



April 6, 2015

Submitted electronically to: comments-pacificnorthwest-wallowa-whitmanwhitmanunit@fs.fed.us

Jeff Tomac, Whitman District Ranger
Wallowa-Whitman National Forest
PO Box 947
Baker City, OR 97814

RE: Comments on the Draft Environmental Impact Statement for the Granite Creek Watershed Mining Project

Mr. Tomac:

The Northwest Environmental Defense Center (NEDC) and Hells Canyon Preservation Council (HCPC) (collectively, Commenters) submit the following comments analyzing the United States Forest Service's (USFS) Draft Environmental Impact Statement (DEIS) for the proposed Granite Creek Watershed Mining Project. The USFS prepared this DEIS pursuant to the National Environmental Policy Act (NEPA) because the agency determined potentially significant environmental impacts may occur as a result of the proposed mining operations in the Granite Creek Watershed. The DEIS analyzes the impacts from 28 mining Plans of Operations across the Granite Mining area, covering approximately 94,480 acres on the Whitman Ranger District of the Wallowa-Whitman National Forest and the North Fork John Day Ranger District of the Umatilla National Forest. Commenters are concerned about the impacts to water quality and to the species that depend on clean water that are likely to result from the 28 proposed mining Plans of Operations. We are especially concerned given the presence of ESA-listed species and the already-degraded water quality conditions in the project area.

NEDC is an independent, non-profit organization working to protect the environment and natural resources of the Pacific Northwest. NEDC does this by providing legal support to individuals and grassroots organizations with environmental concerns and engaging in litigation independently or in conjunction with other environmental groups. Over the past 40 years, NEDC has sought to ensure proper implementation and compliance with our nation's environmental laws with a strong focus on the Clean Water Act (CWA).

HCPC is a non-profit conservation organization based in La Grande, OR with approximately 1,000 members. HCPC's mission is to protect and restore the inspiring wildlands,

pure waters, unique habitats and biodiversity of the Hells Canyon-Wallowa and Blue Mountain Ecosystems through advocacy, education and collaboration, advancing science-based policy and protective land management. HCPC actively participates in USFS proceedings and decisions concerning the management of public lands within the Wallowa-Whitman National Forest (WWNF), including the Whitman District, and the Umatilla National Forest, including the North Fork John Day Ranger District.

Commenters applaud the USFS for recognizing that the proposed new mining activity is likely to result in a significant impact and thus requiring Plans of Operations and an EIS. The analysis in this DEIS, however, is lacking. It fails to comply with NEPA and the agency's own regulations. The following sections outline the major inadequacies in the USFS's environmental analysis of the proposed mining operations. The USFS must revise the DEIS to address these inadequacies before signing a Record of Decision (ROD) authorizing the proposed actions.

I. By issuing this DEIS without the necessary supporting information, the USFS has prevented meaningful public comment and participation.

The ability of the public to meaningfully comment on an agency's NEPA analysis is an essential part of NEPA's public participation mandate. *See* 40 C.F.R. §§ 1500.1(b), 1503.1, 1506.6. Here, the USFS failed to comply with that mandate. For example, the USFS's analysis improperly relies on unspecified mitigation measures to offset the impacts of the proposed mining activities. The DEIS also notes that the USFS expected a Biological Opinion (BiOp) from the National Marine Fisheries Service and U.S. Fish and Wildlife Service (collectively, the Services) by December of 2014. DEIS at 144. Section 7 of the Endangered Species Act (ESA) "requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of listed species or adversely modify a species' critical habitat." *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (citing 16 U.S.C. § 1536(a)(2)). In the *Karuk Tribe* decision, the Ninth Circuit concluded that the USFS's approval of a Notice of Intent to initiate suction dredge mining operations was an agency action subject to consultation under section 7 of the ESA. *Id.* at 1024. There is no BiOp included in this DEIS. Since the DEIS was issued for public review and comment in February of 2015, it is odd that the information was not complete.

