissible if there is little or evidence of the project." (emphasis added).

The Forest Service provides us with no quantification of its interior fencing/section ratio as it has been calculated in Grassland Roadless areas. However as the areas are larger than 5,000 acres, redrawing the boundaries of the area might address the Forest Services concern with interior fencing frequency

Use of the FSH in this way will be more restriction than the direction in the Wilderness Act.

--

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CENTER FOR BIOLOGICAL DIVERSITY and
SIERRA CLUB,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE; BROOKE L. ROLLINS, in
her official capacity as Secretary, United States
Department of Agriculture; UNITED STATES

Civil Action No. _____

**COMPLAINT FOR DECLATORY
AND INJUNCTIVE RELIEF**

(Administrative Procedure Act Case)

1 FOREST SERVICE; TOM SCHULTZ, in his
2 official capacity as Chief, United States Forest
3 Service; ANIMAL AND PLANT HEALTH
4 INSPECTION SERVICE; MICHAEL
5 WATSON, in his official capacity as
6 Administrator, Animal and Plant Health
7 Inspection Service,

Defendants.

INTRODUCTION

10 1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY and SIERRA CLUB bring
11 this action against Defendants BROOKE L. ROLLINS, Secretary of the United States
12 Department of Agriculture, and UNITED STATES DEPARTMENT OF AGRICULTURE
13 (collectively “USDA”), to challenge and remedy USDA’s violations of the Administrative
14 Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, and the National Environmental Policy Act
15 (NEPA), 42 U.S.C. § 4321 *et seq.*, with respect to USDA’s rescission of regulations and
16 procedures requiring public participation in USDA’s and its sub-agencies’ environmental
17 reviews under NEPA, and USDA’s unlawful major amendments to its NEPA regulations.
18 Plaintiffs also bring this action against the following agencies within USDA to remedy their
19 unlawful implementation of NEPA pursuant to USDA’s challenged rulemaking: UNITED
20 STATES FOREST SERVICE (“Forest Service”); TOM SCHULTZ, in his official capacity as
21 Chief of the Forest Service; ANIMAL AND PLANT HEALTH INSPECTION SERVICE
22 (“APHIS”); and MICHAEL WATSON, in his official capacity as Administrator of APHIS.

23 2. This case concerns USDA’s elimination of the public’s vital role in federal
24 agency environmental reviews for projects undertaken by it and its sub-agencies. With respect to
25 the Forest Service, this includes the approval of logging, prescribed burns, mining, road
26 construction, and additional projects and activities on national forests. It also applies to APHIS’s
27 exercise of broad authorities over plant and animal management, including the killing of
28 predators and other wildlife, disposal of diseased livestock, and pesticide application to

1 agricultural products. In these and many other circumstances, NEPA requires that agencies
2 prepare an environmental impact statement (EIS) that takes a “hard look” at the significant
3 environmental impacts of a proposed action before approving it. Alternatively, agencies must
4 demonstrate that the action’s effects are insignificant in an environmental assessment (EA), or
5 that the action falls within a “categorical exclusion” (CE) for actions that normally have no
6 significant effects.

7 3. For nearly 50 years, Council on Environmental Quality (CEQ) and USDA
8 regulations required that federal agencies solicit public comment on a draft EIS and provided for
9 public involvement in preparation of an EA. In the case of the Forest Service, these regulations
10 also required public involvement when determining that a project may fall within a CE. Thus, for
11 decades, CEQ’s and USDA’s regulations ensured that not just the agency decisionmakers but
12 also the affected communities would be apprised of a project’s environmental impacts before
13 approval of a project. The opportunity to weigh in on a proposal and the agency’s analysis within
14 an EIS, an EA, or a CE allowed the public to alert an agency to significant environmental
15 impacts the agency had overlooked, as well as ways to avoid or reduce harmful impacts. This led
16 to better informed, and, inevitably, more environmentally protective decisions, as intended by
17 NEPA’s “look before you leap” mandate.

18 4. Earlier this year, however, USDA dismantled its longstanding NEPA regulatory
19 framework governing USDA project reviews, citing section 5(b) of President Trump’s Executive
20 Order 14154, Unleashing American Energy (Jan. 20, 2025), and its directive that “all agencies
21 must prioritize efficiency and certainty above all other objectives,” *id.* § 5(c). USDA’s revised
22 procedures, adopted in a rushed rulemaking process that sidestepped basic APA procedural
23 requirements, now make public involvement in nearly all aspects of the NEPA process
24 nonexistent or, at best, entirely discretionary. As a result, sub-agencies within USDA can leave
25 the public in the dark as to the full scope of a proposed project and its impacts—or even the very
26 existence of a project proposal, when an EA is prepared—until after the agency approves the
27 project. And in the case of the Forest Service, which has historically approved more than 80% of
28 its actions under CEs, the revised regulations eliminate the longstanding requirements to solicit

1 public comment and inform the public when it determines that a CE applies and thus the public
2 may never learn about the agency's decision. Such inadequate and belated (or in some cases
3 nonexistent) disclosure precludes meaningful public input and undermines NEPA's goal to
4 promote informed agency decisionmaking.

5 5. USDA adopted these procedures via a so-called "Interim Final Rule," which the
6 agency finalized and made effective without any advanced public notice of, or opportunity to
7 comment on, the rule, and which provided no explanation for USDA's major changes to its
8 longstanding public participation procedures. Plaintiffs now seek judicial relief declaring that
9 USDA's Interim Final Rule violates the APA and NEPA. Plaintiffs also ask the Court to vacate
10 the Interim Final Rule, and to order that, in the interim, USDA, the Forest Service, and APHIS
11 operate under USDA's and the respective sub-agency's prior NEPA procedures.

12 JURISDICTION AND VENUE

13 6. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
14 question) and 5 U.S.C. § 702 (APA). The relief sought is authorized by 28 U.S.C. § 2201
15 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701–706.

16 7. This Court has jurisdiction to order declaratory relief under 28 U.S.C. § 2201. If
17 the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive
18 relief.

19 8. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §
20 1391(e) as this civil action is brought against an agency of the United States and officers and
21 employees of the United States acting in their official capacities and under the color of legal
22 authority; as Plaintiff Sierra Club maintains its principal place of business in this judicial district,
23 in Oakland, California; as all Plaintiffs maintain offices in this judicial district; and as no real
24 property is involved in this action.

25 PARTIES

26 9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)
27 corporation incorporated and existing under the laws of the State of California, with its main
28 California office in Oakland. The Center for Biological Diversity has over 93,000 members

1 throughout the United States and the world. The Center for Biological Diversity's mission is to
2 ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems,
3 public lands and waters, and public health through science, policy, and environmental law.

4 Based on the understanding that the health and vigor of human societies and the integrity and
5 wildness of the natural environment are closely linked, the Center for Biological Diversity is
6 working to secure a future for animals and plants hovering on the brink of extinction, for the
7 ecosystems they need to survive, and for a healthy, livable future for all of us.

8 10. Plaintiff SIERRA CLUB is a nonprofit corporation organized and existing under
9 the laws of the State of California, with its headquarters located in Oakland. Sierra Club is the
10 oldest and largest grassroots environmental organization in the United States, with approximately
11 621,000 members nationally. Sierra Club's mission is to explore, enjoy, and protect the wild
12 places of the Earth; to practice and promote the responsible use of the Earth's resources and
13 ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and
14 human environment; and to use all lawful means to carry out these objectives. Sierra Club and its
15 state chapters perform this mission through advocacy, litigation, and educational outreach to
16 members.

17 11. The protection of wildlife, wildlands, ecosystems, and recreational opportunities
18 on public lands and other areas affected by USDA's actions is central to Plaintiffs' missions.
19 Plaintiffs and their members have a long history of involvement in proposed actions and
20 activities by USDA and its sub-agencies, including actions on national forests managed by the
21 United States Forest Service, and actions undertaken by APHIS impacting the health and
22 management of wildlife and animals raised for agricultural purposes. Those activities include
23 tracking proposals for development and/or resource extraction; commenting on proposed projects
24 and their NEPA reviews to limit or eliminate damaging impacts; researching and analyzing
25 potential environmental effects; surveying project sites; proposing project alternatives and
26 mitigation measures; educating Plaintiffs' members and the public via newsletters, press
27 releases, their websites, action alerts, and other communications; and activating their members
28 and the public to weigh in on proposed projects. To carry out these activities, Plaintiffs and their

1 members rely on agency NEPA reviews for information about proposed projects that may
2 otherwise be unavailable. Such information may include a project's proposed location,
3 configuration, acreage, scope, activities, and timing; the condition of the existing environment
4 and resources that would be affected; the project's predicted environmental effects, such as
5 pollution emissions, habitat disturbance, and land-use conflicts, and the severity of those effects;
6 and potential alternatives and mitigation measures the agency is considering to achieve the
7 project's goals while reducing harmful effects.

8 12. Plaintiffs' members use and enjoy national forests for hiking, fishing, hunting,
9 photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational
10 activities. Plaintiffs' members derive recreational, inspirational, religious, scientific, educational,
11 and aesthetic benefit from their activities within the national forest system. Plaintiffs' members
12 intend to continue to use and enjoy the national forests frequently and on an ongoing basis in the
13 future, including this winter and spring.

14 13. Plaintiffs' members live and recreate in or near areas nationwide where they enjoy
15 observing, attempting to observe, photographing, and studying wildlife, including in areas
16 impacted by APHIS's activities to control plant and animal disease outbreaks within industrial
17 agricultural facilities, and in areas where Wildlife Services—a program within USDA sub-
18 agency APHIS—engages in predator and other wildlife killing activities. The opportunity to
19 possibly view wildlife or signs of wildlife in these areas is of significant interest and value to
20 Plaintiffs' members and increases their use and enjoyment of public lands and associated
21 ecosystems nationwide. Plaintiffs' members also have an interest in the health and humane
22 treatment of animals. Plaintiffs' members have definite plans to visit public lands for the purpose
23 of engaging in these activities in the near future.

24 14. Plaintiffs' members have been extensively involved in the public comment and
25 administrative process for agency actions taken by USDA and its sub-agencies pursuant to the
26 APA and NEPA and/or rely on Plaintiffs and other organizations to engage in those
27 administrative processes on their behalf.
28

1 15. Plaintiffs' members who use the public lands administered by USDA and its sub-
2 agencies and are otherwise affected by USDA's actions have a procedural interest in USDA fully
3 complying with the APA's public participation requirements in the development, promulgation,
4 and implementation of the Interim Final Rule.

5 16. The APA's rulemaking procedures require public participation except in limited
6 circumstances. USDA's failure to abide by those procedures deprived Plaintiffs and Plaintiffs'
7 members of their procedural right to protect their concrete interests in participating in
8 decisionmaking affecting the environments they use and enjoy around the country. As a result,
9 USDA's rulemaking violation deprived Plaintiffs and Plaintiffs' members of their substantial and
10 long-standing interest in NEPA public participation while simultaneously depriving Plaintiffs
11 and Plaintiffs' members of their right to comment on that deprivation of interest or to receive
12 advance notice of the deprivation.

13 17. Plaintiffs have members who have visited and used, and will continue to visit and
14 use, lands that could be harmed by future projects implementing the Interim Final Rule,
15 including harm to their interests in recreation, wildlife viewing, plant observation, aesthetic
16 enjoyment, scientific study, educational pursuits, and/or spiritual practices, among other uses.
17 Plaintiffs' members regularly visit and engage in these activities within areas that could be the
18 target of Interim Final Rule implementation and will continue to do so in the foreseeable future.
19 Because of regulatory changes included in the Interim Final Rule, these future projects have been
20 or will be approved without the benefit of public notice and comment on a draft EIS or public
21 involvement in preparation of the EA, significantly reducing or eliminating Plaintiffs' and their
22 members' ability to meaningfully participate in the NEPA review process for these projects, and
23 increasing the risk of environmental harm within these specific areas. Those increased harms will
24 reduce Plaintiffs' members' ability to engage in and enjoy their planned activities within these
25 specific areas. These actual, concrete interests are directly connected to and jeopardized by
26 USDA's failure to comply with its mandatory rulemaking requirements under the APA.
27 Plaintiffs' members are therefore injured by USDA's failure to abide by the APA process that
28 protects those concrete interests. The injuries would be redressed by the relief sought.

1 18. For example, with respect to Forest Service projects approved under a CE, the
2 Interim Final Rule eliminates Plaintiffs' and Plaintiffs' members' right to advance notice of, an
3 opportunity to comment on, and decisional notice of the application of a CE. Plaintiffs and
4 Plaintiffs' members therefore may not learn about a CE-approved project until long after it has
5 been approved and implemented, by which time any recourse to prevent irreparable harm to their
6 concrete interests would no longer be available. The elimination of notice and comment on CEs
7 without following APA-required notice and comment rulemaking procedures threatens imminent
8 irreparable injury to Plaintiffs and their members' concrete interests.

9 19. For example, one of the Center for Biological Diversity's and Sierra Club's
10 members is the Forest Management Issue Chair for the Lone Star Chapter of the Sierra Club and
11 Chair for the Forestry Subcommittee of the Houston Regional Group of the Sierra Club. He has
12 served as the Chair for these Sierra Club sub-entities for about 20 years. As part of his chair
13 position, he provides comments on public notices published by the Forest Service related to
14 potential agency activities on National Forests and Grasslands in Texas, including the Sam
15 Houston, Davy Crockett, Angelina, and Sabine National Forests and Ranger Districts. He also
16 frequently recreates each year in National Forests and Grasslands in Texas, including the Big
17 Creek Scenic Area; the Lone Star Hiking Trail; the Winters Bayou Scenic Area; and other areas
18 of the Sam Houston National Forest. He regularly visits and recreates in these places, and he has
19 definite plans to return in the foreseeable future. In both his Chair and personal capacities, the
20 member responds to public notices with site-specific, detailed comments about proposals that are
21 of concern to Plaintiffs and Plaintiffs' members. Thus, this member has been harmed by USDA's
22 removal of public notice and comment opportunities on scoping, application of categorical
23 exclusions, environmental assessments, and environmental impact statements.

24 20. Another member of the Center for Biological Diversity has traveled widely
25 throughout his life to enjoy and experience the nation's public lands, including in California,
26 Missouri, Arkansas, Arizona, and New Mexico. Since moving to Arizona in 2011, the member
27 has regularly engaged in family outings, hiked, camped, picnicked, watched sunsets, hunted for
28 signs of ancient cultures, sought solitude, enjoyed educational opportunities, and sought spiritual

1 renewal within national forests in Arizona and New Mexico, including the Coronado National
2 Forest (visited 2-3 times per month); Tonto National Forest (once per month); Apache-Sitgreaves
3 National Forest (once per month); and Gila National Forest (twice per year). The member has
4 made definite plans to return once or twice per year to numerous National Forest, National Park,
5 Bureau of Land Management, and National Wildlife Refuge lands in the future. The member has
6 frequently relied on public participation opportunities previously provided by Defendants to
7 receive notice of, learn about, and provide comments on proposed actions subject to NEPA. In
8 view of the member's aesthetic, recreational, and spiritual interests in areas that will be affected
9 by mining, logging, and construction projects on these public lands approved by Defendants in
10 the future, this member is injured by USDA's decision to limit public dissemination of
11 information about these projects and eliminate opportunities for public participation.

12 21. Another member of the Center for Biological Diversity lives and works near the
13 Cape Fear River in North Carolina, which he has visited since childhood and worked to protect
14 since at least 2010. He travels and recreates by boat in the Cape Fear River several times per
15 month, viewing wildlife and investigating potential pollution sources. The member is deeply
16 concerned about environmental and public health impacts to the river caused by nearby
17 concentrated animal feeding operations, such as impacts from pollution, mortality management,
18 carcass disposal, and airborne emissions—many of which can contribute directly or indirectly to
19 the spread of zoonotic diseases regulated by APHIS. He relies on APHIS public reports,
20 including documents prepared under NEPA, to understand exposure risks to him and his family
21 from these operations, and he relies on NEPA public participation opportunities to share crucial
22 information with APHIS about its proposed actions. He also relies on Plaintiff organizations to
23 represent his interests before APHIS and other agencies through public participation
24 opportunities. Thus, the member is injured by USDA's decision to limit public dissemination of
25 information about these projects and eliminate opportunities for public participation.

26 22. USDA's rulemaking, including the failure to solicit prior public comment,
27 violates Plaintiffs' and their members' rights under the APA, and will cause and threaten injury
28 to Plaintiffs and their members until the Court grants the relief requested herein. A court order

1 declaring invalid and vacating the Interim Final Rule would redress Plaintiffs' and Plaintiffs'
2 members' injuries, and restore the status quo ante, including the public's opportunity to comment
3 on draft EISs and participate in the preparation of EAs, and in the preparation of CEs proposed
4 by the Forest Service. An order requiring USDA to comply with NEPA and the APA, and to
5 operate under USDA's prior NEPA procedures in the interim, would likewise restore the status
6 quo ante and could result in a new rule that requires public participation in the preparation of an
7 EIS, EA, and/or CE.

8 23. Defendant BROOKE L. ROLLINS, the Secretary of Agriculture, is the highest
9 ranking official within USDA and, in that capacity, has ultimate responsibility for the
10 administration and implementation of the APA and NEPA within USDA, and for compliance
11 with all other federal laws applicable to USDA and its agencies. Secretary Rollins is sued in her
12 official capacity.

13 24. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE's primary
14 missions are to provide assistance to America's farmers, improve health, end hunger, ensure food
15 safety, provide market assistance, and conserve and protect natural resources.

16 25. Sub-agencies within USDA that are subject to the Interim Final Rule include the
17 United States Forest Service and the Animal and Plant Health Inspection Service.

18 26. Defendant UNITED STATES FOREST SERVICE manages 154 national forests
19 and 20 national grasslands spanning 193.1 million acres across 43 states and two U.S. territories.
20 The Forest Service manages these lands for timber harvesting, grazing, minerals development,
21 recreation, and other uses.

22 27. Defendant TOM SCHULTZ is the Chief of the Forest Service and is the highest
23 ranking official within the Forest Service, and in that capacity has responsibility for the
24 administration and implementation of NEPA within the Forest Service, and for compliance with
25 all other federal laws applicable to the Forest Service. Chief Schultz is sued in his official
26 capacity.

28. Defendant ANIMAL AND PLANT HEALTH INSPECTION SERVICE exercises broad authorities over plant and animal management, including the killing of predators and other wildlife, disposal of diseased livestock, and pesticide application to agricultural products.

29. Defendant MICHAEL WATSON is the Administrator of APHIS and is the highest ranking official within APHIS, and in that capacity has responsibility for the administration and implementation of NEPA within APHIS, and for compliance with all other federal laws applicable to APHIS. Administrator Watson is sued in his official capacity.

LEGAL BACKGROUND

A. National Environmental Policy Act

30. On January 1, 1970, President Nixon signed into law the National Environmental Policy Act of 1969. Pub. L. No. 91-190, title I, § 101, 83 Stat. 852 (1970).

31. NEPA declares a national policy “to promote efforts which will prevent or eliminate damage to the environment and biosphere.” 42 U.S.C. § 4321. Its “twin aims” are to ensure federal agencies “consider every significant aspect of the environmental impacts of a proposed action” and to “inform the public that it has considered environmental concerns in its decisionmaking process.” *Balt. Gas & Elec Co. v. NRDC*, 462 U.S. 87, 97 (1983). Accordingly, NEPA establishes “a set of ‘action-forcing’ procedures that require that agencies take a hard look at environmental consequences.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

32. Specifically, agencies must prepare a “detailed” environmental impact statement (EIS) when they propose to take “major Federal actions significantly affecting the quality of the human environment,” 42 U.S.C. § 4332(2)(c), if those significant effects are “reasonably foreseeable,” *id.* § 4336(b)(1). Among other things, the EIS must analyze the “reasonably foreseeable environmental effects of the proposed agency action,” including “adverse” effects that “cannot be avoided should the proposal be implemented”; “a reasonable range of alternatives to the proposed agency action”; “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity”; and “any irreversible and irretrievable commitments of Federal resources which would be involved in the

1 proposed agency action should it be implemented.” *Id.* § 4332(2)(C)(i)-(v). The EIS must also
 2 discuss “steps that can be taken to mitigate adverse environmental consequences.” *Robertson*,
 3 427 U.S. at 351. Agencies “shall ... ensure the professional integrity, including scientific
 4 integrity, of the discussion and analysis” in an EIS. 42 U.S.C. § 4332(2)(D).

5 33. The EIS “ensures that the agency, in reaching its decision, will have available,
 6 and will carefully consider, detailed information concerning significant environmental impacts; it
 7 also guarantees that the relevant information will be made available to the larger audience that
 8 may also play a role in both the decisionmaking process and the implementation of that
 9 decision.” *Robertson*, 490 U.S. at 349.

10 34. Although Congress granted agencies some flexibility in implementing NEPA, it
 11 also directed that agencies use “all practicable means” in cooperation with the public to fulfill
 12 NEPA’s objectives:

13 [I]t is the continuing policy of the Federal Government, *in cooperation with State*
 14 *and local governments, and other concerned public and private organizations*, to
 15 use *all practicable means and measures*, including financial and technical
 16 assistance, in a manner calculated to foster and promote the general welfare, to
 17 create and maintain conditions under which man and nature can exist in
 18 productive harmony, and fulfill the social, economic, and other requirements of
 19 present and future generations of Americans.

20 42 U.S.C. § 4331(a) (emphases added); *see also id.* § 4331(b) (establishing the Federal
 21 Government’s “continuing responsibility” to “use all practicable means, consistent with other
 22 essential considerations of national policy, to improve and coordinate Federal plans, functions,
 23 programs, and resources to the end that the Nation may ... fulfill the responsibilities of each
 24 generation as trustee of the environment for succeeding generations,” among other objectives
 25 (emphasis added)).

26 35. Accordingly, Congress directed that agencies, “to *the fullest extent possible ...*
 27 shall ... identify and develop methods and procedures, in consultation with the Council on
 28 Environmental Quality ..., which will ensure that presently unquantified environmental
 amenities and values may be given appropriate consideration in decisionmaking along with

1 economic and technical considerations.” *Id.* § 4332(2)(B) (emphasis added); *see* section B, *infra*
 2 (detailing those procedures, including former CEQ and USDA regulations).

3 36. NEPA established CEQ in the Executive Office of the President. 42 U.S.C. §
 4 4342. The CEQ is a three-member council whose members are appointed by the President. *Id.*

5 37. In 2023, in the first significant revision of NEPA since its 1970 enactment,
 6 Congress enshrined into law many of the CEQ NEPA regulations then in effect (formerly at 40
 7 C.F.R. §§ 1500 *et seq.*). Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat.
 8 10, 38 (2023).

9 38. Among other things, the 2023 amendments codified the CEQ’s provisions
 10 providing for an EA and “finding of no significant impact” when an agency elects to avoid
 11 preparation of an EIS notwithstanding potentially significant impacts. *See* 40 C.F.R. §§ 1501.5,
 12 1501.6 (2022). Agencies must prepare an EA when the significance of an agency proposal’s
 13 effects is unknown, or there is no reasonably foreseeable significant effect. 42 U.S.C. §
 14 4336(b)(2). The EA is a “concise public document” that “set[s] forth the basis of [an] agency’s
 15 finding of no significant impact.” *Id.* This finding serves as the agency’s determination that a
 16 proposed action “does not require the issuance of an [EIS].” *Id.* § 4336e(7).

17 39. The 2023 amendments also codified CEQ’s provisions allowing agencies to apply
 18 “categorical exclusions” in lieu of preparing an EIS or EA. *Id.* § 4336(a)(2). A “categorical
 19 exclusion” refers to “a category of actions that a Federal agency has determined normally does
 20 not significantly affect the quality of the human environment within the meaning of section
 21 102(2)(C).” *Id.* § 4336e(1).

22 **B. Regulatory History of NEPA’s Public Participation Procedures**

23 40. The CEQ and federal agencies, including USDA and its sub-agencies, have since
 24 NEPA’s enactment recognized that the solicitation of public input throughout the NEPA process
 25 is a vital and practicable means to help ensure that agencies identify and consider potentially
 26 significant environmental impacts, weigh reasonable alternatives and mitigation measures to
 27 avoid or reduce impacts, and arrive at well-informed decisions that consider environmental
 28 values. As the Supreme Court has recognized, the EIS plays an important “informational role”

not just for decisionmakers but for the public: the EIS “gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provides a springboard for public comment.” *Robertson*, 490 U.S. at 349 (cleaned up).

41. Two months after NEPA’s enactment, President Nixon issued an Executive Order directing agencies to develop procedures for public involvement to carry out NEPA’s environmental objectives:

Consonant with Title I of the National Environmental Policy Act of 1969 ..., the heads of Federal agencies shall ... [d]evelop procedures to ensure the *fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties*. These procedures shall include, whenever appropriate, provision for public hearings, and *shall provide the public with relevant information, including information on alternative courses of action*.

Executive Order 11514, *Protection and Enhancement of Environmental Quality*, 35 Fed. Reg. 4247, § 2(b) (Mar. 5, 1970) (emphasis added).

42. Executive Order 11514 remains in effect today.

43. Since shortly after NEPA’s enactment in 1970, and until USDA’s issuance of the Interim Final Rule in 2025, USDA, the Forest Service, and APHIS—like other federal agencies—required the agencies to provide for public notice and comment on draft EISs.

Council on Environmental Quality NEPA Regulations

44. In 1971, CEQ issued guidelines advising agencies to publish and consider public comments on a draft EIS. 36 Fed. Reg. 7724, 7726 (Apr. 23, 1971) (noting final EISs shall include “all comments received thereon by the responsible agency from Federal, State, and local agencies and from private organizations and individuals”). In 1973, CEQ revised the guidelines, fleshing out public input procedures. The guidelines advised agencies to “[p]rovide for circulation of draft [EISs] to other Federal, State, and local agencies and for their availability to the public,” “consider the comments of the agencies and the public,” and “issue final [EISs] responsive to the comments received.” 38 Fed. Reg. 20550, § 1500.2(b)(1), (2), & (3) (Aug. 1, 1973).

1 45. In 1977, to ensure uniform rules in NEPA’s implementation across all federal
2 agencies, President Carter issued Executive Order 11991, directing CEQ to issue regulations “for
3 implementation of the procedural provisions of [NEPA]” that would be binding on all federal
4 agencies, and that the regulations “be designed to make the [EIS] process more useful to
5 decisionmakers and the public.” Executive Order 11991, *Environmental Impact Statements*, § 1,
6 42 Fed. Reg. 26967 (May 25, 1977) (amending § 3(h) of President Nixon’s Executive Order
7 11514).

8 46. In 1978, CEQ promulgated regulations implementing NEPA. 43 Fed. Reg. 55978
9 (Nov. 29, 1978). CEQ’s rulemaking aimed “to produce better decisions which further the
10 national policy to protect and enhance the quality of the human environment.” *Id.*

11 47. Among other things, CEQ’s regulations recognized that “public scrutiny [is]
12 essential to implementing NEPA,” 40 C.F.R. § 1500.1(b) (1978), and set forth a policy to
13 “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human
14 environment,” *id.* § 1500.2(d).

