

~~Appeal~~
Appeal 04-06-029-15
Retmarked May 6, 2004

APPEAL TO THE REGIONAL FORESTER
USDA FOREST SERVICE REGION SIX OF A
DECISION OF THE FOREST SUPERVISOR OF THE
OLYMPIC NATIONAL FOREST

OLYMPIC FOREST COALITION, OLYMPIC
PARK ASSOCIATES, OLYMPIC
PENINSULA AUDUBON SOCIETY, non-
profit corporations; and BONNIE PHILLIPS,
and KIRIE PEDERSEN, individuals,

Appellants,

vs.

DALE HOM, Olympic National Forest
Supervisor,

Deciding Official

In Re: Appeal of the Dosewallips Washout
Bypass Environmental Assessment, Finding
of No Significant Impact, and Decision
Notice on the Hood Canal Ranger District,
Olympic National Forest

APPELLANTS' NOTICE OF APPEAL,
REQUEST FOR RELIEF, AND
STATEMENT OF REASONS

DATED THIS 6th DAY OF MAY, 2004.

NOTICE OF APPEAL

On March 22 2004, Olympic Forest Supervisor, Dale Hom, issued a decision notice and finding of no significant impact (DN/FONSI) for the Dosewallips Washout Bypass environmental assessment (EA), approving Alternative C that would "repair...Forest Road 2610 by constructing a bypass, or reroute, around the washout" on the same road. *DN/FONSI*, 1. The project would construct a permanent .74 mile bypass around the washout at approximately 8 – 10% grade. *Id.* at 3. At least 220 trees greater than 21" diameter at breast height (dbh) would be logged, affecting 4 acres of late-successional forest. *Id.*; *Attachment 13, Pictures*.

The project area is located in the Dosewallips River Watershed on the Hood Canal Ranger District (District) on the Olympic National Forest (ONF). According to the Northwest Forest Plan, the Dosewallips watershed is a Tier 1 Key Watershed. The entire project area is in a Riparian Reserve adjacent to the Dosewallips River, the Quilcene Late-Successional Reserve (LSR), northern spotted owl and marbled murrelet critical habitat, and is surrounded by two designated wilderness areas (The Brothers Wilderness Area to the south and the Buckhorn Wilderness Area to the north).

Notice is hereby given pursuant to 36 C.F.R. § 215 that the below listed groups are appealing the decision by the Forest Supervisor to approve and implement the Dosewallips Washout Bypass environmental assessment, finding of no significant impact, decision notice, and the Dosewallips River Washout project.

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The Appellants believe that the Forest Supervisor's decision of March 22 2004 is in error and not in accordance with the legal requirements of the Administrative Procedures Act (APA), the Clean Water Act (CWA), the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and these statutes' implementing regulations.

The Appellants have a specific interest in this project. We have previously indicated our interest in this project by commenting throughout the planning process and continued involvement in management of the Olympic National Forest (ONF). Appellants' continued interest and involvement in this project creates standing to appeal this decision according to 36 C.F.R. § 215.11(a) and other sections.

The Dosewallips Washout Bypass directly and significantly affects the members and volunteers of the Olympic Forest Coalition, Olympic Park Associates, and Olympic Peninsula Audubon Society. Our members and volunteers regularly use the project area and the surrounding areas for work, outdoor recreation, fisheries research, wildlife observation, and other forest-related activities.

Bonnie Phillips, an individual, has spent considerable time in the Olympic National Forest and National Park recreating, researching forest ecology, and enjoying other pursuits. Prior to 1983, Ms. Phillips was an avid hiker, climber, and skier and spent a great deal of time in the National Forests in Western Washington, including the Olympic National Forest. In May 1983, Ms. Phillips suffered an injury which has mandated use of a wheelchair during most of every year since that time. Most handicapped trails on public lands are paved and very short. These trails, important to many, nevertheless does not provide a recreation experience for those who have poor or no use of their legs yet have good health and upper body strength. She promotes decommissioning the road and providing for a trail that would be handicapped accessible.

Kirie Pedersen, an individual, was born in the town of Brinnon in 1951, and lived in Brinnon during her youth, and returned to Brinnon in 1986 to raise her family. Ms. Pedersen has spent weekends and summers along the Dosewallips River throughout her lifetime, hiking and enjoying the land in and around the Dosewallips River watershed.

Implementation of the Dosewallips Washout Bypass project would adversely affect the Appellants because the proposed road reconstruction would result in degradation of fish and wildlife habitat in and around the analysis area. Appellants have a long-standing and well-documented interest in the management of the area in which the Dosewallips Washout Bypass is located.

REQUESTED RELIEF

1. That the decision notice and finding of no significant impact for this project be withdrawn;
2. That this project be modified to meet the objections presented in Appellants' Statement of Reasons, including but not limited to:
 - A. Eliminate all road construction or reconstruction; or
 - B. Conduct an extensive geotechnical investigation, analysis, and project design; and
 - C. Prepare an environmental impact statement to assess the project's effects based on the extensive geotechnical investigation; and
3. That the project is revised to ensure consistency with the Administrative Procedures Act, Clean Water Act, Endangered Species Act, National Environmental Policy Act, National Forest Management Act, these statutes' implementing regulations, and the amended Olympic National Forest Land and Resource Management Plan.

Statement of Reasons

The Forest Service (USFS) claims that the purpose and need of the Dosewallips Washout Bypass is to "restore access to the Olympic National Forest Elkhorn Campground and the Olympic National Park Dosewallips Campground and Trailhead." *Dosewallips Washout Bypass Environmental Assessment (EA)*, 8. While Appellants appreciate the need to provide adequate recreational opportunities in the National Forest and National Park, the proposed project is not only unnecessary to accomplish the purpose and need, but is also excessively environmentally harmful: in order to allow more cars into the Forest and Park, the Forest Service is proposing to log hundreds of old growth trees and significantly affect salmon-bearing streams, even though numbers of anadromous fish and terrestrial species such as the northern spotted owl are critically depressed in the planning area.

Once vast stretches of mature and old-growth forest habitat have been reduced to a fragmented patchwork that is now sparsely woven together by remnant stands of late successional and old-growth forest and degraded riparian corridors. Nowhere in the Pacific Northwest is this more evident than on the Olympic National Forest. The degradation of forest habitat has caused the precipitous decline of species dependent on large areas of old-growth forest habitat such as the northern spotted owl and marbled murrelet, and numerous vascular and non-vascular plants. Species that also required large areas of intact, undisturbed forest habitat are also at risk. These species continue to be pushed towards extinction by additional logging and fragmentation of mature and old growth forest. Since the Olympic National Forest has done little or no monitoring of sensitive and rare species on the forest, there are almost no studies on which the USFS or the public can rely for decision-making about resource use and allocation.

While the Hood Canal Ranger District does not seem to dispute that the impacts of logging have been significant, the ONF has failed to adequately quantify and qualify the impacts of the current

proposal. The Dosewallips EA insufficiently identifies the impacts of the project and does not justify the proposed project.

Given both the significant impacts of this project and the lack of evidence supporting the statements that there will be no significant impacts from the Dosewallips Washout Bypass, the decision to implement the proposed project is arbitrary and capricious and violates the Administrative Procedures Act. The Dosewallips Bypass project would also violate the Clean Water Act, the Endangered Species Act, the National Environmental Policy Act, the National Forest Management Act, and the amended Olympic National Forest Land and Resource Management Plan (Forest Plan or OFP).

I. THE FOREST SERVICE VIOLATED NEPA BY APPROVING THE DOSEWALLIPS EA AND DN/FONSI IN THE ABSENCE OF AN ADEQUATE EVIDENTIARY RECORD ESTABLISHING THAT THERE WOULD BE NO SIGNIFICANT DIRECT, INDIRECT, AND CUMULATIVE IMPACTS FROM THE PROPOSED ACTION AND PAST, PRESENT, AND REASONABLY FORESEEABLE FUTURE ACTIONS.

The Dosewallips Washout Bypass environmental assessment violates the National Environmental Policy Act and its implementing regulations. 42 U.S.C. §§ 4321–4370d (1994 & Supp. III 1997); 40 C.F.R. § 1500–1508.28 (1998). The decision notice and finding of no significant impact are arbitrary and capricious in violation of the Administrative Procedures Act. 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344 (1994 & Supp. III 1997).

The Dosewallips EA does not provide enough information to determine the extent of indirect, direct, or cumulative environmental impacts associated with the Dosewallips Bypass project. Moreover, the EA does not furnish substantive and quantitative evidence showing this project will not cause serious and irreversible damage to soils, forest productivity, plant diversity, water quality, and wildlife habitat. In fact, the evidence strongly suggests that the project will cause significant impacts to these resources that preclude the implementation of the proposed project.

The Dosewallips EA fails to identify and evaluate the cumulative impacts of the project. Under NEPA, “significance exists if it is reasonable to anticipate cumulatively significant impacts on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). Furthermore, NEPA requires the agency to evaluate “cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” *Id.* § 1508.24(a)(2).

The Dosewallips EA does not actually analyze the cumulative impacts of this project and other past, current, and foreseeable future projects, including road maintenance, subsequent road bypass projects, federal timber harvest, state and private industrial logging, herbicide use, off-road vehicle use, fire suppression, hazard tree removal, fire rehabilitation, salvage logging, future wildfire, and other management activities. There is no indication that the agency has assessed the nature of the cumulative impacts to species, soil, and aquatic resources within the planning area. Of particular concern is the loss of late-successional habitat and the considerable road maintenance and reconstruction associated with the proposed project.

Several projects in the same watershed have *cumulative impacts*, which are defined as “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. When these impacts are significant, an EIS is required. *Id.* § 1502.4. Under NEPA, “significance exists if it is reasonable to anticipate cumulatively significant impacts on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). NFMA also makes clear that “cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 36 C.F.R. § 1508.24(a)(2).

The Forest Service on the ONF has failed to assess the cumulative impacts of the Dosewallips Washout Bypass. Because there is no indication that the agency has assessed the nature of the cumulative impacts to species, soil, and aquatic resources within the planning area, the Dosewallips Washout Bypass EA and DN/FONSI must be withdrawn. In the alternative, the Forest Service should prepare an EIS that adequately assesses the cumulative impacts of this project in conjunction with other projects in the same watershed.

A. Direct and Indirect Effects from the Dosewallips Washout Bypass Project.

1. Lack of quantitative and qualitative data on water quality.

Appellants point out that there is a general lack of sufficient information surrounding the water quality in the planning area. A recent General Accounting Office study indicates that federal and state land management decisions are limited by the lack of information about the aquatic systems at issue. *Attachment 44, Key EPA and State Decisions Limited by Inconsistent and Incomplete Data*. There is no indication that the Olympic National Forest has assessed the implications of this report or changed its management practices so as to comply with the recommendations in the GAO report.

The fact that there is little baseline against which to gauge the effects of the proposed project is problematic because the USFS does not possess the amount of data that is necessary to issue a DN/FONSI. If adequate baseline data is missing, NFMA requires the agency to obtain it. 36 C.F.R. § 219.12(d). The Ninth Circuit has also held that “general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

According to the Clean Water Act (CWA) Section 313, all federal agencies “shall comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution, and federal actors must comply with all record keeping, recording and permitting requirements.” 33 U.S.C. § 1323(a). The Ninth Circuit has interpreted this provision to mean that the Forest Service must comply with all state water quality standards when carrying out its road-building and logging activities. *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688 (9th Cir. 1986).

This means that the Forest Service cannot claim that the agency's own policies and regulations supersede state water quality standards. In *Northwest Indian Cemetery*, the Forest Service claimed that its Best Management Project (BMPs) were the only water quality standards applicable. *Id.* at 697. The Ninth Circuit held that adherence to BMPs did not automatically ensure that state water quality standards were met. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998), *cert. denied*, *Olympic Lumber Co. v. Blue Mountains Biodiversity Project*, 119 S.Ct. 2337 (1999).

Accordingly, the Forest Service must describe how the selected alternative for the Dosewallips Washout Bypass complies with Washington's water quality standards.

2. Failure to adequately assess affects to wildlife.

The Dosewallips Washout Bypass EA conducts a woefully inadequate review of impacts to wildlife from the proposed project. The Dosewallips Washout Bypass EA fails to adequately identify impacts that the project would have on a number of wildlife species (including threatened and sensitive species) by removing the trees associated with this project. Consequently, the USFS cannot ensure that it is providing for the viability for the species in the planning area. *See, infra.*

B. Cumulative Effects from the Dosewallips Washout Bypass Project and Past, Present, and Reasonably Foreseeable Future Projects.¹

In *City of Carmel-by-the-Sea v. U.S. Dep't of Trans.*, 123 F.3d 1142, 1160 (9th Cir. 1997), the Ninth Circuit held that an NEPA document must "catalogue adequately the relevant past projects in the area." It must also include a "useful analysis of the cumulative impacts of past, present, and future projects [which] requires a discussion of how [future] projects together with the proposed...project will affect the environment." *Id.* The NEPA document must analyze the combined effects of the actions in sufficient detail to be "useful to the decision-maker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Id.* Detail is therefore required in describing the cumulative effects of a proposed action with other proposed actions. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d at 1379 (9th Cir. 1998). *See also, Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998).