Without the details of this information, the public has not been allowed to meaningfully evaluate or comment on the impacts of the proposed action. NEPA dictates that where "a draft [EIS] is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion." 40 C.F.R. § 1502.9(a). That is precisely what must happen here. It was inappropriate for the USFS to issue this DEIS for public review and comment without such critical information such as the details of mitigation measures and a complete BiOp from the Services. The USFS must complete a supplemental NEPA analysis once it receives the biological opinion from the Services, and issue the SEIS for public review and comment.

II. The USFS's analysis in the DEIS fails to comply with the National Environmental Policy Act and the agency's own implementing regulations.

NEPA is a procedural statute designed to ensure public participation and transparent decision making by federal agencies. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA requires an EIS include, inter alia, the (1) environmental impact of the proposed action, (2) any adverse environmental effects that cannot be avoided, and (3) alternatives to the proposed action. 42 U.S.C. § 4332(2)(C). Federal agencies must take a “hard look” at the potential environmental impacts of each major action. *Robertson*, 490 U.S. at 350.

The USFS's own regulations require a Plan of Operations for mining activity that is likely to cause significant disturbance of surface resources. 36 C.F.R. § 228.4. Because the USFS determined that the proposed mining activities are likely to cause significant disturbance of surface resources, the USFS required Plans of Operations and has prepared this DEIS. As set forth below, the analysis in the USFS's DEIS fails to conform with the letter and spirit of NEPA, the Council on Environmental Quality (CEQ) guidelines implementing NEPA, and the USFS's own NEPA regulations.

a. The USFS's statement of purpose and need is fundamentally flawed.

The statement of purpose and need is central to a proper EIS because it provides the guideposts for the analysis of actions, alternatives, and effects. 40 C.F.R. § 1502.13. As such, the EIS must include a concrete and accurate statement of purpose and need. It is fundamental that agencies do not avoid NEPA's requirements by unreasonably restricting the statement of purpose. *Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) (“One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”) *See also Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (stating that “[a]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action”). The statement of purpose and need provided in this DEIS directly contradicts the requirements of NEPA and applicable case law.

Here, the USFS describes the purpose and need as a “need to authorize the approval of Plans of Operation submitted by the miners, as specified in 36 CFR 228.4(a), and to consider the Forest Service's responsibility to approve or require modifications to these Plans in accordance with federal mining and environmental laws.” DEIS at 14. This statement of purpose and need is inconsistent with the case law under NEPA prohibiting an agency from defining the objectives of its action in unreasonably narrow terms.

The statement also lacks justification. The USFS cites to 36 C.F.R. § 228.4(a) in support of its statement of purpose. This rule requires a Notice of Intent or a Plan of Operation for operations that might cause a significant disturbance of surface resources. The rule in no way supports the agency's assertion that the statement of purpose and need must be restricted to *approving* the Plans of Operations. The USFS also cites to 36 C.F.R. § (e), which allows the USFS to ask the operator for proposed modifications to an approved Plan of Operations to

address any unforeseen significant disturbance of surface resources. This rule also in no way supports the agency's claim that it must *approve* a Plan of Operations.

Although the applicant's objectives are relevant for determining the project's purpose and need, "[m]ore importantly, an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other Congressional directives." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (DC. Cir. 1991); *see also Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004) ("Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS."). Under the National Forest Management Act, and the Wallowa-Whitman and Umatilla National Forests Land and Resource Management Plans (Forest Plans), the USFS is tasked with balancing multiple uses of the National Forests.