15 48. Accordingly, the CEQ regulations, from their adoption in 1978 and through
16 multiple recent amendments, consistently required public comment on draft EISs and public
17 involvement in EAs “to the extent practicable,” until their rescission earlier this year. 40 C.F.R.
18 §§ 1501.4(b) (EAs) and 1503.1(a)(4) (EISs) (1978); 40 C.F.R. §§ 1501.5(f) (EAs) and
19 1503.1(a)(2)(v) (EISs) (2020); 40 C.F.R. §§ 1501.5(b) (EAs) and 1503.1(a)(2)(v) (EISs) (2022);
20 40 C.F.R. §§ 1501.5(e), (f) (EAs) and 1503.1(a)(2)(v) (EISs) (2024).

21 *U.S. Department of Agriculture NEPA Regulations*

22 49. Similar to CEQ, in 1971, USDA issued guidelines requiring public notice and
23 comment on draft EISs. 36 Fed. Reg. 23666, 23669 (Dec. 11, 1971) (publishing Department-
24 wide guidelines requiring that “[c]omments and views of the public will be solicited by
25 publication of a notice in the Federal Register, or other appropriate media”). USDA issued these
26 draft EIS procedures in apparent recognition that they are a “practicable” means of providing
27 “timely public information and understanding of Federal plans and programs” and of
28 “obtain[ing] the views of interested parties,” as directed by Executive Order 11514.

50. In 1979, USDA incorporated its NEPA procedures into regulations codified at 7 C.F.R. Part 3100, Subpart B. 44 Fed. Reg. 44802 (July 30, 1979). These new regulations “incorporate[d] and adopt[ed]” the CEQ regulations at 40 C.F.R. Parts 1500-1508. *See* 7 C.F.R. § 3100.20(a) (1979). They required each USDA agency to develop NEPA procedures meeting the requirements of the statute, CEQ’s regulations, and USDA’s NEPA regulations. *Id.* § 3100.21(b).

51. In addition to incorporating CEQ requirements to publish draft EISs and solicit comment on them, USDA’s 1979 NEPA procedures required that “[a]ll NEPA processes developed and followed by USDA agencies shall provide for public involvement.” *Id.* § 3100.24 (1979) (citing 40 C.F.R. §§ 1501.4(e)(2), 1506.6, 1508.10).

52. In 1983, USDA recodified its NEPA regulations at 7 C.F.R. Parts 1b and 1c. 48 Fed. Reg. 11404 (March 18, 1983).

U.S. Forest Service NEPA Regulations

53. The Forest Service’s first NEPA guidelines—dated July 13, 1971—required the agency to publish a draft EIS and make it available for public comment. 36 Fed. Reg. 23669, 29671 (“[T]he responsible official should distribute copies [of the draft EIS] to, and solicit comments from, appropriate Federal, State, and local agencies *and the public.*” (emphasis added)). The guidelines required that, even before preparing and circulating a draft EIS, the Forest Service conduct “preliminary consultation” with the public. *Id.*

54. In 1978, the Forest Service published new “Forest Service NEPA Process” guidelines. 43 Fed. Reg. 21254, 21256 (May 16, 1978). The Forest Service stated that important objectives for the guidelines included providing for “early and continuing participation of other agencies, organizations, and individuals having environmental responsibilities, expertise, or interest,” as well as making the NEPA decisionmaking process “open and available for public review.” *Id.* To accomplish these objectives, the 1978 guidelines required an EIS to be “prepared first in draft form,” after which it would be “distributed for public review and comment.” *Id.* at 21259.

1 55. In 2008, the Forest Service revised its NEPA procedures and codified them in the
 2 Code of Federal Regulations. 73 Fed. Reg. 43084 (July 24, 2008). The Forest Service said the
 3 regulations “supplement[] and do[] not lessen the applicability of the CEQ regulations,” and that
 4 they were “to be used in conjunction with the CEQ regulations and USDA regulations at 7 CFR
 5 part 1b.” 36 C.F.R. § 220.1(b) (2008). The purpose of the codification was to provide “more
 6 visibility” and make the procedures “more readily available to the public, making it easier for the
 7 public and interested parties to engage the Forest Service during decisionmaking and to ensure
 8 they are following the regulations.” 73 Fed. Reg. at 43084, 43085.

9 56. The 2008 regulations recognized that the Forest Service remained subject to
 10 public involvement requirements under the CEQ regulations. *Id.* at 43086; *see also* 36 C.F.R. §
 11 220.1(b) (2008). Thus, for example, the Forest Service would be required to make a draft EIS
 12 available to the public and invite comment on it. The 2008 regulations also reiterated the duty of
 13 the “responsible official” to consider “public and agency comments” in its decisionmaking, as
 14 well as “agency responses to those comments.” 36 C.F.R. § 220.4(c)(2) (2008).

15 57. The 2008 regulations also specified that CEQ’s EIS scoping process
 16 requirements—including the requirement to solicit public comment on the scope of
 17 environmental issues to be addressed for a proposed project—applied to “all Forest Service
 18 proposed actions, including those that would appear to be categorically excluded from further
 19 analysis and documentation in an EA or an EIS[.]” 36 C.F.R. § 220.4(e)(1) (2008).

20 *Animal and Plant Health Inspection Service NEPA Regulations*

21 58. APHIS’s initial NEPA guidelines, published in 1972, just two years after NEPA’s
 22 passage, provided that an EIS would be “prepared in two stages,” with a “draft” that would be
 23 subject to “review and comment by other Agencies and the public,” followed by a final EIS that
 24 would “reflect[] the results of the draft review process.” 39 Fed. Reg. 40048, 40050 (Nov. 13,
 25 1974).

26 59. APHIS revised its NEPA procedures in 1979. *See* 44 Fed. Reg. 50381 (Aug. 28,
 27 1979). Those guidelines required each NEPA analysis to “have designated major decision
 28

1 points,” which included “completion of a draft EIS” and “evaluation of comments and
2 completion of final EIS.” *Id.* at 50382.

3 60. The 1979 APHIS guidelines also set forth robust public involvement
4 requirements, including that officials would be required to “inform and involve the public” at
5 multiple steps in the NEPA process, through the use of “distribution lists of interested persons,”
6 “direct verbal contact, meetings, printed materials, news media, public notices and hearings, and
7 any other appropriate means of increasing public participation in evaluating the environmental
8 impact of agency actions.” *Id.* at 50383.

9 61. In 1995, APHIS replaced its 1979 NEPA guidelines with regulations codified at 7
10 C.F.R. Part 372. *See* 60 Fed. Reg. 6000 (Feb. 1, 1995). Those regulations specifically required
11 that “[a]ll public and other involvement in APHIS’ environmental impact statement process,
12 including the scoping process, commenting on draft documents, and participation in the
13 preparation of any supplemental documents, will be pursuant to CEQ’s implementing
14 regulations.” 7 C.F.R. § 372.8(b)(1) (1995).

15 62. APHIS revised its NEPA regulations in 2018, but retained their reliance on
16 parallel CEQ and USDA NEPA requirements. *See* 83 Fed. Reg. 24003 (May 24, 2018) (noting
17 “the APHIS regulations supplement the CEQ regulations and the USDA NEPA implementing
18 regulations to take into account APHIS missions, authorities, and decision making”). The
19 explicit requirement to comply with CEQ’s NEPA regulations was recodified at 7 C.F.R. §
20 372.7. *See* 83 Fed. Reg. at 24011. Thus, APHIS’s regulations retained the requirements to
21 publish a draft EIS (per 40 C.F.R. § 1502.9 (2024)) and provide an opportunity for comment on
22 it (per 40 C.F.R. § 1503.1(a)(2)(v) (2024)), as well as the requirement to involve the public in the
23 preparation of an EA “to the extent practicable” (per 40 C.F.R. § 1501.5(f) (2024)).

24 *Congressional Response to NEPA Implementation*

25 63. Congress has reinforced the understanding expressed in CEQ’s and USDA’s prior
26 regulations that public comment is required for draft EISs. For example, in statutes aimed at
27 expediting NEPA reviews, Congress has limited the length of comment periods on draft EISs,
28 based on the premise that notice and comment on draft EISs is required. *See, e.g.*, 42 U.S.C. §

4370m-4(d)(1), Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, 129 Stat. 1741 (2015) (setting both minimum and maximum lengths for draft EIS comment periods—“not less than 45 days” and “not more than 60 days”—for certain transportation, energy, manufacturing, and other projects); 33 U.S.C. § 2348(g)(2)(A), Water Resources Reform and Development Act of 2014, Pub. L. No. 113–121, title I, § 1005(a)(1), 128 Stat. 1205 (2014) (establishing “a [public comment] period of not more than 60 days” for “acceleration” of water resource development projects); 23 U.S.C. § 139(g)(2)(A)-(B), Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109–59, 119 Stat. 1862 (2005) (same for “efficient environmental reviews” for highway projects); 49 U.S.C. § 47171(m)(2)(A), FAA Reauthorization Act of 2024, Pub. L. No. 118–63, 138 Stat. 1307 (2024) (same for “expedited, coordinated” reviews for aviation projects).

64. Likewise, Congress has reinforced the understanding expressed in CEQ’s and USDA’s prior regulations that the preparation of EAs requires public involvement. 16 U.S.C. § 6514(g), Infrastructure Investment and Jobs Act, Pub. L. No. 117–58, div. D, title VIII, § 40807, 135 Stat. 1097 (2021) (“In accordance with section 102(2) of [NEPA] (42 U.S.C. 4332(2)) and the applicable regulations and administrative guidelines, the Secretary shall provide an opportunity for public comment during the preparation of any environmental assessment or environmental impact statement for an authorized hazardous fuel reduction project.”); *id.* § 6592c(c)(3), Pub. L. 117-58, § 40803, 135 Stat. 1113 (requiring same for emergency actions).

C. APA RULEMAKING PROCEDURES

65. The APA, 5 U.S.C. § 551 *et seq.*, provides general rules governing the issuance of proposed and final regulations by federal agencies. Fundamental to the APA’s procedural framework is the requirement that, absent narrow circumstances, a federal agency publish as a proposal any rule that it is considering adopting, and allow the public the opportunity to submit written comments on the proposal. 5 U.S.C. § 553.

66. A “rule” is defined by the APA as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe

1 law or policy or describing the organization, procedure, or practice requirements of an
2 agency...” *Id.* § 551(4).

3 67. The APA provides that all federal agencies must provide “general notice” of any
4 “proposed rule making” to the public by publication in the Federal Register. *Id.* § 553(b). The
5 publication must, at a minimum, include “(1) a statement of the time, place, and nature of public
6 rule making proceedings; (2) reference to the legal authority under which the rule is proposed;
7 and (3) either the terms or substance of the proposed rule or a description of the subjects and
8 issues involved.” *Id.*

9 68. The APA requires that “the agency shall give interested persons an opportunity to
10 participate in the rule making through submission of written data, views, or arguments with or
11 without opportunity for oral presentation. After consideration of the relevant matter presented,
12 the agency shall incorporate in the rules adopted a concise general statement of their basis and
13 purpose.” *Id.* § 553(c).

14 69. The foregoing APA public notice and comment procedures do not apply to “rules
15 of agency organization, procedure, or practice,” 5 U.S.C. § 553(b)(A), or to “interpretative
16 rules,” *id.* An agency may only short circuit the public notice and comment requirements of the
17 APA if it finds, “for good cause,” that “notice and public procedure thereon are impracticable,
18 unnecessary, or contrary to the public interest.” *Id.* § 553(b)(B).

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 **A. Executive Order 14154 and CEQ’s Rescission of its Regulations**

21 70. On January 20, 2025, President Trump issued Executive Order 14154, *Unleashing*
22 *American Energy* (Jan. 20, 2025).

23 71. Section 5 of the Executive Order—titled “Unleashing Energy Dominance through
24 Efficient Permitting”—directed CEQ to “propose rescinding CEQ’s NEPA regulations found at
25 40 CFR 1500 *et seq.*” within 30 days of the executive order. EO 14154, § 5(b), 90 Fed. Reg. at
26 8355.

27 72. Section 5 further directed that, once CEQ issued its new NEPA guidance, CEQ
28 “shall convene a working group to coordinate the revision of agency-level implementing

1 regulations for consistency.” *Id.* § 5(c). Section 5 also directed that the CEQ guidance and the
 2 agency-level implementing regulations “must expedite permitting approvals,” and that
 3 “[c]onsistent with applicable law, all agencies must prioritize efficiency and certainty over any
 4 other objectives, including those of activist groups, that do not align with the policy goals set
 5 forth in section 2 of this order or that could otherwise add delays and ambiguity to the permitting
 6 process.” *Id.*

7 73. Executive Order 14154 states that “[i]t is the policy of the United States ... to
 8 guarantee that all executive departments and agencies ... provide opportunity for public
 9 comment.” *Id.* § 2(h), 90 Fed. Reg. at 8354.

10 74. Subsequently, CEQ issued an interim final rule rescinding CEQ’s NEPA
 11 implementing regulations, effective April 11, 2025. *See* 90 Fed. Reg. 10610 (Feb. 25, 2025).
 12 CEQ also issued guidance to federal agencies on NEPA implementing procedures, including
 13 NEPA implementation in the absence of CEQ regulations and while agencies revise their NEPA
 14 procedures. *See* CEQ, Memorandum for Heads of Federal Departments and Agencies,
 15 Implementation of the National Environmental Policy Act (Feb. 19, 2025).¹ CEQ has since
 16 conferred and coordinated with federal agencies to guide agency revision of their NEPA
 17 procedures.

18 75. CEQ directed all agencies to update their NEPA procedures within 12 months. *Id.*
 19 at 7. In the absence of CEQ regulations, CEQ advised agencies that “[w]hile these revisions are
 20 ongoing, agencies should continue to follow their existing practices and procedures for
 21 implementing NEPA consistent with the text of NEPA, E.O. 14154, and this guidance.” *Id.* at 4.

22 **B. USDA’s Rescission of NEPA Regulations**

23 76. On July 3, 2025, USDA issued an Interim Final Rule without any public notice
 24 and comment. 90 Fed. Reg. 29632 (July 3, 2025). The Interim Final Rule rescinded the NEPA

25
 26 ¹ Available at <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf>, superseded by Sept. 29, 2025 Memorandum,
 27 available at <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Agency-NEPA-Implementation-Guidance.pdf>.
 28

1 regulations of all USDA sub-agencies and consolidated all agency-wide NEPA procedures into
2 the USDA regulations at 7 C.F.R. Part 1b.

3 77. The regulations enacted through the Interim Final Rule eliminated the
4 requirement to publish a draft EIS, as well as any requirement to solicit input from the public on
5 an EIS. *Compare* 7 C.F.R. § 1b.7(d) (making entirely discretionary whether USDA or its sub-
6 agencies request comments from State, Tribal, or local governments; other agencies; the project
7 applicant; or the public), *with* 7 C.F.R. § 1b.1(a) (1995) (incorporating CEQ regulations) *and* 40
8 C.F.R. §§ 1502.9, 1503.1(a)(2)(v) (2024) (requiring draft EIS and opportunity for public
9 comment).

10 78. In addition, the Interim Final Rule eliminated the requirement for the Forest
11 Service to solicit “scoping comments” on the scope of issues to be addressed in any NEPA
12 review, including an EA or CE. *Compare* 7 C.F.R. § 1b.3(e), (g), *with* 36 C.F.R. § 220.4(e)(1)
13 (requiring scoping for “all Forest Service proposed actions”).

14 79. USDA’s rulemaking provides only a cursory rationale for the removal and/or
15 drastic revision of public participation procedures, stating that “NEPA (the Act itself) does not
16 require publication of a draft EIS,” and that publishing notice of a draft EIS “adds time and
17 unnecessary process.” 90 Fed. Reg. at 29637. The rulemaking does not acknowledge, let alone
18 justify, changes to public participation procedures for EAs and categorical exclusions, and its
19 departure from CEQ’s former public participation requirements, on which those procedures were
20 based.

21 80. USDA’s rulemaking was finalized and made immediately effective as an “interim
22 final rule” without any advance public notice of, or an opportunity to comment on, the rule.
23 USDA determined that notice-and-comment rulemaking was not required on four grounds:

- 24 a. First, USDA’s rulemaking states that the rule falls within the APA exception
25 for “rules of agency organization, procedure, or practice,” 5 U.S.C. §
26 553(b)(A), because they are purportedly “purely procedural” rules that
27 “prescribe how USDA will conduct NEPA reviews.” 90 Fed. Reg. at 29644.
28

- b. Second, USDA’s rulemaking states that portions of the rule fall within the APA exception for “interpretative rules,” 5 U.S.C. § 553(b)(A), as they purportedly “provide[] an interpretation of a statute, rather than make discretionary policy choices that establish enforceable rights or obligations for regulated parties under delegated congressional authority.” 90 Fed. Reg. at 29644.
- c. Third, USDA’s rulemaking states that portions of the rule fall within the APA exception for “general statements of policy,” 5 U.S.C. § 553(b)(A), as they purportedly “provide notice of an agency’s intentions as to how it will enforce statutory requirements ... without creating enforceable rights or obligations for regulated parties under delegated congressional authority.” 90 Fed. Reg. at 29644.
- d. Finally, USDA’s rulemaking states that the rule satisfies the “good cause” exception under the APA because notice and comment purportedly would be “impracticable, unnecessary, or contrary to the public interest,” 5 U.S.C. § 553(b)(B), and there is “good cause” to make the rule effective immediately, *id.* § 553(d)(3). 90 Fed. Reg. at 29644-45. Purportedly, good cause exists because after the CEQ rescinded its NEPA regulations, USDA “operate[d] under its prior procedures as if the CEQ NEPA framework still existed,” which was no longer “tenable.” 90 Fed. Reg. at 29645.

CLAIM ONE

(Failure to Provide Notice and Comment on and Delay the Effective Date of the Interim Final Rule)

81. Plaintiffs incorporate by reference all paragraphs listed above.

82. USDA’s Interim Final Rule constitutes a “rule” within the meaning of the APA, 5 U.S.C. §§ 551 and 553. This rule includes USDA’s rescission and/or revision of NEPA procedures contained within 36 C.F.R. Part 220 (Forest Service), 7 C.F.R. Part 372 (APHIS), and other sub-agency regulations, as well as USDA’s revision of 7 C.F.R. Part 1b.

83. USDA's rulemaking was implemented immediately, without any publication of a general notice of proposed rulemaking in the Federal Register and without any opportunity for interested persons to participate in the rulemaking process before the rule went into effect, as required by the APA, 5 U.S.C. § 553(b) and (c).

84. USDA's determinations that it need not provide advanced publication of a proposed rule, nor provide the public with an opportunity to participate, nor delay the rule's effective date, because the Interim Final Rule establishes "rules of agency, organization, procedure, or practice," 5 U.S.C. § 553(b)(A), "interpretative rules," and/or "general statements of policy," *id.*, are arbitrary, capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

85. Likewise, USDA's determinations that it need not provide advanced publication of a proposed rule, nor provide the public with an opportunity to participate in USDA's rulemaking process, nor delay the rule's effective date, because doing so would be either impracticable, unnecessary, or contrary to the public interest is arbitrary, capricious, and not in accordance with law, in violation of 5 U.S.C. § 706(2).

CLAIM TWO

(Failure to Provide a Reasoned Explanation for the Substantial Curtailment of Public Participation Requirements within the Interim Final Rule)

86. Plaintiffs incorporate by reference all paragraphs listed above.

87. USDA's rulemaking fails to provide a reasoned explanation for the evisceration of public participation in NEPA reviews, as embodied in the Interim Final Rule.

88. Moreover, USDA's rulemaking fails to explain how the Interim Final Rule is consistent with Executive Order 11514 § 2(b), Executive Order 14154 § 2(h), and with NEPA's requirements that federal agencies "to the fullest extent possible," 42 U.S.C. § 4332, (1) "identify and develop methods and procedures ... which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations," *id.* § 4332(2)(B); (2) "in cooperation ... with concerned public and private organizations ... use all practicable means and measures ... in a

1 manner calculated to” serve NEPA’s environmental objectives, *id.* § 4331(a), and (3) “use all
 2 practicable means ... to improve and coordinate Federal plans, functions, programs, and
 3 resources” for NEPA’s environmental protection aims, *id.* § 4331(b).

4 89. USDA’s unexplained evisceration of public participation procedures via the
 5 Interim Final Rule was also arbitrary and capricious because USDA’s rulemaking failed to
 6 acknowledge and adequately explain the departure from USDA’s longstanding approach to
 7 NEPA implementation, and failed to consider the longstanding recognition that public
 8 involvement is essential to the proper functioning of NEPA, and that public involvement in
 9 NEPA reviews is a necessary and practicable means of achieving NEPA’s aims.

10 90. USDA’s failure to rationally explain its rulemaking is arbitrary, capricious, and
 11 not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2) and NEPA, 42 U.S.C. §§
 12 4331(a)-(b), 4332(2)(B).

13 RELIEF REQUESTED

14 Plaintiffs respectfully request that the Court:

15 (A) Declare that USDA violated the Administrative Procedure Act in the development
 16 and issuance of the Interim Final Rule due to its failure to provide public notice and comment on
 17 the Interim Final Rule and failure to provide a reasoned explanation for changes to USDA’s
 18 public participation procedures adopted in the Interim Final Rule, including its removal of
 19 requirements for public notice and comment on draft EISs, public participation in EAs, and
 20 public scoping on EAs and CEs for Forest Service projects;

21 (B) Declare that USDA’s Interim Final Rule violated the APA and NEPA, 42 U.S.C.
 22 §§ 4331(a)-(b), 4332(2)(B), by failing to consider relevant factors under NEPA;

23 (C) Vacate the Interim Final Rule, including its rescission of regulations at 36 C.F.R.
 24 Part 220 and 7 C.F.R. Part 372, as well as its revision of regulations at 7 C.F.R. Part 1b;

25 (D) Issue an injunction ordering that, until and unless they comply with the APA,
 26 USDA and its sub-agencies shall operate under the NEPA procedures regarding public
 27 participation that USDA applied before the Interim Final Rule took effect;

1 (E) Retain jurisdiction of this matter for purposes of enforcing and effectuating the
2 Court's order;

3 (F) Grant Plaintiffs their reasonable costs of litigation, including attorneys' and expert
4 fees; and

5 (G) Grant such further relief as the Court deems just and proper.

6
7 Respectfully Submitted,

8 /s/ Wendy Park

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August 4, 2025

VIA REGULATIONS.GOV
FEDERAL E-RULEMAKING PORTAL

U.S. DEPARTMENT OF AGRICULTURE
1400 Independence Avenue SW
Washington, DC 20250-0108

RE: EARTHJUSTICE COMMENTS ON U.S. DEPARTMENT OF AGRICULTURE'S
INTERIM FINAL RULE AND REQUEST FOR COMMENTS REGARDING
NATIONAL ENVIRONMENTAL POLICY ACT
Docket ID: USDA-2025-0008

U.S. Department of Agriculture,

Please see enclosed comments submitted by Earthjustice in response to U.S. Department of Agriculture's interim final rule and request for comments regarding National Environmental Policy Act, 90 Fed. Reg. 29632 (July 3, 2025), Docket ID: USDA-2025-0008.

Sincerely,

Jan E. Hasselman
Senior Attorney

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U.S. DEPARTMENT OF AGRICULTURE
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Docket ID: USDA-2025-0008

I. Introduction

The following comments are being submitted to the Department of Agriculture (the “Agency” or “USDA”) by Earthjustice, the nation’s leading environmental law firm. For many decades, on behalf of hundreds of our clients and partners, Earthjustice has worked to implement the National Environmental Policy Act (“NEPA”) in Congress, in the courts, and in the federal agencies to meet its ambitious goals and realize its promise.

The Agency has published an Interim Final Rule (“IFR”) that comprehensively revises the Agency’s department-level NEPA regulations and rescinds or revises regulations of the Agency’s component agencies. *National Environmental Policy Act*, 90 Fed. Reg. 29632 (July 3, 2025). We ask that you carefully consider and respond to these comments, along with the attachments submitted herewith, before implementing this ill-advised plan.

NEPA is the lodestar of America’s environmental conscience and actions. In NEPA, Congress articulated environmental policies and goals for the United States while acknowledging the “worldwide and long-range character of environmental problems.” 42 U.S.C. § 4332(I). Fully implemented, NEPA can help the nation meet its central environmental challenges, including climate change, the collapse of biological diversity, and the ongoing failure to achieve environmental justice. While full implementation of NEPA has yet to be realized, NEPA’s procedural requirements have changed the nature of federal decision making for the better by providing thorough analysis and public involvement. The prior administration’s actions to update and modernize NEPA’s implementing regulations were a crucial step in the right direction.

Through NEPA, communities have been able to learn ahead of time when their government is proposing to permit the expansion of an airport, a new management plan on a nearby national forest, or a new deepwater port for export of coal. Through NEPA, Americans living, working, and recreating near or on public lands have had an opportunity to consider proposed changes to land management plans and actions such as proposed timber harvest, oil and gas leasing, and road construction, and to influence those decisions. Through NEPA, communities have had an opportunity to have their voices heard before construction of a proposed highway that might divide it.

Receiving public comment is only part of the NEPA process. Those comments must be evaluated and considered by federal agencies when they are making decisions. Through compliance with the previously applicable regulations, federal agencies have learned that they are expected to stop, look, and listen to the public that they serve before committing resources. Through public comments and input from other agencies, lead agencies learn of better

alternatives to achieve a particular goal while minimizing harm to communities, public land, and the environment. Federal agencies have learned important new information about land that it manages or communities in which it operates. In short, while implementation has been far from perfect, Americans have benefitted from the important information and public involvement achieved through NEPA's implementation.

Even so, this administration has expressed relentless hostility towards NEPA and has taken unprecedented steps to undermine it. It declared that development of fossil fuel energy and other natural resources are a higher priority than environmental protection and community engagement. It revoked the Council on Environmental Quality's ("CEQ") long-standing implementing rules, leaving agencies on their own to come up with their own standards, and it has continually sent the message that compliance with NEPA should be kept to a bare minimum. Without the scaffolding and direction of the CEQ rules that have served that role for 50 years, it was incumbent on individual agencies to do more to fill in the gaps in the statute and provide clear standards and direction that will ensure that NEPA's goals are fulfilled.

This IFR does precisely the opposite. It does not include a suitable replacement for the clear standards that had been present in CEQ's most recent regulations. Instead, the Agency's approach leaves the public with little clarity on what will be considered and how they can participate, and it will require courts to evaluate NEPA compliance on a case-by-case basis. This will all but ensure that the Agency will fail to implement NEPA's ambitious goals of informed and transparent decision making. And it will do nothing to achieve the administration's goals of efficiency, certainty, and reduced controversy. To the contrary, it is well-demonstrated that taking the time to disclose impacts, consult with effected stakeholders, and assess alternatives yields great dividends in terms of reducing controversy and getting projects on the ground more efficiently.