In the Dosewallips Washout Bypass EA, the Forest Service failed to thoroughly assess these impacts. The Forest Service has failed to address the direct and indirect effects on the wildlife and ecological resources in these areas related to increased levels of recreational vehicular traffic. Furthermore, the agency has failed to assess, analyze, or propose mitigation for the impacts related to increased use of FS Road 2610. Reconstructing the road will mean more users, more people "turning out," and more people stopping at different areas to utilize National Forest resources. While we fully support the public's right to access the resources along the

¹ Connected actions whose environmental impacts have also not been adequately analyzed include all of those activities necessary to complete the project. These include, but are not limited to: tree harvesting, blading bare soil for clearance zones, gravel pits (location, excavation and reclamation), and numerous other construction-related activities.

Dosewallips River, it is important that the Forest Service analyze the increased impacts to the natural resources that will result from the reconstruction. In addition, increased user days and the associated impacts have not been adequately assessed against the Olympic LRMP.

1. Future road washouts and associated road maintenance.

The EA fails to assess the cumulative effects of the proposed project in conjunction with future road washouts and associated maintenance of not only the proposed action area, but also adjacent washout sites. For example, the EA notes that

Regardless of whether the road is reconstructed, this segment of the stream valley would continue to be dynamic and experience changes in channel dimensions and sinuosity in response to large floods. Channel responses that may be the result of the proposed management activity most likely would be limited to approximately 330 feet above the revetment (effect of headcutting) to roughly two meander bends past the lower most large wood complex, where the channel bed becomes coarser and the stream gradient becomes steeper (transport dominated).

EA, 66. Also, “as depicted in the aerial photographs, the distance between Forest Road 2610 and the Dosewallips River in the vicinity of the washout has decreased over the years indicating that the stream is actively migrating to the north, toward the road.” *Id.* at 52. Similarly, “there are seven additional areas along FS Road 2610 where the road and river are adjacent to one another. It can be expected that these hardened points along the road would be maintained over time.” *Id.* at 67.

In constructing the proposed road:

Slope instability is likely to be encountered. Specialized design to retain the cutslope on the 12 percent should include structures such as gabions (allowing free flow of water through the face). These or other structures would be utilized along one-half to one-third of these sections and may be ten feet high.

Recommended use of engineering fabrics (geotextiles) and additional fill or road ballast where road location encounters permanent and seasonally wet soils.

Stream crossings are likely at risk of shifting to different locations as a result of debris loading from above or perhaps other peak flow conditions. The fact that this section is at the head of a 12 percent grade would increase the risk of drainage problems, diversions failures, or excessive erosion.

Id. at 22 – 23. These passages indicate that not only is the project location susceptible to continued washouts (and road failures, if the road is constructed), but also that there are several other areas along FS Road 2610 that will require additional maintenance above and beyond general road maintenance.

Rather than assessing the cumulative effects of the proposed project in terms of future washouts and proximate washouts, the Forest Service states that

Adverse cumulative effects are not likely in the middle and upper Dosewallips watershed, much of which is wilderness, Late-Successional Reserve or national park. Few habitat-disturbing activities, such as timber harvest have been conducted in the area, and the road densities are relatively low. There likely would not be habitat-altering activities in the future, except minor projects such as trail or road work. Adverse cumulative effects in the watershed would be from activities in the lower watershed, much of which is private land, from agriculture, human habitation, and timber harvest.

EA, 77. Although it may or may not be true that the planning area has experienced relatively little disturbance in the past, the law requires the Forest Service to assess the cumulative effects of the proposed project in conjunction with past, present, *and reasonably foreseeable future* actions. Indeed, in its response to comments, the Forest Service explains that

There is always some risk that a road with segments near a river will washout. The Forest Service has considered the possibility that this could happen on this road although it is outside the scope of this analysis. It is the opinion of the Forest Service geotechnical expert that the road is less susceptible to washout at other locations where the river is close to the road due to the more consolidated structure of bank formations in these areas (hard rock in some places). One spot that has been of concern downstream from the current washout changed this past winter when the logjam on the other side of the river, which had been deflecting flow toward the road, broke up and moved further downstream.

Response to Comments, 8. Clearly, then, the Forest Service was aware that future washouts and associated activities designed to deal with them are possible, but does not give a rationale for why these are not “reasonably foreseeable actions” rather than “outside the scope of this analysis.” Because the Forest Service has chosen to address the present washout, it is consequently required to assess all of the environmental effects that flow from this decision.

In this case, the agency has acknowledged that the Dosewallips River is dynamic, and will continue to erode FS Road 2610. This natural activity will necessitate Forest Service activity, which is reasonably foreseeable and must be assessed in accordance with NEPA.² The EA did not assess the cumulative environmental effects of this maintenance, or, more importantly, of future washouts. NEPA requires this analysis, and the failure to provide it violates the law. 40 C.F.R. § 1508.7.

2. Forest fragmentation, biological corridors, and dispersal of late-successional species.

The Dosewallips Washout Bypass EA fails to adequately assess the cumulative impacts of the present project and other proximate projects on forest fragmentation, loss of habitat connectivity,

² On the other hand, if the Forest Service were to close the road at the washout, additional maintenance of the washout site would be unnecessary.

and dispersal of late-successional species. Fragmentation is an important factor in declining biological diversity. Wilcove et al. 1986; Goodman 1987. Habitat fragmentation also seriously threatens the stability and persistence of wild populations because the size and isolation of remaining habitats increases the probability of extinction through demographic, environmental, or genetic stochasticity. Wiens 1976; Soule 1986. Additionally, habitat corridors have been identified as important features of landscape management that allow movement, and thus recolonization, among high-quality habitats. Fragmented corridors may actually serve as a selective filter, allowing movement by some species and blocking movement of others. Noss 1991.

The Quilcene Late-Successional Reserve Assessment notes that the LSR is highly fragmented, and that the northern end of the LSR “probably has limited value for far-ranging late-successional forest dependent species.” *Quilcene Late-Successional Reserve Assessment* (Quilcene LSR Assessment), 16 – 17. While the south end of the LSR may be functioning slightly better, the LSR Assessment notes that no analysis of the functionality of interior forest habitat was made, and does not discuss whether barred owls are taking advantage of the high fragmentation in the planning area to out-compete species such as the northern spotted owl. *Id.* at 21.

Although the LSR Assessment acknowledges that fragmentation is a problem in the Quilcene LSR, the Dosewallips Washout Bypass EA does not discuss fragmentation at all. Although the Forest Service notes that canopy cover will be removed as part of the project, it does not analyze this event in terms of whether or not it will contribute to the fragmented nature of the planning area. The Forest Service has failed to support the contention that the Dosewallips Washout Bypass project will not exacerbate the fragmented condition of the Quilcene LSR. Indeed, the Forest Service has failed to even indicate whether the Quilcene LSR is functioning as intended, not only as a self-contained unit, but also within the network of LSRs across the Forest.

Indeed, the Forest Service had the option of demonstrably *decreasing* fragmentation in the planning area by decommissioning FS Road 2610. Closing the road would have the effect of joining the two wilderness areas, eliminating the one major landscape feature that is a barrier to intact forest habitat in the planning area. However, there is simply no mention of this issue in the EA or DN/FONSI.

The Northwest Forest Plan requires the Forest Service to maintain connectivity for aquatic and terrestrial species through the Aquatic Conservation Strategy Objectives (ACSOs), maintenance of connectivity corridors, and implementation of the Late Successional Reserve system. *Northwest Forest Plan Standards and Guidelines (NFP S&Gs)*, B-13. The NFP also requires the agency to “maintain and restore spatial and temporal connectivity within and between watersheds.” *Id.* at B-11. The agency failed to demonstrate that the proposed project will be consistent with the Aquatic Conservation Strategy Objectives that measure watershed connectivity.

The EA neither adequately considered how increasing the existing level of fragmentation would affect species’ population levels, reproduction, or long-term viability in the watershed and adjacent lands, nor discussed how such fragmentation would affect species requiring large areas

of intact forest. The EA inadequately evaluated the impact of the proposed road construction project on habitat fragmentation, biological corridors, and the dispersal of late-successional and wide-ranging species. Intentionally creating barriers to species dispersal fundamentally violates the NFP and OFP, and is arbitrary and capricious. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e); 5 U.S.C. § 706(2)(A).

3. NEPA obligation to assess cumulative impacts.

The law requires the agency to address the impacts of this project and the effects of past, present and reasonably foreseeable future project in a single environmental document. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1984); 40 C.F.R. § 1508.7. The Dosewallips EA, however, fails to fulfill this mandate because it neither addresses the impacts of other management activities in the vicinity of the Dosewallips Bypass planning area, nor details all aspects of the proposed project such as mitigation plans. Until these defects in the EA are cured, the Dosewallips Washout Bypass EA and DN/FONSI must be withdrawn.

The Forest Service's discussion of the cumulative impacts of the proposed project is inadequate and fails to meet NEPA's requirement for high quality analysis that would satisfy the "hard look" standard. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998) *cert. denied*, *Olympic Lumber Co. v. Blue Mountains Biodiversity Project*, 119 S.Ct. 2337 (1999). The courts have also held that the failure to conduct a cumulative impacts analysis is fatal to a project. *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800 (9th Cir. 1999).

C. The Dosewallips EA Does Not Have Adequate Species Survey Data to Support its Findings.

The Olympic National Forest has failed to survey for sensitive and listed species and therefore lacks the necessary information on which to base its DN/FONSI for the Dosewallips Washout Bypass. Appellants do not believe that the ONF has to survey for every species that may be present in a project area in order to sign a DN and FONSI. However, surveys for sensitive, listed, proposed for listing/rare, and management indicator species that have been reported or are likely to utilize the project area should be conducted if reliable population estimates are not available.

Such monitoring is required under NFMA, and NEPA requires the agency to use only high quality science and to obtain data when it is missing yet necessary to make an informed decision. 36 C.F.R. § 219.27(a)(6); 40 C.F.R. §§ 1503.24 (scientific accuracy), 1502.22 (incomplete or unavailable information). The failure to complete such monitoring means that the data is not collected, and the approximate population levels or trends of species on the Forest are unknown. Without such data, the ONF lacks the informed ability to issue a DN/FONSI, in violation of NEPA. 40 C.F.R. § 1500.1; *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999).

D. The EA Does Not Contain An Adequate Discussion of Mitigation Measures or a Monitoring Plan.

1. The mitigation measures proposed in the EA are inadequate.

The Supreme Court has upheld the agency's duty to consider mitigation measures in preparing environmental documents. See *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 353 (1989). More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action forcing" function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.

The Forest Service's perfunctory description of mitigation measures is inconsistent with the "hard look" it is required to undertake pursuant to NEPA. See generally, *EA*, 22 – 25. The Ninth Circuit has held that "mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Carmel-By-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997). The court has also noted that "a mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 485 U.S. 439 (1988); see also *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998). The Ninth Circuit has held that the Forest Service may not rely mere conjecture or agency claims without presenting the background and supporting data for those conclusions. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998).

There is no discussion in the EA or its supporting documentation of the required implementation of mitigation measures, their use, efficacy, or anything beyond their mere existence. This sort of environmental assessment does not satisfy NEPA.

1. "Extensive geotechnical investigation, analysis, and design."

One of the most important "mitigation measures" associated with Alternative C is an "extensive geotechnical investigation, analysis, and design" of some kind. *EA*, 22. Appellants have several concerns with this "mitigation measure." First, given the nature of this project – reconstructing a road at a 8 – 10% on very steep and unstable slopes above a meandering river – conducting a geotechnical investigation should have been the starting point of this project, not a mere mitigation measure.

Indeed, this information should have been the basis of the Forest Service's selected alternative: the road's alignment should incorporate the findings of this assessment. Instead, however, the Forest Service proposes to build a road that faces serious engineering concerns without the requisite information. The Forest Service proposes to build blind.

Second, and perhaps more importantly, the Forest Service has yet to even conduct the geotechnical investigation and analysis. In response to a FOIA request for this geotechnical investigation and analysis, the Forest Service responded that

The report by Bill Shelmerdine and the preliminary line (P) line located on the ground constitutes that preliminary investigation, analysis and design. Once a Decision has been made, funds can be expended to prepare the referenced "extensive geotechnical investigation, analysis, and design." This is the survey that the engineers complete to prepare a contract for the work to be completed.

Attachment 25, Geotechnical Investigation Letter. This letter raises additional questions such as: How much money will this study cost? Does the Forest Service have the requisite funds for the study? What will happen if the study reveals new environmental considerations, including greater than anticipated cost to build the road in order to mitigate adverse environmental effects? Will the public have access to this study? Will the public be allowed to comment on the results of the study?

In this case, the Forest Service has proposed a project without extremely relevant information: the engineering and geotechnical data regarding the mechanics of actually reconstructing the road. NEPA requires the Forest Service to disclose when there is incomplete or unavailable information relevant to making a reasoned decision. 40 C.F.R. § 1502.22. When the incomplete or unavailable information is *necessary* to make a reasoned decision, as in this case, the agency is required to obtain the information, or, if the cost of obtaining the missing information is exorbitant, the agency must make

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

Id. If, given the lack of adequate information, the proposed action's effects are unknown or uncertain, an EIS is required. 40 C.F.R. § 1508.27(b)(5); *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003), *Anderson v. Evans*, 314 F.3d 1006, 1021 (9th Cir. 2002).

NEPA requires that the Forest Service support its conclusions with scientific information and analysis. The Ninth Circuit in *Idaho Sporting Congress v. Thomas* stated that "we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion." 137 F.3d 1146, 1150 (9th Cir. 1998). Indeed, NEPA has two primary goals: (1) to insure that the agency has fully contemplated the environmental effects of its action; and (2) to insure the public has sufficient information to challenge the agency. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998); *see also Price Road Neighborhood Ass'n v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997) ("One of the

twin aims of NEPA is active public involvement and access to information”); *Columbia Basin Land Preservation v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981) (the preparation of a NEPA document ensures that the public “can evaluate the environmental consequences independently”). NEPA “guarantees 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.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989).