The USFS explains that the test for sufficiency of an operating plan is "reasonableness." UNF Forest Plan, page 4–81. Even if a Plan of Operation for a mining activity is reasonable, under the Forest Plans that use must be balanced against other uses, including preservation of conditions to support fish populations. *See, e.g.*, DEIS at S-4 (noting that Management Area 18 and Management Area C7 "are intended to achieve and maintain optimum conditions for anadromous fish" and that the USFS's plans require it to place emphasis on protecting fish habitat and habitat investments through "reasonable provisions" in Plans of Operation and in reclamation requirements). Combined with the USFS's independent mandate under NEPA to act as a steward for present and future generations, *see* 42 U.S.C. § 4331(b), it is impossible for the USFS to reconcile its statutory objectives with the goal of approving the mining Plans of Operations, regardless of the impacts. Simply put, the Forest Plan provides that protecting federally listed fish and their habitat is more important than authorizing mining activities. The statement of purpose and need in this DEIS ignores these priorities.

b. The USFS's environmental analysis violates NEPA by failing to consider a reasonable range of alternatives.

NEPA requires the USFS to evaluate a reasonable range of alternatives. The alternatives analysis is "the heart" of an EIS. 40 C.F.R. § 1502.14. An EIS must "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a); 42 U.S.C. § 4332(2)(C)(iii). A reasonable alternative is one that is feasible, especially with regards to meeting the underlying purpose and need. As explained in the previous section, the statement of purpose and need is unduly narrow. In turn, the alternatives discussion is superficial and ignores NEPA's requirement to evaluate a reasonable range of alternatives. The alternatives analysis is meant to provide the federal agency and public with a "clear basis for choice among the options." 40 C.F.R. § 1502.14. Federal courts have routinely found that NEPA does not allow federal agencies from effectively reducing the discussion of environmentally sound alternatives to a binary choice between granting and denying an application. *See, e.g., Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006). That is precisely what the USFS has done with the three alternatives set forth in this DEIS.

The DEIS outlines just three alternatives: (1) a “no action” alternative, (2) the proposed action based on the Plans of Operations submitted by the miners, and (3) a minor variation of the proposed action considering Plans of Operations as submitted by the miners with USFS requirements. The Ninth Circuit has rejected this type of avoidance approach by agencies in the past. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (per curiam) (concluding that the EIS violated NEPA when the two action alternatives considered in detail were “virtually identical”). Indeed, “the evaluation of ‘alternatives’ mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.” *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). By considering only the proposed action, a virtually identical alternative, and a false “no action” alternative (see below), the USFS essentially reduced the alternatives discussion to a binary choice between approving continued operations under a Plan of Operations or a Notice of Intent. This defies the purpose of the alternatives analysis under NEPA and prevents meaningful consideration of alternatives.

The USFS describes Alternative 1 as a “no action” alternative under which the mining operations would continue pursuant to Notices of Intent instead of under Plans of Operations. DEIS at S-5–S-6. This fails to comply with the requirement to consider a “no-action” alternative at 40 C.F.R. § 1502.14(d) (requiring a lead agency to consider “the alternative of no action”). A “no-action” alternative would consider the impact of not approving the proposed activities. Instead, all of the alternatives the USFS considered would involve some form of mining activity.

For the alternatives that the USFS did identify, this DEIS fails to “[r]igorously explore and objectively evaluate all reasonable alternatives” as required by CEQ’s regulations. 40 C.F.R. § 1502.14(a). The USFS eliminates Alternative 1 because it does not meet the statement of purpose and need “since Forest Service Regulations in 36 CFR 228, Subpart A, do[] not provide for denying a reasonable Plan of Operations.” DEIS at S-6. The USFS appears to misread the express text of its own regulations. A Plan of Operations is required instead of a Notice of Intent “if the proposed operations will likely cause a significant disturbance of surface resources.” 36 C.F.R. § 228.4(a)(3). Whether each specific Plan of Operations is “reasonable” is a separate, fact-specific determination. Plans that are not reasonable may not go forward at all. 36 C.F.R. §§ 228.4(a)(4) (“If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations *can not be conducted until a plan of operations is approved.*”); 228.5(a). Pursuant to the USFS’s regulations, prospecting would not continue because the USFS itself made the determination that these activities are likely to cause significant disturbance of surface resources, and thus require a Plan of Operations.