We urge you to stop this relentless assault on Congressionally mandated principles. Start by withdrawing the IFR. Initiate a good faith public process to update and overhaul your NEPA implementation procedures. These should be issued as draft rules subject to comment, with a reasonable timeline for comments—far more than what was offered here. In the meantime, commit to adhering to its prior regulations and the 2024 version of CEQ's regulations—the last version adopted by CEQ prior to their revocation—while you engage with the public going forward.

II. The Agency's Process For Finalizing Revisions To NEPA Regulations Is Unlawful And Inadequate.

A. The Agency was obligated to undertake notice and comment before modifying its NEPA regulations.

The Agency's IFR announces sweeping revisions to the Agency's NEPA regulations, effective immediately. The Agency is using an interim final rule, providing a subsequent public

comment period with the potential for a final-final rule to follow. The Agency justifies its inversion of the process by invoking three exceptions to notice and comment rulemaking: for “rules of agency organization, procedure, or practice” (“procedural rules”); for guidance documents (interpretive rules and policy statements); and when the agency, for “good cause,” finds that notice and comment is “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(A)&(B). The Agency, however, fails to grapple with the limited nature of these exceptions and generally ignores the caselaw that defines their contours.

Courts have found that the Administrative Procedure Act’s (“APA”) notice and comment exceptions must be “narrowly construed and only reluctantly countenanced” in order to safeguard the underlying principles of the APA that favor public participation and agency information gathering. *New Jersey Dep’t of Env’t Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *see also Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984). Indeed, it is “antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.” *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005). Given the presumption favoring public comment in advance of a final rule, the Agency has not adequately justified bypassing the “primary method of assuring that an agency’s decisions will be informed and responsive.” *New Jersey*, 626 F.2d at 1045.

First, the APA’s exception for procedural rules does not apply. The Agency relies heavily on the Supreme Court’s recent decision in *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497 (2025), repeatedly citing the opinion’s recognition that NEPA is itself a procedural statute. But *Seven County* broke no new ground: NEPA’s approach to environmental review of agency action has been acknowledged by the courts since the statute’s inception. *See, e.g., Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (noting that NEPA’s “mandate to the agencies is essentially procedural”). Nevertheless, the agency claims a newly articulated categorical rule that regulations that are for “implementing a purely procedural statute must be, by their nature, procedural rules.” 90 Fed. Reg. at 29644. This formulation misconstrues the underlying nature of NEPA and the courts’ common-sense approach to determining when the exception applies.

Congress’s ambitions in passing NEPA were inarguably expansive, seeking to bring about substantively better outcomes for agency decisionmaking. *See, e.g.*, 42 U.S.C. § 4321 (noting that the purpose is “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man”); *id.* at § 4331(b)(1) (establishing that the federal government must “use all practicable means” to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations”). Furthermore, NEPA’s procedural demands and its lofty ambitions are intimately linked: the “sweeping policy goals announced in § [4331] of NEPA are thus realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted; citation modified). In this instance, the procedure is the substance. *See, e.g., Seven*

County, 145 S. Ct. at 1510 (“Properly applied, NEPA helps agencies to make better decisions[.]”).

In contrast, procedural rules exempted from the APA’s notice-and-comment provisions are properly understood to relate primarily to “internal house-keeping measures organizing agency activities.” *Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. Nat’l Lab. Rels. Bd.*, 57 F.4th 1023, 1034 (D.C. Cir. 2023) (discussing the “limited carveout” for procedural rules); *see e.g.*, *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (finding rules governing the processing of petitions to be procedural rules); *Lamoille Valley R.R. Co. v. Interstate Com. Comm’n*, 711 F.2d 295, 327–28 (D.C. Cir. 1983) (finding a modified scheduling deadline to be a procedural rule). The IFR here goes far beyond this narrow “housekeeping” function—for example—by regulating the threshold for applying NEPA, defining when the public will have an opportunity to comment, and establishing the bounds of the Agency’s analyses.

Nor have courts applied a simple binary to an underlying statute in order to determine whether the APA’s procedural exemption applies. Instead, the focus is on the rules themselves, and the question is “functional, not formal,” requiring an examination of how rules affect “not only the ‘rights’ of aggrieved parties, but their ‘interests’ as well. *Chamber of Com. of U.S. v. U.S. Dep’t of Lab.*, 174 F.3d 206, 212 (D.C. Cir. 1999) (citation omitted; citation modified).

The interests at stake here are plain. If the federal government as a whole is to meet the congressional aspirations expressed in NEPA as well as the public’s concomitant interest in seeing those aspirations realized, then the Agency’s implementing regulations are a critical component. The public has long relied on the influence of NEPA and its procedures to facilitate factual and scientific disclosures, allow communities—including regulated parties—to directly engage with government agencies, and shape outcomes by affecting how agencies address environmental effects and develop mitigation measures. Because appropriate implementing regulations are indisputably critical to NEPA’s success, agencies cannot shoehorn their changes into the APA’s “procedural” box in order to evade traditional public review.

Second, the Agency’s claims fall well short of the stringent requirements needed to establish “good cause.” The exception is not intended as an “‘escape clause,’” and consequently, a court’s inquiry is necessarily “meticulous and demanding.” *New Jersey*, 626 F.2d at 1046 (quoting the Senate’s APA Committee Report); *see also United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (an agency “must overcome a high bar if it seeks to invoke the good cause exception”). A finding of good cause generally should be limited to “emergency situations” or “where delay could result in serious harm,” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citation omitted). Neither situation is present here.

The Agency contends that conventional rulemaking is “impracticable” and “contrary to the public interest.” *See* 90 Fed. Reg. at 29654. The Agency maintains that it must act expeditiously following CEQ’s rescission of its own NEPA rules in order to provide certainty and avoid a “makeshift framework” in which Agency regulations cite to and rely on the CEQ

regulations that no longer exist. *See* 90 Fed. Reg. at 29645. But courts have already rejected this very argument. An agency’s desire to “eliminate more quickly legal and regulatory uncertainty is not by itself good cause.” *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018); *see also United States v. Cotton*, 760 F. Supp. 2d 116, 128 (D.D.C. 2011) (collecting cases).

The claimed urgency is entirely a matter of choice. As the Agency concedes, it has been relying on the previous regulatory scheme even after CEQ rescinded its rules. 90 Fed. Reg. at 29644 (has been “continuing to operate under its prior procedures as if the CEQ NEPA framework still existed”). The Agency has made clear that it expects to *continue* to apply the prior rules going forward. 90 Fed. Reg. at 29634 (“[R]evised agency procedures will have no effect on ongoing NEPA reviews”); *see also* 90 Fed. Reg. at 29644. This comports with CEQ’s advice to agencies that they “should consider voluntarily relying on those regulations in completing ongoing NEPA reviews.” Memorandum from Katherine R. Scarlett, CEQ Chief of Staff, Implementation of the National Environmental Policy Act, at 1 (Feb. 19, 2025).¹ Under the circumstances, the purported emergency is both legally and factually untenable.

Moreover, the agency could just as easily have used an IFR to temporarily continue relying on CEQ’s NEPA regulations, while using traditional notice and comment to develop the next iteration of rules. That approach would minimize any perceived instability and confusion during the transition while allowing the public a greater degree of insight into and influence over the process. Instead, the agency imposed drastic revisions to its implementing regulations while inverting the public comment process under the cover of a manufactured emergency.

Finally, the claim to the APA’s exception for statements of policy and interpretive rules does not withstand even the slightest scrutiny. The Agency appears to believe that its prefatory and definitional sections “may” qualify as guidance documents. The Agency suggests that “[a]n interpretative rule provides an interpretation of a statute, rather than make discretionary policy choices that establish enforceable rights or obligations for regulated parties under delegated congressional authority.” 90 Fed. Reg. at 29644. It then explains that the “definitions” it had chosen “may be classified as such.” 90 Fed. Reg. at 29644. And it explains that the prefatory sections of the new procedures may be classified as general statements of policy, because they “provide notice of an agency’s intentions as to how it will enforce statutory requirements, again without creating enforceable rights or obligations for regulated parties under delegated congressional authority.” 90 Fed. Reg. at 29644. Other than asserting it must be so, the Agency does not explain why these portions of the prior and new regulations must be classified this way—after all, the definitions and prefatory components of CEQ’s NEPA regulations long have played a role in determining whether the Agency has met its NEPA obligations. In any event, even assuming this thinly reasoned and tentatively expressed claim has merit, there is no

¹ <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf> (last visited July 30, 2025).

justification—and the Agency provides none—for exempting an entire rule based on select portions qualifying as guidance documents.

B. A 30-day comment period is insufficient.

Nonetheless, the Agency has “elected voluntarily to solicit comment.” 90 Fed. Reg. at 29645. Solicitation of comments after the rules have been changed is hardly an indicator of good faith. And the selected process—a brief 30-day comment period that commenced just before a holiday weekend—is the opposite of good government.

This revision to the Agency’s NEPA process was substantial, amounting to a comprehensive, substantive revision of the Agency’s approach to implementing NEPA. And yet, the Agency has called for substantially less public engagement than CEQ allowed with past revisions to NEPA regulations. When CEQ initiated the rulemaking that resulted in the 2020 regulations, it first issued an advance notice of proposed rulemaking, where it ultimately gave commenters 61 days to respond. *Update to the Regulations Implementing the Procedural Provisions of NEPA*, 85 Fed. Reg. 1684, 1690 (Jan. 10, 2020). CEQ then issued a notice of proposed rulemaking, which provided for another 60 days of public comment. *Id.* at 1684. When CEQ kicked off the Phase 1 NEPA rulemaking in 2021, it offered a 45-day comment period. *See NEPA, Implementing Regulations Revisions*, 87 Fed. Reg. 23453, 23455 (Apr. 20, 2022) (final rule describing commenting process). For the Phase 2 rulemaking in 2023, CEQ again used a 60-day comment period. *NEPA, Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49924, 49924 (July 31, 2023) (notice of proposed rulemaking). On top of longer comment periods, these rulemakings also called for public meetings. *Id.* (Phase 2, four public meetings); 86 Fed. Reg. at 55757 (Phase 1, two public meetings); 85 Fed. Reg. at 1684 (2020 ANPRM, two public hearings). Here, by contrast, no public meetings have been called for.

Giving the public less time to digest and respond makes little sense. It would take considerable time just to understand the regulatory changes any given agency has made. The Agency has disregarded the most recent NEPA regulations, and it replaced them with a hodgepodge of the most recent CEQ regulations, portions of the 2020 CEQ regulations that had been discarded, and some new provisions. It has made its changes all the more undecipherable by including only a short regulatory preamble that describes the changes in only the most general terms. There is no clear explanation of all the ways the current approach differs from the regulations—both Agency-specific and CEQ—that came before, let alone an explanation for why the Agency believes this approach to be preferable. In other words, it will take time to digest what issues the new NEPA process raises and are worth commenting on.

The challenge is multiplied in light of the number of agencies modifying their guidance at the same time. It would be difficult enough to work through these kinds of changes for a single agency. That effort is more challenging still where, as here, the public is expected to respond to at least fifteen distinct agency actions, each of which purports to make sweeping changes from what came before. Any expectation that the public can comprehensively respond in 30 days is

wrong at best and cynical at worst. On behalf of our clients and partners we have asked for an extension of the comment deadline but have not even received the courtesy of a response, let alone an explanation for why an extension was denied.

III. The Agency Has Not Adequately Explained Its New Approach To NEPA Review.

When an agency makes a decision, it must “give adequate reasons” for that decision. *Encino Motorcars v. Navarro*, 579 U.S. 211, 221 (2016). It must at least “articulate a satisfactory explanation for its action.” *FCC v. Fox Television Stations*, 556 U.S. 502, 513 (2009). Where an “agency has failed to provide even that minimal level of analysis,” its decision cannot stand. *Encino Motorcars*, 579 U.S. at 221. The Agency has not sufficiently explained its new NEPA rules here. While we provide specific examples of this failure to explain throughout this comment letter, three general points bear emphasis.

First, despite comprehensively rewriting the Agency’s NEPA rules, the explanation it has given is extraordinarily thin. There is no real explanation in the short regulatory preamble, and the few scraps of reasoning in the IFR do not support the sweeping changes the Agency has made.

Second, the Agency has failed to acknowledge, yet alone explain why, it has deviated from the NEPA review process required by either its prior rules or the 2024 CEQ regulations. The Agency is not writing on a blank slate, so it was required to explain why it took a different approach here.

Finally, the Agency has not resolved tensions between the approach it has adopted to NEPA review and differing approaches adopted by other agencies.

A. The Agency did not sufficiently explain its new rules for implementing NEPA.

To explain its new NEPA process, the Agency has included only a short regulatory preamble that refers to rules it has adopted in the most general of terms. What is lacking is any “reasoned explanation for its action.” *Fox*, 556 U.S. at 515; *cf. Tourus Records v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (“That is not a statement of reasoning, but of conclusion. It does not ‘articulate a satisfactory explanation’ for the agency’s action.”). The “conclusory” explanations contained in the preamble—pitched at a general level and not to justify any specific rules it has adopted—“fall[] far short of what is required” for non-arbitrary decisionmaking. *See Am. Trucking Ass’n v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 253 (D.C. Cir. 2013).

Indeed, as to its overall explanation for the changes, the Agency asserts that its “new implementing procedures . . . are a more faithful implementation of the statute . . . than its old procedures.” 90 Fed. Reg. at 29634. It then offers the conclusory assertion that “[w]here USDA has retained as aspect of its preexisting NEPA implementing procedures, it is because that aspect is compatible with these guiding principles; where USDA has revised or removed an aspect, it is

because that aspect is not so compatible.” 90 Fed. Reg. at 29635. None of this suffices to meet the Agency’s obligation to explain its decision. The Agency does provide some explanation for certain (though not all) provision-level changes, but in many instances, it merely describes the provision without offering any explanation for its choice. *E.g.*, 90 Fed. Reg. at 29637 (describing elimination of the requirement to prepare a draft environmental impact statement, without any explanation for this change). The Agency should explain all of the provisions it has adopted (or omitted).

B. The Agency has failed to adequately explain its change in position from its prior NEPA rules and CEQ’s approach to NEPA review.

That lack of explanation also violates another cornerstone of administrative law. Agencies are “free to change their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motorcars*, 579 U.S. at 212. An agency must at least “display awareness that it *is* changing position.” *Fox*, 556 U.S. at 515. It cannot “depart from a prior policy sub silentio.” *Id.* And, in the end, the Agency “must show there are good reasons for the new policy,” and where an explanation was given for the prior policy, “reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Id.* at 515–16. Indeed, where an agency contradicts an earlier discussion or earlier findings, it must explain its approach. *See U. S. Sugar Corp. v. EPA*, 830 F.3d 579, 650–51 (D.C. Cir. 2016). The Agency has failed to satisfy this obligation, on two levels.

First, the Agency has departed from what its prior NEPA rules required. Those changes have been substantive—eliminating, for example, the requirement that the Agency prepare a draft environmental impact statement (“EIS”) and solicit public comment on the same. Despite these substantive shifts, the Agency has not offered a word of explanation for them. In fact, it has conceded that it takes no “position on the Department’s or any USDA agency’s prior interpretations of NEPA’s procedural requirements.” 90 Fed. Reg. at 29645. Even if some changes may require little explanation—for example, removal of references to CEQ regulations that are no longer on the books—substantive changes in the Agency’s NEPA process surely do.

Second, the Agency has not just removed references to CEQ’s implementing regulations but has, in many respects, departed from the substantive approach CEQ has used for decades. Yet it has not explained why it changed its approach to implementing NEPA from what the most recent CEQ regulations required. Since 1979, CEQ’s regulations have been the touchstone agencies have looked to in establishing their own process for implementing NEPA. A version of those regulations have been in place until earlier this year, when CEQ rescinded them. *See Removal of National Environmental Policy Act Implementing Regulations*, 90 Fed. Reg. 10610, 10611 (Feb. 25, 2025).

It cannot be disputed that the Agency has departed, in multiple ways. For example, while the CEQ regulations required that the agency “shall . . . [r]equest the comments of . . . [t]he

public” when preparing a “draft environmental impact statement,” 40 C.F.R. § 1503.1,² the Agency now has made that step optional. 90 Fed. Reg. at 29666 (7 C.F.R. § 1b.7(m)). The Agency has not sufficiently explained that shift. *See* 90 Fed. Reg. at 29637 (merely describing the shift). Similarly, the CEQ regulations provided clear definitions about the types of environmental effects agencies should consider. 40 C.F.R. § 1508.1(i) (describing “direct effects,” “indirect effects,” and “cumulative effects” and the role for considering “environmental justice concerns” and “climate-change-related effects”). These were considered choices made by CEQ and long implemented by the Agency and backed up with pages of reasoning. *See National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 89 Fed. Reg. 35442, 35538–39 (May 1, 2024). And yet the Agency has eliminated those portions of the regulations, leaving nothing to replace them, and it did so without a word of explanation.

In still other examples, the Agency has included provisions that CEQ previously rejected as inappropriate, confusing, or unwise. Take, for example, the provision that indicates that the Agency will prepare a supplemental environmental impact statement only if “a major Federal action remains to occur.” 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(r)). Just last year, CEQ explained that it was using a different phrase “incomplete and ongoing,” precisely because “remains to occur” was “vague” and the latter phrase provided “more clarity.” 89 Fed. Reg. at 35499. While the two terms have the “same substantive meaning,” the agency’s failure to display any awareness that it was making a shift, let alone explain its reason for doing so, is strong evidence that the Agency has not contended with the prior regulations. *See Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 70 F.4th 582, 598 (D.C. Cir. 2023) (agency displayed no “awareness of its own flip flop”).

In another example, the Agency has exempted actions from NEPA review where the “proposed action is an action for which another statute’s requirements serve the function of the Federal agency’s compliance with the act.” 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2((e)(6)). That approach conflicts with the statute, but it also conflicts with recent CEQ guidance. Just last year, CEQ declined to include such a requirement because it goes “beyond the scope of the NEPA statute and case law” and “could be construed to expand functional equivalence beyond the narrow contexts in which it has been recognized.” 89 Fed. Reg. at 35459–60. CEQ explained that decision across two pages, and yet again, the Agency here took the opposite approach but offered no explanation or engagement with these formidable issues. These are just a few examples out of many where the Agency abruptly changed course without explaining why.

Nothing the Agency said in its limited explanation for its new NEPA rules could support refusing to engage with CEQ’s regulations and reasoning.

² All citations to the NEPA regulations in 40 C.F.R. refer to the 2024 version of the regulations, unless otherwise specified.

To start, the Agency’s explanation that there are no “reliance” interests does not justify its failure to explain its changed position. 90 Fed. Reg. at 29634. That argument operates from the flawed premise—addressed above—that the rules implementing NEPA are procedural. In any event, the absence of reliance interests does not mean that the Agency would owe no explanation. All that means is that the “agency need not . . . provide a *more* detailed justification than what would suffice for a new policy created on a blank slate.” *Fox*, 556 U.S. at 515 (emphasis added). But it still must “show that there are good reasons for the new policy.” *Id.* The agency has not met even that bare minimum requirement here.

Second, the fact that CEQ’s regulations have been rescinded does not justify ignoring its latest guidance and reasoning on the appropriate way to implement NEPA. CEQ did not remove its NEPA regulations because they represented an improper interpretation of the statute. Rather, as CEQ explained, it removed the regulations because Executive Order 14154 directed their removal and CEQ could identify no other authority for issuing binding NEPA regulations. *See* 90 Fed. Reg. at 10613. Even if CEQ’s approach to implementing NEPA no longer can be binding, its views on the best way to implement the statute and extensive explanation for those views have not gone away. The “reasons for the old” policy are still on the books, so the Agency must “show that there are good reasons for the new policy.” *Fox*, 556 U.S. at 515. Declining to consider decades of CEQ experience with the statute also no doubt “entirely fail[s] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, the Agency was obligated to explain any differences in the approach it took.

In fact, as discussed further below, Congress has repeatedly signaled its acquiescence in CEQ’s regulations, reflecting that CEQ’s prior interpretation would be the best interpretation of NEPA. Likewise, as CEQ itself acknowledged in rescinding its regulations, the Supreme Court has looked to those regulations as appropriately implementing the statute. 90 Fed. Reg. at 10613 (collecting cases). For both of these reasons, the Agency would be expected to engage with CEQ’s interpretations before it changes course.

There are additional reasons that an Agency must heed CEQ’s views. NEPA instructs agencies that when they are “develop[ing]” their “methods and procedures,” they must do so “in consultation with the Council on Environmental Quality.” 42 U.S.C. § 4332(B). This reflects a continuing obligation to account for CEQ’s approach to implementing NEPA. Indeed, CEQ recognized as much in its interim final rule rescinding its regulations. 90 Fed. Reg. at 10612. Moreover, it always is CEQ’s obligation to “formulate and recommend national policies to promote the improvement of the quality of the environment.” 42 U.S.C. § 4342. Where CEQ has spoken clearly, and repeatedly, on what policies achieve those goals, agencies must take notice. And even if the Agency were free to disregard CEQ’s guidance, the Agency still must at least explain why it has come to a different view.

Third, the Agency also is wrong that the need to implement the Fiscal Responsibility Act could justify starting from scratch and ignoring CEQ's regulations. After all, the Act incorporated longstanding features of CEQ's regulations, *see* 89 Fed. Reg. at 35443 ("The amendments codify longstanding principles drawn from CEQ's NEPA regulations . . ."), and CEQ already had made extensive "revisions to the regulations to implement the amendments to NEPA made by the Fiscal Responsibility Act," 89 Fed. Reg. at 35447. If anything, throwing out CEQ's considered response to the FRA with nothing to replace it violates Congress's directive.

Finally, the Supreme Court's decision in *Seven County* also does not justify abandoning CEQ's regulations. To the extent that decision required any "course correction of sorts," it was not for the executive branch, but for courts, "some" of which "ha[d] assumed an aggressive role in policing agency compliance with NEPA." *See Seven County*, 145 S. Ct. at 1511, 1514. It makes no sense to read that decision as calling for changing—let alone abandoning—the longstanding regulatory approach embodied in CEQ's regulations. The validity of CEQ's regulations was not before the Court. To the contrary, the Court held that the agency's application of those regulations produced a decision that warranted deference because the agency's "approach complied with NEPA and this Court's longstanding NEPA precedents." *See id.* at 1511, 1515. Indeed, the Court affirmed one component of CEQ's regulations—that "indirect effects can sometimes fall within NEPA," *id.* at 1515—that this Agency has left on the cutting room floor. There is nothing in the decision to suggest that it invites the executive branch to revisit CEQ's regulations, or even that the Court would approve of the approach to environmental review—an approach that removes process that ensured "the agency has addressed environmental consequences and feasible alternatives," *id.* at 1511—the Agency has adopted here.

C. The Agency has not explained inconsistencies between its approach to implementing NEPA and other agencies' approaches.

There is one other glaring lack of explanation present in the Agency's IFR: There are unexplained inconsistencies between this Agency's approach to implementing NEPA and approaches adopted by other agencies. While some modest difference for administrative efficiencies and the Agency's unique missions is warranted, these distinctions transcend such purposes and get to the core issues that should be consistent across agencies.

To take just one example, this Agency is inconsistent with other agencies on whether agencies are required to provide the public an opportunity to comment on draft EISs. Indeed, the Agency does not require issuance of a draft EIS, raising the possibility that a core feature of NEPA will be circumvented at the discretion of the Agency. Yet other agencies still mandate the preparation of a draft EIS. FERC Staff Guidance Manual C.1(d). If other agencies can mandate these features in their NEPA process, why has this Agency omitted it? It does not say.

IV. The IFR Unlawfully And Arbitrarily Weakens The Public's Role In NEPA's Implementation.

Public participation in the NEPA process, “in cooperation” with the government, has been central to the execution of NEPA since its inception. 42 U.S.C. 4331(a). By its very text, NEPA requires public participation in the processes it creates. But the Agency has reshaped the process in a way that weakens or eliminates the guarantee of public participation that is at the heart of the statute. Not only does this violate both the letter and spirit of NEPA itself, but the Agency’s failure to explain its reasoning for this drastic change is arbitrary and unlawful. The Agency has indicated, without explanation, that it intends to pull back on public participation that has long been a guaranteed part of NEPA review, including during the process of developing an EIS. The Agency should ensure that public participation—through comment on scoping, draft EISs, and other NEPA documents—remains a core part of the process.

A. Seeking out and considering public input on NEPA documents represents the very core of NEPA.

The Supreme Court has long recognized the centrality of public participation in NEPA. The Court has noted that NEPA guarantees that “relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson*, 490 U.S. at 349. In this way, it’s not enough to simply publish an environmental document that the public may passively review. “Publication of an EIS, both in draft and final form . . . serves a larger informational role.” *Id.* It gives the public “assurance that the agency has indeed considered environmental concerns in its decisionmaking process” and “*more significantly*, provides a springboard for public comment.” *Id.* (emphasis added) (citations omitted); *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (EIS designed to “provide a springboard for public comment” (citation modified)). Allowing the public to participate early on addresses NEPA’s “manifest concern with preventing uninformed action,” because it is through the “broad dissemination of information” that “the public” can “react to the effects of a proposed action at a meaningful time.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). Such disclosure allows the public to meaningfully participate in NEPA, as Congress intended. To strip this mandate from NEPA would be “incongruous with [NEPA’s] approach to environmental protection.” *Marsh*, 490 U.S. at 371.

The Courts of Appeals have reached the same conclusion. For example, the Second Circuit held that NEPA required “an environmental full disclosure” so that the public could “weigh a project’s benefits against its environmental costs.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 772 F.2d 1043, 1049 (2d Cir. 1985). Allowing the public to weigh costs against benefits is meaningless if the public cannot provide comments to the relevant agencies with that weighing in mind. Rather, an agency must invite comment, and respond; doing so “insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug.” *Id.* Likewise, the Ninth Circuit has recognized the “crucial role” that public engagement plays in “realizing NEPA’s policy goals.” *Prutehi*

Litekyan: Save Ritidian v. U.S. Dep't of Airforce, 128 F.4th 1089, 1101 (9th Cir. 2025). Both public notice and the public participation it supports “are at the heart of the NEPA review process.” *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982). This emphasis on public participation reflects the “paramount Congressional desire to internalize opposing viewpoints into the decision-making process” before an agency arrives at a final decision. *Id.* at 771. To that end, it is not enough to provide “public notice,” because NEPA requires “public participation in the evaluation of the environmental consequences of a major federal action.” *Id.*

B. Data demonstrates that public input improves government decisionmaking.

Beyond its centrality to the purpose and function of NEPA, it is well-demonstrated that public participation in the NEPA process improves the quality of agency action. A recent empirical study of 108 EISs over a period of 22 years indicates that public comment influences agency decision making and provides valuable information for agencies. *See Ashley Stava et. al, Quantifying the Substantive Influence of Public Comment on United States Federal Environmental Decisions Under NEPA*, 20 Env't Rsch. Letters, Jun. 10, 2025, at 1. Public comments submitted under NEPA procedures were linked to substantive decision alterations in 62% of cases. *Id.* Federal agencies credited changes in project alternatives to public comments in nearly 90% of cases. *Id.* And where mitigation plans were modified, agencies credited the public comment process 100% of the time. *Id.*

The data, and consistent behavior of agencies across various administrations and over two decades, shows the value of public comment in the NEPA process. Agencies modify their actions in response to public participation because public participation is *valuable*. *Cf.* Admin. Conf. of the U.S., *Public Participation in Agency Adjudication (Final Report)* 6 (2025) (“[Agencies]” frequently need information from regulated entities, regulatory beneficiaries, unaffiliated experts, and citizens with situated knowledge to fully understand regulatory problems and potential solutions, to make fully informed decisions.”). Removing the public’s ability to participate in the NEPA process will certainly reduce the quality of future agency action because it will cut off a supply of valuable perspectives, critiques, and insights that agencies do not have the capacity to investigate themselves. *Cf.* Admin. Conf. of the U.S., *Public Engagement in Rulemaking (Final Report)* 1 (2019) (“Robust public participation is vital to the rulemaking process. By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.”).