In this case, knowledge about the particular engineering and geotechnical challenges that this project present is a prerequisite to making a reasoned decision about the proposed project. The public and decisionmaker must have adequate information upon which to base their conclusions regarding the nature of the project, but that information is lacking in the Dosewallips Washout Bypass EA. The failure to obtain this information violates NEPA. 40 C.F.R. § 1502.22; 5 U.S.C. § 706(2)(A).

2. The monitoring and mitigation plan is inadequate.

Monitoring is increasingly important in sound forest management, and is considered a cornerstone of proper management of public lands. Appellants note that there is essentially no monitoring plan in the EA. There is no contingency plan if soil impacts exceed thresholds, additional sediment reaches streams, or wildlife populations trend precipitously downward. EA, 24. Instead, the EA only states that BMPs will be implemented. There is no avenue for changes to the proposed project to take place if resource damage exceeds the effects projected in the Dosewallips EA. Without such a comprehensive monitoring and mitigation plan, the Forest Service cannot claim that the resources in the planning area will not be permanently adversely affected.

Similarly, the regulations implementing NEPA require that agencies “state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.” 40 C.F.R. § 1505.2(c). Additionally,

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall: (a) Include appropriate conditions in grants, permits or other approvals; (b) Condition funding of actions on mitigation.

Id. § 1505.3.

Despite the clear requirements that the USFS must state whether the agency has undertaken all practicable means to minimize or avoid environmental harm, and that the agency prepare a detailed monitoring and mitigation plan, the National Forest involved in the current project have

not done so. Until the USFS prepares a mitigation plan for the proposed project, the EA and DN/FONSI must be withdrawn.

II. THE FOREST SERVICE VIOLATED THE NATIONAL FOREST MANAGEMENT ACT (NFMA) BY VIOLATING THE STANDARDS AND GUIDELINES OF THE NORTHWEST FOREST PLAN.

The National Forest Management Act (NFMA) mandates that each national forest create and regularly revise a comprehensive plan for the management of the forest. The plans must incorporate broad standards and guidelines that provide for multiple use of the forest resources and ensure diversity of plant and animal communities. 16 U.S.C. §§ 1604(e), 1604(g)(3)(B). NFMA and its implementing regulations further require that site-specific projects remain consistent with area forest plans. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e).

The Northwest Forest Plan Record of Decision amended the Olympic National Forest Land and Resource Management Plan (Olympic LRMP) to incorporate all aspects of the NFP. As such, NFMA requires that each site-specific project on the Olympic National Forest remain consistent with the Olympic LRMP and the Northwest Forest Plan Record of Decision, including the ACS requirements and the LSR provisions.

A. Permanent Road Construction in a Riparian Reserve.

The entire Dosewallips Washout Bypass project is located within a Riparian Reserve. EA, 6. The EA explains:

This route crosses four distinct zones or segments: (1) The east side flat topography of the Dosewallips floodplain or low terrace, and the unnamed tributary floodplain; (2) the steep side slopes which climb from the unnamed tributary to the upper terrace above the existing washout; (3) the relatively flat area of the upper terrace above the existing washout; and (4) the grade going down the west side to reconnect with Forest Road 2610.

The first 200 feet on the east side would be on a relatively flat grade but entirely within the a riparian area and directly adjacent to and in places encroaching on the unnamed tributary channel, an occupied Coho salmon rearing habitat. As much as 165 feet of the lower part of this segment would place the road fill within the current channel location of the unnamed tributary. The unnamed tributary channel would have to be relocated slightly north in order to accommodate the road. The steep side slope to climb from the unnamed tributary to the upper terrace (flat) above the existing washout is about 600 feet at 12 percent grade. This section would be full bench construction as soon as the segment is far enough above the flats to preclude construction of a benched fill from the bottom of the slope. The bench this is a reasonably good location for a road. The steep side slope to climb down from the upper terrace (flat) above the existing washout is about 625 feet at 12 percent grade.

EA, 21. The EA goes on to note that

The first 175 feet would be on a relatively flat grade but entirely within a riparian area and directly adjacent to and in places encroaching on the unnamed tributary channel. There are no unusual slope stability considerations, but seasonal soil moisture (or saturation), soft subgrade, and shallow groundwater are concerns that have special mitigations needed.

...From the base of the slope to the top of the bench, about 540 feet at 12 percent grade, the proposed route crosses steep sideslopes. It is assumed this section would be full bench construction as soon as the segment is far enough above the flat bench below to preclude construction of a benched fill from the bottom of the slope. Much of the materials on the slopes to the east of the washout appear to be deposits from instability and historic slope movements.

Sideslopes [in the west section] are reported to be in the range of 100 percent over a length of about 570 feet. Cutslopes here would likely ravel and be chronically unvegetated (and therefore susceptible to erosion). The top of the cut would likely run upslope, increasing the clearing limits. This affect would be limited by the slope break at the bench on the eastern end of this segment, and tree roots would probably limit cutslope migration upslope at least in the short term. Sediment supplied from the raw cutslope would accumulate in the ditch to be transported downslope by road runoff.

...Considering the historic evidence of shallow landsliding and deep seated mass movement, the slope angles, materials and seepage conditions in the cutslope, some slope instability is expected. Specialized designs to retain the cutslope could mitigate much of this, but some shallow instability in the cut following construction should be anticipated even with these measures. These eroding cutslopes could be somewhat retained by structures such as gabions. It is likely that some shallow instability in the cutslopes and fillslopes following construction would occur.

Slope failures within the cutslope would likely compromise the road drainage system.

... Deep-seated failures resulting from undercutting the slope above are also possible as well. The potential for this kind of movement is unknown at this time and is considered less likely than shallow instability.

Id. at 47 – 48. It is clear that the site of the proposed road reconstruction is highly unstable, incredibly steep, and very susceptible to failure. Consequently, the proposed project will violate the NFP in several ways.

First, the Northwest Forest Plan (NFP) Standards and Guidelines (S&Gs) states that in addressing transportation needs, “the decision to apply a given treatment depends on the value and sensitivity of downstream uses, transportation needs, social expectations, assessment of probable outcomes for success at correcting problems, costs, and other factors.” *NFP S&Gs*, B-31. In this case, the Forest Service has not assessed the “probable outcomes for success at correcting problems,” or the cost of the road construction, given that the road is likely to fail in the future at an unknown cost to repair (or even construct).

Second, the NFP S&Gs go on to establish several road-specific guidelines for Riparian Reserves:

RF-2. For each existing or planned road, meet Aquatic Conservation Strategy objectives by:

- a. *minimizing road and landing locations in Riparian Reserves.*
- b. *completing watershed analyses (including appropriate geotechnical analyses) prior to construction of new roads or landings in Riparian Reserves.*
- c. *preparing road design criteria, elements, and standards that govern construction and reconstruction.*
- d. *preparing operation and maintenance criteria that govern road operation, maintenance, and management.*
- e. *minimizing disruption of natural hydrologic flow paths, including diversion of streamflow and interception of surface and subsurface flow.*
- f. *restricting sidecasting as necessary to prevent the introduction of sediment to streams.*
- g. *avoiding wetlands entirely when constructing new roads.*

RF-3. Determine the influence of each road on the Aquatic Conservation Strategy objectives through watershed analysis. Meet Aquatic Conservation Strategy objectives by:

- a. *reconstructing roads and associated drainage features that pose a substantial risk.*
- b. *prioritizing reconstruction based on current and potential impact to riparian resources and the ecological value of the riparian resources affected.*
- c. *closing and stabilizing, or obliterating and stabilizing roads based on the ongoing and potential effects to Aquatic Conservation Strategy objectives and considering short-term and long-term transportation needs.*

RF-4. New culverts, bridges and other stream crossings shall be constructed, and existing culverts, bridges and other stream crossings determined to pose a substantial risk to riparian conditions will be improved, to accommodate at least the 100-year flood, including associated bedload and debris. Priority for upgrading will be based on the potential impact and the ecological value of the riparian resources affected. Crossings will be constructed and maintained to prevent diversion of streamflow out of the channel and down the road in the event of crossing failure.

RF-5. *Minimize sediment delivery to streams from roads.* Outsloping of the roadway surface is preferred, except in cases where outsloping would increase sediment delivery to streams or where outsloping is unfeasible or unsafe. *Route road drainage away from potentially unstable channels, fills, and hillslopes.*

NFP S&Gs, C-32 – C-33 (emphasis added). By comparing the guidelines for road management in Riparian Reserves and the proposed project, it is obvious that the Dosewallips Washout

Bypass is in no way consistent with either the S&Gs, or the Aquatic Conservation Strategy (ACS).³

- Road construction in Riparian Reserves has *not* been minimized, as the entire road is in a Riparian Reserve;
- The “appropriate geotechnical analyses” have *not* been completed “prior to construction of new roads or landings in Riparian Reserves;”
- The road alignment has *not* been designed to minimize the disruption of “natural hydrologic flow paths” as the Forest Service admits that sediment and other streamflows will be rerouted as a result of construction;
- The proposed road will *not* entirely avoid wetlands as “the road location in Alternative C would intersect [a] wetland” and “streamcourses and springs that provide water to this wetland would also be affected by this road construction;”⁴
- The Forest Service has *not* considered “closing and stabilizing, or obliterating and stabilizing” FS Road 2610 based on its inherent and continued instability and susceptibility to wash out;
- Reconstructing FS Road 2610 will *not* “minimize sediment delivery to streams from roads,” as the Forest Service acknowledges that “sediment supplied from the raw cutslope would...be transported downslope by road runoff;”⁵ and finally,
- The Forest Service has *not* routed “road drainages away from potentially unstable channels, fills, and hillslopes,” because the entire road will be located on an area that is very unstable and likely to fail in the future.

Given these situations, the EA concludes that

The proposed reroute would highly impact the riparian area within the half mile of road construction.⁶ Segments of the road would be constructed in steep, wet, and unstable soils, which would be prone to road failure. Large conifer trees, 36 inch in diameter and greater would be cut down in order to build the road.

EA, 62. In May 2002, the Forest Service’s own personnel recommended against implementing Alternative C, noting that given the technical and environmental considerations, “it may be

³ Appellants are cognizant of the recent revision of the ACS. However, because the Dosewallips Washout Bypass is a *permanent* road reconstruction project, adverse effects are likely to be long-term, i.e., permanent, in nature.

⁴ EA, 43.

⁵ EA, 60.

⁶ Appellants point out that this passage in the EA was written before the Forest Service decided to extend the length of the road. Therefore, it is highly probable that the environmental effects of the road will extend more than a half mile from the road construction.

prudent to eliminate this alternative from further consideration.” *Attachment 46, Dose Road Field Recon Notes* (unpaginated).

Despite this conclusion, the decisionmaker miraculously concluded that there would be “no significant impacts” from implementation of the Dosewallips Washout Bypass. *See generally, DN/FONSI*. This decision is arbitrary and capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

B. Permanent Road Construction in a Late-Successional Reserve.

The NFP contains specific direction for activities within LSRs. In general:

As a general guideline, nonsilvicultural activities located inside Late-Successional Reserves that are neutral or beneficial to the creation and maintenance of late successional habitat are allowed. While most existing uses and development are envisioned to remain, it may be necessary to modify or eliminate some current activities in Late-Successional Reserves that pose adverse impacts. This may require the revision of management guidelines, procedures, or regulations governing these multiple-use activities. Adjustments in standards and guidelines must be reviewed by the Regional Ecosystem Office.

S&Gs, C-16 (emphasis added). Regarding road management activities in LSRs, the NFP states that

Road construction in Late-Successional Reserves for silvicultural, salvage, and other activities generally is not recommended unless potential benefits exceed the costs of habitat impairment. If new roads are necessary to implement a practice that is otherwise in accordance with these guidelines, they will be kept to a minimum, be routed through non-late-successional habitat where possible, and be designed to minimize adverse impacts.

Id. In this case, construction of the Dosewallips Washout Bypass in an LSR will not have neutral or beneficial effects on the creation of late-successional habitat, specifically because the “potential benefits exceed the costs of habitat impairment.” The project will remove more than 220 old growth trees along a river, an ecotype that is increasingly scarce on the Forest. *Biological Assessment*, Appendix 1; *DN/FONSI*, 3. At least 4 acres of late-successional habitat will be destroyed as a result of implementation of the proposed project. *DN/FONSI*, 3.

The Forest Service has an affirmative obligation to demonstrate that it has complied with the NFP by proposing a project that will have neutral or beneficial effects on late-successional habitat. Because the proposed project will in fact eliminate late-successional habitat, it is impossible for the Forest Service to make this showing. Consequently, the *DN/FONSI* is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

C. Permanent Road Construction in a Tier 1 Key Watershed.

The entire Dosewallips Washout Bypass project is located within a Tier 1 Key watershed. 2/18/03 *Biological Assessment*, 2. These watersheds are those that “were selected for directly contributing to anadromous salmonid and bull trout conservation.” *S&Gs*, B-19. The NFP provides guidance for management activities in Key Watersheds; and in particular directs the Forest Service to “reduce existing system and nonsystem road mileage outside roadless areas. If funding is insufficient to implement reductions, there will be *no net increase in the amount of roads in Key Watersheds.*” *Id.* (emphasis added).

The Forest Service explains that any increase in road mileage would be negated by the planned decommissioning elsewhere on the Forest. *DN/FONSI*, 9. While Appellants support road decommissioning, and are pleased to learn that 6.3 miles are funded and under contract, the fact remains that regardless of when the proposed decommissioning takes place, the new road construction would result in a net increase in roads.

