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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL; ALASKA RAINFOREST DEFENDERS; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB; DEFENDERS OF WILDLIFE; ALASKA WILDERNESS LEAGUE; NATIONAL AUDUBON SOCIETY; and NATURAL RESOURCES DEFENSE COUNCIL, *Plaintiffs*, v. UNITED STATES FOREST SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE; DAVID SCHMID, in his official capacity as United States Forest Service Region 10 Regional Forester; and EARL STEWART, in his official capacity as Forest Supervisor for the Tongass National Forest, *Defendants*.	)	Case No. 1:19-cv-00006-SLG

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING REMEDY

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Pursuant to this Court's orders of March 11, 2020, Doc. 40 at 50, and April 23, 2020, Doc. 44, Plaintiffs submit this supplemental brief addressing the proper remedy.

The parties now agree on a major component of the remedy. After this Court's summary judgment ruling, counsel for Defendants informed the undersigned that Defendants agree an appropriate remedy in this case is vacatur of the vegetation management and road construction portions of the Record of Decision (ROD) for the Prince of Wales Project.

The only area of apparent disagreement concerns potential use of the Final Environmental Impact Statement (FEIS) for future timber sales and roads. Plaintiffs seek relief preventing the Forest Service from "tiering" to the FEIS in future timber sale or road construction projects. Tiering to the FEIS would violate the National Environmental Policy Act (NEPA) because the FEIS was not prepared, nor disclosed to the public, as a programmatic document. To avoid this result, Plaintiffs request that the Court vacate the FEIS as applied to vegetation management and road construction. While vacating the FEIS in that manner would prevent the Forest Service from tiering to it, it would not prevent the Forest Service from using the FEIS in appropriate ways, even for logging and roads. The Forest Service may incorporate by reference relevant portions of a vacated FEIS in future EISs or Environmental Assessments (EAs)—subject to full NEPA review—but may not tier to it.

I. Vacatur of portions of the ROD is an appropriate remedy.

As explained in Plaintiffs' opening brief on the merits, Plaintiffs ask the Court to vacate those portions of the ROD authorizing vegetation management and road construction. Doc. 10 at 43-44. Vacatur of an unlawful agency action is the normal remedy under the Administrative Procedure Act. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018); *see also* 5 U.S.C. § 706(2)(A) (directing reviewing courts to "set aside" arbitrary or unlawful agency action); Doc. 40 at 47-48. The Supreme Court views vacatur as a "less drastic remedy" than an injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010).

The Court need not vacate the entire ROD, but may vacate only those portions held arbitrary or unlawful. *See id.* (citing "partial or complete vacatur" as appropriate remedy); *Today's IV, Inc. v. Fed. Transit Admin.*, No. LA CV13-00378 JAK (PLAx), 2014 WL 5313943, at *17-19, *24 (C.D. Cal. Sept. 12, 2014) (vacating ROD only as to one segment of transit line), *aff'd sub nom. Japanese Village, LLC v. Fed. Transit Admin.*, 843 F.3d 445 (9th Cir. 2016); *League of Wilderness Defs./Blue Mts. Biodiversity Project v. U.S. Forest Serv.*, No. 3:10-CV-01397-SI, 2012 WL 13042847, at *5 (D. Or. Dec. 10, 2012) (vacating invasive species plan ROD only as to herbicide treatments). The ROD here authorized actions in four categories: Vegetation Management (mostly timber sales); Watershed Improvement and Restoration; Sustainable Recreation

Management; and Associated Actions (mostly roads). *See* Doc. 25-7 at 348-51 (ROD at 2-5). Not all of these actions were necessarily unlawful or arbitrary.

There is no need to vacate those parts of the decision approving Watershed Improvement and Restoration and Sustainable Recreation Management. The Forest Service routinely undertakes these types of actions without an EIS, and usually without even an EA, because they generally do not have significant environmental impacts. *See*, *e.g.*, 36 C.F.R. §§ 220.6(e)(1), (6), (7), (18), (20) (establishing categorical exclusions for various recreation and restoration activities); Exhibit 1 (Schedule of Proposed Actions identifying trail, bridge, cabin, thinning, salvage, shelter, stream channel, culvert, and habitat projects to be prepared with EAs or categorical exclusions). Plaintiffs support the restoration and recreation actions approved in the ROD and did not bring any claims challenging them.

In contrast, the logging and road construction components of the ROD would cause significant environmental impacts, and this Court held the FEIS inadequate for those purposes. It is therefore appropriate to vacate only those parts of the ROD.

II. The Court should vacate the FEIS as applied to timber sales and roads.

Plaintiffs request that the Court vacate the FEIS as applied to vegetation management and road construction. This relief would prevent the Forest Service from tiering to an EIS this Court has held invalid, and it flows necessarily from the Court's ruling on the merits. While the agency may not tier to an invalid EIS, the Forest Service would remain free to incorporate parts of the FEIS it finds relevant in future NEPA

documents, which would be subject to full NEPA scrutiny. It is appropriate for a court to vacate an agency action as applied in a particular way. *See Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 81-82 (D.C. Cir. 2020) (holding that courts may vacate unlawful applications of a rule without vacating lawful ones).