The USFS’s reliance on Forest Service Regulations in 36 CFR 228, Subpart A for the proposition that it must approve the Plans of Operations is inconsistent with its own regulations governing approval of Plans of Operations. Reliance on Subpart A to eliminate consideration of a true no-action alternative is misplaced. As a result, the USFS failed to comply with NEPA and CEQ’s implementing regulations by not considering a no-action alternative and failing to take a hard look at Alternative 1. Because the USFS relies on its faulty analysis of Alternative 1 as the base line for comparison of the effects of the proposed action, DEIS at S-6, the USFS’s entire environmental analysis is flawed.

The USFS identified Alternative 3 as the preferred alternative. This alternative is lacking for two main reasons. First, this alternative allows mining operations and only requires additional USFS resource protection measures and requirements for the activities that do not require a 401 certification from DEQ. As explained later, the USFS has an independent duty to ensure protection of water quality. It is inappropriate for the USFS to defer to DEQ for mitigation measures to address the water quality impacts of this action. *See, e.g., Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998 (9th Cir. 2004) (noting that “[a] non-NEPA document – let alone one prepared and adopted by a state government – cannot satisfy a federal agency’s obligations under NEPA”).

Second, the USFS states that reasonable alternative mitigation measures or operating requirements will be created during the development of operating plans or plan modifications to define appropriate stipulations needed to protect other resources while still meeting the objectives of the miner. DEIS at S-2. Yet the USFS’s own regulations require a Plan of Operations to include “[i]nformation sufficient to describe or identify the type of operations proposed . . . and measures to be taken to meet the requirements for environmental protection in § 228.8,” 36 C.F.R. § 228.4(c), unless “development of a plan for an entire operation is not possible at the time of preparation of a plan,” *id.* at 228.4(d). In that case, the miner must submit an “initial plan setting forth his proposed operation to the degree reasonably foreseeable at that time.” *Id.* CEQ’s guidelines state that the alternatives analysis must “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency” and “appropriate mitigation measures not already included in the proposed action or alternatives.” 40 C.F.R. 1502.14(c), (f).

Instead of requiring the details of proposed mitigation in the miners’ full Plans of Operations or at least proposed mitigation measures in an initial plan, as required by the USFS’s own regulations, the USFS simply states that mitigation measures and operating requirements will be developed when the Plans of Operations are developed. Far from the adaptive management approach authorized by the USFS’s regulations implementing NEPA, 36 C.F.R. § 220.5(e)(2) (allowing adaptive management based on monitoring of impacts), deferring all details to a later date is insufficient to comply with NEPA and inconsistent with the agency’s own rules.

In sum, the USFS must consider myriad of onsite and offsite alternatives to the proposed mining activities. The USFS improperly eliminated or ignored reasonable alternatives to the proposed action. Instead, each of the alternatives in the USFS’s analysis contemplates a lot of action with a lot of resulting impacts. By failing to comply with the essential requirement to set forth a reasonable range of alternatives, the USFS’s analysis in this DEIS violates NEPA.

c. The USFS failed to take the required “hard look” at the impacts of the Granite Creek Watershed Mining Project.

NEPA requires agencies to disclose and evaluate all of the effects of a proposed action—direct, indirect, and cumulative. 40 C.F.R. § 1502.16. NEPA further defines impacts or effects to include “ecological[,] . . . economic, [and] social” impacts of a proposed action. 40 C.F.R. § 1508.8(b). Agencies must make “a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making.” *Colo. Env’tl.*

Coal. v. Dombeck, 185 F.3d 1162, 1177 (10th Cir. 1999). Once identified, NEPA requires federal agencies to take a “hard look” at those impacts. *Tillamook Cnty. v. U.S. Army Corps of Eng’rs*, 288 F.3d 1140, 1143 (9th Cir. 2002).

The mining activities analyzed in this DEIS would include stream fording, suction dredging, and discharges that will adversely impact water quality. DEIS at S-5. The activities would also include creation and use of access roads. The USFS has failed to identify all of the direct, indirect, and cumulative impacts that are likely to result from these activities. In certain instances, the USFS has failed to adequately discuss these impacts.