Substantial evidence demonstrates that public participation “improves the substantive quality, legitimacy, and accountability of environmental assessments and decisions,” in addition to fulfilling “norms of popular sovereignty.” Nat’l Rsch. Council, *Public Participation in Environmental Assessment and Decision Making* 226 (Thomas Dietz & Paul C. Stern eds., 2008). Public participation in the NEPA process “at the outset ensures a more productive and efficient outcome.” United States Env’t Prot. Agency, *Better Decisions Through Consultation and*

Collaboration 2 (2008); *see also* Nat'l Rsch. Council, *supra*, at 51 (“[P]articipation increases public understanding of science and scientists’ and agency officials’ understanding of public concerns, thus enabling future participatory processes to proceed more efficiently.”).

C. Public participation has long been central to agency NEPA procedures.

Of course, prior to now, the federal government has long recognized the value, and necessity, of public participation in the NEPA process. CEQ’s 1978 implementing regulations announced the centrality of public participation to NEPA. CEQ’s implementing regulations were crafted to “tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA].” *National Environmental Policy Act—Regulations*, 43 Fed. Reg. 55978, 55990 (Nov. 29, 1978). As such, CEQ’s 1978 regulations highlighted that, among other things, “public scrutiny [is] essential to implementing NEPA.” *Id.* Recognizing that NEPA was designed to make “better decisions” and “not better documents,” CEQ’s initial policy statement directed federal agencies to “encourage and facilitate public involvement in decisions which affect the quality of the human environment” to the fullest extent possible. *Id.* at 55991.

This public involvement in NEPA procedures must entail information sharing *and* public input to agencies if it is to help create “better decisions.” To fulfill this requirement, CEQ mandated that when drafting an EIS an agency must “[r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.” *Id.* at 55998. This public involvement in the EIS process was not one-sided: an agency was required to “assess and consider comments both individually and collectively” and “respond,” ensuring that public participation in the NEPA process was not just aesthetic, but in fact substantial. *Id.* Elsewhere, CEQ made clear that where public participation is concerned, agencies have an affirmative duty to “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” *Id.* at 56001. This language highlights the intent that NEPA foster cooperation between the government and the public through public participation—as highlighted in NEPA itself. *See* 42 U.S.C. 4331(a). To facilitate these efforts, CEQ required agencies to “solicit appropriate information from the public,” solidifying the understanding that NEPA affirmatively demands public participation. 43 Fed. Reg. at 56001.

This emphasis on public comment and input continued even during periods when administrations sought to streamline NEPA processes. In its 2020 overhaul of its regulations, for instance, which significantly weakened NEPA’s reach in ways we and other organizations explained were unlawful, CEQ nonetheless focused on maintaining public access to agencies by increasing agency flexibility in doing public outreach. *Update to the Regulations Implementing the Procedural Provisions of NEPA*, 85 Fed. Reg. 43304, 43337 (July 16, 2020); *see also id.* at 43356 (“The final rule expands the already wide range of tools agencies may use when providing notice to potentially affected communities and inviting public involvement.”). CEQ’s manifest concern was for maximizing the ability of the public to participate in NEPA proceedings. *See, e.g., id.* at 43371 (“When selecting appropriate methods for public involvement, agencies shall

consider the ability of affected entities to access electronic media.”). To that end, CEQ required agencies to “provide for agency websites or other means to make available . . . relevant information for use by agencies, applicants, and interested persons.” *Id.* at 43374. CEQ’s focus on facilitating public participation confirms its importance in NEPA’s procedural scheme.

Similarly, in its 2024 revisions to the NEPA implementing regulations CEQ repeatedly stressed its interest in ensuring “full and fair public participation [in NEPA procedures] and a process that informs the public about the potential environmental effects of agency actions.” 89 Fed. Reg. at 35447. CEQ sought to increase the ability of the public to participate in NEPA procedures, recognizing the value and necessity of such participation. *See, e.g., id.* at 35476 (expanding public comment requirements for EAs in order “to reflect current agency practice and provide the public with a clearer understanding about potential public participation opportunities”). In the end, the 2024 regulations included multiple provisions on notice and comment on EISs, 40 C.F.R. §§ 1503.1–1503.4; *see also* 40 C.F.R. § 1501.5(e) (comment on environmental assessments). While the CEQ implementing regulations have been revoked, the fact that public participation in the NEPA process was mandated for over fifty years—across a spectrum of changing administrative goals and ideologies—demonstrates the value and importance of public participation in NEPA and highlights the importance of agency-specific rules and procedures that accomplish this key objective.

D. Congress has accepted that public input is crucial to NEPA’s implementation.

While the statute itself contains relatively little explicit direction on public comment and input, the fact that Congress acquiesced to CEQ and the Court’s long-standing interpretation of NEPA confirms that it is in fact statutorily mandated. “[C]ongressional acquiescence” to a practice or interpretation of an administrative agency indicates its approval under two conditions: the practice must be “long-standing,” *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980); *cf. NLRB v. Noel Canning*, 573 U.S. 513, 524–25 (2014) (explaining that “long settled and established practice is a consideration of great weight” in ascertaining whether the coordinate branches have respected the separation of powers), and the circumstances must illustrate Congress’s “extensive awareness” of the interpretation or action to which it has allegedly acquiesced. *Schism v. United States*, 316 F.3d 1259, 1289, 1295–96 (Fed. Cir. 2002); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983).

An “unusually strong” showing of Congressional acquiescence can be made when Congress considers and rejects alternative proposals and when its enactments reference or take for granted the agency practice. *See Schism*, 316 F.3d at 1259 (quoting *Bob Jones*, 461 U.S. at 599); *see also Bob Jones*, 461 U.S. at 600–01 (referencing Congressional hearings “on th[e] precise issue” making Congress’s “non-action . . . significant”); *Dames & Moore v. Regan*, 453 U.S. 654, 678–60 (1981) (“By creating a procedure to implement” claims settlement by executive agreement, Congress “implicitly” “placed its stamp of approval on such agreements.”); *Five Lakes Outing Club v. United States*, 468 F.2d 443, 446 (8th Cir. 1972) (procedure long

employed by Commissioner had gained court approval, and was “acquiesced in by Congress” before “expressly incorporated into the Code”); *Farmers Coop. Co. v. Comm’r of Internal Revenue*, 288 F.2d 315, 323–24 (8th Cir. 1961) (“over forty years” of “rulings and administrative practices” followed by congressional action “at least impliedly approved” that interpretation).

Congress has shown longstanding, extensive awareness of CEQ’s NEPA regulations and authority and has at least implicitly agreed that they constitute appropriate interpretations of the statute. Indeed, in a few places, Congress done even more, directly incorporating CEQ’s regulations by reference in many places. *See, e.g.*, 33 U.S.C. § 2348a(a) (defining categorical exclusion, environmental assessment, and finding of no significant impact with reference to CEQ’s implementing regulations); 23 U.S.C. § 139(d)(5) (defining a cooperating agency with reference to CEQ’s implementing regulations); 16 U.S.C. § 6511(7)(C) (defining a decision document with reference to applicable CEQ regulations). Congress has also legislated against the backdrop of CEQ’s NEPA regulations many times, such as with the recent Fiscal Responsibility Act, through which Congress enacted the first major statutory changes to NEPA in fifty years. *See* Pub. L. No. 118-5, 137 Stat. 10 (June 3, 2023). That legislation clarified certain procedural aspects of NEPA’s implementation, incorporating some of CEQ’s prior regulations into statutory text, without any indication that Congress looked askance at CEQ’s interpretations of NEPA’s requirements to seek out and consider public input on NEPA documents. Other examples include requiring agencies to comply with the regulations for specific projects or exempting agencies from the regulatory requirements altogether. *See, e.g.*, Building Chips in America Act of 2023, Pub. L. 118-105, 138 Stat. 1587 (Oct. 2, 2024).

All of this illustrates that Congress has accepted that the longstanding CEQ regulations reflect the appropriate interpretation of NEPA as a general matter. There is even more evidence that Congress has accepted CEQ’s public participation requirements. Congress has directly legislated against the backdrop of CEQ’s public participation requirements. Through the Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015), Congress, in part, streamlined the review process for certain federal infrastructure projects. For example, Congress expressly required agencies to establish public comment periods of 45 to 60 days for all draft EISs, and public comment periods not exceeding 45 days for all other environmental review and comment periods. 42 U.S.C. § 4370m-4(d)(1)–(2). But even though streamlining was the goal, these provisions still took for granted that public comment periods were *required* under NEPA: a statutory minimum indicates that public comment periods are not optional. The 45-day minimum it legislated came from CEQ’s rules. 85 Fed. Reg. at 43372 (“[A]gencies shall allow at least 45 days for comments on draft statements.”). By legislating in this way, Congress confirmed the necessity of public participation to NEPA.

E. NEPA requires agencies to respond to public comment.

Finally, it is not enough to allow the public to comment. The law is clear that agencies must also respond. Under the APA, agencies are required to “adequately explain [their] result and

respond to relevant and significant public comments.” *Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993) (citation modified); *see also W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 954 (D.C. Cir. 2021) (“[F]ailure to respond to significant comments . . . violates a substantive guarantee of the APA.”); *Ohio v. EPA*, 603 U.S. 279, 293–94 (2024) (finding EPA was likely to have acted arbitrarily and capriciously because it failed to respond to concerns raised in the notice and comment period). Failure to respond to public comments “generally demonstrates that the agency’s decision was not based on a consideration of relevant factors.” *Liliputian Sys., Inc. v. Pipeline and Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (citation modified). Indeed, these principles apply with equal force when an agency engages in the NEPA process. *See Block*, 690 F.2d at 773. Agencies are “obliged to provide a meaningful reference to all responsible opposing viewpoints concerning the agency’s proposed decision.” *Id.* (citation modified). Agencies must produce “good faith, reasoned analysis in response” to public comments. *Id.*

F. The Agency’s new approach is unlawful because it is contrary to statute and unexplained.

All of this long history and well-established understanding of NEPA has been eviscerated by the Agency. No longer is there any requirement to seek out and consider public comment. Indeed, it appears that issuance of a draft EIS and consideration of public comment is now optional. By cutting the public out of NEPA review, agencies are undermining the very purpose of NEPA, in direct contradiction of Congressional, Judicial, Administrative, and public understanding of the role the American people play in safeguarding the environment at the federal level.

The Agency’s choice is not only contrary to statute, but it also has failed to explain why it has made this dramatic shift. *See, e.g.*, 90 Fed. Reg. at 29637. A recent Ninth Circuit decision illustrates precisely why the Agency’s new procedures are arbitrary and capricious and inconsistent with NEPA. In *Montana Wildlife Federation v. Haaland*, 127 F.4th 1 (9th Cir. 2025), the court considered a challenge to a BLM policy that reduced the comment period for oil and gas lease sales from 30 days to only ten days, and eliminated any public participation for determinations of NEPA adequacy. The court ruled that the change was arbitrary and capricious because:

the justification offered for a change in policy . . . cannot be inconsistent with the purpose of the requirement being implemented. Here, the agency’s decision to prioritize administrative efficiency and expedition of oil and gas production over deliberative decision-making that takes into account informed public comments is in direct tension with NEPA’s goal of informing the public and facilitating public participation. . . . By curtailing the opportunities available for public input in land management decisions for the sole purpose of more expeditious offerings of oil and gas leaseholds, the agency ‘entirely failed to consider an important aspect of the problem,’ one embedded in NEPA.

Id. at 39 (citation modified). The court also held that the change was inconsistent with NEPA, holding that “whether the agency’s new policy is permissible under the statute” as interpreted by longstanding regulations and practice “is also doubtful when considered in the context of [BLM’s] earlier policy.” *Id.* at 39–40.

The same is true here: The Agency’s gutting of public participation in the NEPA process fails to consider the law’s goal of facilitating public information and participation. And the Agency’s long-standing practice of providing public participation opportunities under NEPA underscore how inconsistent with the statute the new procedures are.

Of course, the Agency may point to provisions in the statute and its NEPA process that call for comment at the notice of intent stage. But this is wildly insufficient. At that stage, there is usually little or no detailed information about the proposed action, its potential impacts, and the range of potential alternative for the public to comment on. While we agree that comment on a notice of intent is valuable, it is no substitute for participation in scoping proceedings, let alone comment at the draft EIS stage, when the project has been fully fleshed out and the Agency has taken a first look at its potential impacts and alternatives. We urge the Agency to revisit its rules and guidance and in the meantime continue to maximize public engagement and comment in order to comply with NEPA.

V. The IFR Unlawfully Conflicts With The Forest Service’s Pre-Decisional Objection Processes.

The IFR creates an unlawful catch-22 for members of the public potentially affected by proposed Forest Service actions for which the agency prepares an EA. On one hand, the IFR allows the Forest Service to complete the NEPA process without providing the public any opportunity to comment on such proposed actions. But on the other hand, the Forest Service’s mandatory pre-decisional objection processes allow objections to be filed only by those who have previously “submitted timely, specific written comments . . . during any designated opportunity for public comment.” 36 C.F.R. § 218.5(a) (2017); *see also id.* § 219.53 (2017). And anyone who fails to file an objection via the pre-decisional process is barred from seeking judicial review. 7 U.S.C. § 6912(e). The IFR does not explain how the Forest Service will reconcile these provisions. Will the absence of a “designated opportunity for public comment” relieve the public of the Forest Service’s “specific written comments” prerequisite for administrative objections? Or will agency officials instead seek to rely on the interaction between the Interim Final Rule and the Forest Service’s objection process to deprive members of the public of their right to seek judicial review of agency action as guaranteed by the APA, 5 U.S.C. § 702. The latter would be unlawful. To avoid such an unlawful result, the Agency must afford the public an opportunity to comment, prior to the objection process, on all proposed actions.

Further, the IFR creates a similar catch-22 even for actions where the Forest Service affords some opportunity for public comment. For actions requiring an EIS, the IFR authorizes

the Forest Service to limit the public’s opportunity to comment to the “notice of intent” stage, before the agency has made available to the public detailed information about the project, environmental analyses, and potential alternatives under consideration. Yet, the Forest Service’s objection processes require that any “[i]ssues raised in objections must be based on previously submitted specific written comments regarding the proposed project or activity.” 36 C.F.R. § 218.8(c); *see also id.* §§ 219.54(c)(7), 219.55(a)–(b) (2017). This “specific written comments” requirement impermissibly burdens the public with an obligation to comment with a level of specificity that likely will be impossible to achieve at the notice of intent stage. Moreover, while the objection process contains an exception to this restriction for issues “based on new information that arose after the opportunities for comment,” *id.* § 218.8(c), the IFR does not explain how the Forest Service will interpret this provision when the only opportunity for comment is at the notice of intent stage. *See also id.* § 218.8(d)(6) (requiring objectors to show that each objection was raised in a prior comment, “unless the objection concerns an issue that arose after the designated opportunity(ies) for comment”); *id.* § 219.54(c)(7) (same). Will objections to conclusions drawn in a final EIS or EA be barred if those objections rely on pre-existing information or “issues,” even if the objector could not have known that the agency would reach a conclusion to which that pre-existing information was relevant, that misapplies that information, or that implicates a particular issue? Will commenters at the “notice of intent” stage be required to load their comments with every piece of potentially relevant information and every conceivable “issue” to avoid being precluded from relying on such information or raising such “issues” in a subsequent objection? The IFR does not answer these questions.

Moreover, limiting public comment to the notice of intent stage runs contrary to the purpose of the exhaustion provisions of the Forest Service’s objection process, which is to “encourage early and active involvement by the public in project planning and analysis.” *See Final Rule, Project-Level Predecisional Administrative Review Process*, 78 Fed. Reg. 18481, 18487 (Mar. 27, 2013). The best way to achieve meaningful “early and active involvement by the public” would be to require agencies to publish draft EAs and EISs on their proposed projects and afford opportunities for public comment on those documents—not to narrow the public’s involvement opportunities to the minimum extent possible, as the IFR has done here.

VI. Executive Order 14154 Does Not Justify The Approach Taken By The IFR.

The Agency has made clear that its revision to its NEPA regulations and guidance has been animated by “President Trump’s direction in E.O. 14154 to, ‘[c]onsistent with applicable law, prioritize efficiency and certainty over any other objectives, including those of activist groups, that do not align with the policy goals set forth in section 2 of [that] order or that could otherwise add delays and ambiguity to the permitting process.’” 90 Fed. Reg. at 29635 (quoting Executive Order 14154, §5(c) (Jan. 20, 2025)).

Section 2, in turn, emphasizes policy goals like “encourag[ing] energy exploration and production,” Executive Order 14154, § 2(a), “establish[ing] our position as the leading producer

and processor of non-fuel minerals,” § 2(b), “protect[ing] the United States’s economic and national security and military preparedness,” § 2(c), and “promot[ing] true consumer choice,” § 2(e); *see also* § 2(f). There are two problems with the Agency’s reliance on this executive order to justify its new NEPA processes: (1) The executive order is inconsistent with NEPA’s requirements; and (2) the procedures implemented by the Agency fail to satisfy the executive order on its own terms.

A. Executive Order 14154 is inconsistent with NEPA.

A NEPA process that seeks to achieve “efficiency and certainty over any other objective” and aims to implement only the policy goals enumerated in section 2 of the executive order are fundamentally inconsistent with NEPA. While efficiency and more assurances as to outcomes are worthy objectives, the statute does not allow them to be prioritized over the protection of human and environmental health, as the executive order demands.

NEPA, not the executive order, declares the relevant policy of the federal government. It serves to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment,” 42 U.S.C. § 4321, and it establishes that the “continuing policy of the Federal Government” is to “use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans,” 42 U.S.C. § 4331(a). The whole of the “Federal Government” thus must “use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources” to various “end[s],” including, among others, “assur[ing] for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” and “preserv[ing] important historic, cultural, and natural aspects of our national heritage.” 42 U.S.C. § 4331(b). Accordingly, if the Agency took the executive order to allow it to disregard these policies and goals, its NEPA revisions cannot stand.

Indeed, to the extent NEPA gestures at any of the goals embraced by section 2 of the executive order, it reflects a need to balance those ends with other goals. *See* 42 U.S.C. § 4331(b)(3) (“attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences”); § 4332(b)(4) (balancing “maintain[ing]” “variety of individual choice” with the need to “preserve important historic, cultural, and natural aspects of our national heritage”); § 4332(b)(5) (“achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities”). There is no statutory support for considering “efficiency and certainty,” or the policy goals enumerated in section 2, to the exclusion of all other aims—especially the ones called out in the statute itself, including NEPA’s express purpose of environmental protection, *see* 42 U.S.C. § 4321.

The statute also confirms the marching orders the “agencies of the Federal Government” must follow. *See* 42 U.S.C. § 4332(B). Agencies are not directed to prioritize “efficiency and

certainty” or to pursue the specific aims discussed in section 2 of the executive order above all else. Rather, “[a]ll agencies of the Federal Government” have long been required to be in “full compliance with the purposes and provisions of this chapter,” including those just discussed. 42 U.S.C. § 4333. They must “identify and develop methods and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.” 42 U.S.C. § 4332(B).

The Agency’s adherence to this executive order, rather than NEPA’s statutory text, also places it on the wrong side of Supreme Court precedent. While agencies are “not constrained by NEPA from deciding that other values outweigh the environmental costs,” they must ensure that they have followed “the necessary process,” which in turn includes ensuring that “adverse environmental effects of the proposed action are adequately identified and evaluated.” *Robertson*, 490 U.S. at 350. It is through NEPA’s public-facing procedures—not a process that seeks efficiency and certainty over all else—that the “sweeping policy goals” found in § 4331 are implemented. *Id.* To that end, the “twin aims” of NEPA are an “obligation to consider every significant aspect of the environmental impact of a proposed action” and “ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (citation modified). The goal of “[a]dministrative efficiency and consistency of decision” should give way if NEPA’s requirements are not otherwise met. *See id.* at 101.

In short, NEPA identifies the policy goals it intends agencies to pursue in promulgating regulations implementing it, and they are not those goals that agencies have elected to pursue by relying on Executive Order 14154. The Agency should reconsider its NEPA implementation decisions for that reason alone.

B. The NEPA process the Agency adopted does not achieve the efficiency and certainty goals of the executive order, in any event.

In any event, as evidenced further in these comments, the Agency has failed to implement the President’s command.

To start, among the policies enumerated in the executive order is a “guarantee that all executive departments and agencies (agencies) provide opportunity for public comment and rigorous, peer-reviewed scientific analysis.” Executive Order 14154, § 2(h). But these NEPA rules provide no guarantee of such public comment. The Agency has declined to require public comment when it establishes or revises any categorical exclusion. 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(b)). When it does engage in environmental review, it has declined to guarantee public comment where the Agency determines that a categorical exclusion applies, or where the Agency uses an environmental assessment (“EA”). *See generally* 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3) (categorical exclusions); 90 Fed. Reg. at 29659–61 (7 C.F.R. § 1b.5) (environmental assessments). Indeed, the Agency has declined to guarantee public involvement

in any scoping proceedings preceding environmental review. 90 Fed. Reg. at 29662 (7 C.F.R. § 1b.7(c)). And the Agency has curtailed the level of public involvement in the environmental impact statement process, requiring comment only at the notice of intent stage while omitting the guarantee of public participation on any draft environmental impact statement. 90 Fed. Reg. at 29662–63 (7 C.F.R. § 1b.7(d)); *see also* 90 Fed. Reg. at 29662 (7 C.F.R. § 1b.7(b)). Accordingly, the Agency’s approach to NEPA review fails to the Executive Order by its own terms.

Moreover, these choices, and others, have undermined “efficiency and certainty” and will produce “delay and ambiguity” in the permitting process. Executive Order 14154, § 5(c). There is ambiguity and uncertainty about when, exactly these new rules will start to apply. Notwithstanding the Agency’s insistence that it proceed by interim final rule, the Agency also has indicated that the “revised agency procedures will have no effect on ongoing NEPA reviews” where the old rules still will apply. 90 Fed. Reg. at 29634. The Agency stacks confusion on confusion, including in one part of the preamble a suggestion that the “revised agency procedures will have no effect on ongoing NEPA reviews” because “it will continue to apply” the old rules, 90 Fed. Reg. at 29634, while suggesting elsewhere that “USDA subcomponents have discretion to continue using the versions of USDA and agency-specific NEPA regulations” that existed before the IFR, *id.* at 29644. Still more, the Agency provides that it would be free to apply the “2020 version of the CEQ NEPA regulations,” *id.*, which are not the most recent version of the CEQ NEPA regulations. So, it’s a mystery about what rule is going to apply to any given NEPA review.

There also is nothing efficient about different components of the federal government, the public, and project proponents having to navigate a complex web of ever-changing rules that vary from agency to agency. There is a reason that CEQ is meant to “formulate and recommend national policies to promote the improvement of the quality of the environment.” 42 U.S.C. § 4342. CEQ could draw on the experience of all of government to develop best practices, and it could at least recommend a consistent set of practices that would produce those results. One of the primary drivers of the government establishing consistent, uniform regulations across the federal government in the first place was to address the ways “inconsistent government-wide practices” had “impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process.” 43 Fed. Reg. at 55978. It was that difficulty that “caused unnecessary duplication, delay and paperwork.” *Id.* Where each agency, including this one, has elected to go it alone, compliance with NEPA will be less efficient. With CEQ’s regulations rescinded and no assurance that agencies are following a common set of principles, all involved will have to account for differences across agency NEPA review processes. In other words, this Agency—along with others—have recreated problems that the government solved nearly 50 years ago.

The substance of the Agency’s NEPA rules further demonstrates it has embraced an ambiguous approach. Underscoring that the governing rules are subject to change, it has made clear that even the universe of available categorical exclusions remains fluid: Even if no

currently available categorical exclusion would cover a proposed action, the Agency will consider whether “the proposed action warrants the establishment of a new categorical exclusion, or the revision of an existing categorical exclusion.” 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)(2)). And in other areas, the Agency has elected not to provide clear, substantive criteria that will inform the public, project proponents, or other components of the federal government. For example, it may, but is not required to, consider certain environmental effects. 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)). In many key areas, the Agency has provided little guidance. It instead emphasizes that resolving issues that arise in those areas is a matter of the Agency’s expert judgment or discretion. That is the guiding principle on significance, 90 Fed. Reg. at 29662 (7 C.F.R. § 1b.7(a)), what issues are addressed, 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)), and whether an action is a “major Federal action” in the first place. 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)(1)). The Agency has not explained the basis for all this newfound discretion, and it’s an approach that amplifies the risk of inconsistent environmental review that NEPA was meant to address.

This approach amplifies the risk of inconsistent environmental review that NEPA was meant to address.

In the past, public comment—and the Agency’s response to those comments—could be relied on to shape an Agency’s analysis. But there is uncertainty about the level of public involvement the Agency will choose. It may, but is not required to, “request” comments from the “public” during “the process of preparing an environmental impact statement.” 90 Fed. Reg. at 29663 (7 C.F.R. § 1b.7(d)). Even where it takes comment, the Agency has explained that “[t]here is no requirement in NEPA to address comments in writing,” and thus has retained “discretion for addressing substantive comments in writing.” 90 Fed. Reg. at 29638. While it says elsewhere that it “shall consider and should address in writing that raise substantive issues and/or recommendations,” 90 Fed. Reg. at 29663, it is unclear whether the Agency is committed to do so. So, there is uncertainty about whether the Agency will accept comment and, if it does, whether it will respond.

In short, no one will know what NEPA review will look like for any given project, and given the possibility that the Agency will not fully respond to comments, there will be uncertainty about what the Agency actually considered. And there will be no way to rely on what an Agency has done in the past to inform what material might be useful to the Agency going forward. Where discretion and flexibility is the guiding principle, the Agency may be left to start from scratch whenever they encounter a new proposal.

Finally, there is yet another efficiency cost of the Agency electing to proceed without public involvement. As discussed above, public involvement *helps* the Agency identify the relevant universe of environmental effects and alternatives, potential mitigation options, and other information the Agency would be expected to evaluate. Public involvement surfaces

“reliable data source[s]” necessary for evaluating environmental impacts, 42 U.S.C. § 4336(b)(3), so that the Agency does not have to locate that material all by itself. And experience shows that engaging the public and listening to their concerns reduces controversy and boosts the likelihood that projects will be timely permitted and built. Public involvement saves agencies’ time while producing better environmental reviews.