Given the NFP’s direction, Appellants fail to understand why the Forest Service proposes to reconstruct a road – increasing its current length and thereby increasing the amount of roads in a Key Watershed – when in fact nature has given the agency the perfect opportunity to decommission a road that is threatening aquatic habitat and species. Ignoring the mandate in the NFP to refrain from building more roads in a Key Watershed is arbitrary and capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

D. Violations of the Aquatic Conservation Strategy.

The NFP establishes nine Aquatic Conservation Strategy Objectives that direct management affecting aquatic conditions, habitat, and riparian-dependent species. In particular, the NFP states that

In order to make the finding that a project or management action “meets” or “does not prevent attainment” of the Aquatic Conservation Strategy objectives, the analysis must include a description of the existing condition, a description of the range of natural variability of the important physical and biological components of a given watershed, and how the proposed project or management action maintains the existing condition or moves it within the range of natural variability. *Management actions that do not maintain the existing condition or lead to improved conditions in the long term would not “meet” the intent of the Aquatic Conservation Strategy and thus, should not be implemented.*

S&Gs, B-10. The Forest Service has failed to not only demonstrate how the Dosewallips Washout Bypass will “meet” or “does not prevent attainment” of the Aquatic Conservation Strategy objectives, but also to describe how “the proposed project or management action maintains the existing condition or moves it within the range of natural variability.” Because the natural range of variability, by definition, did not include roads, it would be impossible for the agency to demonstrate that reconstructing a road in a very unstable area would maintain or move the planning area within the range of natural variability.

The DN/FONSI states that “Alternative C as described in the EA was rated as “degrade” when examined under Objectives 2 through 5 of the ACS (EA page 68). This was primarily due to the impacts that would have occurred to the unnamed tributary and its salmon habitat with the originally proposed alignment of the bypass.” *DN/FONSI*, 3. However, on closer inspection, the EA’s determination is not wholly tied to the destruction of the unnamed tributary, and in fact is related to a combination of effects to various aquatic indicators. Indeed, the Biological Assessment for the project dated 2/18/03 discloses that several factors in National Marine Fisheries Service’s (NMFS) Matrix of Pathways and Indicators will be degraded at the 5th Field watershed level in both the long and short term. *2/18/03 Biological Assessment*, Table 3.

Bypassing the unnamed tributary does not eliminate all of the concerns identified in the EA, and the Dosewallips Washout Bypass project will still violate several ACS Objectives. Consequently, the project “should not be implemented.” 5 U.S.C. § 706(2)(A).

1. Objective 2: maintain and restore watershed connectivity.

ACS Objective 2 requires the Forest Service to “maintain and restore spatial and temporal connectivity within and between watersheds.” *S&Gs*, B-11. This Objective means that Riparian Reserves must be protected in order to “enhance habitat conservation for organisms that are dependent on the transition zone between upslope and riparian areas and improve travel and dispersal corridors for many terrestrial animals and plants. Riparian reserves also serve as connectivity corridors among the Late-Successional Reserves” and other protected areas. *Id.* at B-13 (describing Riparian Reserves as conferring “benefits to riparian-dependent and associated species other than fish” such as spotted owls).

As described above, the proposed project will build a permanent road in a Riparian Reserve. The Forest Service has failed to demonstrate that this activity will maintain connectivity options for aquatic and terrestrial species in the watershed, as required by the NFP. Consequently, the decision to implement the proposed project is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

2. Objective 3: maintain and restore physical integrity of the aquatic system.

ACS Objective 3 states that the Forest Service must “maintain and restore the physical integrity of the aquatic system, including shorelines, banks, and bottom configurations.” *S&Gs*, B-11. Part of the physical integrity of the aquatic system includes stream banks and slopes, especially those within Riparian Reserves. *Id.* In the planning area, “the glacial valley landform (steep toeslope and footslope) has been rated as medium for natural landslide potential and high for management response of road construction...Slope instability was observed in this area, especially on steep slopes near convergent drainages and springs.” *EA*, 42.

The proposed project will construct a road across slopes that are “steep to very steep (50 to 100 percent.” *EA*, 11. “This road construction would average a 12 percent grade. Sideslopes along much of this re-route length average 65 percent and greater.” *Id.* at 46. Given the slope of the proposed reroute, continued

slope instability is expected. Specialized designs to retain the cutslope could mitigate much of this, but some shallow instability in the cut following construction should be anticipated even with these measures. These eroding cutslopes could be somewhat retained by structures such as gabions. It is likely that some shallow instability in the cutslopes and fillslopes following construction would occur.

Slope failures within the cutslope would likely compromise the road drainage system.

Id. at 47.

These passages indicate that it is likely that additional slope failures will continue in the future, and will appreciably alter the physical integrity of the aquatic system, if the Dosewallips Washout Bypass. The Northwest Forest Plan prohibits such changes. Consequently, the decision to implement the Dosewallips Washout Bypass is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

3. Objective 5: maintain and restore sediment regimes.

The ACS Objectives require the Forest Service to “maintain and restore the sediment regime under which aquatic ecosystems evolved. Elements of the sediment regime include the timing, volume, rate, and character of sediment input, storage, and transport.” In this case, however, the Forest Service acknowledges that sedimentation will increase as a result of the proposed project. For example, the EA states that

The consequences of the road construction may result in formation of gullies and deposition of shallow-rapid mass wasting. This would potentially impact vegetation and soils on the slope, and the riparian area and possibly the unnamed tributary. Most material would likely be deposited and held in storage on the flats below. Toward the east end such movements of materials would likely reach the unnamed tributary. Most of the coarse material would likely remain in storage where deposited, while sand and fine sediment, could be transported to the Dosewallips River via the unnamed tributary.

EA, 48. Indeed,

Short and long-term sedimentation increases into the unnamed tributary and the wetland area would result from this action. Fine sediment would eventually reach the Dosewallips River. Despite the mitigation measures imposed to minimize the potential for surface erosion, chronic sedimentation is expected. It is anticipated that much of the disturbed exposed soil would establish vegetation in 2-3 years, but continual small slumps, ravel, and debris slides are likely that would deliver to the road and below to the wetland and streamcourse. Road maintenance would need to be frequent on this road section, and likely would be needed to remove debris from the road semi-annually.

Id. In other areas of the road reconstruction

Sideslopes on the west end of the road are in the range of 100 percent over a length of about 625 feet. Cutslopes here would likely ravel and be chronically unvegetated (and therefore susceptible to erosion). The top of the cut would likely run upslope, increasing the clearing limits. This affect would be limited by the slope break at the bench on the eastern end of this segment, and tree roots would probably limit cutslope migration upslope at least in the short term. Sediment supplied from the raw cutslope would accumulate in the ditch to be transported downslope by road runoff. This material would eventually be deposited on the bench (terrace) that currently contains Forest Road 2610, and would not be transported to the Dosewallips River. If runoff pathways (streams) exist during storms that connect these areas to the Dosewallips, then it is likely that the stored fine sediment could be transported to the river.

Id. at 60. As a result,

Within the project area, there would be a decrease in soil productivity, increased slope instability, and alteration of hillslope hydrology. It is expected that increased chronic fine sediment into the unnamed tributary which supports resident and anadromous fisheries would continue long term, and reach the Dosewallips below the confluence of this tributary.

Id. Moreover, the EA notes that “segment two of the proposed road would most likely be a chronic source of sediment due to the unstable soils and wet undefined seeps that are common along the steep slope. This input of fine sediment would further degrade the coho rearing habitat within the unnamed tributary.” *Id.* at 60. Even though the Forest Service indicated in the DN/FONSI that the agency decided to alter the route of the road to avoid the unnamed tributary,⁷ the EA projects that even if the tributary is avoided, “it is uncertain when if ever the functioning coho rearing habitat would be re-expressed, due to the chronic sediment input from the road.” *Id.* at 61.

In addition to the increase in sedimentation as a result of the proposed project, the EA explains that “the [.74] mile rerouted road would increase ditch length through steep, wet, and unstable soils, segments 2 and 4. There would be a potential to create new first order channels at the outlet of ditch relief pipes in these wet and unstable areas.” *EA*, 62. As a result of an increase in the drainage network, increases in sediment as a result of the road construction would be delivered directly to the unnamed tributary, other streams, and the Dosewallips River itself. *Id.*

The USFS seems to claim that the direct sediment input will be sufficiently mitigated by the use of Best Management Practices (BMPs). While the use of BMPs is to be encouraged, Appellants note that the use of these measures is not sufficient to ensure compliance with the Clean Water Act (CWA). *Northwest Indian Cemetery Protective Ass’n v. Peterson* 795 F.2d 688, 697 (9th Cir. 1986) (holding that compliance with BMPs does not equate to compliance with the CWA). Indeed, the USFS assumes that the implementation of BMPs will sufficiently mitigate any

⁷ This change – and a description of its environmental effects – has yet to be submitted to the public for notice and comment as required by NEPA. 40 C.F.R. § 1500 et seq.

problems that the proposed project will have on aquatic systems, but offers no proof of this assertion.⁸

Construction of the Dosewallips Washout Bypass will violate the NFP because it will result in an increase in sediment, which is prohibited by the ACS.

4. Objective 6: maintain and restore water flow regimes.

ACS Objective 6 states that the Forest Service must “maintain and restore in-stream flows sufficient to create and sustain riparian, aquatic, and wetland habitats and to retain patterns of sediment, nutrient, and wood routing. The timing, magnitude, duration, and spatial distribution of peak, high, and low flows must be protected.” *S&Gs*, B-11. In this case, the proposed project will interrupt existing channel dynamics and groundwater flow patterns in violation of ACS Objective 6.

The EA states that “newly constructed or reconstructed roads may alter channel dynamics, potentially altering channel conditions in which threatened salmon have functional habitat elements for spawning and rearing, and may affect sediment delivery to streams. Riparian functions along an unnamed tributary or along the Dosewallips River may be affected.” *EA*, 11. Because there are several streams and seeps directly in the path of the proposed reroute, the planning area “has been rated as medium for natural landslide potential and high for management response of road construction.” *Id.* at 42.

In the planning area,

hillslope hydrology has a significant influence...A large amount of water is conveyed throughout this hillside, the glacial outwash plain below, eventually entering the Dosewallips River system. The glacial troughwall area comprising approximately 85 percent of the planning area has a rapid runoff rate and low groundwater storage capacity, due to the steepness of slope and shallow soils, and large amount of rock outcrop...These soils are unable to store as much water, as evidenced by frequent seeps, springs and small streams.

EA, 43. Moreover,

New road construction would intersect four streams, including an unnamed tributary that supports resident and anadromous fish. Alterations to this surface water flows is anticipated, even with mitigations to allow for 100 year flows at stream crossings. Interception of subsurface flows, seeps and springs is also expected. The affects to shallow groundwater flow, seasonal saturation, and its impacts to riparian function are unknown but are anticipated. There is the potential to affect low flow conditions in the

⁸ By failing to include an adequate discussion in the EA of the effect that the project will have on sediment input, the USFS violates NFMA, which requires the agency to conserve aquatic resources. 36 C.F.R. § 219.27(a)(1). The failure to evaluate the impacts to aquatic systems from all potential sources of sediment violates NEPA, which requires the USFS to assess the impacts of all activities associated with the proposed project in a single environmental document. 40 C.F.R. § 1502.16.

unnamed tributary if groundwater pathways from water storage within the riparian zone are intercepted.

Id. at 48.

Although the Forest Service decided to bypass the unnamed tributary in the DN/FONSI, “there is probably potential to affect low flow conditions in the unnamed tributary if groundwater pathways from water storage within the riparian zone are cut-off.” *EA*, 60. The *EA* goes on to note that “shallow groundwater seepage is common throughout this section and could be intercepted by cutslopes in this segment. This would likely affect water supply and perhaps seasonal moisture conditions in the riparian and wet area below, and possibly low flow conditions in the unnamed tributary.” *Id.* Because of the especially steep slopes, “seasonal soil moisture (or saturation), soft subgrade, and shallow groundwater, are concerns that have special mitigations needed.”⁹ *Id.* at 46.

It is not surprising that the construction of a road across a very steep slope permeated with numerous seeps, springs, and small tributaries will affect ground- and surface water capacity and function. Indeed, the entire hydrologic pattern of the planning area will be affected by the placement of a mid-slope road. *EA*, 11, 42, 43, 48, 46, 60. Given this situation, the Forest Service cannot reasonably conclude that the Dosewallips Washout Bypass project is consistent with ACS Objective 6. 5 U.S.C. § 706(2)(A).

5. Objective 7: Maintain and restore floodplains and wetlands.

ACS Objective 7 requires the Forest Service to “maintain and restore the timing, variability, and duration of floodplain inundation and water table elevation in meadows and wetlands.” *S&Gs*, B-11. In this case, the Dosewallips Washout Bypass project will bisect a wetland and adversely affect the Dosewallips River floodplain, in contravention to the ACS Objectives.

The *EA* states that “a small wetland exists just north of the unnamed tributary, and would also be impacted.” *EA*, 48. Although the Forest Service does not acknowledge this fact, the NFP requires the agency to protect wetlands less than 1 acre by designating a buffer of “a distance equal to the height of one site-potential tree, or 100 feet slope distance, whichever is greatest. A site-potential tree height is the average maximum height of the tallest dominant trees (200 years or older) for a given site class.” *S&Gs*, C-31.

