No. 22-35430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH CASCADES CONSERVATION COUNCIL
AND KATHY JOHNSON,

Plaintiffs-Appellants

v.

UNITED STATES FOREST SERVICE

Defendant-Appellee

HAMPTON LUMBER MILLS-WASHINGTON, INC.; et al.

Intervenor-Defendants

On Appeal from the United States District Court
for the Western District of Washington
No. 2:20-cv-01321-DGE
Hon. David G. Estudillo

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Appellant North Cascades Conservation Council is a non-governmental, non-profit corporation. It has no parent corporation and no stock.

Dated this 31st day of August, 2022.

Respectfully submitted,

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I. INTRODUCTION

Plaintiffs North Cascades Conservation Council ("N3C") and Kathy Johnson appeal the decision of the Western District of Washington to uphold a road-construction and timber-cutting project of the United States Forest Service. Plaintiffs seek vacatur of the Record of Decision and Finding of No Significant Impact (FONSI) for the South Fork Stillaguamish Vegetation Project (the "Vegetation Project" or "Project"), on the grounds that the Vegetation Project and its associated environmental review do not comply with the National Forest Management Act (NFMA), 16 U.S.C. § 1600, *et seq*, and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*.

While dubbed a "vegetation" project by the Forest Service, the Project calls for the construction of miles of roads and the harvest of timber on approximately 3,000 – 4,300 acres. The Forest Service approved the Project even though it is inconsistent with the 1990 Mount-Baker Snoqualmie National Forest Plan ("1990 Plan") and the 1994 Northwest Forest Plan ("1994 Plan") (as amended 2001). The agency also failed to adequately analyze environmental issues before making its decision, contrary to NEPA's requirements. The Forest Service unlawfully increases road mileage within the Project area in violation of the 1994 Plan, unlawfully fails

to retain required woodpecker habitat in violation of the 1990 Plan, and unlawfully declines to conduct required surveys for protected species in violation of the 1994 Plan, amended 2001. The Forest Service's actions were arbitrary and capricious, not in accordance with law, and taken without observance of procedure. This Court should hold unlawful and vacate the Record of Decision and FONSI under the Administrative Procedures Act (APA), 5 U.S.C. § 706, and enjoin the Forest Service from allowing any implementing land-disturbing activities.

II. STATEMENT OF JURISDICTION

The Vegetation Project is an agency action as that term is defined in the Administrative Procedure Act. 5 U.S.C. § 551(13). N3C invokes the district court's jurisdiction to review the agency action pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331. The district court's April 7, 2022 order adopting the magistrate's report and recommendation, and April 7, 2022 judgment in a civil case, constituted final orders that disposed of N3C's claims. ER-3–9. N3C filed a notice of appeal on May 31, 2022. ER-211–216. N3C's appeal was timely, because the defendants are a United States agency and its staff in their official capacities. FRAP 4(A)(1)(b). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Vegetation Project will lead to a net increase in road mileage within the Project area and, therefore, will violate the 1994 Northwest Forest Plan, Dkt. 7-13, AR 06351–06586,[1] which will, in turn, constitute a violation of the National Forest Management Act (NFMA), 16 U.S.C. § 1604(j).

2. Whether the Vegetation Project will lead to less retention of cavity nester (woodpecker) habitat than the amounts mandated by the 1990 Forest Plan for the Mt. Baker-Snoqualmie National Forest, Dkt. 7-8, AR 02527–3089, and, therefore, will violate 16 U.S.C. § 1604(j).

3. Whether the Forest Service, in approving the Vegetation Plan, failed to conduct adequate sensitive species evaluations as required by the 1990 Forest Plan for the Mt. Baker-Snoqualmie National Forest, Dkt. 7-8, AR 02527–3089, and, therefore, violated 16 U.S.C. § 1604(j).

[1] In our Excerpts of Record, we supply only the cited pages of lengthy documents such as the 1994 Northwest Forest Plan. When introducing each document, however, we identify the complete document's entire page range within the Administrative Record and the location of those pages within the district court's docket.

4. Whether the Forest Service was required by the 1990 Forest Plan for the Mt. Baker-Snoqualmie National Forest, Dkt. 7-8, AR 02527–3089, to conduct a pre-disturbance survey for the Puget Oregonian Snail, did not conduct such a survey, and, therefore, violated 16 U.S.C. § 1604(j).

5. Whether the Forest Service failed to take the required "hard look" at the environmental impacts of the Vegetation Project and, therefore, violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*.

6. Whether the Forest Service failed to consider a reasonable range of alternatives to the Vegetation Project and, therefore, violated NEPA.

Each of the foregoing issues was raised below in the Plaintiffs' Rev. Mot. for Summ. J., ER-85–116. The magistrate issued a Report and Recommendation Adverse to N3C on each of these issues. ER-10–54. The district court adopted in full the magistrate's Report and Recommendation in the court's April 7, 2022 order granting summary judgment. ER-3–9.

IV. STATEMENT OF THE CASE

The Project area consists of 65,000 acres within the larger Mount Baker-Snoqualmie National Forest in Washington's Cascade Mountains. *See* Final

Environment Assessment ("FEA"), ER-150–151.[2] The Project area consists of a mosaic of natural stands (meaning patches of old-growth trees that have never been logged) and "managed" stands (meaning patches that were logged in previous decades and are now regrowing). *Id*.

The Project proposes to construct new roads and log on approximately 3,000 – 4,300 acres. *See* ER-206 (Decision).[3] The proposed logging will not consist of clearcuts but rather "thinning." *Id*.

Thinning is a process in which many trees, but not all, are removed from a particular stand. ER161–164 (FEA). The purpose of thinning is to eliminate smaller trees from the stand, thereby concentrating the stand's growth potential in the remaining, larger trees, which will grow faster in the absence of competition. *Id*. In commercial thinning, the felled logs are hauled away and sold. In non-commercial thinning, the felled logs remain in place. *Id*.

Within the 65,000-acre Project area, 2,000 – 3,300 acres will be commercially thinned. An additional 1,060 acres will be "considered" for non-commercial

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[2] The complete FEA is in the record at Dkt. 7-39, AR 19095-19425, but we supply only cited excerpts here.