In other words, whatever time savings might be gained by cutting corners in the environmental review process will be overcome by the time lost to inefficiencies, uncertainties, and controversies resulting from the new rules. To be sure, the Agency has in places retained its discretion to do more than the bare minimum. But this just reinforces the point that the goals of certainty and efficiency are better served by having a consistent and predictable set of rules that project proponents and the public, and the Agency itself, know up front will apply.

Moreover, the data reflects that the need for time savings is overstated. Recent data showed that, in the wake of the 2023 amendments and the regulatory reforms of the previous administration, the trend towards longer and longer EIS and EA timelines had been reversed. For example, in a 2025 Report, CEQ found that federal agencies “benefitted from recent statutory, regulatory, and executive reforms to the NEPA process and significant cross-government investments to expedite permitting processes.” CEQ, *Environmental Impact Statement Timelines (2010-2024)*, at 1 (Jan. 13, 2025). Progress is also documented in a 2024 fact sheet that explained how thoughtful reforms and investments accelerated the timeline for project permitting. White House, *Fact Sheet: Biden-Harris Administration Takes Action to Deliver More Projects More Quickly, Accelerates Federal Permitting* (Aug. 29, 2024).³ Rather than rush to gut NEPA altogether, the administration should have given these reforms time to work. At a minimum, the Agency should explain its reasoning for its action in light of this documented success.

In the end, these skipped steps in the environmental review will contribute to yet another kind of delay and uncertainty. There will be serious questions about whether the Agency’s NEPA decisions will withstand judicial scrutiny. If an agency has failed to “address[] environmental consequences and feasible alternatives as to the relevant project,” it casts doubt on whether the Agency’s decision is “reasonably explained.” *Seven County*, 145 S. Ct. at 1511. Granted, the Agency enjoys some discretion about what to do with “new potential information” it receives, in terms of “determin[ing] whether and to what extent” to address that information. *Id.* at 1512 (quoting *Pub. Citizen*, 541 U.S. at 767). But there is no refuge for an agency that creates processes that allow it to “entirely fail[] to consider an important aspect of the problem” or “articulate a satisfactory explanation for its action.” *State Farm*, 463 U.S. at 43. Indeed, now, just as before, NEPA cannot be implemented to allow an agency to “act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh*, 490 U.S. at 371. Because the

³ <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/08/29/fact-sheet-biden-harris-administration-takes-action-to-deliver-more-projects-more-quickly-accelerates-federal-permitting/> (last visited July 30, 2025).

Agency gives NEPA's processes short shrift, project proponents will have less certainty, not more, that their projects can go forward, and there will be an increased likelihood of delay resulting from an agency needing to redo an inadequate environmental review. That benefits no one.

For all these reasons, the Agency should reevaluate its decision to eliminate many of the features of the existing regulations that ensured efficiency and certainty in their NEPA reviews.

VII. The Agency Adopted Impermissible Threshold Limitations On When NEPA Applies.

NEPA specifies four “threshold” circumstances where an “agency is not required to prepare an environmental document with respect to a proposed agency action.” 42 U.S.C. § 4336(a). The Agency has attempted to inject two additional restrictions as threshold issues. The Agency should revisit its approach to these requirements.

A. The Agency should revisit its approach to the major Federal action requirement.

The Agency has explained that NEPA review is not required where “[t]he proposal is not a ‘major Federal action,’” where the “terms ‘major’ and ‘Federal action’ each have independent force.” 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)(1)).

The Agency does not explain why adding such a statement is necessary or appropriate. *See* 90 Fed. Reg. at 29635. The earliest cases interpreting NEPA—including those that predated CEQ’s regulations—declined to give the “magnitude of the federal action”—that is, the “major” in “major Federal action” much additional bite. *Minn. Pub. Int. Rsch. Grp. v. Butz*, 498 F.2d 1314, 1321 (8th Cir. 1974). When a major Federal action “significantly affect[s] the quality of the human environment,” an EIS is required. 42 U.S.C. § 4332(C).

Congress added its own definition of the major Federal action requirement with the recent statutory amendments. 42 U.S.C. § 4336e(10). But that provision did not adopt the Agency’s approach. Instead, it provided only that the term “means an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.” 42 U.S.C. § 4336e(10). When CEQ implemented the statutory amendments in the 2024 regulations, it defined the requirement the same way. 40 C.F.R. § 1508.1(w); 89 Fed. Reg. at 35543–48. The Agency has not explained whether this statement is meant to be a change from what came before, and if it is, why such a change is necessary or even advisable.

In fact, the Agency offers little in the way of guidance about how to apply the major Federal action requirement. Whereas the 2024 regulations provided examples of what constitutes “substantial Federal control and responsibility” and what does not, 40 C.F.R. § 1508.1(w), the Agency here has stated only that “[s]uch a determination is dependent upon the facts and circumstances of each situation, and is thus reserved to the judgment” of the Agency. 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)(1)). But the Agency does not have unlimited discretion to

determine what constitutes a major Federal action; where an action constitutes major Federal action within the meaning of the statute, NEPA requires the Agency to go through environmental review, and the statute does not provide offramps except where specified. *See* 42 U.S.C. § 4332(C). And that is true even if the Agency initially exercises its judgment to conclude otherwise. *See, e.g., City of Dania Beach v. FAA*, 485 F.3d 1181, 1189 (D.C. Cir. 2007); *Wild Fish Conservancy v. Thom*, 2021 WL 8445587, at *18 (W.D. Wash. Sept. 27, 2021).

In the meantime, the omission of guidance about what constitutes a major Federal action is sure to sow confusion and uncertainty, which in turn will result in litigation about whether actions are, in fact, major Federal actions. By including what could appear to be a narrower threshold to the major Federal Action requirement while omitting the examples CEQ once included, 40 C.F.R. § 1508.1(w)(1), has the Agency indicated that it no longer considers those to be major Federal actions? There is no way to know since there is no explanation offered. There is no need for this confusion, and the Agency should clarify that it continues to consider these actions as qualifying as major Federal actions under the statute.

B. The Agency has created a functional equivalence exception that is not supported by the statute.

The Agency also has sought to exempt from NEPA review situations where “[t]he proposal is an action for which another statute’s requirements serve the function of the Federal agency’s compliance with the Act.” 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(e)(6)). The Agency’s creation of a blanket “functional equivalence” exception to NEPA review is unlawful and unfounded.

When Congress amended NEPA in the Fiscal Responsibility Act, Pub. L. No. 118-5, 137 Stat. 10, it foreclosed reliance on the “functional equivalence” doctrine to exempt Agency proposals from NEPA. Congress amended NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C), to clarify that agencies can avoid the broad mandate to prepare NEPA analyses of “every” proposal for “major Federal action[.]” “where compliance would be inconsistent with other statutory requirements.” Pub. L. No. 118-5, § 321(a)(3)(A), 137 Stat. at 38. The revised NEPA section 106 explains that narrow exemption, limiting the circumstances where another statute relieves agencies of their duty to “prepare an environmental document” under NEPA to only where (1) “the proposed agency action is excluded pursuant to ... another provision of law” or (2) “the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law.” 42 U.S.C. § 4336(a)(2), (3).

The Fiscal Responsibility Act adopted “elements of the BUILDER Act.” 169 Cong. Rec. S1,877 (daily ed. June 1, 2023) (statement of Senator Capito); *see* Pub. L. No. 118-5, § 321, 137 Stat. at 38. Congress declined, however, to endorse the functional equivalence exemption, which the BUILDER Act, as originally proposed, would have codified. *See* H.R. 1577, 118th Cong. § 2(b) (2023) (proposed section 106(a)(6)).

Congress’s codification of express, narrow exemptions from NEPA’s mandate that federal agencies prepare NEPA documents for proposed actions precludes agencies from creating an implied “functional equivalence” exemption, which Congress considered and declined to adopt. *See United States v. Johnson*, 529 U.S. 53, 58 (2000) (“When Congress provides exceptions in a statute, . . . [t]he proper inference . . . is that Congress . . . limited the statute to the ones set forth”). The inclusion of *any* functional equivalence requirement cannot be squared with the statute. It thus should be excluded from the rules for that reason alone.

Moreover, CEQ in the past has expressly declined to create this categorical functional equivalence exception to NEPA review, as it would go “beyond the scope of the NEPA statute and case law” and “could be construed to expand functional equivalence beyond the narrow contexts in which it has been recognized.” 89 Fed. Reg. at 35459–60. Indeed, while in the past, some courts applied a judge-created “exemption from [NEPA’s] literal requirements” to a narrow subset of “environmentally protective regulatory actions” taken by federal “environmental agencies” like U.S. Environmental Protection Agency, that exemption has never been extended to proposals to conduct destructive activities made by non-environmental agencies. *Env’t Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973); *see Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (“NEPA must be accorded full vitality as to non-environmental agencies.”). The Agency has not acknowledged CEQ’s prior explanation, let alone explained its basis for deviating from it. Accordingly, it is unlawful for the agency to include such a requirement.

VIII. The Agency Has Impermissibly Expanded the Use Of Categorical Exclusions.

A. The Agency’s process for adopting categorical exclusions inappropriately excludes public comment.

In the 2024 CEQ regulations, agencies were required to “substantiate” any “proposed new or revised categorical exclusion with sufficient information to conclude that the category of actions does not have a significant effect, individually or in the aggregate, on the human environment.” 40 C.F.R. § 1507.3(c)(8). Importantly, the agency is meant to “provide this substantiation in a written record that is made publicly available as part of the notice and comment process.” *Id.* The Agency has abandoned that commitment here. 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(b)). The Agency has not explained the reason for making public comment optional, nor has it explained why a change from the prior approach is justified. And such a shift makes little sense—in determining whether a “category of actions . . . *normally* does not significantly affect the quality of the human environment,” 42 U.S.C. § 4336e(1) (emphasis added), the Agency should solicit broad feedback about the effects a particular type of action can have. The Agency should guarantee public comment or at least explain its reasoning for turning around long-settled standards.

B. The Agency has placed its thumb on the scale of applying categorical exclusions.

The Agency also appears to have modified its standards to make it easier to apply categorical exclusions, without justification or explanation. For example, the Agency has given itself multiple bites at applying categorical exclusions. Even where an existing categorical exclusion might not apply to the action, the Agency then must “consider whether to adopt” a categorical exclusion that “another agency has already established” or even to “establish[]” a “new” exclusion (or revise an old one) to cover the action. 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)(2)). This stands at sharp odds with past practice: CEQ had provided only limited authority to adopt categorical exclusions in the context of a particular action, permitting agencies to do so in the context of more “programmatic” environmental review, where agencies would necessarily be taking a broader view. 40 C.F.R. § 1501.4(c); *see* 89 Fed. Reg. at 35472.

Extending this authority to reach a single action undermines the whole point of a categorical exclusion—that the Agency has assured itself that across a category of actions, that the category “normally does not significantly affect the quality of the human environment.” 42 U.S.C. § 4336e(1). When the Agency can reach out to find a categorical exclusion to resolve its environmental review in the context of a specific case, that puts a thumb on the scale of finding that the categorical exclusion applies, and it creates a risk that the Agency will not appropriately consider the broad set of contexts in which that category of actions can arise. Accordingly, the Agency should limit the circumstances where it can adopt new categorical exclusions, or at least ensure that the normal safeguards for proper adoption of such exclusions will apply with equal force when categorical exclusions are adopted in case-specific contexts.

C. Agencies impermissibly permit combining application of multiple categorical exclusions to exempt actions not covered by a single exclusion.

The Agency indicated that it may be authorizing the unlawful combining or “stacking” of categorical exclusions to preclude environmental review of actions that would not be covered by a single exclusion. The Agency explained that, “[t]o apply a categorical exclusion, a responsible official must determine that one or more categorical exclusions apply to a proposed action and that no extraordinary circumstance exists.” 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(g)); *see also* 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(e)). The IFR’s reference to “one or more categorical exclusions” could be read as an invitation to combine multiple categorical exclusions to short circuit environmental review of a project, even though no single exclusion would cover the entire project.

This workaround, also known as “stacking” categorical exclusions, is unlawful because it runs contrary to NEPA’s structure and purpose by allowing agency actions with potentially significant impacts to evade NEPA review. *See* 42 U.S.C. §§ 4336(a)(2), (b)(2); *Friends of the Inyo v. U.S. Forest Serv.*, 103 F.4th 543, 556–57 (9th Cir. 2024).

Starting with the statutory text, NEPA requires an agency to prepare an EIS or EA unless “the proposed agency action is excluded pursuant to *one of* the agency’s categorical exclusions, another agency’s categorical exclusions consistent with section 4336c of this title, or another provision of law.” 42 U.S.C. § 4336(b)(2) (emphasis added); *see also* 42 U.S.C. § 4336(a)(2) (same). By specifying that, to be exempt from the EA or EIS requirement, the agency action must be covered by “one of” the categorical exclusions, Congress made clear that agencies may not combine multiple categorical exclusions to exclude a single proposed action. *Cf. Friends of the Inyo*, 103 F.4th at 554–55 (plain text of Forest Service regulations requiring proposed action to fall within “one of” the categorical exclusions or within “a” categorical exclusion does not permit “the agency to combine CEs when no CE alone could cover a proposed action”).

NEPA’s structure and purpose leads to the same conclusion. Under NEPA, categorical exclusions serve to streamline the environmental process while still ensuring that actions with potentially significant environmental effects receive adequate review, by allowing agencies to forego preparation of an EA if an agency has already determined that the type of action at issue does not normally have significant environmental effects. *See id.* at 556; 42 U.S.C. § 4336e(1). But combining multiple categorical exclusions to avoid preparing an EA for an action that would not be covered by a single categorical exclusion undermines this function. As the court in *Friends of the Inyo* explained: “Any project can be broken down into seemingly innocuous independent acts. The fact that the Forest Service has found CEs normally do not have a significant effect on the human environment, does not mean they have no effect, and combining carefully defined exclusions renders these calculated risks unknown.” *Friends of the Inyo*, 103 F.4th at 557 (internal quotation marks and citation omitted).

Consider this example drawn from the categorical exclusions discussed in the IFR. While the Forest Service may have determined that certain mineral or energy investigations lasting less than a year normally lack a significant environment effect, 90 Fed. Reg. at 29657 (7 C.F.R. § 1b.4(d)(32)), it has not made such a determination for a project that includes such an investigation *as well as* activities covered by other categorical exclusions, such as conducting initial oil and gas development activities involving up to four drill sites and three miles of pipelines, 90 Fed. Reg. at 29658 (7 C.F.R. § 1b.4(d)(39)), constructing new telephone and utility lines within a right of way, 90 Fed. Reg. at 29657 (7 C.F.R. § 1b.4(d)(27)), widening up to eight miles of road shoulders, 90 Fed. Reg. 29659 (7 C.F.R. § 1b.4(d)(45)), modifying a dam, 90 Fed. Reg. at 29658 (7 C.F.R. § 1b.4(d)(40)), constructing administrative buildings at administrative sites 90 Fed. Reg. at 29659 (7 C.F.R. § 1b.4(d)(43)), and conducting up to 2,800 acres of timber harvesting, prescribed burning, and vegetation thinning, 90 Fed. Reg. at 29659 (7 C.F.R. § 1b.4(d)(47)).

Combining such categorical exclusions to avoid preparing an EA or even an EIS circumvents NEPA’s information-forcing function and undermines the statute’s core environmental protection purpose. Accordingly, the Agency should make clear in the final rule

that combining categorical exclusions is impermissible where a single exclusion does not cover the entire project.

D. The Agency circumvented NEPA by authorizing the Agency's subcomponents to use dozens of categorical exclusions established by another agency.

The IFR violates NEPA by making dozens of previously subcomponent-specific categorical exclusions applicable to all of the Agency's subcomponents without complying with NEPA's procedures for doing so, including inter-agency consultation and a reasoned determination that the use of the exclusions in each agency's particular context is appropriate. *See* 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(e)); 90 Fed. Reg. at 29650–59 (7 C.F.R. § 1b.4). For example, any of the Agency's subcomponents may now use the omnibus "Construction or ground disturbance" categorical exclusion, originally authorized by the Farm Service Agency (FSA), which is applicable without limitation to construction of roads, bridges, dams, dikes, levees, diversions, irrigation systems, farm storage facilities, water pipelines, and tanks, as well as to excavation, grading, leveling, shaping, and filling in previously undisturbed areas. 90 Fed. Reg. at 29654 (7 C.F.R. § 1b.4(d)(1)). But while such activities might have been determined by the FSA normally not to have a significant environmental effect on the types of farming projects the FSA is involved with, those activities take on an entirely different tenor when conducted, for instance, in National Forests. Indeed, categorical exclusions originally developed by the Forest Service expressly limit many of these activities, such as road construction and dams, to prevent significant impacts on sensitive National Forest environments. *See* 90 Fed. Reg. at 29659 (7 C.F.R. § 1b.4(d)(46)) (road construction categorical exclusion limited to two miles); *id.* at 29658 (7 C.F.R. § 1b.4(d)(40)) (categorical exclusion limited to removing, replacing, or modifying dams to restore wetlands or other water bodies). No similar limitations appear in the FSA's "Construction or ground disturbance" categorical exclusion. And there is no reason to believe that the Forest Service has determined, or would determine, that any of the other activities listed in this FSA-originated omnibus exclusion normally have no significant environmental impact in the National Forest context. Yet, under the IFR, the Forest Service could choose to apply the FSA-originated omnibus categorical exclusion and ignore the limitations imposed by the similar categorical exclusions it had developed for itself. More broadly, under the IFR, any of the Agency's subcomponents can now use any of the categorical exclusions listed in § 1b.4 of the IFR, regardless of whether they cover activities that normally have significant environmental effects in those agencies' particular contexts.

This violates NEPA. While NEPA authorizes agencies to adopt each other's categorical exclusions, it imposes guardrails to prevent the sort of unconsidered and inappropriate mass cross-adoption of exclusions exemplified in the IFR. Specifically, NEPA authorizes an agency to "adopt a categorical exclusion listed in another agency's NEPA procedures" so long as the adopting agency "consult[s] with the agency that established the categorical exclusion to ensure that the proposed adoption of the categorical exclusion to a category of actions is appropriate." 42 U.S.C. § 4336c. But there is no indication that this procedure was followed by the Agency

here when it converted dozens of subcomponent-specific categorical exclusions into ones that can be applied by any of the Agency's subcomponents. Rather, the only explanation the Agency provides in the IFR's preamble is that "[g]iven the issuance of one set of departmental NEPA regulations to provide consistency for all USDA subcomponents implementing NEPA, the recission of agency-specific NEPA regulations, and the overlap of similar programs and activities across USDA mission areas and agencies, the Department finds it is appropriate for USDA subcomponents to apply the same categorical exclusions where it makes sense to do so for the actions proposed by the subcomponent." This conclusory non-explanation meets neither the letter nor the spirit of NEPA's provision for inter-agency adoption of categorical exclusions. Accordingly, § 1b.4 of the IFR unlawfully circumvents NEPA and must be eliminated.

E. The Agency violates NEPA by expanding agency discretion in deciding extraordinary circumstances.

In addition to expanding the sweep of categorical exclusions, the IFR attempts to inject excessive discretion into Agency determinations of extraordinary circumstances, in at least two ways. Both attempts are unlawful.

First, the IFR defines an extraordinary circumstance as "a unique situation . . . in which actions that normally do not have significant impacts . . . create uncertainty whether the degree of the effect is significant, or certainty that the degree of effect is significant, for the relevant resources considered." 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(17)). "Resources for consideration for extraordinary circumstances will be determined at the responsible official's sole discretion and shall be based on the nature of the actions proposed and in the context of the potentially affected environment." 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(f)). This language unlawfully purports to make the determination of which resources to consider entirely discretionary, in violation of NEPA. For example, the IFR's new provision leaves it to the responsible official's "sole discretion" whether even to consider if the action to which a categorical exclusion is being applied would impact such resources as "federally listed threatened or endangered species;" "special sources of water . . . that are vital in a region;" federal or state "wilderness areas, parks, or wildlife refuges;" "prime agricultural, forest, or range lands;" or historically significant sites or structures designated by Federal, Tribal, State or local governments. 90 Fed. Reg. at 29649 (7 C.F.R. § 1b.3(f), (f)(1)(i), (iii), (iv), (vii)). NEPA does not commit such choices to unreviewable agency discretion but instead demands that "presently unquantified environmental amenities and values . . . be given appropriate consideration in decisionmaking," 42 U.S.C. § 4332(B), in order to "preserve important historic, cultural, and natural aspects of our national heritage," 42 U.S.C. § 4331(b)(4). Thus, § 1b.3 is unlawful and ineffective to the extent it purports to make officials' resource consideration determinations discretionary and will lead to confusion and ill-considered agency decisions.

Second, the IFR lacks language mandating the agency must find extraordinary circumstances in some situations, unlike most of the prior agency regulations. For example, the

prior Natural Resources Conservation Service regulations provide that “[a]ctions that have *potential for significant impacts* on the human environment *are not* categorically excluded,” and list eight additional specific extraordinary circumstances with the language of “cannot,” including that “[t]he effects of the proposed action on the quality of the human environment cannot be highly controversial.” *See* 7 C.F.R. § 650.6(b), (c)(2)(i)–(vii) (2025) (emphasis added); *see also id.* § 799.33(a) (listing six circumstances that trigger an extraordinary circumstances finding). Without this clear list of actions that cannot be categorically excluded, it is more likely that agencies will inappropriately apply categorical exclusions to situations that the agency has previously determined are likely to result in a significant environmental impact that would otherwise require EIS or EA review. Thus, the IFR appears to allow agencies to render decisions exempt from analysis and public input, in violation of NEPA.

These features of the new regulations fail on their own terms. But they also represent significant departures from the prior sub-agency regulations and how they treated extraordinary circumstances review. Yet, the agency does not provide any explanation for them. It at most says that existing regulations “discussed extraordinary circumstances in a way that created confusion as to when an extraordinary circumstance existed.” 90 Fed. Reg. 29632, 29639. But it does nothing to address either of these specific changes and how they may eliminate confusion. This level of explanation and acknowledgement is inadequate. *See Fox*, 556 U.S. at 515.

IX. The Agency Has Impermissibly Altered The Scope Of Effects It Must Consider.

NEPA’s core requirement is that an agency provide a “detailed statement” on “reasonably foreseeable environmental effects of the proposed agency action,” and any “reasonably foreseeable adverse environmental effects which cannot be avoided.” 42 U.S.C. § 4332(C)(i)–(ii). The scope of these requirements turns on what effects of the proposed agency action the agency must consider. For 50 years, CEQ interpreted that scope in a stable, common-sense way, leading to a broad shared understanding among courts, the regulated community, and the impacted public. The Agency has now abandoned that framework, without any explanation for doing so and without any conceivable basis for doing so. The Agency should not abandon such stable guidance. Nor should the Agency abandon its guidance on the need to consider climate-related effects or environmental justice considerations. Those effects fall squarely within NEPA’s requirements, and the Agency should not abandon their consideration without explanation.

A. The Agency omitted the familiar framework that has governed the scope of NEPA review since just after NEPA’s passage.

CEQ’s regulations have always included three types of effects: (1) direct effects, “which are caused by the action and occur at the same time and place”; (2) indirect effects, “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” and (3) cumulative effects, “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.1(i)(1)–(3). The agency’s new process makes no mention of this familiar framework. It is not clear whether

the Agency intended to abandon consideration of these kinds of effects—its IFR does not acknowledge that it has disregarded this framework, let alone explain why it makes sense to do so. The Agency should clarify whether it will continue to consider these kinds of effects, and, if it does not, explain the basis for that change in position. *See Fox*, 556 U.S. at 515

Direct Effects. There could be no basis for eliminating the consideration of direct effects. They are, by definition, the effects “caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.1(i)(1). Nothing in the Agency’s rules suggest those would be excluded, as it embraces considering effects that are not “remote in time, geographically remote, or the product of a lengthy causal chain.” 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). By design, direct effects satisfy that standard. The Agency should clarify that is so.

Indirect Effects. The Agency also should retain consideration of indirect effects, which are a crucial but often contentious set of impacts with which agencies and courts must grapple. The deletion of the definition and references to indirect effects is unlawful and will lead to confusion and litigation.

The statute itself contemplates consideration of indirect effects. NEPA reflects Congress’s recognition of the “impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances.” 42 U.S.C. § 4331(a). The statute directs the federal government to look beyond the immediate intended effects of an action, and specifically directs agencies to consider “undesirable and unintended consequences,” 42 U.S.C. § 4331(b)(3), and even “presently unquantifiable environmental amenities and values,” 42 U.S.C. § 4332(B). NEPA calls on agencies to recognize “the worldwide and long-range character of environmental problems.” 42 U.S.C. § 4332(I). Thus, agencies must consider the relationship between “local short-term uses” of the environment and “long-term productivity,” all with an eye toward “any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.” 42 U.S.C. § 4332(C)(iv)–(v).

In other words, consideration of indirect effects ensures that the effects of an agency action are not “overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Robertson*, 490 U.S. at 349. Artificial constraints on the effects the Agency can consider creates the risk the Agency will “act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh*, 490 U.S. at 371. The act’s “manifest concern with preventing uninformed action” demands as much. *Id.*

Adhering to this statutory direction, CEQ has long interpreted NEPA to require consideration of indirect effects. CEQ first addressed the need to analyze indirect or secondary effects in the 1970 Interim Guidelines. *Statements on Proposed Federal Actions Affecting the Environment*, 35 Fed. Reg. 7390, 7391 (May 12, 1970) (“Interim Guidelines”). Those guidelines explained that “[b]oth primary and secondary significant consequences for the environment

should be included in the analysis.” *Id.* As an example, the guidance chose “the implications, if any, of the action for population distribution or concentration” and “any possible changes in population patterns upon the resource base.” *Id.* CEQ repeated that guidance in 1971, *Statements on Proposed Federal Actions Affecting the Environment*, 36 Fed. Reg. 7724, 7725 (Apr. 23, 1971), and expanded on it in the 1973 guidelines. Those guidelines explained that “[s]econdary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis.” *Preparation of Environmental Impact Statements: Guidelines*, 38 Fed. Reg. 20550, 20553 (Aug. 1, 1973). Indeed, the guidance recognized, these indirect effects “may often be even more substantial than the primary effects of the original action itself.” *Id.*

The annual reports CEQ prepared reached the same conclusion. CEQ drew on examples where agencies considered the indirect effects of their proposed actions when they were implementing the statute. CEQ, *Environmental Quality, the Second Annual Report of the Council on Environmental Quality* 25–26 (1971). And it lamented those instances where agencies would “ignore the secondary” effects, because they “may be more significant than the project’s primary effects.” CEQ, *Environmental Quality, the Fifth Annual report of the Council on Environmental Quality* 410–11 (1974); *see also* CEQ, *Environmental Quality, the Sixth Annual Report of the Council on Environmental Quality* 656 (1975). CEQ anticipated that as agencies continued to develop “experience” in “defining and understanding” indirect effects, their analysis would play a useful role in environmental impact statements. CEQ, *The Fifth Annual Report of the Council on Environmental Quality* 411.