Water Quality

Water quality standards are implemented under the CWA to supplement technology-based standards whenever “discharges of pollutants from a point source or group of point sources...would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters.” 33 U.S.C. § 1312. According to the CWA, “standards shall be such as to protect the public health or welfare, enhance the quality of water” and “shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.” 33 U.S.C. § 1313(c)(2)(A). To set water quality standards, a state must first designate the beneficial uses it must protect and then set standards to protect those uses. *See, e.g.*, O.A.R. 340-041-0101.

Based on the district court ruling in *HCPC v. Haines*, section 313 of the CWA requires all federal agencies must comply with water quality standards. 2006 WL 2252554 *1, *4 (D.Or. 2006). Federal agencies also must comply with the federal anti-degradation policy set out under 33 U.S.C. § 1313(a) and 40 C.F.R 131.12, and Oregon’s anti-degradation policy set out under O.A.R. 340-041-0004. *HCPC*, at *4. As a result of these provisions, the USFS must demonstrate in its NEPA analysis that the agency’s selected action will protect water quality. The USFS must also demonstrate that activities will not result in any further degradation to streams listed as water quality limited pursuant to Oregon’s 303(d) list. *Id.* at *5. This includes no measurable increase in sedimentation to water-quality impaired streams. The USFS’s analysis of water quality impacts in this DEIS is inadequate.

First, the USFS fails to demonstrate in the DEIS that the preferred alternative will protect water quality and not result in any further degradation to any stream listed as water quality limited pursuant to Oregon’s 303(d) list. According to the DEIS, “[t]wo streams in the watershed (Bull Run Creek and Granite Creek) are currently listed as water-quality limited for sedimentation.” DEIS at S-1. A number of streams were also listed for temperature but were removed after promulgation of a TMDL in 2010. *Id.* at 28. Despite this “[a]ll eleven streams continue to exceed [the temperature target as determined by the John Day River Basin TMDL].” *Id.* at 86. As a result, these streams cannot be subject to further degradation. The mining activities are likely to result in further degradation.

Second, the USFS fails to demonstrate in the DEIS that the designated uses will be protected. According to the DEIS, “Granite Creek is a tributary to the North Fork John Day River, which is a tributary to the John Day River.” DEIS at S-1. The designated fish uses on Granite Creek includes core cold-water habitat, Oregon DEQ, *Figure 170A: Fish Use*

Designations, John Day Basin, Oregon (2003), and salmon and steelhead spawning from January 1 to June 15. DEQ, *Figure 170B: Salmon and Steelhead Spawning Use Designations, John Day Basin, Oregon* (2003). Water quality is intricately tied to the health of fish species. An EPA report notes that “[i]mbalance in loading of suspended and bedded sediment (SABS) to aquatic systems is now considered one of the greatest causes of water quality impairment in the Nation.” EPA, *The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review* 1, 4 (2003). Additionally, EPA guidance for Region 10 states that “[w]ater temperatures significantly affect the distribution, health, and survival of native salmonids in the Pacific Northwest.” EPA, *EPA Region 10 Guidance For Pacific Northwest State and Tribal Temperature Water Quality Standards* 1, 1 (2003). Furthermore, according to O.A.R. 340-041-0028, “[w]ater temperatures affect the biological cycles of aquatic species and are a critical factor in maintaining and restoring healthy salmonid populations throughout the State... Surface water temperatures may also be warmed by anthropogenic activities such as discharging heated water, changing stream width or depth, reducing stream shading, and water withdrawals.” Finally, suction dredge mining can mobilize mercury and potentially violate water quality standards protective of aquatic life. In a report released by the EPA in 2000, EPA concluded that “[m]ercury is highly toxic, persistent, and bioaccumulates in food chains.” 65 Fed. Reg. 79,825, 79,827 (Dec.20, 2000).