[3] The complete Decision is in the record at Dkt. 7-43, AR 20268–20318.

thinning. ER-206 (Decision). Because non-commercial thinning does not generate revenue but does generate cost, the ultimate decision on how much land to subject to non-commercial thinning will depend on revenues from the commercial thinning and on other funding sources. ER-161 (FEA).

The extraction of logs from the commercially thinned areas will require the construction of new "haul roads" to move the logs out of the forest. Decision, ER-210. By contrast, the non-commercially thinned areas will not require the construction of roads. *See* ER-165 (FEA, map showing proposed "temporary roads" in yellow, all of which lead to commercially thinned areas but not non-commercially thinned areas). The exact mileage of roads to be constructed is a disputed issue in this case, so it will be addressed in the argument section of this brief.

In September 2017, the Forest Service completed its FEA for the Project. On May 31, 2019, the Forest Service issued its finding of no significant environmental impact, which means there would be no comprehensive environmental analysis in the form of an environmental impact statement. Simultaneously, the agency selected Alternative 2B as its final action. On or about the same date, the Forest Service also issued an errata sheet for the FEA. ER-198–205 (Errata).

V. SUMMARY OF ARGUMENT

A. The Vegetation Project will Lead to a Net Increase in Road Mileage within the Project Area, in Violation of the 1994 Northwest Forest Plan.

The 1994 Northwest Forest Plan mandates that there will be "no net increase in the amount of roads" within "key watersheds." ER-139. The parties agree that the Vegetation Project is subject to this provision. ER-62 (Def.'s Opp. to Summ. J.). The purpose of the prohibition is to avoid the impacts of new logging road construction, which can be worse than the impacts of logging itself. ER-137 (Final Supplemental EIS to the 1994 Plan). The Vegetation Project violates the "no net increase" road prohibition in three ways.

First, there will be a net increase in road mileage within the Project area during the implementation of the Project—which could be as long as 20 years. The Forest Service argues that a net increase for up to two decades does not violate the prohibition because the increase is not forever. That reading is incorrect because it ignores the environmental harms associated with two decades of road construction and operation—the very harms the prohibition was intended to prevent.

Second, the Forest Service's inventory of existing roads erroneously counts roads that already have been decommissioned as existing roads, which leads the

Forest Service to erroneously count the mileage of decommissioned roads "reopened" during the Project as if the reopened roads are not new roads. The "reopened" decommissioned roads should have been counted as new roads for purposes of assessing net increase in mileage.

Third, the Forest Service presents multiple, inconsistent tallies of existing roads and roads to be built or reopened, but none of the tallies show there will be no net increase in mileage. The Forest Service's inability to provide consistent, verifiable calculations is, itself, a basis for finding the agency's action is unreasoned and, therefore, arbitrary and capricious.

B. The Vegetation Project will Lead to Less Retention of Woodpecker Habitat than the Amounts Mandated by the 1990 Forest Plan.

The 1990 Plan sets an objective of retaining 40% of the potential population of "cavity nester" (woodpecker) habitat throughout the forest. ER-129 (1990 Plan). The Forest Service acknowledges that the 1990 Plan's 40% cavity excavator population standard applies to the Project. *See* ER-175 (FEA). The Project FEA admits that the Project will not meet this standard. *Id.* at ER-178 ("modeled expected snags/acre would **not provide adequate numbers to support above 40 percent** of

the target primary excavator in the projected 100 years"). This violation of the plan renders the decision arbitrary and capricious and not in compliance with the law.

C. The Forest Service Failed to Evaluate the Project's Impacts on Certain Sensitive Species.

The 1990 Plan requires a biological evaluation for sensitive species in the Project area and a prohibition on activities that will contribute to their demise. ER-135. Sensitive species known or suspected to be present in the Project area include peregrine falcon, bald eagle, harlequin duck, common loon, northern goshawk, Townsend's big-eared bat, little brown myotis, Cascade red fox, mountain goat, California wolverine, and various plant or fungus species. ER-171–173 (FEA).

The Forest Service asserts that its biological evaluation ("BE") of the sensitive species satisfies the Plan's requirement to assess the Project's impacts on these sensitive species. ER-209 (Decision, citing BE).[4] However, the BE does not actually evaluate whether the Project will "contribute to these [sensitive] species becoming threatened or endangered," as required by the 1990 Plan. The BE only makes the assertion without evidence or analysis.

[4] The complete BE is in the record at Dkt. 7-36, AR 18051–18109.

D. The Forest Service Failed to Conduct a Pre-Disturbance Survey for the Pacific Oregonian Snail.

The 2001 amendments to the 1994 Northwest Forest Plan require pre-disturbance surveys for species categorized as "survey and manage" species Category A or Category C. *See* ER-142–143 (2001 Rule).[5, 6] The Pacific Oregonian snail (Cryptomastix devia) is listed as Category A. *Id*. at ER-144. However, the Forest Service did not conduct pre-disturbance surveys for this species.

The Forest Service was required by the 1990 Forest Plan by the Mt. Baker-Snoqualmie National Forest to conduct a pre-disturbance survey for the Puget Oregonian Snail but did not conduct such a survey.

E. The Forest Service Failed to Take a Hard Look at the Environmental Impacts of the Project.

NEPA requires the Forest Service to take a "hard look at the likely effects" of a proposed project. *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 916

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5 The complete 2001 Rule is in the record at Dkt. 7-14, AR 07660–07813.

6 "Survey and manage" species are those about which insufficient data is known to evaluate the impacts of logging, and thus, project-level surveys are needed to determine each project's impacts. *Id*. "Survey and manage" species depend on old-growth forest and are not otherwise protected by the provisions of the 1994 Plan. Survey and manage species are divided among six categories, depending on their rarity and their amenability to pre-disturbance survey. ER-142.

(9th Cir 2012). Critical to understanding a project's impacts is understanding the existing conditions. Effects cannot be assessed without reference to a reliable baseline.