During this same period, courts consistently interpreted NEPA to require consideration of indirect effects. An early district court decision recognized that NEPA directs agencies to consider the predictable “ripple” effects of their actions. *Citizens Organized to Def. Env’t v. Volpe*, 353 F. Supp. 520, 540 (S.D. Ohio 1972). And in *City of Davis v. Coleman*, for example, the court held that the agency needed to consider the effects that a proposed highway interchange could spur urban development that occurs as a result of the project. 521 F.2d 661, 674–77 (9th Cir. 1975). That was “precisely the kind of situation Congress had in mind when it enacted NEPA.” *Id.* at 675. That court was not alone in concluding that NEPA requires consideration of at least some indirect effects. *See, e.g., City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 973–74 (2d Cir. 1976) (concluding that NEPA requires consideration of indirect effects); *Jackson Cnty. v. Jones*, 571 F.2d 1004, 1013 (8th Cir. 1978) (“Under NEPA, indirect, as well as direct, costs and consequences of the proposed action must be considered.”).

CEQ codified this early consensus in the 1978 regulations, defining effects to include “[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. 1508.8; 43 Fed. Reg. at 56004. This definition of effects proved remarkably durable. CEQ omitted it in 2020, but less than two years later, CEQ returned to the original definition because it “better reflects NEPA’s statutory purpose, policy, and intent and is more consistent with the case law interpreting NEPA’s requirements.” 87 Fed. Reg. at 23464. Moreover, the omission of this requirement in the 2020 rule had created

“disruption and uncertainty,” in part because it suggests that agencies should depart from the “context-specific inquiry that they have undertaken for more than 40 years.” 87 Fed. Reg. at 23466. To that end, while the omission of those requirements still might allow agencies to “continue to consider indirect . . . effects, an agency could misunderstand the language of the rule to prohibit considering” such effects. 87 Fed. Reg. at 23466–67.

CEQ also addressed any concerns with continuing to use the indirect effects standard. It observed that “longstanding CEQ and Federal agency experience and practice ha[d] demonstrated that th[is] interpretation[] promote[s] the aims of the NEPA statute and [is] practical to implement.” 87 Fed. Reg. at 23466. The inclusion of indirect effects would “not result in consideration of a limitless universe of effects,” and any concern that consideration of such effects would “lead[] to longer timelines” was unfounded “given the long history of agency and practitioner experience with analyzing” such impacts as “well as modern techniques leveraging science and technology to make environmental reviews comprehensive yet efficient.” 87 Fed. Reg. at 23463, 23467. And, in the end, it is “critical that analyses are complete and scientifically accurate to ensure that decision makers and the public are fully informed.” 87 Fed. Reg. at 23467.

But now, the Agency has omitted reference to indirect effects. Again, the agency has not explained the reason for this omission, so it is not possible to say whether the agency omitted this explanation because it is no longer going to consider indirect effects or merely because it wanted to remove this express reference. So, at a minimum, the Agency’s approach is going to lead to confusion. And more fundamentally, to the extent the agency has changed its approach, it has done so without engaging with the statutory authority, caselaw, or CEQ’s extensive explanation for expressly including indirect effects analysis in NEPA review. *See Fox*, 556 U.S. at 515. The Agency must at least explain why it has chosen a different path here.

The Agency cannot justify its omission of the indirect effects provisions with any of the recent developments the IFR generally references. The recent statutory amendments could not justify abandoning indirect effects analysis. CEQ retained its definition of indirect effects in the regulations it promulgated after those statutory amendments. With good reason: with respect to effects, the statute added the “reasonably foreseeable” qualifier, 42 U.S.C. § 4332(C)(i)–(ii), but that limitation had long been present in CEQ’s regulations and thus was consistent with CEQ’s “indirect effects” analysis. *See, e.g.*, 87 Fed. Reg. at 23467 (“[T]he final rule will retain language on reasonable foreseeability.”).

The decision in *Seven County* likewise does not alter the need for agencies to consider indirect effects. As discussed above, the validity of CEQ’s regulations was not before the Court. More fundamentally, the premise of the Court’s analysis was that indirect effects must be considered, recognizing that there is a question as to “how far” down the causal chain an agency must “go in considering the indirect effects that might occur outside the area of the immediate project.” *Seven County*, 145 S. Ct. at 1512. What was “clear” is that “the environmental *effects* of

the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time”—that is, if they are not direct effects. *Id.* at 1515 (“[I]ndirect effects can sometimes fall within NEPA.”). While agencies have some discretion about where to draw the line, *Seven County* surely does not stand for the proposition that indirect effects can be set aside altogether, as the Agency’s omission of an express requirement to consider indirect effects could be read to suggest. The Agency should make clear that indirect effects still may be considered.

Cumulative Effects. Any mention of cumulative effects—another critical set of environmental impacts that can be as contentious as it is crucial—has likewise evaporated from the Agency’s new standards. Cumulative effects are those that appear minor when considered in isolation but are significant when added to numerous other seemingly minor impacts. The Agency also should reverse this omission.

The same features of the statute discussed in the context of indirect effects analysis support consideration of cumulative effects. Again, in NEPA, Congress meant to situate effects analysis in the context in which they arise, which reflects a set of complex “interrelations of all components of the natural environment.” 42 U.S.C. § 4331(a). And again, NEPA seeks to capture all “undesirable and unintended consequences,” 42 U.S.C. § 4331(b)(3), that flow from a project, and embraces consideration of problems that are more global and “long-range” in scope, *see* 42 U.S.C. § 4332(I). To that end, agencies act as “trustee of the environment for succeeding generations,” 42 U.S.C. § 4331(b)(1), and so should explore the “relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” 42 U.S.C. § 4332(C)(iv). Consideration of cumulative effects is necessary to ensure that the Agency is acting on complete information.

NEPA’s legislative history confirms the point, surfacing the complexity of environmental impacts and the consequences of “letting them accumulate in slow attrition of the environment” and the “ultimate consequences of quiet, creeping environmental decline.” 115 Cong. Rec. 29070 (Oct. 8, 1969); *see also* Report Accompanying S. 1075, National Environmental Policy Act of 1969, Senate Committee on Interior and Insular Affairs (July 9, 1969).

Shortly after NEPA’s passage, CEQ’s interim guidelines explained that the statute should be “construed by agencies with a view to the overall, cumulative impacts of the action proposed.” Interim Guidelines, § 5(b) (Apr. 30, 1970); *see also* 36 Fed. Reg. at 7724. CEQ rooted its interpretation in the statute. *See* Interim Guidelines, § 7(a)(iv) (agency must “Assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.”). In its 1973 guidelines, CEQ repeated the earlier guidance but further explained that “agencies should bear in mind that the effect of many Federal decision about a project . . . can be individually limited but cumulatively considerable.” 38 Fed. Reg. at 20551. NEPA review solves that problem by requiring agencies to

consider how that limited effect fits into a broader context where decisions made over “a period of years” can result in significant impacts on the environment. *Id.*

At the same time (just after NEPA’s passage), federal courts quickly and repeatedly recognized that environmental effects should not be considered in a vacuum. In 1972, the Second Circuit acknowledged the common-sense idea that “even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant.” *Hanly v. Kleindienst*, 471 F.2d 828, 831 (2d Cir. 1972). At a minimum, then, it is important to consider effects against the backdrop of “the existing environment of the area which is the site of a major federal action” because “[o]ne more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel.” *Id.* In 1975, the Second Circuit once again explained that Congress had recognized that 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.” *Nat. Res. Def. Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975). The court thus interpreted the statute to account for this problem, explaining that 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.” *Id.* Other courts likewise embraced the idea that “cumulative effects can and must be considered on an ongoing basis.” *Swain v. Brinegar*, 517 F.2d 766, 775 (7th Cir. 1975); *see also Balt. Gas & Elec. Co.*, 462 U.S. at 106–07 (“[W]e agree with the Court of Appeals that NEPA requires an EIS to disclose the significant health, socioeconomic and cumulative consequences of the environmental impact of a proposed action.”); *Sierra Club v. Morton*, 510 F.2d 813, 824 (5th Cir. 1975) (“CEQ guidelines, Interior regulations, Bureau of Land Management regulations, and prior court decisions all require that federal agencies consider the cumulative effect of similar actions.”); *cf. Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (“Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending before an agency, their environmental consequences must be considered together.”).

As with indirect effects, CEQ codified the need to consider cumulative impacts in its 1978 regulations. The definition of effects included cumulative effects, *see* 40 C.F.R. § 1508.8 (1978), which were defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions,” 40 C.F.R. § 1508.7. The regulations further clarified that such impacts “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

CEQ’s approach to cumulative effects again remained consistent ever since. Once again, CEQ omitted this reference to cumulative effects in the 2020 regulations, a massively contentious decision that resulted in extensive litigation, but (once again) less than two years

later, CEQ returned to the original definition, because it “better reflects NEPA’s statutory purpose, policy, and intent and is more consistent with the case law interpreting NEPA’s requirements.” 87 Fed. Reg. at 23464. Indeed, the same rationales that justified restoration of indirect effects (described above) applied with equal force to cumulative effects. 87 Fed. Reg. at 23462–23467. CEQ made plain that it disagreed with the conclusion that “cumulative effects analyses divert agency resources from analyzing the most significant effects to effects that are irrelevant and inconsequential.” 87 Fed. Reg. at 23467. To the contrary, “consideration of reasonably foreseeable cumulative effects allows agencies and the public to understand the full scope of potential impacts,” and thus are “critical to sound agency decision making.” *Id.*⁴

The Agency removed any direction or discussion of cumulative effects, but here again, it is unclear what this omission means. And here again, its failure to engage with key provisions of the statute, caselaw interpreting it, or CEQ’s extensive explanation for including cumulative effects analysis in its NEPA review renders its exclusion of cumulative effects unsupported. *See Fox*, 556 U.S. at 515. The Agency must at least explain why it has chosen a different path here.

Indeed, the recent statutory amendments and the Supreme Court’s decision in *Seven County* no more displace the obligation to consider cumulative effects than they replace the obligation to consider indirect effects. As with indirect effects, CEQ retained its definition of cumulative effects in the regulations it promulgated after those statutory amendments, and CEQ already had determined that the key statutory addition—the inclusion of a “reasonably foreseeable” qualifier, 42 U.S.C. § 4332(C)—is consistent with CEQ’s “cumulative effects analysis. *See, e.g.*, 87 Fed. Reg. at 23467 (“[T]he final rule will retain language on reasonable foreseeability.”).

Consideration of cumulative effects likewise is perfectly consistent with *Seven County*. When agencies are called on to consider the “effects on the environment that result from the incremental effects of the action,” 40 C.F.R. § 1508.1(i)(3), that complies with “the textually mandated focus of NEPA” being “the project at hand,” *Seven County*, 145 S. Ct. at 1515. What the concept of cumulative effects adds is that the effects of the project at hand must be considered in the relevant context—that is, when the effects of the project at hand are “added to effects of other . . . actions” the Agency reasonably knows have taken place or reasonably foresees will take place in the future. 40 C.F.R. § 1508.1(i)(3). The Agency is not being called on to account for the environmental effects of a separate project that is “initiated (or expanded) as a result of . . . the current project.” *Seven County*, 145 S. Ct. at 1512–13. But rather, a consideration of cumulative effects reflects that the acknowledged effects of the project at hand must be assessed against the environmental backdrop in which the project at hand arises. In this

⁴ Even under the 2020 regulations, CEQ distanced itself from the suggestion that cumulative effects would be omitted from NEPA reviews. Instead, environmental trends (like climate change) “would be characterized in the baseline analysis of the affected environment rather than as an effect of the action.” 85 Fed. Reg. at 43331.

way, consideration of cumulative effects informs the consideration of the effects of the project itself. Or, to put it in terms of the effects “NEPA dictated that” the agency in *Seven County* must consider—the ways the new railroad line “could disrupt the habitat of protected species, or the new rail embankments could cause soil erosion into local bodies of water, or trains on the new line could pollute the air,” 145 S. Ct. at 1516—a consideration of cumulative effects would at least require looking at the ways those effects might combine with other actions to disrupt the species, cause soil erosion, or pollute the air.⁵

B. The Agency omits any express obligation to consider effects relating to climate.

As the United States government has recognized, climate change is the overarching environmental issue of our time. *Fifth National Climate Assessment*, U.S. Global Change Research Program, (Nov. 2023); *Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050*, U.S. Dept. of State and the Executive Office of the President (Nov. 2021); *Endangerment and Cause or Contribute Findings for Greenhouse Gasses Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496, 66523 (Dec. 15, 2009) (finding that elevated concentrations of greenhouse gasses were likely to “endanger the public health and welfare of current and future generations”); *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (“The harms associated with climate change are serious and well recognized.”). It has been clear for many years that federal agencies have an obligation to assess climate impacts under NEPA, an obligation consistently affirmed by the courts. *See, e.g., Vecinos para el Bienestar v. FERC*, 1321 F.4th, 1329–30 (D.C. Cir. 2021); *350 Mont. v. Haaland*, 50 F.4th 1254, 1266–70 (9th Cir. 2022); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *Wild Earth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017); *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008); *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990). Given NEPA’s textual directive to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations,” 42 U.S.C. § 4331(b)(1), no other conclusion is possible. Consideration of climate impacts of federal agency actions is also compelled by NEPA’s command to “utilize a systematic, interdisciplinary approach” that ensures the use of “natural and social science,” and to “ensure the professional and scientific integrity” of NEPA documents. 42 U.S.C. § 4332(A), (D). Despite this administration’s efforts to downplay the urgency of the climate crisis, the scientific consensus supporting it remains unimpeachable.

⁵ Indeed, the Court expressly recognized that one form of well-recognized cumulative analysis is called for, explaining that it often will be necessary to consider “other projects” where they are “so interrelated” as to inform the analysis of the project as issue. *Seven County*, 145 S. Ct. at 1517. So, there is every indication that the Court would expect that other forms of cumulative analysis would continue, too.

The 2024 CEQ regulations codified this requirement into regulation, clarifying that there is a linkage between the NEPA process and the statute’s purpose. 89 Fed. Reg. at 35506–09; *see also* 88 Fed. Reg. at 49949, 49957. For example, § 1502.14(f) explained that the environmentally preferable alternative or alternatives are those that would best promote NEPA’s policies by, for example, addressing climate change. 40 C.F.R. § 1502.14(f). Similarly, § 1502.15 identified the requirement to include anticipated climate-related changes to the environment and steps to take when that information is not readily available. 40 C.F.R. § 1502.15(b). Section 1502.16(a)(6)’s charge to agencies to analyze reasonably foreseeable climate change-related effects of both the proposed action and alternatives and on the proposed action and alternatives reflects long-standing law.

These changes to CEQ’s rules were the subject of extensive public and expert input, and triggered considerable discussion from CEQ in its final rule. They also withstood legal challenges from a court that struck down other provisions of the rules. *Iowa v. Council on Env’t Quality*, 765 F. Supp. 3d 859, 886 (D.N.D. 2025) (requirements to consider climate change are within CEQ’s “zone of authority”). The rules were accompanied by detailed CEQ guidance that assisted agencies in assessing both a proposed action’s contribution to the problem, as well as the potential impacts of a changing climate on federal projects. *See, e.g., National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023). As the guidance recognized, “[c]limate change analysis is a critical component of environmental reviews and integral to Federal agencies managing and addressing climate change.” *Id.* at 1198. Individual federal agencies have also taken extensive steps to plan for climate change in their individual planning and NEPA implementation. *See, e.g., Report on Effects of a Changing Climate to the Department of Defense*, Office of the Under Secretary of Defense for Acquisition and Sustainment (Jan. 2019); *2023 Climate Action Plan Progress Report*, Department of Defense; *Climate Adaptation Plan 2024–2027*, U.S. Dept of Agriculture (May 2024); *Climate Adaptation and Resilience Plan*, Office of the Chief Scientist, U.S. Dept. of Agriculture (2024); *Climate Energy Adaptation Plan 2024–2027*, U.S. Dept. of Energy (May 2024); *2021 Climate Action Plan for Adaptation and Resilience*, U.S. Dept. of Commerce (Aug. 2021); *Climate Action Plan*, U.S. Dept. of the Interior (2021). And there has been substantial outside scholarship providing detailed recommendations on how to integrate climate issues into NEPA reviews, scholarship that CEQ and agencies previously took seriously. *See, e.g.,* Romany M. Webb et al., *Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform* (2022); Michael Burger & Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA*, 44 Wm. & Mary Env’t L. & Pol’y Rev. 423 (2020); Institute for Policy Integrity, *Toward Rationality in Oil and Gas Leasing: Building the Toolkit for Programmatic Reforms* (2021).

However, CEQ has revoked its regulations and guidance in their entirety. This vacuum leaves it up to individual agencies to fill the regulatory gap on a case-by-case basis. But the Agency has provided zero direction or assistance in this effort, failing to include even so much as

a mention of climate change. The Agency must explain why it chose to say nothing about such a critical issue with a long-standing record, and why leaving agencies without any direction or guidance as to how to comply with NEPA is better than the rules and guidance that the IFR replaces. *Fox*, 556 U.S. at 515.

In short, any NEPA analysis of a proposed action that fails to include information on climate, where such impacts are present, cannot be considered a “hard look” given our rapidly changing environment and improved scientific capacity. The absence of any direction from the Agency, coupled with the withdrawal of the CEQ regulations and guidance, does not make the obligation to consider climate disappear. Instead, it leaves agencies vulnerable to legal challenge should they fail to adequately address this critical issue. Moreover, both CEQ and this agency have worked for many years to integrate climate into NEPA reviews. The decision to abandon that is nowhere explained or justified. We urge you to integrate the climate provisions adopted in the 2024 CEQ rules, and its implementing guidance, into a final rule. Failure to do so guarantees more project gridlock and controversy.

C. The IFR omits any express obligation to consider effects relating to environmental justice.

Environmental justice has played a key role in NEPA reviews for decades. 89 Fed. Reg. at 35540 (“Agencies have decades of experience integrating consideration of environmental justice in their NEPA reviews”). The purposes of NEPA align closely with the goal of ensuring greater consideration of environmental justice concerns, as articulated in the definition of “environmental justice” in CEQ’s 2024 regulations:

Environmental justice means the just treatment and meaningful involvement of *all people* . . . in agency decision making and other Federal activities that affect human health and the environment so that people are fully protected from disproportionate and adverse environmental effects (including risks) and hazards . . . have equitable access to healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

Id. at 35575 (emphasis added); Council on Environmental Quality, “National Environmental Policy Act Implementing Regulations Revision; Phase 2 Final Rule Response to Comments” (Apr. 2024) at 58 (“references to environmental justice reflect and advance NEPA’s statutory objectives, text, and policy statements”).

The core principles of environmental justice are embedded in the statutory language and purpose of NEPA. The statute strives “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare” of people; establishes “the continuing policy of the Federal Government” to “assure for *all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings” and to “preserve important historic, cultural, and natural aspects of our national heritage;” and “recognizes that *each person* should enjoy a healthful environment.” 42 U.S.C. §§ 4321, 4331(a), (b)(2), (b)(4), (c) (emphasis

added). CEQ explicitly agreed. *See* Council on Environmental Quality, “National Environmental Policy Act Implementing Regulations Revision; Phase 2 Final Rule Response to Comments” (Apr. 2024) at 55 (“CEQ agrees that the environmental justice-related provisions of the rulemaking advance NEPA’s statutory policies, which include avoiding environmental degradation; preserving historic, cultural, and natural resources; and attaining the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.”).

Addressing environmental justice in NEPA reviews is consistent with longstanding CEQ policy and agency practice. CEQ issued guidance on how to integrate environmental justice concerns into NEPA reviews nearly 28 years ago. *See* Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (1997). The guidance reiterates that “attainment of environmental justice is wholly consistent with the purposes and policies of NEPA,” and that “[e]nvironmental justice issues encompass a broad range of impacts covered by NEPA.” *Id.* at 7–8. The Guidance directs agencies how to address and consider environmental justice considerations at every stage of the NEPA review process. *Id.* at 10–17.

Other federal agencies, such as EPA, have published guidance on incorporating environmental justice in NEPA reviews. U.S. Environmental Protection Agency, *Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses* (1998). Some agencies, such as the Department of Transportation and the Department of Interior, have strategies for addressing environmental justice in NEPA processes. *See, e.g.,* Secretary Pete Buttigieg, DOT Order 5310.2C, *U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (2021); Secretary Deb Haaland, Secretarial Order 3399, *Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process* (2021); Dep’t of Defense, *Strategy on Environmental Justice* (1995). In addition to specific agency guidance and strategy, the NEPA Committee and Interagency Working Group released a 2016 report on Promising Practices for Environmental Justice Methodologies in NEPA Reviews to disseminate best practices across the federal government for engaging with and protecting communities facing environmental injustice during the NEPA process. That report was based on four years-worth of researching and analyzing the interaction of environmental justice and NEPA, compiling methodologies gleaned from agency practices. The Working Group also released the 2019 Community Guide to Environmental Justice and NEPA Methods to aid communities in participating in the NEPA process. The Guide states:

Many minority and low-income communities have been subject to multiple environmental and social impacts. Because these impacts in combination with potential new impacts can produce adverse and disproportionate effects on minority populations and low-income populations, NEPA review of a proposed action should address the history or circumstances of a particular community or population, the

particular type of environmental or human health impact, and the nature of the proposed action.

Federal Interagency Working Group on Environmental Justice & NEPA Committee, *Community Guide to Environmental Justice and NEPA Methods* 3–4 (2019).

Courts have repeatedly recognized that agencies must consider environmental justice impacts. *Mid States Coal.*, 345 F.3d at 541; *see also Sierra Club*, 867 F.3d at 1368 (acknowledging that federal agencies are required to include environmental justice analysis in NEPA reviews); *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006) (same); *Trenton Threatened Skies, Inc., v. F.A.A.*, 90 F.4th 122, 138 (3rd Cir. 2024) (stating agencies “must consider designs or alternatives that will avoid or minimize disproportionately high and adverse impacts on low-income communities or communities of color”). Courts have not hesitated to find NEPA reviews deficient where agencies did not properly assess the environmental justice implications of their actions. *See, e.g., City of Port Isabel v. FERC*, 111 F.4th 1198, 1207–10 (D.C. Cir. 2024) (holding the agency should have issued a supplemental EIS to address its new environmental justice analysis and conclusions); *Vecinos*, 6 F.4th at 1330–32 (remanding environmental impact statement because the agency’s environmental justice analysis was deficient); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (remanding an environmental assessment for providing inadequate analysis of environmental justice implications of crude oil pipeline).

The 2024 CEQ regulations cemented the requirement to consider environmental justice impacts in NEPA reviews, giving agencies a definition and direction on how to weigh environmental justice considerations during the NEPA process where they arise. 40 C.F.R. §§ 1502.16, 1502.14(f), 1508.1(o). The inclusion of environmental justice in CEQ’s regulations was supported by a chorus of public comments.⁶ The explicit inclusion of environmental justice consideration in the regulations stood up when challenged in court. *Iowa v. Council on Env’t Quality*, 765 F. Supp. 3d at 886 (including environmental justice considerations is within CEQ’s “zone of authority”).

However, in February, CEQ rescinded its NEPA regulations. In its wake, CEQ released a memorandum to the heads of federal agencies providing guidance on compliance with NEPA. In addressing President Trump’s revocation of Executive Orders 14096 and 12898 (the Executive

⁶ CEQ received many comments during the public comment period expressing support for more specific provisions to address environmental justice concerns. Inclusion of specific provisions on how to consider the issue was “long overdue, given the centuries of environmental dangers, toxins, public health implications, quality of life impacts, and unjust practices that perpetuate environmental violence on communities across the country.” Letter from GreenLatinos and WE ACT for Environmental Justice, to Council on Env’t Quality (Sept. 29, 2023); Letter from Abre’ Conner, NAACP to Council on Env’t Quality (Sept. 29, 2023) (“Black communities are often sacrifice zones for decisions that undergo a NEPA process”).

Orders directing agencies to address environmental justice), the memorandum stated, “NEPA documents should not include an environmental justice analysis, to the extent this approach is consistent with other applicable law.” CEQ, Memorandum Implementation of the National Environmental Policy Act, at 5. As explained above, declining to address environmental justice is not consistent with applicable law. Such guidance not only undermines the core purposes of NEPA, but it also contradicts decades worth of agency practices and established case law. This Agency fails to provide any guidance on how to address NEPA’s purpose of assuring “for *all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings,” by considering environmental justice. 42 U.S.C. § 4331(b)(2) (emphasis added). The Agency must provide an explanation for why it chose not to mention environmental justice, an aspect of NEPA processes for decades.

Failure to consider environmental justice in NEPA reviews frustrates the core purpose of NEPA, is arbitrary and unexplained, and goes against longstanding agency practice and case law. By not mentioning environmental justice or even cumulative impacts in the IFR, the Agency is left without a clear direction on how or whether to address environmental justice impacts from agency action. This inevitably will leave Agency decisions vulnerable to legal challenges if they do not address environmental justice in its NEPA reviews. We strongly urge you to adopt the language in CEQ’s 2024 NEPA regulations as it relates to environmental justice to avoid future litigation and delays.

D. The Agency has adopted limits on the scope of effects the Agency must consider that are not consistent with the statute.

In addition to omitting the features of the effects analysis just discussed, the Agency has included a number of other provisions that purport to narrow the effects that must be considered. These provisions largely restore language from the 2020 CEQ regulations—language that CEQ promptly discarded as inappropriate or confusing. The Agency has not explained why restoring these provisions makes sense nor has it engaged with CEQ’s explanation for why these limitations are inappropriate.

Limiting consideration to the action or project at hand. To start, in multiple places, the Agency has suggested that it will limit its consideration to the “proposed action or project at hand.” 90 Fed. Reg. at 29647 (7 C.F.R. § 1b.2(e)); 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)); *see also* 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)); 90 Fed. Reg. at 29663 (7 C.F.R. § 1b.7(g)). To the extent this means to eliminate consideration of indirect effects or cumulative effects, this is unsound for the reasons discussed above. If this is meant to confirm only that the focal point for environmental review is the action or project at hand, then that is unobjectionable. But, as with other additions made in the 2020 regulations, this addition is confusing and unnecessary. And it may also be incomplete. As the Supreme Court just made clear, it is not always sufficient to focus on the “project at hand.” To take just one example, “in certain circumstances, other projects may be interrelated . . . to the project at hand” and thus must be considered. *Seven*

County, 145 S. Ct. at 1517. In those circumstances, limiting the analysis to the project at hand would render the environmental review deficient. More fundamentally, such a categorical approach to environmental review never could be appropriate. Agencies always must consider at least “those effects” that “are relevant to the agency’s decisionmaking process.” *Id.* at 1516; *see also id.* at 1513, 1514 n.4. If effects other than those from the “project at hand” are relevant to that determination, then of course the Agency must consider them. The absence of any regulatory direction on this point will breed confusion and contention.