As the NFP states, road construction is to entirely avoid wetlands. *S&Gs*, C-32. At the very least, the NFP states that a buffer of one site-potential tree, or 100 feet slope distance, whichever is greatest, must be applied to the wetland. However, the Dosewallips Washout Bypass will bisect the wetland, so it is obvious that the Forest Service has failed to both avoid the wetland as well as apply the requisite buffer.

The biological opinion (BiOp) for the project states that the reroute “starts at the flat topography of the Dosewallips floodplain...[and] crosses an unnamed tributary floodplain....” *Dosewallips Washout Bypass Biological Opinion*, 3. The road will be an impervious surface within the

⁹ The requisite mitigation measures have not been described or provided in the *EA*.

floodplain and across the wetland. *Id.* The EA omits these disclosures, and also fails to disclose the fact that the NFP requires buffers around floodplains. The S&Gs indicate that a buffer of “the height of two site-potential trees, or 300 feet slope distance (600 feet total, including both sides of the stream channel), whichever is greatest” is required around “the outer edges of the 100-year floodplain” of fish-bearing streams. S&Gs, C-30. No buffer was applied around the Dosewallips River floodplain, or described in the EA.

The EA is also completely silent in terms of the Dosewallips Washout Bypass’s consistency with Executive Order 11988, Flood Plain Management, and Executive Order 11990, Protection of Wetlands. 3 C.F.R., 1977 Comp., p. 117, 121. Both of these Executive Orders establish detailed restrictions on federal developments in and around floodplains and wetlands, and yet the Forest Service has failed to mention them and their requirements.

By design, the Dosewallips Washout Bypass will adversely affect floodplains and wetlands, but the Forest Service fails to adequately address this issue in the EA, DN, and FONSI for the project. It is likely that the proposed project is in fact inconsistent with the ACS, NFP, and Executive Orders 11988 and 11990. Consequently, the decision to implement the Dosewallips Washout Bypass is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

6. Violations of the ACS.

The EA indicates that Alternative C will “degrade” 6 of 10 indicators for long-term aquatic impacts at the project scale. *EA*, 56. The EA also states that the project will “degrade” 4 of the 9 ACS Objectives.¹⁰ *Id.* at 68. Appellants are aware that the Forest Service recently “clarified” the ACS in an effort to circumvent problematic adverse legal precedent, namely regarding consistency with the ACS at the project scale. However, there is nothing in the clarifying language that suggests that the ACS Objectives do not still apply within Riparian Reserves themselves. Because this project is located entirely within a Riparian Reserve, the Forest Service must still meet the requirements of the ACS. The failure to do so is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

III. THE FOREST SERVICE VIOLATED THE NATIONAL FOREST MANAGEMENT ACT (NFMA) BY NOT ASSURING COMPLIANCE WITH STATE WATER QUALITY STANDARDS.

The regulations implementing NFMA states that “forest planning shall provide for...compliance with requirements of the Clean Water Act, the Safe Drinking Water Act, and all substantive and procedural requirements of Federal, State, and local governmental bodies with respect to the provision of public water systems and the disposal of waster water.” 36 C.F.R. § 219.23(d). The regulations also state that “all management prescriptions shall ... conserve soil and water resources and not allow significant or permanent impairment of the productivity of the land. *Id.* § 219.27(a)(1).

¹⁰ Appellants submit that the project will violate more than 4 ACS Objectives, as the EA failed to assess effects to wetlands and floodplains, as well as watershed-level connectivity. As described *supra*, we believe that the project will violate at least 5 of the 9 ACS Objectives.

According to the Clean Water Act (CWA) Section 313, all federal agencies “shall comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution, and federal actors must comply with all record keeping, recording and permitting requirements.” 33 U.S.C. § 1323(a). The Ninth Circuit has interpreted this provision to mean that the U.S. Forest Service must comply with all state water quality standards when carrying out its road-building and logging activities. *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688 (9th Cir. 1986). This means that the Forest Service cannot claim that the agency’s own policies and regulations supersede state water quality standards. In *Northwest Indian Cemetery*, the Forest Service claimed that its Best Management Projects (BMPs) were the only water quality standards applicable. *Id.* at 697. The Ninth Circuit held that adherence to BMPs did not automatically ensure that state water quality standards were met. The Ninth Circuit recently reiterated this standard. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998), *cert. denied*, *Olympic Lumber Co. v. Blue Mountains Biodiversity Project*, 119 S.Ct. 2337 (1999).

Accordingly, the Forest Service must describe how the selected alternative for the Dosewallips Washout Bypass complies with Washington’s water quality standards. The EA does nothing to indicate how logging the Dosewallips Bypass planning area, in addition to logging other federal and nonfederal lands in the area, will meet water quality standards. In fact, evidence in the record suggests that state standards *will not* be met.

Data to support the conclusion in the EA and DN/FONSI that water quality is not a problem in the planning area is unavailable. Indeed, the EA itself states that there is a high risk of cumulative impacts to the watershed. Therefore, Dosewallips Washout Bypass should be withdrawn until data is available that shows this project will not further degrade the water quality in the planning area. 40 C.F.R. § 1500.1(b); 36 C.F.R. § 219.14(2).

Other than the minor disclosures regarding adverse aquatic effects, however, the EA does not indicate the extent of impairment of water quality, and fails to disclose the direct and cumulative impacts of the project. For example, the EA does not quantify the amount of sediment input to aquatic systems due to road construction and maintenance. The Clean Water Act does not permit de minimis degradation of water quality, especially on streams that are already impaired. 33 U.S.C. § 1323(a)(2)(C). Moreover, the Ninth Circuit has held that “general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

The Forest Service has failed to state how the proposed project will comply with NFMA, the CWA, and NEPA because it has not shown how the Dosewallips Bypass project will not contribute to violations of Washington State water quality standards. The Forest Service is required to withdraw this project until such compliance is demonstrated.

IV. THE FOREST SERVICE VIOLATED THE NATIONAL FOREST MANAGEMENT ACT (NFMA) AND THE ENDANGERED SPECIES ACT (ESA) BY NOT ASSURING SPECIES VIABILITY.

The Dosewallips Washout Bypass EA conducts a woefully inadequate review of impacts to wildlife from the proposed project. The Dosewallips Washout Bypass EA fails to adequately identify impacts that the project would have on a number of wildlife species (including threatened and sensitive species) by removing the trees associated with this project. Consequently, the USFS cannot ensure that it is providing for the viability for the species in the planning area. 36 C.F.R. §§ 219.19, 219.26.

Appellants have several general wildlife concerns. First, it appears as though the Forest did not adequately survey for threatened or sensitive species. This is problematic for several reasons. First, it is impossible for the agency to conclude in a FONSI that there are no significant impacts to listed or proposed species when it fails to analyze the project in terms of impacts to these species, or even mention them in its environmental assessment. Simply pretending that these species do not exist in the planning area does not alleviate the agency's duties under the Endangered Species Act. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994).

Second, the Endangered Species Act (ESA) requires the USFS to use the best available scientific and commercial data in assessing the impacts to species, which includes surveying for them. 16 U.S.C. § 1536(a)(2). Since population studies are lacking for the Dosewallips Washout Bypass planning area, the USFS is precluded from determining that the project is not likely to adversely affect the listed species under section 7 of the ESA. *Id.* § 1536(b). Basing a DN/FONSI on "non-information" is unreasonable and violates the Administrative Procedure Act (APA). 5 U.S.C. § 706.

Third, impacts to wildlife species in the short and midterm are not insignificant, and the agency failed to assess what these impacts would be. Because habitat will be permanently eliminated in the road corridor, it is unclear how wildlife species will be affected. Again, NFMA does not recognize this outcome as legally acceptable.

The Dosewallips Washout Bypass project would cause nonlisted species to trend towards listing, and listed species to trend toward jeopardy. Marbled murrelet, northern spotted owls, and some salmon species are species about which the District lacks adequate information to conclude that the proposed project would not make their populations trend downwards, in violation of the ESA. *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999). There is no evidence to support the conclusion that removing what remains of suitable habitat for wildlife species will benefit them. Indeed, the facts suggest that these species will be adversely affected in the short and long term.

A. Threatened, Endangered, and Sensitive species.

It is the stated policy of Congress that all Federal departments and agencies "shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of [this] purpose." Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(1). The Supreme Court has clearly restated congressional policy stating that, "The plain intent of

Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). The USFS’s decision to proceed with the Dosewallips Washout Bypass project is inconsistent with the congressional mandate of the ESA.

Under the ESA, the Forest Service has the responsibility to “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a). As described *infra*, the record does not support the finding that the proposed project would not likely adversely affect at least marbled murrelets, northern spotted owls, and anadromous and resident fish. The proposed project would significantly exacerbate the degraded habitat conditions for these species that already exists on the ONF. The near absence of any information from surveys or monitoring of listed species makes a reasonable analysis of how this project and others proposed will cumulatively affect these species impossible.

1. Northern spotted owl.

The EA concedes that the project is “likely to adversely affect” the northern spotted owl and its critical habitat. *EA*, 76; *DN/FONSI*, 2. Given the owl’s precipitous decline on the Olympic Peninsula, Appellants maintain that the agency has an increased duty to protect whatever habitat remains for the owl.

- a. Lack of current spotted owl population baseline for the Olympic Forest precludes implementation of the Dosewallips Washout Bypass Project.

To avoid the taking or otherwise jeopardizing of listed species and/or the destruction or adverse modification of critical habitat, the ESA creates a process whereby all federal action agencies must consult with the FWS before the action agency engages in actions that may affect critical habitat or a threatened or endangered species that may be present in the project area. 16 U.S.C. §§ 1536(a)(2). The action agency – here, the USFS – must prepare a biological assessment that describes the anticipated impacts to the target species because of the project. *Id.* § 1536(c)(1). FWS then must issue a biological opinion that “shall...[e]nsure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” *Id.* §§ 1536(a); (b).

As part of a biological opinion, the FWS must quantify the extent of the incidental take and the effect that the proposed action will have on a listed species’ critical habitat. 16 U.S.C. § 1536(b)(4), (A)(i); (B)(i). To this end, the FWS must consider the impacts to the listed species from the proposed action in conjunction with past and present actions: the “effects of the action.” 50 C.F.R. §§ 402.14(g)(2) – (4); 402.02. In nearly all cases of consultation on the ONF, FWS has adopted the USFS’s biological assessment as FWS’s determination of effect on the listed species.

The FWS has an affirmative obligation to independently assess the status of the spotted owl, as well as the proposed project's effect on the species. Consistently deferring to the USFS's assessment of that agency's impact to a listed species vitiates the consultation requirement of the ESA. 16 U.S.C. § 1536(b). Similarly, the Forest Service violates its own ESA requirement to independently ensure against jeopardy of a listed species and to use its authority to conserve listed species when it fails to require the FWS to adequately assess a proposed project's impacts to those species. 16 U.S.C. § 1536(b).

The condition of the species and its habitat prior to the proposed action is known as the "environmental baseline" for the species. 50 C.F.R. § 402.02. The environmental baseline "includes all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress." 50 C.F.R. § 402.02. Without an adequate environmental baseline, FWS has no way of evaluating the present status of a listed species, and thus cannot rationally decide whether additional impacts on the species may not jeopardize its continued existence.

The failure to make a population-based analysis creates a significant level of uncertainty regarding the level of impact that this project will have on owls in the planning area, adjacent roadless areas, and nearby lands. NEPA requires that when data are not available an agency should recognize the lack of data and explain why obtaining it was not feasible. 40 C.F.R. § 1502.22. The ESA prohibits the Forest Service from going forward with the proposed project without ensuring that the project will not result in jeopardy to the species. In light of this, the FONSI was not reasonably supported, and an EIS should have been prepared that addressed population trends in relation to Dosewallips Washout Bypass.

b. Direct and indirect impact to spotted owls precludes implementation of the Dosewallips Washout Bypass project.

Appellants have several concerns about the Forest Service's assessment of project effects to northern spotted owls. First, it is likely that the proposed project will directly impact unidentified spotted owls. The EA states that "there have been no recent owl surveys." EA, 69. The BiOp states: "because protocol surveys within the project area are lacking, spotted owls may occupy unsurveyed habitat within or adjacent to the project area. The Service believes unsurveyed NRF [nesting, roosting, foraging] habitat within the project area may be occupied by nesting, roosting, or foraging spotted owls." BiOp, 25-26. Marshall (1942:67) observed that where "suitable habitat prevails, pairs [of spotted owls] can be expected at intervals of one to two miles." Spotted owl activity centers have been found to be as close as one mile to an adjacent activity center (Forsman et al. 1984:17) and also as close as one mile between nesting pairs (Pearson and Livezey, unpubl. data).

The project area lies within the median home-range circle for spotted owls on the Olympic Peninsula (2.7-mile radius) of two spotted owl pair activity centers. BiOp, 25. Spotted owl site Number 24 is 1.4 mi. [east] and spotted owl site Number 160 is 2.2 mi. [west] from the proposed project. *Id.* There is, therefore, adequate spacing to have a spotted owl activity center within or

adjacent to the project area. Following the course of the Dosewallips River, there is a distance of 5.3 mi. between the two identified sites, which is adequate spacing to support a second unidentified spotted owl pair between the identified sites.

The Dosewallips Washout Bypass project would remove 4 acres of nesting, roosting, and foraging habitat. This includes the removal of large-diameter trees with very good potential to provide a nesting opportunity. Pearson,¹¹ *personal communication and field observation*. The BiOp describes 221 trees with a dbh (diameter breast height) of 21" or greater, 101 of which are over 3 feet dbh. *BiOp*, p. 2 at Table 1.