Here, the Forest Service failed to determine the baseline wildlife populations. Without a baseline, the project impacts could not be meaningfully assessed and NEPA's requirement for a thorough assessment of environmental consequences was not met.

F. The Forest Service Failed to Analyze a Range of Reasonable Alternatives.

NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). Likewise, the Forest Service is required by its own NEPA rules to analyze alternatives that meet the need for action, unless there are "no unresolved conflicts concerning alternative uses of available resources." 36 C.F.R. § 220.7.

The "heart" of an NEPA review is the agency's analysis of alternatives. *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). *See* 42 U.S.C. § 4332(E). The alternatives analysis enables the agency to identify

modifications to the proposed action that can accomplish the agency's objectives, but with less harm to the environment. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1068–1069 (9th Cir. 2012). "The alternatives provision of NEPA applies whether an agency is preparing an EIS or an EA." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005).

Here, the FEA does not analyze any alternative besides the Project and no action. Yet, there is unresolved conflict concerning alternative uses of the South Fork Stillaguamish Forest, in that the Forest Service is seeking to build new, environmentally destructive roads. *See*, ER-137 (Final Supplemental EIS to the 1994 Plan: impact of road construction can be worse than impact of logging). However, Alternatives 2 and 2A merely adjust the acreage and mileage of Alternative 2B—they do not examine an alternative to road-building in the first place, such as, for example, relying solely on existing roads to implement the Project.

VI. STANDARD OF REVIEW

When an agency's NFMA and NEPA decisions are appealed under the APA, this Court conducts *de novo* review. *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1032 (9th Cir. 2020) (citing *Guatay Christian Fellowship v. Cty. of San*

Diego, 670 F.3d 957, 970 (9th Cir. 2011). This Court reviews the agency's decisions under the familiar APA standard of review set forth at 5 U.S.C. § 706(2)(a): "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. (citing *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1112 (9th Cir. 2018)).

Judicial review under this standard is to be "searching" and "careful" and should determine whether the decision was based upon a consideration of the relevant factors. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). An agency action should be overturned when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (1983).

Courts have effectively treated forest plan directives as equivalent to federal regulations adopted under the APA, deferring to the Forest Service's interpretation of plan directives that are susceptible to more than one meaning, unless the

interpretation is plainly erroneous or inconsistent with the directive. *See Hapner v. Tidwell*, 621 F.3d 1239, 1251 (9th Cir. 2010). An agency's position that is contrary to the clear language of a forest plan is not entitled to deference. *Native Ecosystem Council v. U.S. Forest Serv.*, 418 F.3d 953, 962 (9th Cir. 2005); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1377 (9th Cir. 1998).

VII. ARGUMENT

A. NFMA and NEPA: Legal Background.

The National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1687, charges the Forest Service with the management of national forest land, including planning for the protection and use of the land and its natural resources. *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1109 (9th Cir. 2018). Under NFMA, forest land management occurs on two levels: (1) the forest level, and (2) the individual project level. *Id*. at 1109 (citing *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2012)).

On the forest level, each planning unit of the National Forest system is managed under a "Land Resource Management Plan," commonly called a "forest plan." 16 U.S.C. § 1604. A forest plan describes the desired resource conditions across the planning unit and provides allocations, goals, objectives, standards, and

guidelines for forest managers. *Id*. Specific logging projects, such as the Vegetation Project, must be consistent with the goals, objectives, standards, and guidelines set forth in the forest plan. 16 U.S.C. § 1604(i).

The Project is subject to the governance of two forest plans: the 1990 Plan for the Mt. Baker-Snoqualmie National Forest and the 1994 Northwest Forest Plan that emerged from the spotted owl litigation of the 1980s and 90s.[7] The 1994 Plan was updated with new "survey and manage" guidelines for wildlife in 2001. The specific requirements of these plans and the Vegetation Project's non-compliance with them will be discussed below.

The Project is also subject to review under the National Environmental Policy Act (NEPA). NEPA compels agencies to prepare an environmental assessment (EA) when the agency proposes action that might result in adverse environmental impacts. 40 C.F.R. § 1501.3. Based on the assessment, the agency then issues either a Finding of No Significant Impact (FONSI) or an EIS. The agency prepares an EIS when "substantial questions are raised as to whether a project may cause significant

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[7] For background on the emergence of the 1994 Northwest Forest Plan, *see* "Enforcing Ecosystem Management under the Northwest Forest Plan: The Judicial Role," 12 Fordham Entl. L.J. 211 (2000).

degradation of some human environmental factor." *Cal. Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (citations omitted). If the agency determines that there are no substantial questions, then it may issue a FONSI. 40 C.F.R. § 1501.6.

B. The Vegetation Project Violates the 1994 Plan Prohibition Against Increased Road Mileage.

In recognition of the environmental damage caused by roads, the 1994 Plan seeks to reduce total road mileage in the forest and absolutely precludes any increase. In several respects, the Project violates the prohibition against any increase. Errors exist on both sides of the equation: the mileage of pre-Project roads is overstated, and the mileage of post-Project roads is understated. Both calculations also suffer from accountings that are at times inconsistent and/or impossible to decipher. We discuss these issues below.

1. The 1994 Plan prohibits a net increase in road mileage.

The EIS for the 1994 Plan recognizes that logging roads often cause more harm to fish-bearing streams than any other activity, even worse than the logging itself:

> Road networks in many upland areas of the Pacific Northwest are the primary sources of management-

> accelerated sediment delivery to anadromous fish habitat. Sedimentation from this source is often **much greater than from all other land management activities combined**, including log skidding and yarding. Large storms can result in road-related landslides, surface erosion and stream channel diversion. Storms deliver large quantities of sediment to streams, both chronically and catastrophically. **Roads have unavoidable effects on streams no matter how well they are designed, located or maintained**.

ER-137. Thus, the 1994 Plan includes Standards and Guidelines C-7, which seeks to reduce total road miles and in "Key Watersheds" absolutely prohibits an increase:

> Outside Roadless Areas - Reduce existing system and nonsystem road mileage. If funding is insufficient to implement reductions, **there will be no net increase in the amount of roads in Key Watersheds**.