Limiting effects to generally exclude those that are “remote in time, geographically remote, or the product of a lengthy causal chain.” The Agency proposes restoring language from the 2020 CEQ regulations that “generally” excludes effects that “are remote in time, geographically remote, or the product of a lengthy causal chain.” 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). Here again, CEQ quickly removed this language because it “may unduly limit agency discretion” and “stating them as categorical rules that limit effects” is in tension with the statute. 87 Fed. Reg. at 23466. Indeed, CEQ’s view was well-founded, as the Supreme Court recently declined to adopt this kind of categorical rule: The Court explained that environmental effects “may fall within NEPA even if those effects might extend outside the geographical territory of the project or might materialize later in time.” *Seven County*, 145 S. Ct. at 1515. The other touchstones the Court emphasized for NEPA review—relevance to the agency’s decisionmaking and consideration of its regulatory authority, *see* 145 S. Ct. at 1513, 1514 n.4, 1516—likewise do not gel with this categorical rule. If an effect is remote in time, geographically remote, or the product of a lengthy causal chain but sits comfortably within the agency’s regulatory authority and would be relevant to its decisionmaking, then it must still be considered, even after *Seven County*.

Limiting effects to exclude “those effects that the agency has no ability to prevent due to the limits of its regulatory authority, or that would occur regardless of the proposed action.” The Agency also proposed to restore language from the 2020 CEQ regulations that excludes consideration of “effects that the [Agency] has no ability to prevent due to the limits of its regulatory authority or that would occur regardless of the proposed action.” 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). This addition should be removed for the same reason the prior addition should be: The 2022 CEQ regulations removed this language as “unduly limit[ing] agency discretion” and because this kind of “categorical rule[]” is in tension with NEPA’s statutory requirements. 87 Fed. Reg. at 23466. For all the same reasons just discussed, *Seven County* does not dictate the inclusion of this language. It merely repeated the discussion from *Public Citizen*—a feature CEQ already accounted for in its previous iteration of the rules—and did not purport to adopt a categorical rule. Moreover, the categorical rule the Agency adopts here does not match up with the Court’s analysis, which appears to have been limited to those circumstances where the agency had “no regulatory authority over . . . separate projects” and it was clear “[o]ther agencies possess authority to regulate those separate projects.” *Seven County*, 145 S. Ct. at 1516. In those circumstances, the agency’s regulatory authority may be a relevant

limit, but that decision does not support the categorical rule that agencies are permitted to limit their review even where no other agencies would regulate a separate project. And again, what matters is not any narrow sense of regulatory authority, but rather the set of considerations that might inform the agency's decisionmaking.

The Agency has also appended an exclusion of effects relevant to projects "initiated by a third party." 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(a)(12)(ii)). To the extent that is meant to exclude categorically an analysis of all induced effects, that marks a dramatic change from how agencies have analyzed effects since NEPA's passage, and is sharply in tension with the statute itself, for the reasons explained above. The Agency cannot completely transform the scope of NEPA, let alone do so without any explanation. And certainly the Supreme Court's recent decision is not a basis for such a radical turnaround. Even if *Seven County* gestured at declining to consider such effects where the record left doubt about whether they would occur, 145 S. Ct. at 1515–16 ("the project at issue *might* lead to construction or increased use of a separate project" (emphasis added)), an Agency still might need to consider such effects where those effects are so certain that the "separate project" cannot be said to "break[] the chain of proximate causation," *id.* After all, in traditional proximate causation analysis, the causal chain does not break where the later actions down the causal chain are sufficiently predictable at the time the action being considered took place. W. Page Keeton et al., *Prosser and Keeton on Law of Torts* 273, 276–77 (5th ed. 1984); Restatement (Third) of Torts § 34; Restatement (Second) of Torts §§ 440–443. And in any event, this categorical approach would have to give way where the Agency was called upon to account for the actions third parties might take in response.

Scope of Analysis provision. The Agency ultimately provides that "[t]o the extent it assists in reasoned decision making," the Agency "may, but is not required to by NEPA, analyze environmental effects" that fall outside the limits just discussed. 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)(3); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)). Perhaps it is encouraging that the Agency leaves the door open to doing more than what it views as the bare minimum. Even so, the provision surfaces the fundamental incoherence of the Agency's approach. If the analysis of such effects "assist[s]" in "reasoned decision making," then by definition the Agency must do that analysis. 90 Fed. Reg. at 29660 (7 C.F.R. § 1b.5(b)(3); 90 Fed. Reg. at 29664 (7 C.F.R. § 1b.7(g)(3)). And if these categorical rules are allowing the Agency to avoid considering effects that might be useful to it, they can have no place in an appropriate implementation of NEPA. *See Marsh*, 490 U.S. at 371; *accord Seven County*, 145 S. Ct. at 1513.

X. The Agency Omits Important Features Of The Prior Regulations That Guided The Alternatives Analysis.

The "alternatives" analysis has long constituted "the heart" of NEPA review. 40 C.F.R. § 1502.14; *City of Los Angeles v. F.A.A.*, 63 F.4th 835, 843 (9th Cir. 2023) ("Consideration of alternatives 'is the heart of the [EIS]' and agencies should '[r]igorously explore and objectively evaluate all reasonable alternatives.'"). Without a robust analysis of alternatives, the NEPA

process becomes a process documenting the effects of a “done deal” rather than contributing to a decisionmaking process. 89 Fed. Reg. at 35502.

The Agency has omitted key aspects of CEQ’s regulations that made that promise real, without offering any explanation about why it made sense for the Agency to deviate from long-standing and well-settled standards

To start, the Agency has omitted the acknowledgment that this analysis is at the “heart” of NEPA review. 40 C.F.R. § 1502.14. That language appeared in the original CEQ regulations, and as CEQ recently explained in the 2024 regulations when it restored that language, doing so “emphasizes the importance of the alternatives analysis” and reflects that a number of courts have “quoted that language . . . in stressing the importance of the alternatives analysis.” 89 Fed. Reg. at 35502. Indeed, as the Supreme Court just confirmed, whether the agency properly “has addressed . . . feasible alternatives” is among the issues that is so critical that courts must play a role in ensuring compliance. *See Seven County*, 145 S. Ct. at 1511. The Agency should include the language here or explain why it chooses not to.

Second, the Agency also has omitted the requirement that the agency “[r]igorously explore and objectively evaluate alternatives.” 40 C.F.R. § 1502.14(a). Including that standard is important because it helps “ensure agencies conduct a robust analysis of alternatives and their effects, rather than a cursory, box-checking analysis.” 89 Fed. Reg. at 35503. It also aligns with “a standard that agencies have decades of experience applying in the analysis of alternatives.” *Id.* at 35503. Indeed, CEQ has directed agencies to apply this standard since at least April 1970. Interim Guidelines § 7(a)(iii). The Agency should make clear that this familiar standard continues to apply to alternatives analysis, instead of leaving it ambiguous.

Third, the Agency has omitted authorization to include in the analysis “reasonable alternatives not within the jurisdiction of the lead agency.” 40 C.F.R. § 1502.14(a). CEQ had recognized that there are certain circumstances where those kind of alternatives would be relevant and wanted to make clear to agencies that they had the discretion to consider them. Cases support this analysis, *see, e.g., Natural Resources Defense Council v. Morton*, 458 F.2d 827, 835–36 (D.C. Cir. 1972), and it can be particularly important to do so when “agencies are considering program-level decisions or anticipate funding for a project not yet authorized by Congress,” 89 Fed. Reg. at 35503.

While most of the time, we are focused on reasonable alternatives that are within the lead agency’s jurisdiction, there are situations in which it is reasonable to evaluate alternatives outside the agency’s jurisdiction, not just those discussed by CEQ, but also others. The Agency should not omit this requirement.

Finally, the Agency also has omitted the requirement that the Agency identify the “environmentally preferable alternative.” 40 C.F.R. § 1502.14(f). This information is “helpful for decision makers and the public” because it can allow “public comment on th[e]

determination” and facilitate a determination of whether the agency has “adequately explained its conclusion.” 89 Fed. Reg. at 35504. This improves the “transparency of the agency’s decision-making process” and ensures that “agencies make informed decisions regarding actions that impact the environment.” *Id.* CEQ also has confirmed that such a requirement does not “result in unnecessarily broad and time-consuming environmental reviews.” *Id.* That’s because CEQ’s “regulations have always required agencies to identify the environmentally preferable alternative” and thus agencies have “decades of experience” applying that standard. *Id.* And identification of the environmentally preferable alternative does not mean that the Agency must adopt this alternative. But it does mean that the public will understand where a different choice is made and the Agency will have an opportunity to explain why. This is yet another example where the Agency has not contended with CEQ’s explanation.

XI. The Agency Has Adopted An Impermissible Approach To Significance.

Without any explanation, the Agency has abandoned the long-standing factors of context and intensity that have informed the question whether an “adverse effect of the proposed action is significant.” 40 C.F.R. § 1501.3(d). The question of whether a proposed action has “significant impacts” is among the most consequential and controversial issues that arise in NEPA processes and litigation. Agencies and the public have become familiar with the long-standing criteria for significance and have used them systematically as a roadmap to evaluate a proposed action. In reaffirming the utility of these criteria just last year, CEQ explained that they did not “expand the scope of NEPA review,” but rather “assist[ed] agencies in determining the appropriate level of NEPA review for their proposed actions by focusing their review on the critical factors in determining significance.” 89 Fed. Reg. at 35464. The prior approach to assessing significance has been useful and should not be abandoned.

In addressing significance here, the Agency has adopted a version of what appeared in the 2020 regulations. *See* 85 Fed. Reg. at 43360. CEQ already has explained, in detail, why the 2020 approach to significance should be abandoned. *See* 89 Fed. Reg. at 35464–69. To the extent the Agency has followed the 2020 regulations, its approach reflects the same omissions, confusion, and other problems that the 2024 regulations addressed. The Agency should restore those omitted components from the 2024 regulations, or at least explain how it has resolved the problems with the 2020 regulations that CEQ later solved.

To take one example, the agency has omitted the consideration of “global” contexts. That departs from the recently revoked CEQ rules, which directed agencies to evaluate “the potential global, national, regional, and local contexts” of impacts to determine the appropriate level of NEPA review. 40 C.F.R. § 1501.3(d)(1). The use of the word “global” in this provision reflects the statute itself, which calls for agencies, to the “fullest extent possible,” to:

recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate

support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.

42 U.S.C. § 4332(2)(I); *id.* § 4346b (authorizing “expenditures in support of international activities”); *see also* 44 Fed. Reg. 1957 (Jan. 9, 1979) (executive order instructing agencies to consider effects of action on “the global commons” and the “environment of a foreign nation”). While the focus of NEPA is “fulfill[ing] the social, economic, and other requirements of present and future generations of Americans,” 42 U.S.C. 4331(a), NEPA recognizes the extraterritorial impacts of federal government actions—on climate, water, air pollution, and biodiversity among other things—ultimately impact Americans as well as everyone else. NEPA’s application to federal actions that result in environmental impacts outside U.S. borders has long been settled. *See, e.g., Env’t Def. Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993). In including the word “global” in this provision, CEQ explained the rule’s description of context was “consistent with the decades of experience agencies had implementing the 1978 regulations.” 89 Fed. Reg. at 35465.

The Agency omits this reference to “global,” and there is a repeated and consistent emphasis on the impacts of actions to “Americans,” as if the impacts to the global commons are irrelevant or that the environment stops at the U.S. border. That approach does not square with the legal authorities just discussed, and it is foreclosed by the recent statutory amendments which make clear that an agency need not consider a decision only where its “effects” are “located *entirely* outside of the jurisdiction of the United States.” 42 U.S.C. § 4336e(10)(b)(vi) (emphasis added). While the new standards appear to at least offer discretion to agencies to consider extraterritorial impacts, we urge you to provide greater clarity on this important issue so that key extraterritorial impacts are not omitted

That is not the only way in which the Agency’s rule departs from the approach CEQ previously chose to assess significance. The Agency offered some explanation for its approach, *see* 90 Fed. Reg. at 29636, but it fails to contend with all the ways it has departed from the prior CEQ regulations. At a minimum, the agency should restore some of the overarching principles—for example, the notion that “agencies shall not offset an action’s adverse effects with other beneficial effects to determine significance.” 40 C.F.R. § 1501.3(d). Moreover, the agency fails to include consideration of criteria specifically identified in NEPA, itself, such as “important historic, cultural, and natural aspects of our national heritage,” “renewable resources,” impacts to “long-term productivity,” and the “worldwide and long-range character of environmental problems.” 42 U.S.C. § 4331(4), (6); *id.* § 4332(2)(C)(iv), (F).

In any event, the Agency’s approach here also adds novel considerations that were not present in previous versions of the CEQ regulations. For example, the Agency directs the consideration of “[e]conomic effects” and the “[e]ffects on the quality of life of the American people.” 90 Fed. Reg. at 29648 (7 C.F.R. § 1b.2(f)(3)). Given the many criteria the Agency has

omitted, these are particularly inexplicable additions. In the past, CEQ has made clear that “economic [and] social” effects stand alone as effects that “by themselves do not require preparation of an environmental impact statement.” 40 C.F.R. § 1502.16(b). Indeed, these are the sort of effects that should not be given “a higher priority than other effects” in the analysis. 89 Fed. Reg. at 35510. As to focusing the Agency’s attention on the “quality of life of the American people,” that criterion is as unobjectionable as it is unhelpful. An overarching goal of NEPA is, of course, to improve the quality of life of Americans, and thus additional guidance has been helpful to channel the types of factors the Agency should assess in evaluating significance. To that end, many of the factors agencies previously would look at to determine significance—and which have been omitted here—no doubt inform the quality of life of the American people. To name just a few, the degree to which “the action may adversely affect unique characteristics of the geographic area” informs how an action will impact the American people. 40 C.F.R. § 1501.3(d)(2)(ii). As does the degree to which the “action may adversely affect communities with environmental justice concerns” informs how an action will impact the American people. 40 C.F.R. § 1501.3(d)(2)(vii). So too with others. Accordingly, the Agency should restore the more granular guidance CEQ once provided or explain why it has not done so.

XII. The Agency Has Adopted An Impermissible Approach To Reviewing Connected Actions And Long-Term/Multi-Phase Actions.

A. The Agency’s explanation for when a supplemental EIS is required is inappropriate.

CEQ has long required that an agency will prepare “supplements to either draft or final” EISs if a “major Federal action is incomplete and ongoing,” and “the agency makes substantial changes to the proposed action that are relevant to environmental concerns” or there “are substantial new circumstances or information about the significance of adverse effects that bear on the analysis.” 40 C.F.R. § 1502.9(d). The Agency should revert to CEQ’s formulation.

First, the Agency swapped “incomplete and ongoing” with “remains to occur.” 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(r)). Just last year, CEQ rejected the use of “remains to occur”—and switched back to “incomplete and ongoing,” precisely because “remains to occur” was “vague” and the latter phrase provided “more clarity.” 89 Fed. Reg. at 35499. The Agency should not reintroduce that confusion.

Second, the Agency chose to describe the circumstances under which a supplemental document must prepared in new terms, explaining that it will supplement an environmental document if there “are new circumstances or information with relevance to the proposal and these have bearing on the proposed action (or selected alternative) or potential to change the anticipated degree of effect.” 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(r)). It is unclear whether this amounts to any substantive change from CEQ’s formulation, but if it is, the Agency must explain why it has taken a different approach.

The Agency also has omitted the catchall provision that permits the Agency to “prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.” 40 C.F.R. § 1502.9(d)(2). The Agency has not explained the basis for that omission, and it should retain this authority to develop a supplemental EIS when it would be appropriate.

B. The Agency has adopted an inappropriate approach to segmentation and connected actions.

Previous iterations of the CEQ regulations have long provided that the “agency shall, in a single review, proposals or parts off proposals that are related closely enough to be, in effect, a single course of action.” 40 C.F.R. § 1501.3(b); *see also* 43 Fed. Reg. at 55992, 56005 (1978 regulations). CEQ also had established a natural corollary to that principle, which is that an “agency shall not avoid a determination of significance by . . . segmenting an action into smaller component parts.” 40 C.F.R. § 1501.3(b). As CEQ explained, that also is a “longstanding principle” that is relevant to the preparation of all environmental documents. 89 Fed. Reg. at 35462; *see also id.* 35462–63 (collecting caselaw support for this anti-segmentation principle).

The Agency has omitted these critical, common-sense provisions, without explaining why. That omission, coupled with its emphasis on considering only the project or action at hand, risks the Agency declining to take the comprehensive approach to NEPA review that long has been required. That would be error for the reasons discussed above. *See also Seven County*, 145 S. Ct. at 1517. The Agency should restore these important provisions from the 2024 CEQ regulations or else explain why it has abandoned them.

Separate from the absence of these provisions, the Agency also has abandoned any discussion of the concept of a “connected action” for purposes of NEPA review. Under CEQ’s most recent controlling regulation, the Agency must “consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in same NEPA review” and that

- (1) [a]utomatically trigger other actions that may require NEPA review;
- (2) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or
- (3) [a]re interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1501.3(b).

Here, the Agency does not reference connected actions, without any explanation for abandoning this concept. The Agency should restore references to connected actions and this definition of connected action or else explain why it has abandoned them.

C. Agencies have not guaranteed comment when they rely on a previously-prepared environmental impact statement.

In providing for the adoption of previously prepared environmental documents in cases where the later action is not “substantially the same” as the earlier action, the 2024 CEQ regulations required additional “public engagement . . . consistent with the requirements for the document type.” 89 Fed. Reg. at 35521; 40 C.F.R. § 1506.3. That meant that, before adopting an EIS, the Agency was required to provide notice and seek comment.

The Agency no longer requires the public engage here. 90 Fed. Reg. at 29668 (7 C.F.R. § 1b.9(e)(8)). For all the reasons discussed above, the Agency should require notice and comment on this type of environmental impact statement, too.

XIII. The Omission Of Standards For Mitigation Is Inappropriate And Unexplained.

Previous iterations of CEQ’s NEPA implementing rules provided detailed direction as to how to properly consider the role of mitigation in the NEPA process. The issue is a critical one: properly employed, mitigation can reduce the extent of the environmental impacts to the point where effects are no longer significant enough to trigger an EIS. Alternatively, it can be utilized to reduce the severity of adverse impacts identified in an EA or EIS. Ensuring the integrity of such mitigation, holding agencies accountable to their promises to implement it, and analyzing it carefully is therefore critical to ensuring NEPA’s admonition to fully imbue federal decision making with environmental awareness. 42 U.S.C. §§ 4321, 4331. While NEPA does not substantively require that adverse environmental impacts be mitigated, it does require consideration of mitigation. *Roberston*, 490 U.S. at 351 (1989) (“The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from *the language of the Act* and, more expressly, from CEQ’s implementing regulations.” (emphasis added)).

Consideration and disclosure of measures to mitigate adverse impacts has always been a key part of the NEPA process. *See, e.g.*, 40 C.F.R. § 1502.14(f) (1978) (requirements for discussing alternatives); § 1502.16(e)–(h) (1978) (requirements for discussing environmental effects); § 1503.3(d) (1978) (requirements for comments); § 1504.3(c)(2)(vi) (1978) (criteria for referrals); § 1505.3 (1978) (implementation standards). It is also the subject of extensive agency guidance and practice going back decades. *See, e.g., Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 76 Fed. Reg. 3843 (Jan. 21, 2011).

The latest version of CEQ’s implementing regulations provided a detailed and helpful update to these provisions. For example, the 2024 CEQ regulations state that agencies “should, where relevant and appropriate” incorporate measures to address “significant human health and environmental effects” of their actions. 40 C.F.R. § 1505.3(b). Similarly, 40 C.F.R. § 1505.2(c) requires an agency to “state whether the agency has adopted all practical means to mitigate

environmental harm . . . and if not, why not.” Another provision directed that mitigation “shall” be implemented (for example, through conditions in permits or funding) where mitigation is established in a NEPA document “and committed as part of the decision.” *Id.* § 1505.3(a).⁷ Of particular note, CEQ’s provisions recognized that in the circumstances where further environmental review is avoided “based on implementation of mitigation,” it makes sense to make sure that it occurs. *Id.* § 1505.2(c). And so, it may be important that agencies “provide for monitoring to assure that their decisions are carried out.” *Id.* § 1505.3(a). As CEQ confirmed, these provisions “do[] not impose any binding requirements on agencies, but rather codif[y] a portion of CEQ’s longstanding position that agencies should, as a policy matter, mitigate significant adverse effects where relevant and appropriate.” 89 Fed. Reg. at 35517.

The adoption of these revised rules was particularly valuable due to the inconsistencies in the way agencies handled mitigation. For example, some agencies built mitigation into the project itself and then failed to ensure that it ever occurred—meaning that the effects of the action were more significant and more adverse than ever considered by the agency or disclosed to the public. For example, the Forest Service and BLM, routinely have relied on EA project design “criteria” or “features,” or other formulations to escape the obligation to enforce such measures during project implementation. Although these measures are described as part of the project and therefore not mitigation, they can still serve to limit the extent or duration of adverse effects and thus to support a finding of no significant impact. However, the agencies frequently waive many of these measures in project implementation, undermining both the spirit and letter of NEPA. The previous regulations were intended to put a stop to such abuses.

Following this IFR, at least some of this scaffolding and direction is absent. While some features of the existing regulations continue to appear in at least some form, 90 Fed. Reg. at 29661 (7 C.F.R. § 1b.6(b)(3)); 90 Fed. Reg. at 29666 (7 C.F.R. § 1b.8(b)(6)); 90 Fed. Reg. at 29672 (7 C.F.R. § 1b.11(29)), there are also omissions. Without the existing scaffolding and direction, the Agency will be left yet again to figure things out on their own and the public will be in the dark about how effects are being mitigated and unsure about whether the mitigation will actually come to pass. Leaving such a vacuum in a critical component of NEPA implementation is inexplicable and the agency does not offer any justification for it in the IFR. It must either restore the 2024 mitigation provisions or explain why a different approach is warranted.

⁷ As CEQ explained, because NEPA requires agencies to identify the “reasonably foreseeable environmental effects” of an action, “to the extent that identification assumes the implementation of mitigation measures to avoid adverse effects, it follows, in turn, that implementation of mitigation must also be reasonably foreseeable.” 89 Fed. Reg. at 35518. This provision was upheld against a legal challenge. *Iowa v. Council on Env’t Quality*, 765 F. Supp.3d at 887 (“Monitoring agency-chosen mitigation is directly related to the detailed statement CEQ is directed to regulate.”).

XIV. The Agency Failed To Comply With NEPA Even Though Promulgation Of The IFR Is A “Major Federal Action” With Potentially Significant Impacts.

The IFR is procedurally defective in another way, insofar as the Agency did not comply with NEPA in issuing this rule—which is a major federal action with environmental impacts that need to be disclosed and considered in a NEPA document. The Agency has broken with precedent and offered an inadequate and arbitrary explanation for its actions.

NEPA requires all agencies of the federal government to prepare a “detailed statement” analyzing the environmental effects of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Historically, a “major federal action” upon which an EIS may be required included “new or revised agency rules [and] regulations.” 40 C.F.R. 1502.4 (1978) (“Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations.”); 40 C.F.R. § 1508.1(q)(2)(i) (2024) (major federal action includes “[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act”). As the leading treatise on NEPA states bluntly, “Federal agency rules and regulations are federal actions that require the preparation of an impact statement.” § 8:31. *Rules and regulations*, NEPA Law and Litig. § 8:31 (2024). NEPA has been performed on the issuance of regulations since its inception. *See, e.g., Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971) (rules for licensing nuclear power plants); *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 397 F. Supp. 3d 430 (S.D.N.Y. 2019) (interpretive rule declaring that the Migratory Bird Treaty Act’s take prohibition does not apply to incidental takes was a major federal action).

Indeed, when CEQ first promulgated the original version of its implementing regulations, it prepared a special environmental assessment considering the impacts of its action; it did the same when it issued the 2024 revisions. 89 Fed. Reg. at 35552 (discussing history of preparing “Special EAs” for promulgation of NEPA rules). Both documents are attached.

In issuing the IFR, the Agency did not prepare an EA, EIS, or any NEPA documentation at all. Instead, the IFR declares that the rules are “procedural in its entirety” and hence not subject to NEPA review. 90 Fed. Reg. at 29645. This justification makes no sense. NEPA itself is entirely procedural but nonetheless is intended to have, and does have, environmental impacts. These set of rules will have significant impacts on what kinds of actions are covered by NEPA reviews and what those reviews will cover. There is no exemption under NEPA for “procedural” rules and the agency must comply with NEPA prior to implementing the IFR.

Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 954–55 (7th Cir. 2000) is not to the contrary. In *Heartwood*, the Seventh Circuit concluded that adoption of categorical exclusions for timber harvest on Forest Service land was not a major federal action for NEPA review purposes. On that record and those facts, that may have been so. But the IFR—combined with the revocation of CEQ’s implementing regulations—is entirely another matter.

The IFR’s potential environmental impacts are self-evident. Combined with the revocation of the CEQ rules, the IFR eliminates all of the direction to agencies that guide their implementation of NEPA. The entire premise of this effort is to meet explicit goals of expediting development and resource extraction projects as directed by the President’s executive orders. *See, e.g.*, Executive Order 14154. The IFR is explicitly directed towards the Administration’s effort to streamline federal approvals for consequential, high-impact projects like pipelines and energy generation, production, and transmission projects. Assuming that the premise of the IFR is correct—that it will expedite the approval and construction of many such projects with potential significant environmental impacts—then it unavoidably follows that the IFR itself will have significant environmental impacts that the Agency must consider and disclose pursuant to NEPA.

The Agency’s promulgation of the IFR without preparing an EA or EIS that: (a) examines a reasonable range of alternatives; (b) has a statement of purpose and need that corresponds to the agencies’ proposed action; (c) identifies the correct no action alternative baseline for comparing and assessing direct, indirect, and cumulative environmental effects; (d) uses high quality scientific information; and (e) examines the overarching direct, indirect, and cumulative environmental effects of the IFR violates NEPA and the APA.

XV. The Agency Failed To Comply With The Requirements Of The Endangered Species Act In Issuing The IFR.

Section 7(a)(2) of the ESA requires that each federal agency, in consultation with the U.S. Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service (“NMFS”), ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action is defined to include the promulgation of regulations; actions that may directly or indirectly cause modifications to the land, water, or air; and actions that are intended to conserve listed species or their habitat.” 50 C.F.R. § 402.02.

If a federal agency determines that a proposed action—like issuance of a regulation—“may affect” listed species or critical habitat, the agency must engage in “formal consultation” with FWS and/or NMFS, depending on the species involved. 50 C.F.R. § 402.14. Courts have recognized that the “may affect” hurdle is extremely low, encompassing any possible effect, whether beneficial, benign, adverse, or of an undetermined character.

Formal consultation concludes with the preparation of a biological opinion by FWS and/or NMFS addressing whether the proposed action will jeopardize threatened or endangered species or result in the destruction or adverse modification of critical habitat and setting forth any necessary measures for avoiding, minimizing, and mitigating any adverse impacts. 16 U.S.C. § 1536(b). An action agency may avoid formal consultation by engaging in “informal

consultation” with FWS and/or NMFS and obtaining a written concurrence that the project is not likely to adversely affect threatened or endangered species or critical habitat. 50 C.F.R. § 402.13(a).