Suction dredge mining can harm salmon, steelhead, and other important aquatic life that depend on clean water. Bret C. Harvey & Thomas E. Lisle, *Effects of Suction Dredging on Streams: a Review and an Evaluation Strategy, Fisheries Habitat* 1, 8–9, 12 (1998). Mining stirs up sediment. Indeed, “[o]ne of the most obvious off-site effects of dredging is increased suspended sediment because background concentrations where and when dredging occurs are usually low.” *Id.* at 12. Mining also destabilizes the streambed where fish lay their eggs. *Id.* at 9. “Fishery managers should be especially concerned when dredging coincides with the incubation of young fish in stream gravels or precedes spawning runs (e.g., fall-run chinook salmon) soon followed by high flows.” *Id.* at 15. Finally, the dredges can also harm fish eggs through entrainment. *Id.* at 9. Overall, the Harvey report notes that “[w]here threatened or endangered species exist, managers would be prudent to assume activities such as dredging are harmful unless proven otherwise.” *Id.* at 15.

The DEIS states that both Columbia River bull trout and Mid-Columbia steelhead are listed species and are present in streams within the Granite Creek Watershed. DEIS at 14. In addition, a number of sensitive species including the Mid-Columbia Spring Chinook Salmon, the redband trout, and the Columbia spotted frog are present in the watershed. *Id.* at 14, 29. The DEIS acknowledges that “[w]ater quality has been affected by past placer mining operations” and that the “exposed soil on the mining access roads . . . could increase the amount of sediment entering these streams resulting in degradation of existing spring chinook salmon, summer steelhead, and redband trout spawning, incubating, and rearing habitat.” *Id.* at 29.

The DEIS preferred Alternative (Alternative 3) allows for construction 4.18 miles of previously closed or decommissioned Forest Service roads, use of 8.21 miles of existing miner-created temporary roads, and use of 0.43 temporary new roads. *Id.* at 65. It also authorizes use of eight existing fords and construction of one new ford. *Id.* The USFS notes that there will be impacts from sedimentation specifically on Bull Run Creek and Olive Creek but fails to include a full discussion of the impacts in the main EIS document. *See, e.g., id.* at 113 (noting that under

the preferred alternative there is “potential to discharge sediment” but that this potential decreases “as a result of the addition of Forest Service WRPMs and General Requirements”), *see also id.* at 99 (analyzing the direct and indirect effects of the preferred alternative on water quality in three sentences). According to Forest Service NEPA regulations, “[m]aterial may be incorporated by reference into any environmental or decision document” but “[t]his material must be reasonably available to the public and its contents briefly described in the environmental or decision document.” 36 C.F.R. § 220.4(h). Additionally, only one of the site-specific fisheries protection measures addresses sediment. *Id.* at 67. Here, the USFS fails to fully analyze the impacts from the mining plans on water-quality limited streams from sediment discharges. Additionally, what little discussion there is does not provide assurance that this concern will be addressed based on the small number of mitigations measures included.

In terms of temperature, the USFS admits in the DEIS that even under Alternative 3, “five [mining plans] would still not be in compliance with the John Day Basin TMDL, though the length of effects would be shorter for Lightning, Tetra Alpha Placer and Tetra Alpha Mill and Lode because of the addition of the Forest Service Fish Protection Measures.” *Id.* at 115. This is unacceptable since, as noted above, the USFS must demonstrate in its NEPA analysis that the agency’s selected action will protect water quality. *See HCPC v. Haines*, 2006 WL 2252554 *1, *4 (D.Or. 2006). Further, the USFS may not defer to state agencies for an analysis of the water quality impacts of this action. *See, e.g., Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998 (9th Cir. 2004) (noting that “[a] non-NEPA document – let alone one prepared and adopted by a state government – cannot satisfy a federal agency’s obligations under NEPA.”).