ER-139 (emphasis supplied). ("Key Watersheds" contain "at-risk anadromous salmonids, bull trout, and resident fish species, or are important sources of high quality water." ER-136 (1994 Plan EIS).)

The Forest Service acknowledges that the entire Project is within a Key Watershed. ER-160 (FEA). Therefore, Standard C-7 applies: the Forest Service must reduce existing road mileage and, if there is insufficient funding to do so, the Forest Service must, at a minimum, prevent a net increase in amount of roads in the Project area.

2. The Agency has not demonstrated compliance with the "no net increase" rule because of multiple flaws in its pre- and post-project road inventories.

The Forest Service's description of the existing and proposed roads is confusing and contradictory, in a manner that conceals both the existing and the proposed mileage. In fact, the Forest Service confused itself and had to issue an errata to the FEA correcting its mileage figures. ER-204–205 (Errata, amending FEA); ER-208 (Decision). However, even with the errata, the Forest Service's figures do not add up to no net increase, no matter which of the many contradictory mileage counts is used.

a. The Forest Service overstates the pre-Project road mileage by erroneously counting decommissioned roads as existing roads.

It is impossible to determine whether the total mileage of roads post-project is greater or less than the pre-project baseline unless the agency accurately and clearly determines the pre-project road mileage. Unsurprisingly, then, the Ninth Circuit has ruled that if the Forest Service fails to indicate which roads are included in its "baseline" inventory of roads, the Service cannot demonstrate compliance with forest plan requirements to avoid increasing road mileage. "The Forest Service committed clear error in its analysis by failing to specify that the existing

undetermined roads were included in the Access Amendments baseline calculation, and thus failed to provide a cogent explanation for its conclusion that the Project complies with the Access Amendments". *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1036 (9th Cir. 2018).

The Forest Service categorizes roads by their maintenance levels, which the FEA and Decision abbreviate "ML." The ML of a road describes the standard to which the road is currently managed. ER-180 (FEA). ML1 roads are the lowest standard, characterized as "[i]ntermittent service roads managed as closed to vehicular traffic, and kept in storage until the next project access need." *Id*. At the other end of the spectrum, ML5 roads provide the highest standard of comfort and convenience, "normally double lane and paved." *Id*. ML2, ML3, and ML4 fall in-between. *Id*.

Two categories of roads fall outside the ML system. One is the "Unclassified" roads (formerly "primitive roads") which receive no maintenance. They are "not managed as part of the forest transportation system, including those roads that were once under permit or other authorization and were not decommissioned upon the termination of the authorization." *Id*.

The other non-ML category is decommissioned roads. Decommissioned roads are no longer roads at all. They are closed with berms and vegetation is allowed to grow, rendering them impassable to vehicles. *Id*. at AR 19279. The intention with a decommissioned road is that "soil and plant growth would eventually reclaim the road site." *Id*. at ER-179. *See also* 36 C.F.R. § 212.1 ("Road Decommissioning. Activities that result in the stabilization and restoration of unneeded roads to a more natural state").

Decommissioned roads are similar to unclassified roads in that neither receive maintenance, but different in that decommissioned roads are "managed according to the land allocation in which [they are] located," ER-196 (FEA), meaning the road corridor of a decommissioned road is treated the same as the surrounding forest type for purpose of forest management. For instance, if a decommissioned road is traversing forest lands designated for harvest, the acreage beneath that decommissioned road is characterized as part of the harvest area, not as a "road." *See Friends of Bitterroot v. Marten*, CV-20-19-M-DLC, 2020 WL 5804251 (D. Mont., Sept. 29, 2020) (decommissioned roads are "returned to the productive land base").

By contrast, unclassified roads are obsolete roads that were *not* decommissioned. *Compare* ER-196 (FEA definition of decommissioned road) *with* ER-197 (FEA definition of unclassified road). The acreage beneath "unclassified" roads is still denominated as "road," unlike that of decommissioned roads.

The Forest Service details the existing road inventory in the Project area in Table 33 of the FEA. The table commingles the mileage of unclassified and decommissioned roads, despite their very different status for land management purposes:

Maintenance Level (ML)	ML Type	Miles
5	High degree of user comfort and convenience	0
4	Moderate degree of user comfort and convenience at moderate travel speeds	5.3
3	Maintained for travel by prudent driver in standard passenger car	71
2	High clearance vehicle use	27.1
1	Intermittent use road while placed in storage	71.5
Unclassified	Unclassified or decommissioned	23
Total		197.9

FEA, ER-181.

Because decommissioned roads are supposed to be managed the same as the surrounding forest, not treated as roads, the decommissioned roads should have been excluded from the inventory of existing roads. By including the mileage of the

decommissioned roads in the inventory of existing roads, the Forest Service makes it appear as if there is currently more road miles in the Project area than actually exists—an error which conceals the Project's increase in actual road mileage.

For example, Benson Creek Road segment 4005000 is identified in the Transportation Report as an existing "unspecified road planned for hauling." ER-124 (Table 3). However, segment 4005000 is identified in the Forest Service's inventory as a decommissioned road. ER-125 (Spreadsheet: ML Changes MBS SF Stillaguamish ATM Roads Summary). In other words, for purposes of counting existing road miles, the Forest Service is treating this decommissioned road as an existing road even though, as a decommissioned road, it should not be counted as a road at all. By this disingenuous technique, the Forest Service pretends that any work done on segment 4005000 is merely "reconstruction" of an existing road when, in reality, it is construction of a new road. The same is true for all the other road segments listed at ER-124 (Table 3), totaling 11.864 miles.

Because the agency's net road mileage calculation is built on a flawed pre-project inventory, the net mileage calculation is flawed and overstates the pre-existing road mileage. Therefore, the decision should be vacated. *See Alliance for the Wild Rockies v. Savage*, *supra*, 897 F.3d at 1036.

b. The Forest Service's pre-project road inventory is riddled with inconsistencies.