The Agency’s issuance of the IFR required consultation under the ESA because when combined with CEQ’s revocation of its implementing regulations, it substantially weakens the environmental review process in many ways that affect listed species and their habitat, including by allowing the agencies to: (1) disregard and/or inadequately analyze direct, indirect, and cumulative impacts of proposed projects; (2) establish arbitrary limits on the completion of EAs and EISs, truncating and reducing the quality of those reviews; (3) gather no new data when preparing completing environmental reviews; (4) undercut the importance of analyzing a range of reasonable alternatives; (5) significantly expand the use of categorical exclusions when in fact adverse environmental impacts are likely; and other flaws as discussed in these comments.

But as far as commenters can determine, the Agency did not consult on the impacts of the IFR to protected species. The IFR says nothing about the issue at all, providing no explanation of a key issue. Nor is there any record of consultation that we are aware of. This failure violates the ESA and is arbitrary.

The Agency should suspend the effectiveness of the IFR until consultation is complete. This too is compelled by statute. Specifically, ESA Section 7(d) provides that after federal agencies initiate consultation on an action under Section 7(a)(2), but prior to completion of consultation, the agencies “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S. C. § 1536(d). The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. While the Agency goes through the consultation process, it should take measures to ensure that this provision is satisfied.

XVI. The IFR Impermissibly Broadens The Circumstances Where There Can Be Preparation Of NEPA Documents By Applicants Or Contractors.

The IFR provides that the applicant, or contractors hired by the applicant or by the Agency, may prepare environmental documents under the Agency’s supervision. 90 Fed. Reg. at 29671–72 (7 C.F.R. § 1b.10).

The Agency impermissibly permits an “applicant or other third party” to prepare documentation relating to categorical exclusions. 90 Fed. Reg. at 29671 (7 C.F.R. § 1b.10(b)). The statute does not authorize the Agency to allow an applicant to prepare findings relating to a categorical exclusion or any other document beyond an EA or EIS, 42 U.S.C. § 4336a(f). The Agency thus should omit this provision and any other provision that would allow applicants or contractors to prepare documents other than EAs or EISs.

XVII. Certain Provisions Of The CEQ Regulations The Agency Has Retained Are Inconsistent With The Statute.

In several places, the Agency has retained provisions that appeared in the 2024 CEQ regulations and to which we previously have objected and/or continue to object as inconsistent with NEPA's requirements. Where the Agency has maintained versions of those provisions here, we incorporate our prior objections. *See, e.g.*, Letter from 328 organizations and tribal nations, to Council on Env't Quality (March 10, 2020); Letter from Environmental Organizations, to Council on Env't Quality (March 2, 2022); Letter from 88 organizations, to Council on Env't Quality (Sept. 29, 2023). We emphasize a few of the ways that the latest CEQ regulations are inconsistent with the statute and also describe objections to the way the Agency has reimplemented those requirements here.

A. The Agency cannot apply a categorical exclusion where it determines significant effects are avoided by mitigation or modification of the action.

CEQ's regulation provided that "[i]f extraordinary circumstances exist, the agency nevertheless may apply the categorical exclusion if . . . the agency modifies the action to avoid the potential to result in significant effects." 40 C.F.R. § 1501.4(b)(1). The Agency has retained a version of this regulation. 90 Fed. Reg. at 29650 (7 C.F.R. § 1b.3(f)(3)).

This approach is inconsistent with NEPA's statutory structure. Where an action cannot be "excluded pursuant to" a categorical exclusion, the Agency must do at least an EA. 42 U.S.C. § 4336(b)(2). In finding extraordinary circumstances, the agency has determined that the action is no longer within the "category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment," 42 U.S.C. § 4336e(1), and so the Agency must do an EA or EIS. *See* 42 U.S.C. § 4336(b)(2).

Indeed, normally, the place for an agency to determine that a particular action will not result in a significant impact as a result of modification or mitigation is after the completion of an EA. Such a determination—called a mitigated finding of no significant impact (FONSI)—thus is normally the end result of the EA review process, not a categorical exclusion determination. By bringing that forward into the categorical exclusion stage of environmental review, the Agency is engaging in an attempted end-run around the procedural requirements of the EA process. The statute envisions categorical exclusions and EAs to play separate roles, and the Agency's approach thus cannot be squared with the statute.

B. The statute does not permit reliance on previously prepared environmental documents.

CEQ also had permitted an agency to adopt EISs, environmental assessments, and categorical exclusion determinations where the proposed actions are "substantially the same" as the action covered by the original environmental document. 40 C.F.R. § 1506.3. The Agency repeats that authority here, *see* 90 Fed. Reg. at 29668 (7 C.F.R. § 1b.9(e)(8)).

Whether there is any statutory support for this kind of adoption or reliance is questionable. The statute specifies the circumstances where no environmental review is required, 42 U.S.C. § 4336, and allows an agency to rely on a prior environmental document only in cases “[w]hen an agency prepares a programmatic environmental document,” 42 U.S.C. § 4336b. But even if some forms of adoption could be squared with the statute—where the adopted document was subjected to any required public participation and other requirements in the context of applying it to the proposed action—the statute should not be read to bear using such a process to skip procedural steps altogether.

To that end, the Agency’s attempt to use this process to expand the scope of available categorical exclusions that have never been formally adopted pursuant to 42 U.S.C. § 4336c is not permitted. NEPA expressly limits reliance on categorical exclusions to only “one of the agency’s [own] categorical exclusions” [or] “another agency’s categorical exclusions consistent with section 4336c of this title.” 42 U.S.C. § 4336(a)(2); *see also id.* § 4336(b)(2). Further, even for situations where an agency has adopted a categorical exclusion, it can be applied only to the specific activities that fall within that “category of actions,” *id.* § 4336e(1), not to any other action that the agency claims is “substantially the same.”

C. The emergency circumstances provision is not authorized by statute.

The Agency has retained a version of CEQ’s provision (40 C.F.R. § 1506.11) relating to NEPA compliance in the case of emergencies.

As an initial matter, the Agency has not located any statutory support within NEPA that justifies non-compliance. NEPA does not, by its terms, allow its requirements to be skipped in the case of emergency. Indeed, the statute and its promise of compliance “to the fullest extent possible,” 42 U.S.C. § 4332, should be interpreted as “words of expansion rather than words of limitation,” Richard Lazarus, *The National Environmental Policy Act in the United States Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1508, 1541 (2012) (collecting cases), and early courts applying the act rejected the argument that agencies had discretion not to implement the statute, *see, e.g., Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 699 (2d Cir. 1972) (“NEPA must be followed unless some existing law applicable to the agency ma[kes] compliance impossible.”); *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971). Accordingly, there is no basis for the Agency omitting its obligation to satisfy NEPA by claiming the existence of an emergency.

Relatedly, the Agency has omitted the reminder—found in CEQ’s prior version of the regulations—that “[a]lternative arrangements do not waive the requirement to comply with the statute, but establish an alternative means for NEPA compliance.” 40 C.F.R. § 1506.11. That had been an important provision to “address confusion as to whether, during emergencies, agency actions are exempted from NEPA.” 89 Fed. Reg. at 35529. The answer to that confusion was a resounding no. *Id.* The Agency should retain this express disclaimer.

Finally, to the extent the Agency suggests that it can take actions without consulting the CEQ, 90 Fed. Reg. at 29670 (7 C.F.R. § 1b.9(v)), that marks an unexplained change from CEQ's regulation.

XVIII. Conclusion.

For all these reasons, the Agency's IFR is inconsistent with NEPA and bedrock principles of administrative law. We urge the Agency to withdraw the IFR until the agency can issue draft rules subject to comment, with a reasonable timeline for comments.

Prairie Hills Audubon Society

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September 23, 2026

Director, Public Benefits
USDA Forest Service, Public Benefits Office
201 14th Street SW, Washington, DC 20250
Submitted via [regulations.gov](https://www.regulations.gov), Docket FS-2026-0100

Re: Scoping comments on the Notice of Intent to Prepare an Environmental Impact Statement, Travel Management; National Forest System Lands, 36 C.F.R. parts 212 and 261, 91 Fed. Reg. 54,686 (Aug. 24, 2026), **Docket FS-2026-0100**

Dear Director:

Prairie Hills Audubon Society (PHAS) submits these scoping comments on the Forest Service's proposal to rewrite its Travel Management Rule. PHAS is a volunteer-run nonprofit conservation organization incorporated in South Dakota. Our members live, work, hike, hunt, camp, birdwatch, engage in nature study and are spiritually renewed by nature in the Black Hills & surrounding prairie. We use the national forests and grasslands of western South Dakota and the neighboring states: the Black Hills National Forest in South Dakota and Wyoming; the Custer Gallatin National Forest's units in northwestern South Dakota & eastern Montana; the Buffalo Gap, Fort Pierre, Grand River and Cedar River National Grasslands in SD; Thunder Basin National Grassland in Wyoming; the Little Missouri National Grassland in North Dakota; and the Nebraska National Forest Units in Nebraska. Our members also use Forests/Grasslands further away. Every one of these units would be governed by the rule the Forest Service proposes.

Summary of Main Points

As the Notice requests here is a brief summary of longer comments:

1. **The Forest Service does not have the staff to carry out this rule.** After losing roughly 16 percent of its workforce in 2025, the agency cannot conduct an annual review of every closed route, document justifications for every closure, and maintain and patrol more open routes. In practice, an understaffed agency presuming routes open means routes will be open by default.
2. **Roadless areas must be closed to motorized use unless specifically opened.** With USDA simultaneously proposing to rescind the 2001 Roadless Rule, all inventoried roadless areas (whether or not that rescission is finalized) should be excluded from the open-unless-closed presumption and from the off-route exemptions, and the EIS must analyze the two rulemakings together, as connected actions.
3. **Rare plants and their habitat in roadless areas would be damaged by motorized use.** The EIS must identify rare plant habitat in roadless areas and protect such areas from

route proliferation and off-route travel. All areas with special designations related to protection of biodiversity, such as special botanical areas must be excluded from the open-unless-closed presumption and from the off-route exemptions,

4. **Keep the minimization criteria** and analyze a full alternative that retains them. Do not dismiss environmental effects as “speculative.”
5. **PHAS objects to the NEPA procedures governing this review** and demands a draft EIS and proposed rule with a comment period of at least 90 days and public meetings.
6. We insist on an **objection period** for your decision
7. **Monitoring of the damage caused by off road travel** must be monitored and the FEIS must include a schedule and a budget for monitoring.
8. All areas designated as **Semi-Primitive NM and Primitive Recreational Opportunity Spectrum (ROS) classes**, must be excluded from the open-unless-closed presumption and from the off-route exemptions. The DEIS must discuss how each Forest/Grassland meets the needs/demands for SPNM and P ROS Classes. It must look at the negative impacts of OHV use, roads and logging on whether areas still provide quality SPNM and P ROS Classes

I. The Forest Service Lacks the Staff to Carry Out an Annual Review of Closures

The proposed rule would require annual review of all trails, roads, airfields, trailheads and other access routes and points that are closed or highly restricted, and would keep a route open unless its closure is “supported by specific, documented and justifiable reasons.” 91 Fed. Reg. 54,686 (Summary). Both requirements demand staff time: botanists, wildlife biologists, hydrologists, archaeologists, recreation planners, law enforcement officers and road crews, on every ranger district, every year.

Those people are no longer there. In early 2025 the Department of Government Efficiency (DOGE), then led by Elon Musk, drove a wave of firings and forced departures across the federal government. USDA itself stated that it released about 2,000 probationary, non-firefighting Forest Service employees; the employees’ union put the number closer to 3,400. According to USDA’s Office of Inspector General, the Forest Service lost 5,860 employees, about 16 percent of its total workforce, in the first half of 2025 alone. Forest Service personnel have since warned in an internal report that critical vacancies, depleted staff and unfunded contracts threaten the agency’s recreation program.

If staffing is inadequate, what other programs would suffer and lose staff , diverted to work on OHV planning and review?

The design of the proposal guarantees the wrong result. The burden of proof shifts to the agency: a route stays open unless an employee builds a documented, science-based record for closing it, and every closure must be revisited every year. When there is no one to build or defend that record, the route stays open or is reopened. An understaffed agency operating under an open-unless-closed presumption is, in effect, an agency that opens routes by default and repeatedly re-

litigates every closure it has already made. The same shortage means fewer people to maintain routes, monitor damage, control weeds and enforce the rules on the ground.

Does the proposal provide for annual review of open roads to see if they are damaging resources? What are the monitoring requirements needing to be met, to justify keeping the OHV roads/trails open? Does the proposal provide for annual review of impacts to wild and pristine areas to see if the needs on the Forest Grassland for SPNM or Primitive ROS Class experiences are being met? Is this an utterly unfair and biased review?

PHAS asks that the EIS:

- Disclose current staffing, by resource specialty, on each national forest and grassland compared with staffing before 2025, and estimate the staff hours an annual closure review and closure documentation would require on a typical unit.
- Analyze what happens when a unit cannot complete the annual review or cannot document a closure for lack of staff, and state plainly whether routes default to open in that case.
- Treat lack of maintenance, monitoring and enforcement capacity as a sufficient, documented reason for closure, as the Notice's own list of closure reasons ("maintenance and administrative capacity") allows, and analyze an alternative in which routes the agency cannot maintain or patrol are closed.
- Analyze an alternative that drops the annual review requirement entirely.
- Provide an alternative that requires monitoring of damage from OHV use to other resources

II. Roadless Areas Must Be Closed to Motorized Use Unless Specifically Opened

Four days before this Notice, USDA published a proposed rule to rescind the 2001 Roadless Area Conservation Rule, 91 Fed. Reg. 53,827 (Aug. 20, 2026) (Docket FS-2025-0001; comment period extended to Oct. 6, 2026). The two actions come from the same Department, in the same month, and push in the same direction. Together they would strip inventoried roadless areas of their national protection against road building and, at the same time, presume that any route that "exists or existed" in them is open, using "commonly available public data sets, including aerial imagery" as evidence of existence. 91 Fed. Reg. 54,686 (Summary). In a roadless area, what shows up on aerial imagery is very often a user-created, unauthorized track, exactly the kind of route the 2005 rule was written to stop.

PHAS asks that:

- All inventoried roadless areas, whether or not the Roadless Rule is rescinded, be excluded from the open-unless-closed presumption and closed to motorized and mechanized use except on routes specifically designated open through a site-specific decision with NEPA analysis and public involvement.
- The off-route exemptions for big-game retrieval, firewood gathering and dispersed camping, and any designation of open "areas" for motorized recreation, not apply in

inventoried roadless areas, recommended wilderness, or other areas managed for primitive or semi-primitive recreation.

- Unauthorized and user-created routes in roadless areas never be treated as “existing” routes, regardless of what aerial imagery shows.
- The EIS analyze the cumulative effects of this rule together with the proposed Roadless Rule rescission, and include an alternative implementing the protections above.

In our region, the Black Hills National Forest has three inventoried roadless areas: Beaver Park in South Dakota and Sand Creek and Inyan Kara in Wyoming. PHAS has long regarded Sand Creek as the finest roadless area in the Black Hills. These are small remnants in a heavily roaded and heavily logged forest. The national grasslands of western South Dakota, especially Buffalo Gap, also contain roadless areas, some of which were recommended for wilderness after years of public effort.

III. Rare Plants and Rare Plant Habitat in Roadless Areas

The Black Hills is a botanical crossroads, with plant communities from the Rocky Mountains, Great Plains, northern boreal forest and eastern deciduous forest. The Forest Service reports that the Black Hills supports over 1,500 plant species, 17 of which are regionally designated as sensitive species. Many of the rarest are relicts confined to cool, spring-fed draws, seeps, fens, streambanks and north-facing slopes: small, wet, easily damaged habitats. Roadless areas, because they have been spared roads, are among the places where such populations and habitats remain intact. The Sand Creek Roadless Area is exceptional in this regard.

Motorized use damages rare plants and their habitat in ways that are well documented: direct crushing; soil compaction and rutting; erosion and sediment in springs and streams; altered drainage that dries out seeps and fens; and, above all, the spread of invasive weeds, whose seeds travel on tires and undercarriages. Once a track is established it is used again and again, and off-route exemptions for game retrieval, firewood and camping multiply tracks across the landscape where no one is surveying.

PHAS asks that the EIS:

- Map known occurrences and potential habitat of federally listed, Regional Forest sensitive (or species of conservation concern) and state-ranked or listed rare plants in roadless areas and other unroaded lands, using Natural Heritage Program data and Forest Service survey records.
- Analyze how the open-unless-closed presumption, the annual reopening review, and the off-route exemptions would affect those occurrences and habitats, including weed spread.
- Require that rare plant habitat, wetlands, fens, springs and riparian areas be excluded from all off-route exemptions and from open-area designations, and that closures protecting rare plants not be subject to annual reconsideration.
- Fully discuss the risk of weed and invasive plants spreading along motorized travel routes.

V. Other Special Areas.

Forests and Grasslands in their Land and Resource Management Plans may set up other special management areas besides Roadless Areas, these can be related to protection of special plant habitat, special wildlife species or habitat, special geologic or paleontological areas, special scenic or recreational areas, special archaeological or Native American areas. We request that all these types of special areas be identified, discussed and must be excluded from the open-unless-closed presumption and from the off-route exemptions,

VI. Monitoring

The DEIS must fully disclose all monitoring planned, how it will be paid for and what happens if the monitoring fails to happen...will the roads and trails stay open?

VIII. Backcountry Recreators Alternative

The Forest Service should provide an alternative that seeks to improve and maximize Semi-primitive and Primitive Recreation Opportunity Spectrum Class opportunities on each Forest or Grassland. This alternative should seek to close to OHV all areas of 2,500 acres without roads/trails or having only very primitive roads/trails. It should inventory road/trail density on forests/grasslands to identify areas without much backcountry area left. If a Forest/Grassland has a lack of such areas, it should have a plan to close roads/trails and/or obliterate road templates to allow nature to recover such areas.

IX. Neighbors living near OHV trails

The Forest Service should have a plan to listen to and involve the neighbors living near OHV trails whose peace and quiet is sacrificed to the trails.

X. Other Scoping Issues

- **Keep the minimization criteria.** The minimization criteria, now at 36 C.F.R. §§ 212.55(b) and 212.81(d), require that routes be located to minimize damage to soil, watershed, vegetation and other resources, harassment of wildlife and disruption of wildlife habitat, and conflicts among uses. The listed alternatives would retain only “selected” requirements. The EIS must analyze at least one alternative that retains all of the minimization criteria in their entirety.
- **Do not dismiss the effects as speculative.** The Notice says estimating site-specific effects would be “highly speculative.” The EIS should model realistic scenarios of route reopening and use growth, using the agency’s own route inventories and MVUM history, and analyze cumulative effects on soils, water, wildlife, weeds and quiet recreation.
- **Analyze the self-executing exemptions now.** The class 1 e-bike exemption and the off-route exemptions would take effect without further local decisions. Their effects must be analyzed in this EIS, not deferred.

- **Wildlife.** Analyze effects on elk and deer security habitat, raptor nesting, grassland birds, northern long-eared bat and other listed and sensitive species.
- **Tribal and cultural resources.** The Black Hills are sacred to the Lakota and other tribes. The EIS must analyze effects on cultural resources, traditional cultural properties and sacred sites, and the Forest Service must conduct meaningful government-to-government consultation.
- **Public involvement.** Retain the public involvement and government coordination requirements of §§ 212.52 and 212.53 for all designation changes, including so-called minor revisions.
- **Analyze effect on fire risk** of more roads & trails, as people are known to start fires.

XI. Objection to the Unlawful NEPA Procedures Governing This Review; Demand for Full Public Participation and Objection Rights; Incorporation by Reference

1. The Forest Service is conducting its NEPA review of this rulemaking under the U.S. Department of Agriculture's revised NEPA procedures, adopted first as an Interim Final Rule issued without prior notice and comment, National Environmental Policy Act, 90 Fed. Reg. 29,632 (July 3, 2025) (Docket No. USDA-2025-0008), and adopted, with minor changes, as a final rule effective April 3, 2026, 91 Fed. Reg. 17,062 (Apr. 3, 2026). That rulemaking rescinded the Forest Service's NEPA regulations at 36 C.F.R. Part 220 in full; eliminated the mandatory requirements to publish a draft environmental impact statement (EIS) and to solicit public comment on it (see 7 C.F.R. § 1b.7(d), which renders all solicitation of comment from the public, Tribes, States, local governments and other agencies discretionary); and eliminated the requirement of former 36 C.F.R. § 220.4(e)(1) that the Forest Service conduct public scoping for all proposed actions, including environmental assessments (EAs) and categorical exclusions (CEs). Consistent with those procedures, this Notice allowed only 30 days of scoping on a nationwide rule governing some 193 million acres, with no scoping meetings.
2. Prairie Hills Audubon Society believes these revised procedures violate the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and the Administrative Procedure Act, 5 U.S.C. §§ 553, 706(2). The procedures are the subject of pending federal litigation: Center for Biological Diversity and Sierra Club v. U.S. Department of Agriculture, et al., Case No. 3:26-cv-00866 (N.D. Cal., filed Jan. 28, 2026). PHAS hereby incorporates by reference into these comments the Complaint for Declaratory and Injunctive Relief in that action, available at https://biologicaldiversity.org/programs/environmental_health/pdfs/USDA-IFR-Complaint.pdf and adopts its allegations and arguments as PHAS's position on the lawfulness of the procedures governing this review. PHAS further incorporates by reference the comments of Earthjustice on the Interim Final Rule (Aug. 4, 2025, Docket No. USDA-2025-0008), available at <https://earthjustice.org/document/nepa-ifr-comments-usda>.
3. The main points of that Complaint, which PHAS adopts, are: (a) the rule was made immediately effective without advance notice or opportunity for public comment, in

violation of 5 U.S.C. § 553(b) and (c), and none of the exceptions USDA invoked (“procedural rule,” “interpretative rule,” “general statement of policy,” or “good cause”) lawfully applies; (b) USDA provided no reasoned explanation for abandoning public participation requirements in place, largely unchanged, since the 1970s, rendering the rule arbitrary and capricious under 5 U.S.C. § 706(2); (c) the elimination of public participation is contrary to NEPA’s statutory mandates that agencies use “all practicable means,” in cooperation with the public, to fulfill NEPA’s purposes, 42 U.S.C. §§ 4331(a)–(b), 4332(2)(B); (d) the rule is inconsistent with Executive Order 11514 § 2(b), which remains in effect and requires procedures ensuring “the fullest practicable provision of timely public information”; and (e) Congress, including in the Fiscal Responsibility Act of 2023 and in numerous permitting statutes that set comment periods on draft EISs, has legislated on the settled premise that draft EISs are published for public comment. USDA’s April 2026 final rule does not cure these defects; an agency cannot validate a rule adopted in violation of section 553 by accepting comments only after the rule has taken effect.

4. This rulemaking compounds those violations at the local level, where travel decisions are actually made. Today, 36 C.F.R. §§ 212.52 and 212.53 guarantee public notice, public involvement and coordination with governments and Tribes before routes are designated or changed. The Notice proposes to scale those steps back, at least for so-called minor revisions. Under the revised USDA NEPA procedures, the Forest Service is no longer required to scope categorically excluded actions, and categorically excluded projects are exempt by statute from the objection process (Consolidated Appropriations Act, 2014, § 431, Pub. L. 113-76). If route reopenings under the annual review are handled as categorical exclusions or “minor” map revisions, the public may never learn that a closure protecting a stream, a rare plant population or elk security habitat has been lifted until the gate is open. The EIS must disclose, step by step, how the public will receive notice of and be able to comment on local route decisions under the combined effect of this rule and the revised NEPA procedures, and the final rule should require notice and comment on every designation change.
5. The Notice states that this action is not subject to the objection process of 36 C.F.R. parts 218 or 219. PHAS disagrees – the rule would override land management plan components. Many forest and grassland plans contain standards, guidelines, management-area direction, route-density limits or motorized-use restrictions that the open-unless-closed presumption, the off-route exemptions and the e-bike exemption would displace. A national rule that overrides plan components effectively amends those plans without the public participation that the National Forest Management Act requires, 16 U.S.C. §§ 1604(d), 1612, and without the objection process of 36 C.F.R. Part 219, subpart B. PHAS asks that the EIS identify every plan component on every unit that the rule would override or conflict with, and that the Forest Service either (a) provide Part 219 participation and objection opportunities for those changes, or (b) state in the rule that it does not override plan components, which remain in effect until amended through the Part 219 process.

6. Future local route decisions implementing this rule that are documented in an EA or EIS must remain subject to the predecisional objection process required by statute, Consolidated Appropriations Act, 2012, § 428, Pub. L. 112-74, as preserved when the 2014 Farm Bill, § 8006, Pub. L. 113-79, repealed the Appeals Reform Act. PHAS further notes the Forest Service's pending proposal to revise the objection regulations, Project-Level Predecisional Administrative Review Process, 91 Fed. Reg. 5,387 (Feb. 6, 2026) (RIN 0596-AD69), which would reduce EA comment periods to 10 days and draft EIS comment periods to 20 days, eliminate extensions, and replace newspaper legal notice with website-only posting. Because only those who submit timely comments may object (36 C.F.R. §§ 218.5, 218.25), and objection is a prerequisite to judicial review, those changes would operate to extinguish administrative and judicial review of local route decisions. Combined with this rule's annual reopening review, the result would be a system in which closures are reconsidered every year and the public has almost no practical way to defend the closures.
7. Accordingly, PHAS demands that for this rulemaking the Forest Service: (a) publish the proposed rule and a draft EIS together, with a public comment period of no fewer than 90 days; (b) hold public meetings in affected regions, including the Northern Great Plains, and conduct government-to-government consultation with affected Tribes, including the Lakota and other Tribes with ties to the Black Hills and national grasslands; (c) circulate the draft EIS to States, counties, Tribes and cooperating agencies; (d) respond to substantive comments in the final EIS; (e) identify on the record which administrative review procedures the agency contends apply to the final rule and to local decisions made under it; and (f) give direct notice of all milestones to everyone who submitted scoping comments. Anything less would violate NEPA and NFMA themselves, independent of any regulation.
8. PHAS submits these comments under protest of the unlawfully truncated procedures and expressly reserves all rights. Should the court in *Center for Biological Diversity v. USDA* vacate the challenged rule in whole or in part, PHAS expects the Forest Service to re-conduct any public participation steps for this rulemaking that were omitted or curtailed under the invalid procedures. Should the Forest Service finalize the proposed revision of 36 C.F.R. Part 218, PHAS objects to its application to local decisions implementing this rule. PHAS reserves the right to challenge any decision issued in reliance on the invalid procedures.



Conclusion

PHAS urges the Forest Service to abandon the open-unless-closed presumption, retain the minimization criteria, protect roadless areas and rare plant habitat from motorized use, and base this rule on an honest accounting of the staff it actually has. Thank you for considering these comments.

Sincerely,

Nancy Hilding
President, Prairie Hills Audubon Society