Finally, the USFS relies on outdated information to complete its water quality analysis. On March 27, 2015, the Oregon Department of Environmental Quality issued a revised water quality permit for wastewater discharges from small-scale placer mining operations. *See* 700PM General NPDES Permit, *available at* <http://www.deq.state.or.us/wq/wqpermit/docs/General/npdes700pm/permit.pdf>. This 700PM general permit incorporates significant changes, including a prohibition of mining in waters impaired for sedimentation, turbidity or toxics. Looking at Appendix 4B of the DEIS, the USFS improperly relies on the outdated 700PM permit that expired in December of 2014. *Id.* at A4B-1. The USFS must update the DEIS to reflect this new permit. The permit is effective May 15, 2015 and must be incorporated into the final EIS.

Land Use and Vegetation

The DEIS recognizes that past placer mining operations have “removed trees, shrubs, and ground cover in the flood-prone areas immediately adjacent to the Granite Clear, Bull Run, Boulder, Last Chance, Tent Cent, Olive, Ruby, Lightning, McWillis, Quartz and Lucas Gulch creeks.” DEIS at S-4. These disturbance activities altered instream habitat including pool frequency and distribution, substrate composition, off channel habitat, and instream large woody material, as well as riparian habitat in areas adjacent to streams and bank stability. *Id.* Use of access roads from past placer mining operations also increased sediment in streams. *Id.* The USFS must consider these impacts in conjunction with current impacts in order to obtain a full look at all the impacts to the area.

Wildlife

The USFS fails to adequately discuss the impacts of the proposed mining activities on wildlife in the area. First, species listed as threatened under the Endangered Species Act (ESA) that exist in the proposed action area include the Columbia River bull trout and Mid-Columbia steelhead. DEIS at S-1 – S-2. There is also critical habitat within the proposed mining area. S-4. As noted in part I above, the USFS failed to include the Services' BiOp in this public review and comment period. As such, any discussion of the impacts on listed species lacks the insight of the expert federal agencies charged with protecting those species. The USFS must revise its DEIS to include information from the BiOp once it becomes available.

Second, the USFS fails to address impacts on aquatic life that are likely to result from the impacts on water quality. The USFS recognized that temperatures for 12 streams in the Granite Creek Watershed exceed the applicable state water quality standard for summer stream temperatures necessary for bull trout spawning and rearing. DEIS at S-3. Two streams in the action area have also been identified in the past as impaired for sedimentation. These temperature and sedimentation issues are an existing major problem for fish species. In addition to the ESA-listed species mentioned above, the USFS lists Mid-Columbia Spring Chinook Salmon as Forest Service Sensitive species. These fish occupy Essential Fish Habitat designated under the Magnuson-Stevens Act. The USFS also identified redband trout, Westslope cutthroat trout, and Columbia spotted frog as being on the Regional Forester's sensitive species list and existing in the action area. DEIS at S-2, S-4. Authorization for the proposed mining operations would allow additional impacts to these streams, further negatively impacting habitat that is necessary for the survival of ESA listed species. The USFS must consider the cumulative impacts of the proposed mining operations, when combined with historic and ongoing adverse impacts to the aquatic habitat of these fish species.

Cumulative Impacts & Induced Growth

The USFS also fails to fully consider cumulative impacts and induced growth that will result from the 28 proposed mining plans. The CEQ defines cumulative impact as:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. USFS regulations note that its NEPA analysis should be carried out in accordance with this section. 36 C.F.R. § 220.4.

According to the Harvey report, “[d]redging should be of special concern where it is frequent, persistent and adds to similar effects caused by other human activities.” *Effects of Suction Dredging on Streams: a Review and an Evaluation Strategy, Fisheries Habitat*, 1, 15 (1998). The DEIS acknowledges that the Granite Creek Watershed is recovering from past

activities. Specifically, the USFS notes that “[r]estoration and reclamation work has been ongoing in the Granite Creek watershed for more than three decades, yet much remains to be done. Some actions may be one-time investments, but others will require long term investment because chronic conditions and/or severe impacts.” DEIS at 82. Adding 28 more mine plans to an area that is already fragile may exponentially impact the ecosystem. The DEIS fails to consider this dynamic and must do so in order to properly determine cumulative impacts. Finally, the DEIS fails to adequately disclose future cumulative impacts by failing to consider the collective impacts from the 28 proposed mining plans. Neither Table 3-1, *id.* at 73–79, nor Table 3-34, *id.* at 165–68, where the bulk of the cumulative effects analysis occurs, document or discuss the effects that will occur from adding an additional 28 mining plans the area.