Separately from the road mileage table discussed in the prior section, the Forest Service made an effort to disaggregate the decommissioned roads from the unclassified roads, but that attempt only highlights the Forest Service's failure to accurately inventory the roads. In its record of decision, the Forest Service claims it will reopen 29 miles of "closed roads" on a temporary basis. ER-207. It describes these existing, closed roads as "12 miles of non-system roads" (meaning unclassified roads, ER-185 (FEA)) and "15 miles of road prism from previous timber harvest" (meaning decommissioned roads, ER-167 (FEA)). ER-207 (Decision).

However, 12 + 15 = 27 miles, not 29 miles (the miles of closed roads the Decision says will be re-opened), so these numbers literally do not add up. Nor are these numbers consistent with the value in Table 3 of the FEA (ER-181), which listed 23 miles of "unclassified or decommissioned roads" in the Project area, not 27 miles nor 29 miles. Further inconsistent numbers appear in the Forest Service's Transportation Report, which lists 23.4 miles of "unclassified or decommissioned roads," not 23 miles, 27 miles, or 29 miles. ER-117.

In its various attempts to explain the existing road mileage calculations, the Forest Service simply cannot get its facts straight. Clearly, the Forest Service is counting some previously decommissioned roads as existing roads in its inventory of existing roads. But the exact mileage affected cannot be determined because the Forest Service does not provide consistent accounting. Without that data, the agency lacks a "cogent explanation" for its net road mileage calculation, rendering its decision arbitrary and capricious and unsupported by substantial evidence. *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1050 (2010); 5 U.S.C. § 706(2)(A).

c. The Forest Service's post-project inventory is riddled with inconsistences.

The Forest Service's post-Project road mileage forecasts are also internally inconsistent. As with the pre-Project inventories, the agency's numbers simply do not add up. We describe two significant inconsistencies in this section.

The FEA's Table 44 sets forth the agency's pre- and post-Project mileages and purports to show that they are the same. The table is reproduced below. The column "Existing – No Action Miles" tallies the pre-Project miles. The column "Alt.

2B mileage" tallies the post-Project miles. The totals in both columns (197 miles) purport to show that there is no change in net road mileage.[8]

Maintenance Level (ML)	ML Type	Existing - No Action Miles	Alt. 2B mileage
4	Moderate degree of user comfort and convenience at moderate travel speeds	5.26	5.26
3	Maintained for travel by prudent driver in standard passenger car	71	53
2	High clearance vehicle use	27.1	20
2A	Administrative use only	0	8
1	Intermittent use road while placed in storage	71.55	70
C	Convert system road to trail	0	1.8
0	Decommission current system road	0	17
Unclassified	Unclassified road used as temporary roads would be decommissioned	22	22
Total		197	197

FEA, Table 44, ER-195.

First, there is a new and unexplained inconsistency between Table 33 (ER-181) and Table 44 (ER-195) with regard to the "unclassified" roads. In Table 33, the existing roads in the "unclassified" category include an undifferentiated mixture of unclassified roads and decommissioned roads. (These two categories should have been disaggregated, as described above, but at least Table 33 acknowledges the existence of both unclassified and decommissioned roads.) In Table 44, however,

[8] As noted in the prior section of this brief, the FEA inventory of 197.9 miles of existing roads, ER-181, is inaccurate because it counts decommissioned roads as existing roads. But for argument's sake, we use that as the baseline in this section.

the "unclassified" ML term (in column one) disappears, replaced by the "ML0" descriptor and this line of the table now references only unclassified roads, as if there were no decommissioned roads. This is a whole new failure to account for the Project's mileage, in that the FEA indicates there are both unclassified and decommissioned roads, not just unclassified roads, as Table 44 claims.

A second, smaller discrepancy between Table 33 and Table 44 is the change from 23 unclassified miles in Table 33 to 22 unclassified miles in Table 44. This change is made without explanation, creating yet another inconsistent tally of the Forest Service's roads. As the 1994 Northwest Forest Plan notes, "each mile" of roads is significant for purposes of the no-net increase rule. ER-138. No-net increase requires a one-mile reduction to offset a one-mile increase. A single mile cannot simply be added or deleted at whim, as has occurred here.

A third, larger inconsistency flows from the agency's effort to fix the problems with the errata. The errata sheet does not include a replacement to Table 44, but juxtaposing the values from Table 44 with those included in the errata results in the following comparison:

Maintenance Level (ML)	ML Type	Existing - No Action Miles (same on both tables)	Original Table 44 Alt. 2B mileage	Errata Table 44 Alt. 2B mileage
4	Moderate degree of user comfort and convenience at moderate travel speeds	5.26	5.26	5.26
3	Maintained for travel by prudent driver in standard passenger car	71	53	41
2	High clearance vehicle use	27.1	20	14
2A	Administrative Use Only	0	8	8
1	Intermittent use road while placed in storage	71.55	70	60
C	Convert system road to trail	0	1.8	1.8
0	Decommission current system road	0	17	17
Unclassified	Unclassified road used as temporary roads would be decommissioned	22	22	23
Total		197	197	170

The errata makes it appear as if there has been a bottom-line 27-mile reduction in road mileage relative to both existing conditions and the original Table 44 (197 miles drops to 170). But this reduction does not withstand scrutiny. The 27 mile drop in post-Project mileage between Table 44 and the errata is the sum of a 12 mile reduction in post-Project in ML3, a 6 mile reduction in ML 2, and a 10 mile reduction in ML 1. (As noted earlier, there was also a one mile change in the opposite direction in "Unclassified.") The errata's accounting is silent as to the disposition of these roads. If, for instance, the Project results in 12 fewer miles of ML3 roads, where have they gone? According to the errata, they have simply disappeared. They are not accounted for in any other category. If they are to be decommissioned, there

should be a corresponding increase in decommissioned roads, but there is none. The errata shows a total of only 17 miles of decommissioned road for Alternative 2B, which is the same as the total mileage of decommissioned roads in Table 44. Twenty-seven miles of existing road have disappeared without accounting for them anywhere.