The BiOp goes on to state that "however, few trees contain characteristics favorable for spotted owl...nesting," and that "the ONF determined there are 9 potential spotted owl nest trees." *BiOp*, 3. The inference is that somehow eliminating 9 nesting trees minimizes the impact of the proposed project, and that it is the number of potential nest trees in a localized area that determines whether or not spotted owls are present in the area. This assumption is flawed for two reasons.

One, *nine* potential nest trees in a 4-acre area is an excellent opportunity for nesting: it only takes one tree to attract an owl and result in a nest. Two, the 9-nest-tree-estimate is based upon the assessment of a wildlife biologist, not a spotted owl. No matter how competent the human may be, spotted owls may not pay any attention to that assessment and may nest anywhere, including in "less desirable" trees (of which there are hundreds in the action area).

NRF habitat (i.e. the opportunity for nesting) in this area is concentrated along a corridor on either side of the Dosewallips River. Without recent protocol surveys to determine spotted owl occupancy, the proposed project could negatively impact an unidentified resident spotted owl pair, and/or compromise the capability of this area to support nesting. Additionally, there is no indication that the opportunity for nesting related to potential nest trees was analyzed outside of the action area. There is no way to know, therefore, if the removal of nest tree opportunity from the project area would also remove the only opportunities for nesting in the immediate area.

Second, there are apparent errors in both the DN/FONSI and the BiOp regarding the amount of NRF habitat pertinent to the affected spotted owl home range circles, and there are discrepancies between the DN/FONSI and BiOp regarding amounts of NRF habitat within the two affected spotted owl home-range circles. The combination of errors and disagreement lead to a false assumption of risk:

- (1) The BiOp states: "the removal of NRF habitat below 40 percent (2,663 acres) within the 2.7-mile radius home range circle is one of the Service's indicators of incidental take for this species." *BiOp*, 29. However, 2,663 acres would be 40 percent of an approximately 1.81-mile radius circle. The correct amount for a 2.7-mile radius circle would be approximately 5,963 acres.

¹¹ Mr. Pearson is a spotted owl expert with more than a decade of field experience surveying and studying northern spotted owls in Washington State. See, *Attachment 117*. Mr. Pearson has analyzed the Dosewallips Washout Bypass Project EA and DN/FONSI, and has visited the project area in order to provide expert input into this appeal.

- (2) The DN/FONSI states that: "Table 3 reflects the changes to nesting, foraging, roosting habitat." *DN/FONSI*, 5. However, the table column-descriptions include dispersal habitat along with NRF habitat. Based upon comparison with available GIS spotted owl habitat data, the amount of habitat listed reflects NRF without dispersal habitat.
- (3) In the column "Percent NRF and dispersal habitat w/in home range," site number 24 is listed as 30(%). *DN/FONSI*, 5. However, dividing the acres of NRF habitat given in the table by the total acres within a 2.7-mile home-range circle gives 37.5%, not 30%.
- (4) In the BiOp, site number 24 is said to have 6,117 acres of NRF habitat within the home-range circle, *BiOp*, 25, while the DN/FONSI lists this pair as having 5,502 acres in its home-range circle. *DN/FONSI*, 5. This is significant in that if one uses the DN/FONSI amount of 5,502 acres for site number 24, it results in 37.5% NRF, well below the 40% minimum threshold for the Fish and Wildlife Service indicator of incidental take.
- (5) In the BiOp, site number 160 is said to have 6,698 acres of NRF habitat within the home-range circle, *BiOp*, 25, while the DN/FONSI lists this pair as having 5,890 acres in its home-range circle. *DN/FONSI*, 5. If one uses the DN/FONSI amount of 5,890 acres for site number 160, it results in 40.2 %NRF, very close to the 40% minimum threshold for the Fish and Wildlife Service indicator of incidental take. *BiOp*, 25.
- (6) The BiOp states: "...the two home-range circles would still have 2.3 and 2.5 times the incidental take threshold amount of NRF." This, however, is based upon the erroneous figure of 2,663 acres being 40% of a 2.7-mile radius circle. If you multiply 2.5 times 40% (take threshold), it would equal 100% NRF, which is obviously wrong. Using the correct total acres within a 2.7-mile radius circle (14,657 acres), and the BiOp NRF habitat totals, results in 1.04 and 1.14 times the incidental take threshold amount of NRF.

Given these errors, there is no way of knowing which of the habitat totals, Fish and Wildlife's or the Forest Service's, are the correct habitat totals, or even if either of them are correct. Because the project is located on Forest Service lands, it would be logical to assume that the Forest Service totals are more correct than the Fish and Wildlife Service totals. If the Forest Service NRF habitat totals are used, then site Number 124 is well below the Fish and Wildlife Service threshold for incidental take at 37.5%, and site Number 160 is barely above the 40% NRF threshold at 40.2%. Either way, these owls are already pushed to the limit in terms of surviving additional habitat destruction.

Third, NRF habitat totals (i.e., available NRF habitat in the action area) are often inflated by designating roads as suitable habitat. It appears from the Olympic NF GIS vegetative and transportation (roads) data, that approximately 5.2 miles of road are labeled as NRF habitat. Assigning the same value as the proposed bypass road of 4 acres forest removed for 0.74 miles of road, this results in an overestimation of available NRF habitat of 28 acres. Applying this information to site Number 160 brings the Forest Service total one acre below the Fish and Wildlife Service minimum threshold for take. This information was not assessed in either the EA or the BiOp.

The Olympic Peninsula has undergone a substantial decline in spotted owl population over the last 15 years. The BiOp states “the long-term demography data (Franklin et al. 1999:33) for the Olympic study area suggested a 6 percent annual decline in the spotted owl population for the years of the study (1987 to 1998).” *BiOp*, 20. The BiOp goes on to note that “Forsman and Biswell (2003:3) stated: ‘the information collected since 1998 does not suggest any improvement in this picture’ and ‘the percent of territories with pairs was still only about 50 percent of the levels detected in 1987 to 1992.’” *Id.* at 2, 20-21. Gremel (2003:4) reported for the ONP that spotted owl pairs were detected at only 23 of 52 monitored sites.

In light of this information, and the fact that the proposed project is entirely within a Late-Successional Reserve that is intended to retain spotted owl pairs, utmost caution should be exercised to insure that potential, unidentified resident spotted owl pairs are not negatively impacted.

The proposed project rests on the lack of information regarding spotted owls to justify implementation. The Dosewallips Washout Bypass project would compromise the capability of the Late-Successional Reserve to support spotted owl pairs at a time when the overall population on the Olympic Peninsula is in serious decline, disregards the potential to impact unidentified spotted owl pairs, and relies on an erroneous habitat assessment that leads to false conclusions regarding habitat available to known spotted owl pairs. This decision is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

c. Interspecies competition.

Appellants are also concerned that the Forest Service has failed to assess the effects of interspecies competition on spotted owl viability. The DN/FONSI only states that “it is not known, however, whether the activity will increase the chance of occupancy by the barred owl.” *DN/FONSI*, 5. Notably, the NFP and its EIS did not assess how spotted owls would be impacted by interspecies competition: it only addressed the impacts to the species because of habitat loss.

The FWS recently recognized the importance of interspecies competition with spotted owls, and the role that barred owls play in spotted owl survival. *A Range Wide Baseline Summary and Evaluation of Data Collected through Section 7 Consultation for the Northern Spotted Owl and its Critical Habitat: 1994-2001*, 11. This document, prepared in response to litigation and dated June 26, 2001, should be incorporated into the administrative record in its entirety by this reference. In it, the FWS states that “the barred owls’ increasing expansion into the range of the spotted owl may eventually pose a serious threat” to spotted owl survival. *Id.* The mainstream media have also raised the question of interspecies competition and spotted owl viability. *Attachment 63, Scientists Fear Threat to Owl May be Kin.*

Similarly, the BiOp cites Gremel (2003) with regard to spotted owl sites and barred owl presence in the adjacent Olympic National Park (ONP), stating that “Gremel found that when barred owls invaded spotted owl territories, the spotted owls tended to shift their activities more than 4,000 feet laterally.” *BiOp*, 24. The BiOp also states that “A barred owl was detected in 2002....” for site number 24, and that (in regard to Pacific Northwest demographic research surveys) “these protocol surveys typically do not include surveys within the outer ring of the home range circle.”

Id. at 25. This outer ring would begin at a distance 0.7 miles from the activity center of pair number 24 and extend to 2.7 miles.

Given that 4,000 feet is 0.76 miles, surveys would not have reached the average distance that Gremel found spotted owls to move laterally with barred owl presence. For the pair occupying site number 24, there is not enough NRF habitat to the north, east, or southeast of the historical activity center to support a pair, so if this pair moved in response to barred owl presence, it would have to be either south or west in the direction of the planning area.

There is no indication in any of the documents associated with the Dosewallips Washout Bypass that the Forest Service has considered this information, which is clearly significant. Based on this significant new information, NEPA requires the Forest Service to withdraw the Dosewallips Washout Bypass project until a reasoned examination of how barred owls affect spotted owl survival range wide and within the planning area, and how implementation of the Dosewallips Washout Bypass project will contribute to this situation. 40 C.F.R. § 1502.9(c)(ii).

- d. Lack of assessment of impacts to and protection of Critical Habitat Unit WA-49 precludes implementation of the Dosewallips Washout Bypass Project.

One of the FWS' consultation duties is to ensure that other federal agency actions do not result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). In addition, Forest Service regulations require measures for preventing the destruction or adverse modification of critical habitat. 36 C.F.R. §§ 219.27(a)(8), 219.19(a)(7). "Critical habitat" is defined in the ESA as "[t]he specific area within the geographic area occupied by a species . . . on which are found those physical and biological features (I) essential to the conservation of the species, and (II) that may require special management considerations or protections." *Id.* § 1532(5)(A)(i).

"Destruction or adverse modification" of critical habitat is defined as "direct or indirect alteration that appreciably diminishes the value of critical habitat[,]. . . includ[ing], but . . . not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. § 402.02. "Conservation" is further defined as "to use and the use of all methods and procedures necessary to bring an endangered species to the point at which measures provided pursuant to this Act are no longer necessary." 16 U.S.C. § 1533(3).

When designating critical habitat for the Northern spotted owl, the FWS recognized that critical habitat is meant to promote recovery of the species by stating that "the Act's definition of critical habitat indicates that the purpose of critical habitat is to contribute to the species' conservation, which by definition equates with recovery." 57 Fed.Reg. 1822 (1992). Both the ESA and the FWS' northern spotted owl critical habitat rule reveal that the purpose of designating critical habitat, and thus the FWS' role in protecting the habitat from activities that might adversely affect it, is clearly for the recovery of the species.

The entire planning area is located within designated critical habitat for the spotted owl. *EA*, 13. Despite the location of the project in critical habitat, the Forest Service fails to assess how the project will affect critical habitat for the owl, and how the species will be affected by the loss of this critical habitat. Given its scarcity, Appellants question how a loss of 4 acres of critical habitat will not “appreciably diminish the value of critical habitat” as it relates to the species’ recovery. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. The decision to implement a decision that does not comply with the ESA is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

2. Marbled Murrelet.

Many of the concerns raised above pertaining to the northern spotted owl also pertain to the marbled murrelet, including the concern that the project is “likely to adversely affect” the species and its critical habitat. *EA*, 76; *DN/FONSI*, 2. There is very little analysis in the Dosewallips Washout Bypass EA regarding the project’s effects on this species and its critical habitat (CHU WA-06-a), and we point out that the USFS or FWS have not surveyed for the murrelet, and do not have an adequate baseline for the species. *EA*, 70. Absent survey information, it is impossible to account for the project’s effect on the species.

Again, the Forest Service is aware that the Fish and Wildlife Service is currently conducting a status review of the marbled murrelet. Results of this scientific review indicate that marbled murrelet populations in Washington, Oregon and California continue to decline, and continue to be at risk from the same threats identified at listing, plus one possible new threat from disease. Population declines in the listed range are related mainly to historic and ongoing nesting habitat loss and low breeding success (due to high predation related to reduced quality of remaining nesting habitats).

In a larger perspective, the marble murrelet evolved to breed at solitary nests in old-growth forests throughout most of its range. As a long-lived alcid, it has a low annual reproductive rate, delayed maturity, and high adult survival. Population declines appear to be related to the loss of nesting habitats due to logging and urbanization over the past 150 years. In most areas within the listed range, murrelets are left with small, isolated stands of older trees for nesting. At present and for the foreseeable future, these remnant populations are struggling to be self-sustaining and may soon become non-viable in Zones 5 and 6 and face potential extinction during the next century. It is unrealistic to expect that the species will recover before there is significant improvement in the amount and distribution of suitable nesting habitat.

The Forest Service has failed to address these considerations in the Dosewallips Washout Bypass project EA or *DN/FONSI*. The failure to consider and analyze this information is arbitrary and capricious.

3. Anadromous fish species.

The EA indicates that

Anadromous fish species present in the Dosewallips watershed are chinook salmon, coho salmon, chum salmon, pink salmon, steelhead trout, and sea-run cutthroat trout. Both

Hood Canal summer chum and Puget Sound chinook, which have been listed as threatened under the Endangered Species Act by the National Marine Fisheries Service (NMFS), are present in the Dosewallips River. Chinook salmon, coho salmon, pink salmon, steelhead trout, and cutthroat trout spawn and rear within the project area. Coho spawn mostly downstream of the project area in side and braided channel areas. Summer chum are present within the lower reaches of the Dosewallips watersheds, off National Forest lands. Essential Fish Habitat has also been designated by NMFS, which includes chinook, coho, and pink salmon habitat.