The Council on Environmental Quality (CEQ) and the courts draw important distinctions between tiering and incorporating by reference. To eliminate repetition and focus on the issues relevant to a particular decision, the CEQ regulations encourage agencies to tier their EISs. 40 C.F.R. § 1502.20. The agency may tier to two types of EISs: (1) those for programmatic plans; and (2) those for an earlier stage of the same project. *Id.*; *see also id.* § 1508.28. Agencies can tier only to a valid EIS—they "cannot 'tier' their site-specific EISs to the broader . . . program where the program itself has not been subject to NEPA procedures." *Kern v. U.S. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002) (quoting *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998)); *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 811 (9th Cir. 1999) (rejecting tiering to watershed report not subject to EIS); *Cal. ex rel. Lockyer v. U.S. Forest Serv.*, 465 F. Supp. 2d 917, 926-27 (N.D. Cal. 2006) ("Where, as here, NEPA review is required, tiering is encouraged as long as the relevant analysis relies on a document that has been subject to an adequate NEPA analysis."); *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Connaughton*, No. 3:12-CV-02271-HZ, 2014 WL

6977611, at *10 (D. Or. Dec. 9, 2014) (rejecting agency's attempt to tier to a not-yet-completed NEPA document). Thus, an agency cannot tier to an invalid or vacated EIS.

In contrast, an EIS or EA may incorporate by reference any materials available to the public, *see* 40 C.F.R. § 1502.21, as long as the new EIS or EA contains a complete analysis under NEPA. When it does, courts have allowed agencies to incorporate by reference materials from non-NEPA documents and from draft NEPA documents. *See, e.g., All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1120-21 (9th Cir. 2018) (upholding reliance on material from a draft forest plan EIS where the Project EIS fully analyzed the cumulative, direct, and indirect effects); *Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 795 (9th Cir. 2014) (upholding incorporation by reference of, but not tiering to, non-federal environmental reports where the text of the challenged EIS thoroughly considered the environmental effects); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1186 (N.D. Cal. 2004) ("To the extent the environmental analysis in the EA incorporates and depends upon the analyses in these specialists' reports, the adequacy of the analyses in the specialists' reports must be scrutinized."). Presumably, then, an agency might incorporate by reference portions of even a vacated EIS, if it contains relevant data, as long as it remains publicly available and is subject to full NEPA scrutiny—including judicial review if needed—in the new EIS or EA.

In the present case, it would not be permissible for the Forest Service to tier to the FEIS for any future vegetation management or road construction. The FEIS was prepared for neither a programmatic plan nor an earlier stage of any future project. *See* 40 C.F.R. § 1508.28 (defining tiering). To the contrary, the FEIS makes clear repeatedly that it is the final step in the NEPA process. As this Court explained, "Instead of preparing a programmatic EIS to be followed by site-specific NEPA analyses for individual timber sales as they occur, the agency compressed its NEPA review for the entire 15-year Project into a single document." Doc. 40 at 17. And the Court held it invalid for its stated purpose. *Id.* at 32.

The FEIS repeatedly makes clear that the Forest Service did not intend to tier to it in any future NEPA decisions. The first page of the FEIS explains: "The Prince of Wales Landscape Level Analysis (POW LLA) Project is a large scale, condition-based analysis to comply with the National Environmental Policy Act (NEPA) that will produce *one decision* to authorize integrated resource management actions on Prince of Wales Island." Doc. 25-6 at 3 (emphasis added). It further explains: "The site-specific locations and methods will be determined *during implementation* based on defined conditions in the alternative selected in the Record of Decision (ROD) in conjunction with the Activity Cards in Appendix A and Implementation Plan in Appendix B, which will accompany the Record of Decision." *Id.* at 17 (emphasis added). The Implementation Plan in Appendix B, in turn, "was developed in conjunction with the

Activity Cards in Appendix A to provide a linkage from the FEIS to the project-specific work *without the need for additional NEPA analysis*." Doc. 25-7 at 217 (emphasis added).

Thus, any future attempt to tier to the FEIS would directly contradict its plainly stated function. To repurpose the FEIS in that manner would be a substantial change in the proposed action, requiring a supplemental EIS. 40 C.F.R. § 1502.9(c)(1)(i) (requiring supplemental EISs where "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns"). The Forest Service staff who prepared the FEIS, the state and federal agencies and members of the public who reviewed and commented on it, and the decisionmakers who approved it all did so with the understanding that it was to be the one and only NEPA review for the POW project. To repurpose the FEIS to support some type of programmatic plan (or some other type of document to which future projects would tier) would require a new NEPA process defining its new purpose, analyzing alternatives and impacts accordingly, and explaining how it would relate to future NEPA compliance for timber sales or roads. It would also require a new ROD, selecting one of the alternatives as a programmatic plan. *See id.* § 1505.2 (requiring RODs). In the absence of a supplemental EIS and new ROD, the FEIS as applied to logging and roads would be nothing more than a free-floating analysis of various alternatives prepared for a different purpose.

These additional procedural steps would be required by NEPA to provide members of the public and other agencies the opportunity to review, comment on, file objections to, and, if necessary, litigate the EIS and new ROD in light of their new purpose. As this Court explained, NEPA "requires 'that the 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.'" Doc. 40 at 15 (quoting *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 924 (9th Cir. 2015) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989))); *see also id.* at 16 (focus of review is "whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." (quoting *Churchill Cty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001)).

For these reasons, vacating the FEIS as applied to vegetation management and road construction would appropriately prevent the Forest Service from tiering to the FEIS contrary to its stated purpose, but would not prevent the agency from using any relevant data in the FEIS through incorporation by reference in future NEPA documents—either programmatic or site-specific—subject to full NEPA scrutiny. It would therefore be appropriate relief in this case. *See Nat. Res. Def. Council v. Wheeler*, 955 F.3d at 81-82 (holding that courts may vacate unlawful applications of a rule without vacating lawful ones).

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court: (1) vacate the portions of the ROD authorizing vegetation management and road construction; and (2) vacate the FEIS as applied to vegetation management and road construction.

Respectfully submitted this 5th day of May, 2020.

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