Simply put, nothing the Forest Service says about its road mileage is believable: Neither the existing road mileage (where decommissioned roads are wrongly counted as unclassified roads) nor the Project mileage (where, among other things, the Forest Service deletes 27 miles from its inventory without actually decommissioning them) withstand scrutiny. The approval should be vacated because of the Forest Service's failure to demonstrate compliance with the 1994 Northwest Forest Plan's Standard C-7, even when it comes to such a simple task as tallying road mileage in a consistent manner. 5 U.S.C. 706(2)(A), (E). *See Humane Soc. Of U.S. v. Locke*, *supra*, 626 F.3d at 1050 (requiring agency to provide a "cogent explanation").

d. The Forest Service wrongly omits new temporary roads in its post-project accounting.

The Forest Service fails to include "temporary" roads in its post-Project inventory—it does not count them at all, as if the temporary roads will never exist. Like the other errors, this flaw precludes the agency from demonstrating compliance with the no net increase standard.

The Forest Service claims it will be opening either 23 miles or 29 miles or 30 miles of so-called temporary roads. *See* ER-205 (Errata: "Use and then decommission approximately 23 miles of non-system roads"); ER-207 (Decision: "reopening 29 miles of closed roads and closing after use"); ER-119 (Transportation Report: "Alternative 2 would use approximately 30 miles of temporary roads"). Consistent with its sloppy bookkeeping, the Forest Service provides no explanation for these conflicting values. Whatever the correct value, the agency has failed to account for these roads in its inventory. Yet these 23 or 29 or 30 miles of roads would function as roads for the duration of the Project, so they should have counted against the no-net increase requirement.

The agency's use of the adjective "temporary" to describe these roads is misleading. "Temporary" might suggest roads in existence for a brief time. But

nothing in the record provides a deadline by which the timber contractors will have to decommission the temporary roads. On the contrary, as the FEA states:

> 2.2.2.5 Timing of Project Activities
>
> Most activities would be completed within the next **10 to 15 years**. Some actions related to timber sale preparation could begin at the earliest possible implementation date. Other actions, such as road to trail conversion or recreation site improvements would not begin **until after thinning is completed and funding is secured from grants or other sources to complete construction**. Connected actions may require sequencing over the **10 or more** years with the commercial thinning activities which would occur over the course of several years. Road and trailhead construction activities, **road decommissioning** and aquatic organism passage activities, etc. **would also occur intermittently, as funding becomes available** through timber sales or other sources.

ER-166 (emphasis added).

> Road work and harvest activity associated with timber sales in the project could begin in 2018 and continue **for approximately 10 years through successive timber sale contracts**.

ER-169 (emphasis added).

> The purpose of the project is to manage the SF Stillaguamish Late Successional Reserve on a landscape scale with opportunities for forest management actions identified for the next **10 to 20 years**.

ER-158 (emphasis added).

Leaving the so-called temporary roads in place for 10–20 years (or longer—no deadline for decommissioning them is set forth) will result in multiple decades of "landslides, surface erosion and . . . large quantities of sediment to streams." ER-137 (1994 Plan FEIS). In addition, the environmental impacts from the actual construction of the so-called temporary roads will be substantial:

> Opening and reconstructing these non-system roads would include clearing shrubs, trees and other vegetation from the road bed and road side, reestablishing a safe road prism, cleaning and replacing culverts and other drainage features and road re-surfacing where needed. New and existing temporary roads would also have improvements necessary to stabilize the roadbed and fill slopes, including employing measures such as out-sloping, drainage dips, and water-spreading ditches.

Transportation Report, ER-121.

Contrary to the Plan's mandate for no net road mileage increase, these new miles of so-called temporary road will not be offset during their existence by any decommissioning of roads elsewhere. Instead, the temporary roads are simply omitted from the agency's supposedly balanced road budget.

The only way to offset the impacts of the 10–20 years of new "temporary" roads and thereby achieve no net increase would be to decommission other roads

before or concurrently with opening the new "temporary" roads. But the Forest Service has not proposed such a plan.

Ten to 20 years of additional "temporary" road mileage, while the roads generate landslides, erosion and large quantities of sediment and the Forest Service looks for decommissioning funding that may never appear, is not consistent with the requirement of the 1994 Plan, Standard C-7 that there be "no net increase in the amount of roads." In *Native Ecosystem Council v. Krueger*, 946 F.Supp.2d 1060, 1088–1089 (D. Mont., 2013), the court found that when a forest plan's EIS recognized impacts from temporary roads and recommended "no net increase" in road mileage, a revision to the forest plan that discounted temporary road mileage from the forest's final mileage was arbitrary and capricious. The parallel to this case is obvious, in that the 1994 Plan EIS recognizes severe landslide and erosion impacts from roads "no matter how well they are designed, located or maintained." ER-137. If it was arbitrary and capricious to discount temporary miles in *Krueger*, it is arbitrary and capricious to discount them here.

Federal courts have, on occasion, countenanced projects that created temporary increases in road miles during the projects, even where forest plans called for "no net increase." However, none of these projects proposed decades-long

temporary roads and all of these projects resulted in *fewer* roads at the end of the project, neither of which is the case for this Project. For instance, in *Klamath-Siskiyou Wildlands Ctr. v. Graham*, 899 F.Supp.2d 948, 966 (E.D. Cal., 2012), the court upheld a project that added 6.7 miles of new road, but also proposed decommissioning 15 miles of existing road "in the near future." In *Native Ecosystems Council v. Martin*, 209 F.Supp.3d 1168, 1172 (D. Mont. 2016), the court upheld a project that authorized 11.2 of additional temporary roads, but the decommissioning of 22 miles of roads. Neither of these cases indicates support for this Project, which does not propose any decrease in road mileage at the end of the Project and will increase "temporary" roads for decades—not the "near future."

In *Alliance for the Wild Rockies v. Bradford*, 856 F.3d 1238, 1242 (9th Cir. 2017), the 9th Circuit upheld a project that called for a temporary increase in road miles during the project, but there, the forest plan had a specific allowance for temporary roads outside of the no net increase accounting: "Temporary increases (not off-set) in linear miles of total roads are acceptable under the following conditions … These roads shall be closed immediately upon completion of activities requiring use of the road." *Id*. at 1242. But here, the 1994 Plan does not have a

provision that authorizes temporary road mileage increases outside of the no net increase accounting. *Bradford* does not aid the Forest Service's position.