EA, 12. Many of these stocks are “depressed” or “threatened.” *Id.* at 53.

Appellants appreciate that the Forest Service decided to avoid the unnamed tributary by rerouting FS Road 2610 to avoid destroying salmon spawning and rearing habitat. However, we remain concerned about the Dosewallips Washout Bypass’s adverse effects on aquatic habitat due to increases in sedimentation and the risk of future road washouts. The Forest Service must adequately demonstrate that this project will not adversely affect anadromous fish species, but the EA does not contain enough information to determine whether the agency has taken a “hard look” at this issue. *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d at 1380 (9th Cir. 1998). Until this information is provided, the project must be withdrawn.

B. Management Indicator Species.

NFMA requires the Forest Service to provide animal and plant diversity in the national forests. 16 U.S.C. § 1604(g)(3)(B). USFS regulations implementing this requirement direct the Service to manage forests for viable populations of native vertebrate and desired non-native species. 36 C.F.R. § 219.19. The regulations define viable populations as a population that has “the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.” *Id.*

To ensure that viable populations are maintained, the Forest Service regulations also require that the Service identify management indicator species (MIS) and that “[p]opulation trends of the management indicator species will be monitored and relationships to habitat change determined.” 36 C.F.R. § 219.19(a)(6). This monitoring is “essential to verify and, if necessary, modify the forest plan’s assumptions about the effects of timber harvesting and other management activities on wildlife...In order to meet the monitoring requirement, planners will need to obtain adequate inventories of wildlife populations and distribution.” Charles F. Wilkinson and H. Michael Anderson, *Land and Resource Planning in the National Forests*, 304 (1987).

The Ninth Circuit has stated that the duty to ensure viable or self-sustaining populations “applies with special force to “sensitive” species.” *Inland Empire Public Lands Council v. United States Forest Serv.*, 88 F.3d 754 (9th Cir. 1996) citing *Oregon Natural Resources Council v. Lowe*, 836 F.Supp 727, 733 (D. Or. 1993). NFMA clearly directs the Forest Service to create regulations to “insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land.” 16 U.S.C. § 1604(g)(3)(C); *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999).

In light of this direction, NFMA's regulations require inventorying and monitoring on the National Forests under 36 C.F.R. §§ 219.12(d) and (k) as well as 36 C.F.R. §§ 219.19(a)(6), 219.26, and 219.19(a)(2). The regulations state "each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction." *Id.* § 219.12(d). The regulations further require that "at intervals established in the plan, implementation shall be evaluated on a sample basis to determine how well objectives have been met and how closely management standards and guidelines have been applied." *Id.* § 219.12(k). To ensure biological diversity, the regulations specifically require that "[i]nventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition." *Id.* § 219.26.

Although NFMA clearly requires the monitoring of MIS populations, the Forest Service has traditionally relied upon the availability of suitable MIS habitat, rather than population surveys, to meet NFMA's viable populations requirement. *Inland Empire Public Lands Council v. United States Forest Serv.*, 88 F.3d 754 (9th Cir. 1996). Recently, however, the Ninth Circuit has revisited its holding in *Inland Empire*, and held that if the Forest Service utilizes a "proxy-on-proxy" approach to meeting the agency's NFMA obligations, any habitat models must be grounded in fact and field verified. *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002). The court also acknowledged that other courts have expressly disavowed the holding in *Inland Empire*, casting additional doubt on the validity of that case. *See generally*, *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999), *Utah Environmental Congress v. Zieroth*, 190 F. Supp. 2d 1265, 1272 (D. Utah 2002) (holding that § 219.19 unambiguously requires collection of population data), *Forest Guardians v. U.S. Forest Service*, 180 F. Supp. 2d 1273 (D.N.M. 2001) (same).

On the Olympic National Forest, the Forest Service has failed to survey for any management indicator species such as pileated woodpecker, pine marten, primary cavity excavators, bald eagle, northern spotted owl, or bats. The USFS has also failed to assess these species' viability based on habitat availability. The agency cannot simply skip the stages of gathering population data, or gathering habitat data, before using habitat models to determine population viability. This is exactly the approach invalidated by the courts in *Martin*, *Rittenhouse*, *Zieroth*, and *Forest Guardians*.

Given the developing reinterpretation of the legal requirements attendant to management indicator species, it is questionable at best whether the multiple mandates in NFMA and its implementing regulations requiring population monitoring and surveying are being met for the Dosewallips Bypass Project. Given this situation, we recommend that the USFS immediately withdraw the EA and DN/FONSI until the appropriate information can be gathered for this project.

The multiple mandates in NFMA and its implementing regulations requiring population monitoring and surveying is clearly unmet by the USFS on the ONF. Because of the difficulty in monitoring all the species on the forest, NFMA regulations recognized that management indicator species (MIS) could be used as surrogates for other species with similar habitat needs. The ONF, however, has failed to even meet the minimal requirement to monitor MIS.

V. THE FOREST SERVICE VIOLATED THE NATIONAL FOREST MANAGEMENT ACT (NFMA) BY NOT ADEQUATELY ANALYZING THE PROJECT'S IMPACTS TO SOIL PRODUCTIVITY.

The proposed project also violates NFMA because it will permanently impair the productivity of the area due to degradation of soil productivity, significant changes to watershed functions, the introduction of exotic invasive weeds, and the increase in the already high rates of erosion and sedimentation. 36 C.F.R. §§ 219.14 (a)(2); 219.27(a)(1). There is no scientific support in the EA that these impacts would be adequately mitigated. *Attachment 116, Effects of Forest Management on Erosion and Soil Productivity*. Therefore, the project must be withdrawn until compliance with NFMA can be obtained.

A. Soil Compaction and Disturbance.

Appellants have several concerns regarding soil resources. First, as stated previously in the aquatics sections, it is clear that the soils in the planning area are highly susceptible to erosion, displacement, mass wasting, and slope failure. The agency has not explained how it plans to minimize this situation.

Second, the EA acknowledges that Alternative C will result in adverse soils effects:

Soil productivity would be reduced under this alternative. Detrimental soil conditions expected from this action would include long-term compaction, displacement, and surface erosion. Approximately 1.8 acres (0.5 miles) would be removed from the productive land base, currently in late successional forest. The physical soil conditions such as water infiltration, porosity, organic matter, biological factors, would be impacted. Surface erosion (sheet, rill) would likely be extensive on the cutslopes on the east and west side of the washout. Gully erosion is also likely due to water diversions from the ditchlines and culverts. Additional loss of soil productivity could result from landsliding that could occur above and below the road.

EA, 47. The EA does not state what the applicable Forest Plan standard is for detrimental soil conditions, or whether the proposed project will violate that standard.

The Forest Service attempts to downplay adverse effects to soils by stating that "the impacts to soils and the potential increase over natural sediment levels from implementing Alternative C - Modified are well within acceptable levels, and even though adverse, are a reasonable tradeoff." *DN/FONSI*, 9. However, because the EA does not disclose what the "acceptable levels" are, or what the standard is against which to measure effects, the agency has failed to provide the public and decision maker with adequate information to make a reasoned assessment regarding the project's effects. This is a clear abdication of the agency's duty to assess the impacts to soil resources and to preserve them. 40 C.F.R. § 1502.16(a)-(b); 36 C.F.R. §§ 219.17(a)(1), 219.23(f).

Given the fact that the USFS has a demonstrated inability to conserve soil resources and protect soil from detrimental compaction and disturbance, the agency should be precluded from implementing the Dosewallips Washout Bypass Project. Similarly, given the fact that the USFS does not adequately address the impacts on soils in the planning area, it is impossible to determine whether the USFS will violate Forest Plan standards, as well as NFMA standards that require the conservation of soil resources. 36 C.F.R. § 219.27(a)(1).

B. Productivity.

Although the agency undertakes some analysis regarding the effects of the proposed project on the compaction and displacement of soils, there is little analysis of how the project will affect the productivity of the soils in the planning area. Appellants note that the Forest Service has an obligation to ensure soil productivity throughout the planning area. 36 C.F.R. § 219.27(a)(1).

C. Noxious Weeds.

The EA and DN/FONSI for the Dosewallips Washout Bypass inadequately discuss the status of noxious weeds in the planning area. Indeed, there is very little mention of the possibility of the introduction and spread of noxious weeds in the planning area as a result of the ground disturbance associated with the project.

The courts have recently held that failing to address an action alternative that would prevent the introduction of noxious weeds is arbitrary and capricious, and violates NEPA for failing to consider a reasonable range of alternatives. *Blue Mts. Biodiversity Project v. United States Forest Serv.*, 229 F. Supp. 2d 1140, 1147 (D. Or. 2002). That case also held that the USFS erred in tiering its analysis of noxious weed spread and introduction to the 1988 FEA and Finding of no significant impact and decision notice on Managing Competing and Unwanted vegetation, and that the Forest Service violated NEPA in failing to prepare a supplemental EA for the 1988 FEA and ROD. *Id.* at 1148 – 1149.

Given this legal interpretation of the Forest Service's obligations vis-à-vis noxious weed introduction and spread, the USFS must withdraw the Dosewallips Washout Bypass EA and DN/FONSI. Failing to do so is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

VI. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO ADEQUATELY ASSESS THE SIGNIFICANT NEW INFORMATION PRESENTED BY THE WINTER 2003 – 2004 STORMS, AND TO OBSERVE THE APPROPRIATE PROCEDURES REQUIRED BY LAW.

NEPA requires the Forest Service to supplement existing environmental analyses when there are "significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). The Ninth Circuit has held that this requirement applies to supplementation of both environmental impact statements as well as environmental assessments. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998). The purpose of the supplementation requirement is grounded in NEPA's goals of

informed agency decisionmaking and public involvement in those decisions. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000).

Not all new information requires supplementation of an existing NEPA document, and the Forest Service is permitted to prepare a "supplemental information report" (SIR) to assess whether new information rises to the level of significance that requires a new NEPA document and renewed public comment. *Idaho Sporting Congress v. Alexander*, 222 F.3d 562 (9th Cir. 2000).

However, both forest fires and a reduction in project size have been held to constitute significant new information requiring supplemental NEPA documentation and public review. *Leavenworth Adopt-A-Forest v. Ferraro*, 881 F.Supp. 1482 (W.D. Wash. 1995) (forest fires); *Oregon Natural Resources Council Action v. United States Forest Serv.*, 293 F.Supp.2d 1200 (D. Or. 2003) (reduction in project size); *Kettle Range Conservation Group v. United States Forest Serv.*, 148 F.Supp.2d 1107 (E.D. Wash. 2001) (same).

In the Winter of 2003, the Olympic peninsula was beset by unusually severe storms that brought large amounts of precipitation to the area, including the Dosewallips Washout Bypass project planning area. As a result of the storms, additional portions of the existing roadbed of FS Road 2610 were washed out.

The Forest Service has not provided the public with additional information about how these storms affected the project area, and has undertaken no additional environmental review of how the storms may have changed the environmental baseline of the Dosewallips Washout Bypass project. Given that the existing roadbed continues to erode, it is possible that the entire design of the project (which, again, has itself not been made available to the public because there has yet to be a detailed engineering study) should be altered to reflect the evolution of the Dosewallips River's meander.

At the very least, the Forest Service should have prepared a supplemental information report regarding the changed circumstances of the project, and provided it to the public for comment. 40 C.F.R. § 1502.9(c). The failure to do so is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

VII. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO ADEQUATELY ASSESS THE SIGNIFICANT NEW INFORMATION PRESENTED BY THE 2004 STATUS REVIEW OF THE NORTHERN SPOTTED OWL AND MARBLED MURRELET, AND TO OBSERVE THE APPROPRIATE PROCEDURES REQUIRED BY LAW.

As stated previously, the Forest Service has an obligation to continuously assess its actions and projects for not only compliance with the law, but also for significant new information. In this case, there is significant new information pertaining to the northern spotted owl and marbled murrelet that the Forest Service should have assessed for relevance, through a supplemental information report, and submitted to the public for comment.

As the Forest Service is well aware, the Fish and Wildlife Service is currently undertaking a five-year status review of the marbled murrelet and northern spotted owl. In particular, all science

indicates that Olympic Peninsula populations of both species are critically depressed, and are continuing to trend downward. *Attachment 20, Demographic Characteristics of Northern Spotted Owls on the Olympic Peninsula*. Indeed, there is a high likelihood that these species may not persist in the near or long term.

The Dosewallips Washout Bypass project will eliminate approximately 4 acres of late-successional forest, much of which is suitable for nesting by both species. Despite this situation, the Forest Service has failed to even survey for either marbled murrelets or spotted owls in the planning area. The agency may assume that all suitable habitat is occupied, but this is the type of cavalier attitude that has resulted in the continued decline in species population on the Olympic National Forest and elsewhere in the Pacific Northwest: the Forest Service must investigate whether or not species are in fact using this habitat, and determine whether or not the species will continue to exist after additional habitat is removed.

In this case, the Forest Service has not assessed the new information that has been generated by the status review processes for the marbled murrelet and northern spotted owl. In general, this information indicates that the species are not faring well, and that additional conservation measures may be warranted. At the very least, the Forest Service should have prepared a supplemental information report regarding this information and how it informs (or does not) the Dosewallips Washout Bypass project, and provided it to the public for comment. 40 C.F.R. § 1502.9(c). The failure to do so is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

VIII. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT ADDRESSING THE DIRECT, INDIRECT, AND CUMULATIVE ENVIRONMENTAL EFFECTS OF PAST, PRESENT, AND REASONABLY FORESEEABLE FUTURE PROJECTS IN THE DOSEWALLIPS WASHOUT PLANNING AREA.