Finally, foreseeable development resulting from an agency decision is an indirect impact that must be analyzed. 40 C.F.R. § 1508.25(c) (requiring the EIS to analyze direct, indirect and cumulative impacts from a federal action). *See also Davis v. Mineta*, 302 F.3d 1104, 1122-23 (10th Cir. 2002) (characterizing the growth-inducing effect of agency’s approval of a highway project as an indirect impact requiring analysis). The USFS must address any additional impacts that are likely to result from the proposed activities, including additional use of the new access roads by persons engaged in other activities, additional camping, and the like.

III. The USFS must ensure that the proposed mining activities comply with the PACFISH/INFISH standards as part of its analysis under NEPA.

Under the National Forest Management Act (NFMA), the USFS must ensure that all site-specific actions are consistent with the Forest Plan. 16 U.S.C. § 1604(i). The Forest plan requires all site-specific projects to avoid degrading habitat as quantified by the PACFISH/INFISH riparian management objectives (RMO). The USFS must consider whether the project is consistent with the substantive requirements of the Forest Plan, including consistency with PACFISH/INFISH. *See ONDA v. BLM*, 625 F.3d 1092, 1109 (9th Cir. 2008) (“[B]ecause ‘NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,’ *Vt. Yankee Nuclear Power Corp v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978), the considerations made relevant by the substantive statute driving the proposed action must be addressed in NEPA analysis.”).

In its DEIS, the USFS cites to the various PACFISH standards but does not provide any details to explain how the Plans of Operations will be modified to ensure compliance with these standards, especially given the cumulative impacts that are likely to result from the numerous mining plans proposed in an already degraded ecosystem. *See* DEIS at 20–22. The DEIS states that compliance with PACFISH “would be monitored during annual inspections.” DEIS at 59. This tangentially accomplishes the objective of PACFISH MM-6 (requiring the USFS to develop inspection, monitoring, and reporting requirements for mineral activities), but does not actually require monitoring or reporting by the miner.

The DEIS largely ignores the substantive PACFISH requirements, including the instruction to avoid adverse effects to listed species and designated critical habitat from mineral operations; locating structures, support facilities, and roads outside Riparian Habitat Conservation Areas (RHCA); and prohibiting solid and sanitary waste facilities in RHCAs.

Later, the DEIS does rely on PACFISH for site-specific fisheries protection measures. DEIS at 66.

The impacts from the mining activities will be most evident in the ecologically sensitive riparian areas, and especially in the RHCA protected by PACFISH/INFISH's mandatory provisions. The Granite Creek Watershed is home to numerous threatened, sensitive, and indicator species. Many of the streams in the project area are already too warm to support these species. Despite these conditions and ongoing adverse impacts from current activities, the USFS is now proposing to approve Plans of Operations for numerous mining activities and attendant access roads in this region. For example, the DEIS preferred Alternative (Alternative 3) allows for construction 4.18 miles of previously closed or decommissioned Forest Service roads, use of 8.21 miles of existing miner-created temporary roads, and use of 0.43 temporary new roads. DEIS at S-7. The cursory analysis of PACFISH standards in this DEIS fails to comply with the USFS's duty to ensure the Plans of Operations comply with applicable Forest Plans. At bottom, the USFS has failed to demonstrate how management and enhancement of water quality and fish habitat will have priority over authorizing mining activities in a watershed that is already severely degraded.

Conclusion

For the reasons set forth above, Commenters respectfully request that the USFS revise the DEIS to comply with the requirements of NEPA and the USFS's own regulations.

Sincerely,

Marla Nelson
NEDC Staff Attorney

Becca Fischer
NEDC Law Clerk