Thus, even if the Forest Service's mileage numbers were actually cogent and consistent (which they are not), the Project would be in violation of the no-net increase rule because of the temporary roads. Therefore, the Project approval was not in accordance with the law. 5 U.S.C. § 706(2)(A).

C. The Project Violates the 1990 Plan Requirement to Meet Forest Plan Requirements for Woodpecker Habitat.

The Project violates the 1990 Plan's requirements to preserve woodpecker habitat. The 1990 Plan sets an objective of retaining 40% of the potential population of "cavity nester" (woodpecker) habitat throughout the forest. ER-129 (1990 Plan). In support of this objective, the 1990 Plan sets Standards and Guidelines for "project planning" that incorporates that objective and increase the standard to 80% in crucial riparian areas:

> Retain standing dead and standing green trees sufficient to maintain cavity nester habitat at or above 40% of minimum potential population levels, throughout the managed forest (80% in riparian areas).

ER-130.

The FEA acknowledges that the 1990 Plan's 40% cavity excavator population standard applies to the Project. ER-175. The FEA also admits that the Project will not meet this standard: "[M]odeled expected snags/acre would **not provide adequate numbers to support above 40 percent** of the target primary excavator in the projected 100 years." ER-178 (emphasis added).[9] Instead, the Project area will fall to just 30% cavity excavator population in the lowlands and "less than 30%" in the montane region. *Id*.

In contrast, under the no-action alternative, the Project area would have met the 40% standard—in fact, exceeded it:

> Snag levels in the second growth stands, as modeled out to the year 2116, are projected to contribute to snag levels at the **50% tolerance leve**l for species associated with snags greater than 10" dbh and **50% tolerance level** for species associated with snags greater than 20" dbh for the Western Lowland/Conifer Hardwood Forests (WLCH_S) vegetation types. Snag levels in proposed second growth project stands would contribute to a landscape that would maintain **at least the 80% tolerance level** for species associated with snags greater than 10" dbh and **also an 80% tolerance** level for species associated with snags greater than 20" dbh for the Montane Mixed Conifer Forests (MMC) vegetation types.

[9] There is no separate woodpecker modeling in the FEA for Alternative 2B, the selected alternative. However, Alternative 2 and 2B are similar, except that Alt. 2B affects even more stands than Alternative 2.

ER-176 (FEA description of "no action" alternative; emphasis added).

In essence, the agency admits that the Project will take an area of forest that would, in its undisturbed state, have complied with the 1990 Plan, but, as a result of the Project, will fall out of compliance with the Plan. This violates NFMA's requirement that projects be consistent with the forest plan, 16 U.S.C. § 1604(i), and is grounds to vacate the Project decision, 5 U.S.C. 706(2)(A).

In addition, the Forest Service turned a blind eye to the 1990 Plan requirement to provide 80% (not 40%) cavity excavator habitat within riparian areas. Riparian areas are pervasive throughout the Project area, so the 80% habitat rule should have been top of mind. *See* ER 170 (FEA: "84% of the watershed is Riparian Reserve"). Instead, the Forest Service made no effort to demonstrate that the forest will continue to meet the 80% habitat standard for riparian areas post-Project. An agency has a duty to provide a reasoned explanation for its decision. *Alliance for the Wild Rockies v. Savage, supra*, 897 F.3d at 1036. The Forest Service's failure to address the 80% habitat standard in riparian areas is an additional basis for vacatur.

D. The Forest Service Failed to Determine Impacts on Sensitive Species and Failed to Survey for Species Subject to a "Survey-and-Manage" Mandate.

The 1990 Plan includes special protections for "sensitive species"[10] and "survey-and-manage" species.[11] However, the Forest Service failed to follow the 1990 Plan's protections for either of these two categories of species.

1. The Forest Service failed to evaluate all sensitive species.

The 1990 Plan requires a biological evaluation for sensitive species in the project area and a prohibition on activities that will contribute to their demise:

> All proposed management actions which have the potential to affect habitat of endangered, threatened, or sensitive species will be evaluated to determine if any of these species are present …
>
> When sensitive species are present, a Biological Evaluation shall be completed as described in Forest Service Manual 2670. Habitat for sensitive plants and animals shall be managed to ensure that management activities do not contribute to these species becoming threatened or endangered.

ER-135.

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[10] "Sensitive species" are those that are under consideration for listing as threatened or endangered species at either the federal or state level.

[11] "Survey and manage species" described in n. 6, *supra*.

Sensitive species known or suspected to be present in the Project include peregrine falcon, bald eagle, harlequin duck, common loon, northern goshawk, Townsend's big-eared bat, little brown myotis, Cascade red fox, mountain goat, California wolverine, and various plant or fungus species. ER-171–173 (FEA). The Forest Service asserts that its biological evaluation ("BE") of the sensitive species satisfies the Plan's requirement to assess the Project's impacts on these sensitive species. *See* Decision, at ER-209 (citing BE).[12]

However, the BE does not actually evaluate whether the Project will "contribute to these [sensitive] species becoming threatened or endangered," as required by the 1990 Plan. For many of the sensitive species (including Cascade red fox, northern goshawk, California wolverine, harlequin duck, and peregrine falcon), there is no citation to any data regarding the species' abundance or sensitivity to the Project's logging and road building. Thus, there is no basis for the BE's conclusion that the Project will not contribute to the species' listing. The decision is unsupported by substantial evidence and fails the APA requirement that an agency "articulate a

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[12] A biological evaluation is a document that considers a project's impacts on sensitive species. *See Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1236 (9th Cir. 2005).

rational connection between the facts found and the conclusions reached." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156–57 (9th Cir. 2006), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The court should find the Forest Service's decision is not in compliance with the law, 5 U.S.C. § 706(2)(A), and vacate it.