“A threshold question in a NEPA case is whether a proposed project will ‘significantly affect’ the environment, thereby triggering the requirement for an EIS.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citing 42 U.S.C. § 4332(2)(C)). The Ninth Circuit has established a “relatively low threshold for preparation of an EIS,” and an EIS must be prepared if a plaintiff raises substantial questions about whether a project will have significant effects. *NRDC v. Duvall*, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991); *Idaho Sporting Congress*, 161 F.3d at 1212. The NEPA regulations outline factors that an agency must consider in determining whether an action may significantly affect the environment. *Sierra Club*, 843 F.2d at 1193; 40 C.F.R. § 1508.27; see also *Blue Mountains*, 161 F.3d at 1212. Any of these factors may be sufficient to require preparation of an EIS. *Public Citizen v. Dep’t of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003) (holding that the presence of one NEPA significance factor required the preparation of an EIS); *Anderson v. Evans*, 314 F.3d 1006, 1021 (9th Cir. 2002) (same). Appellants have raised substantial questions about the environmental impacts of the Dosewallips Washout Bypass project, and an EIS is therefore required. *Id.*

At least seven of the “significance” factors are at issue in this case. First, the Forest Service must assess “the degree to which the proposed action affects public health and safety.” 40 C.F.R. §

1508.7(b)(2). Second, the Forest Service must consider the “unique characteristics” of the planning area, such as the “proximity to...ecologically critical areas.” *Id.* § 1508.27(b)(3). Third, “to determine whether a proposed project will have ‘significant’ impacts on the environment, an agency must evaluate...‘the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.’” *Blue Mountains*, 161 F.3d at 1212 (citing 40 C.F.R. § 1508.27(b)(5)). Similarly, the Forest Service must assess whether “the effects on the quality of the human environment are likely to be highly controversial.” *Id.* § 1508.27(b)(4).

Another significance factor is “whether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). Next, significance exists when the project will “adversely affect an endangered to threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” *Id.* § 1508.27(b)(9). Finally, the agency must consider “whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.* § 1508.7(b)(10).

The Dosewallips Washout Bypass is located within a Late-Successional Reserve and Riparian Reserve (ecologically critical areas); the effects of the project are controversial, uncertain, and involve unknown risks because the Forest Service has failed to undertake a comprehensive geotechnical investigation of the project area; the project may threaten public safety given the unstable nature of the proposed project site; the project’s effects are likely to be cumulatively significant; the project will adversely affect two threatened species and their critical habitat; and the project may run afoul of the Memorandum of Understanding between the Forest Service and the Washington Department of Ecology regarding reduction of roads on National Forest lands. Therefore, the Forest Service must prepare an EIS.

A. The Dosewallips Washout Bypass Project Will Affect Public Health and Safety.

As described previously, the Forest Service proposes to build the Dosewallips Washout Bypass Project across extremely steep and unstable slopes. Future washouts are likely as slopes are unstable given the hydrologic condition of the area. The steep grade of the road – 8 to 10% – will make travel along the road hazardous. *EA*, 39.

All of these conditions suggest that construction and operation of the road will pose significant threats to public health and safety. However, the Forest Service did not assess this significance factor in the EA, and in fact does not assess public health and safety at all. Instead, the agency has focused on access for access sake alone, without considering the nature of that access.

B. The Dosewallips Bypass Project is Located in Ecologically Critical Areas.

The entirely planning area is in an LSR and Riparian Reserve. The NFP recognizes that these two land allocations are very important to aquatic integrity and terrestrial species persistence. The project is also located in a wetland and floodplain. The Dosewallips Washout Bypass Project will construct a permanent road in all of these ecologically critical areas, even though it is highly unlikely that the road would have been built in its present location had the NFP been in

place. The NFP's S&Gs were created to prohibit ill-advised projects such as the Dosewallips Washout Bypass Project.

C. The Effects of the Proposed Project are Likely to be Highly Controversial.

The DN/FONSI states that

None of the effects discussed in the EA are unusual or should be the subject of great controversy. There are groups and individuals who desire a different land use in this area. There has been a concerted effort to generate opposition to repairing this road, and at least one group has indicated that they will appeal any decision made to restore motorized access...The point here is that I am well aware of the activities in opposition to this project and in my judgment; the concerted efforts to encourage opposition and the level of response generated do not constitute a high degree of public controversy that would require the production of an Environmental Impact Statement.

DN/FONSI, 12. The Forest Service misunderstands the regulatory requirement and the case law associated with it. NEPA "controversy" is not understood in terms of "opposition to a use," or based on the number of comments received on a project, but rather on whether there is a lack of information about the effects of a project, or if those effects are uncertain. *Blackwood*, 161 F.3d at 1212; *Friends of the Earth v. Hall*, 693 F. Supp. 904 (W.D. Wash. 1988). In turn, whether environmental effects are "controversial" or involve uncertain or unknown risks goes to the question of whether or not the project has significant environmental effects, thus compelling the preparation of an EIS. *Forsgren*, 184 F. Supp. 2d 1058 (D. Or. 2002).

In this case, the Forest Service has very little information about the effects of the proposed project, which results in a project with effects that "are highly controversial." 40 C.F.R. § 1508.27(b)(5).

D. The Potential Environmental Effects of the Dosewallips Bypass Project are Uncertain and Involve Unknown Risks.

As stated previously, the Forest Service has failed to undertake an extensive geotechnical investigation, analysis, and project design. Without this information, it is impossible for the Forest Service and the public to adequately discern the nature of the project's effects. Indeed, the Forest Service has not presented a detailed description of the proposed road's route, as this continues to change over time.

When the EA was originally released to the public, Alternative D was the preferred alternative, and would have reconstructed the road in its present alignment. Accordingly, the EA describes Alternative C in rather unfavorable terms, and paints this option as being infeasible due to technical, environmental, engineering constraints. When Alternative D became impractical, the Forest Service was left with an EA that describes Alternative C as presenting several problems (in particular, Alternative C would have obliterated a salmon spawning and rearing tributary).

Consequently, the Forest Service revised Alternative C by modifying the route that the road would take upslope. The “new” route has not been presented to the public for notice and comment as required by law. NEPA requires the Forest Service to supplement existing environmental analyses when there are “significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts;” and substantial revision of the Dosewallips Washout Bypass’s route constitutes such information. 40 C.F.R. § 1502.9(c). The Ninth Circuit has held that this requirement applies to supplementation of both environmental impact statements as well as environmental assessments. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998). The purpose of the supplementation requirement is grounded in NEPA’s goals of informed agency decisionmaking and public involvement in those decisions. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000).

Because the Forest Service has not undertaken the requisite investigation required to give the decision maker and the public adequate information to make a reasoned decision about the proposed project, and because the road’s alignment seems to have changed substantially between the EA and the DN/FONSI, the agency must withdraw the EA and DN/FONSI in compliance with NEPA. The Forest Service should prepare an EIS to adequately assess all of the effects of the proposed project.

E. The Potential Cumulative Environmental Effects of the Dosewallips Bypass Project are Significant.

The regulations implementing NEPA state that cumulative effects result “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future [federal and non-federal] actions.” 40 C.F.R. § 1508.7. “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” *Id.* § 1508.27(b)(7).

Nowhere in the Dosewallips Washout Bypass EA, DN/FONSI, or other documentation does the Forest Service analyze the cumulative effects of the proposed project. The agency has failed to document and assess the cumulative effects of not only the actions taking place in the proposed project, but also the environmental consequences other past, present, and reasonably foreseeable future projects. 40 C.F.R. § 1508.7. Despite the lack of analysis in the EA, the data available to the Forest Service suggests that an EIS is required for this project. *Sierra Club*, 843 F.2d at 1195. Therefore, the Forest Service’s decision was not fully informed and well considered, and must be withdrawn. *Id.*

The courts have held that all that must be demonstrated in order to trigger the preparation of an EIS is that significant impacts *may* occur. *Blue Mountains*, 161 F.3d at 1212. Appellants have met that burden in this case, and the Forest Service must prepare an EIS.

F. The Dosewallips Bypass Project will Adversely Affect the Northern Spotted Owl and Marbled Murrelet and Their Designated Critical Habitat.

As stated previously, the Dosewallips Washout Bypass project is located within designated spotted owl and marbled murrelet critical habitat, and will adversely affect both species. Inexplicably, the Forest Service did not account for these facts in designing or approving the proposed project. The agency has not required or recommended any mitigation measures of any kind that would minimize the effects of the Dosewallips Washout Bypass project on either the spotted owl, or its habitat. Instead, the FWS has proposed limited operating periods for road construction, but neither the action nor consulting agency have offered mitigation measures for road operation, maintenance, and associated activities.

G. The Dosewallips Washout Bypass Project Threatens a Violation of Federal, State, or Local Law or Requirements Imposed for the Protection of the Environment.

In 1999, the Forest Service and the State of Washington Department of Ecology signed a Memorandum of Agreement (MOA) designed to reduce the number of miles of roads on Forest Service lands in Washington State, and to bring the USFS into compliance with the Clean Water Act. *Attachment 104, DOE-USFS Roads MOA*. The existence of this MOA is not discussed in the Dosewallips Washout Bypass EA or supporting documentation. There is no indication in the EA that this project complies with the MOA, as its very purpose is to construct a road of dubious integrity.

NEPA requires the Forest Service to disclose and discuss "possible conflicts between the proposed action and the objectives of...State...land use plans, policies and controls for the area concerned." 40 C.F.R. § 1502.16(c). NFMA also requires consistency between site-specific projects and "all substantive and procedural requirements of...State...governmental bodies with respect to the provision of public water systems." 36 C.F.R. § 219.23(d). NEPA also requires the agency to disclose "whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment," and to prepare an EIS if such a violation may occur. 40 C.F.R. § 1508.7(b)(10).

In this case, the Forest Service failed to disclose and discuss how the proposed project is consistent with the MOA, and how building a new permanent road in the planning area will assist the Forest Service in meeting its obligation to "develop road maintenance and abandonment plans for all federal forest roads within five years and fully implement those plans within 15 years." *Attachment 104, DOE-USFS Roads MOA*.

H. An EIS is Required.

These seven significance factors should have informed the Forest Service that the project would have significant adverse effects, and that an EIS was required. That the decision maker nevertheless failed to prepare an EIS indicates that the decision to implement the Dosewallips Washout Bypass Project was arbitrary, capricious, and in violation of NEPA. 5 U.S.C. § 706(2)(A).

VIII. THE DECISION NOTICE FOR THE DOSEWALLIPS WASHOUT BYPASS IS INCONSISTENT WITH APPLICABLE LAWS AND IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedures Act requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The court will look to see if the USFS decision was "based on a consideration of the relevant factors... Moreover, it must engage in a 'substantial inquiry' into the facts, one that is 'searching and careful'." *Northern Spotted Owl v. Hodel*, 716 F.Supp 479, 482 (W.D. Wash. 1988), quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, at 34 (D.C. Cir.), cert. denied, 426 U.S. 941(1976). The DN/FONSI and EA for the Dosewallips Washout Bypass were not based on a consideration of relevant factors.

The failure to eruditely consider all relevant environmental impacts in the EA was arbitrary and capricious. This decision contravenes the clear intent of NEPA as well as NEPA's implementing regulations that require the USFS to fully consider the direct, indirect, and cumulative impacts of this project in conjunction with other past and future impacts in the area. 40 C.F.R. §§1500.1(b), 1508.25(2), 1508.27(b)(7); *Sierra Club v. United States Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988).

CONCLUSION

The Dosewallips Washout Bypass analysis area provides important aquatic and terrestrial habitat for a multitude of species. However, the proposed project would significantly affect remaining habitat that facilitates fish and wildlife movement, in a watershed that has been highly impacted by past and ongoing road construction, aggressive pursuit of timber, and down valley urban development, at the cost of multiple use values such as fisheries, wildlife, and low-impact recreation.

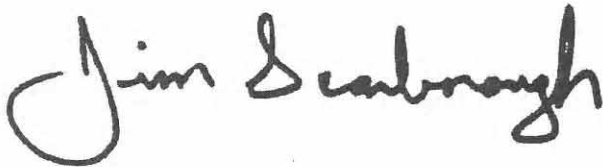
Information about non-game sensitive and listed wildlife species is seriously lacking. Habitat conditions strongly indicate that the ONF is not providing for viable populations of northern spotted owl, marbled murrelet, pine marten, and numerous other species affected by high road densities and the loss of interior forest habitat. Water quality information is lacking, but what information does exist indicates that serious sedimentation problems will result from the proposed project.

In light of these existing conditions, the proposed project will have significant cumulative impacts when viewed in conjunction with other past, present and future actions. The poor condition of the watershed is aggravated by non-federal activities on adjacent lands. An EIS should be prepared in order to completely address all of these issues.

The ONF should withdraw the Dosewallips Washout Bypass DN/FONSI and EA and prepare a EIS analyzing the Dosewallips Washout Bypass Project and associated activities. The ONF should also begin surveys of MIS, listed, and sensitive species on a forest-wide basis. Anything short of this ignores the multiple use objectives of NFMA, and the ESA's and NEPA's

requirement of high quality science, leaving the ONF with little basis for concluding the Forest is meeting the requirements of the National Environmental Policy Act, Clean Water Act, Endangered Species Act, and the National Forest Management Act.

Sincerely,

A handwritten signature in black ink that reads "Jim Scarborough". The signature is fluid and cursive, with the first name "Jim" and last name "Scarborough" clearly legible.

Jim Scarborough, Board of Directors
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