2. The Forest Service failed to conduct pre-disturbance surveys for the Pacific Oregonian snail, a "survey and manage" species.[13]

The 2001 amendments to the 1994 Plan require pre-disturbance surveys for species categorized as "survey and manage" species Category A or Category C. ER-142–143 (2001 Rule). The Pacific Oregonian snail (*Cryptomastix devia*) is listed as Category A. ER-144. However, the Forest Service did not conduct pre-disturbance surveys for this species.

The FEA acknowledges that the Pacific Oregonian is a Category A species and is "suspected" to occur in the Project area. ER-173 (listing the species as "suspect, but not documented"). Thus, a pre-disturbance survey should have been conducted. However, even though it is suspected to occur, and without undertaking

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[13] *See* note 6, *supra*.

any investigation to establish its occurrence, the authors of the BE chose not to survey "due to the lack old-growth features and the mollusk's obligate association with Bigleaf maple." ER 145 (BE).

This rationale for failing to survey for Pacific Oregonian lacks any basis in the record and lacks a "rational connection" between the facts found and the agency's conclusions. *Earth Island Inst. v. U.S. Forest Serv.*, *supra*. It runs contrary to the statement that the snail is "suspected" to occur and the agency's similar statements that it cannot assume that the current lack of sightings indicates the snail is not present. As stated in the 2001 Rule EIS:

> Information on both geographic and reference distributions is fragmentary or entirely unavailable for all of the species in this group because historically, collections were undertaken in limited geographic areas and a majority of the Survey and Manage mollusk species were undiscovered or unrecognized as distinct species until recently
>
> …
>
> [T]here is a moderate level of uncertainty primarily due to lack of knowledge about the historic and current distributions and habitat associations for these species.

ER-140–141.[14]

The scientific uncertainty acknowledged in the 2001 Rule EIS should have prompted the Forest Service to conduct a thorough pre-disturbance survey for the Pacific Oregonian, not no survey at all. *See Klamath Sikiyou Wildlands Center v. Boody*, 468 F.3d 539, 562 (9th Cir. 2006). There are hundreds of acres of big-leaf maple in the Project area (FEA, at ER-168) (big-leaf maples comprise at least 1% of the 65,000-acre Project area) bolstering the likelihood that the Pacific Oregonian *is* present. The Forest Service's failure to conduct a pre-disturbance survey for Pacific Oregonian, are not compliant with the 1990 Plan and the 2001 Rule and are grounds to vacate and remand the Decision.

E. The Forest Service Failed to Take a Hard Look at the Environmental Impacts of the Project.

NEPA requires the Forest Service to take a "hard look at the likely effects" of a proposed project. *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 916 (9th Cir. 2012). "In other words, the Forest Service must 'undertake a thorough environmental analysis before concluding that no significant environmental impact

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[14] The complete EIS for the 2001 Rule is in the record at Dkt. 7-14, AR 06702–07269.

exists.'" *Native Ecosystem Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005) (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998)).

Critical to the process of understanding a project's impacts is an understanding of the existing conditions prior to the project.

> A baseline is not an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action. *See* 54 Fed.Reg. 23756 (1989). Although this Court has had few occasions to address this issue, we have stated that "[w]ithout establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir.1988).

American Rivers v. Fed. Energy Regulatory Comm'n, 201 F.3d 1186, 1195, n. 15 (9th Cir. 1999). NEPA requires "high-quality information and accurate scientific analysis. 40 C.F.R. § 1500.1(b)." *See also Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005).

Here, the Forest Service has not undertaken a thorough environmental analysis of the Project, because, as demonstrated above, it has failed to determine the baseline wildlife populations prior to the Project. Thus, in this Court's words,

"there is no way to comply with NEPA." *American Rivers v. Fed. Energy Regulatory Comm'n*, *supra.*

F. The Forest Service Failed to Analyze a Range of Reasonable Alternatives.

NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). Likewise, the Forest Service is required by its own NEPA rules to analyze alternatives that meet the need for action, unless there are "no unresolved conflicts concerning alternative uses of available resources." 36 C.F.R. § 220.7. "The alternatives provision of NEPA applies whether an agency is preparing an EIS or an EA." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005).

Here, the FEA does not analyze any alternative besides the Project and no action. Yet, there is unresolved conflict concerning alternative uses of the South Fork Stillaguamish Forest—more logging or more protection for imperiled species? To further the logging goal, the Forest Service is seeking to build new environmentally destructive roads. However, that brings with it the potential for more environmental

harm. Other balance points between these competing goals are possible. Logging that uses existing roads—no new roads—could be considered. Less logging and more environmental protection versus more logging and less environmental protection. This is the "unresolved conflict" that mandates an assessment of alternative actions.

Bu the agency failed to consider any such alternative. Alternatives 2 and 2A merely propose slightly different acreage and road mileage compared to Alternative 2B—they do not examine an alternative to road-building in the first place. In particular, the agency had the option of conducting noncommercial thinning exclusively. That would require no road-building at all and yet could accomplish some or all of the agency's stated objective of enhanced future old-growth habitat by concentrating growth in the larger trees. *See* ER-165 (FEA: non-commercial thinning requires no roads). The agency's failure to analyze that reasonable alternative violates NEPA.

VIII. RELIEF SOUGHT

N3C asks this Court to vacate the Forest Service's decision approving the Vegetation Project under NFMA and the Forest Service's decision to issue a FONSI under NEPA. Vacatur of an unlawful decision is appropriate under Section 706 of

the APA, *See, e.g., SE. Ala. Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action."), *rev'd on other grounds sub nom. Coeur Alaska v. Bonneville Power Admin.*, 557 U.S. 261 (2009).The Forest Service should be enjoined from undertaking or authorizing any land-disturbing activities until adequate environmental review has been completed and a new decision made that uses that review and is consistent with the requirements of the 1990 Forest Plan, 1994 Northwest Forest Plan, and the 2001 amendments to the 1994 Northwest Forest Plan.

IX. STATEMENT OF RELATED CASES

The undersigned attorney states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are: ______________________________

X. CERTIFICATE OF COMPLIANCE

In compliance with FRAP 32(7)(B), I certify that this brief contains 9,033words.

Dated this 31st day of August, 2022.

Respectfully submitted,

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