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4506 SE Belmont St. Suite 230A
Portland OR 97215
2700 E Evergreen Blvd.
Vancouver WA 98661
www.cascadeforest.org
(503) 222-0055

May 21, 2020
Gifford Pinchot National Forest Supervisor
987 McClellan Road
Vancouver, WA 98661

Via email: objections-pnw-giffordpinchot@fa.fed.us

RE: Objection to the Spirit Lake Intake Gate Replacement and Geotechnical Drilling Draft Decision Notice and FONSI

Dear Forest Supervisor,

The Cascade Forest Conservancy (CFC) submits the following objection to the U.S Forest Service's Draft Decision Notice (Draft DN) Finding of No Significant Impact (FONSI), and Environmental Assessment (EA) upon which the Draft DN is based for the Spirit Lake Intake Gate Replacement and Geotechnical Drilling Project (hereinafter, "Spirit Lake Project"). This project affects the Forest Service lands within the Gifford Pinchot National Forest and Mount St. Helens National Monument.

As required by 36 C.F.R. § 218.8(d), the following is the lead objector's name, address, and telephone number:

Lucy Brookham
Cascade Forest Conservancy
4506 SE Belmont Street, Suite 230A
Portland, OR 97215
(503) 222-0055
lucy@cascadeforest.org

1. Interest and participation of objecting parties.

CFC is an independent nonprofit conservation organization with offices in Washington and Oregon. CFC's mission is to protect and sustain forests, streams, wildlife, and communities in the heart of the Cascades through conservation, education, and advocacy. We represent over 12,000 members and supporters who share our vision for a forest where wild places exist, and wildlife thrives. We have organizational interests in proper and lawful management of the Mount St. Helens Monument and the Gifford Pinchot National Forest.

CFC acknowledges the need to protect public health and safety through the replacement of the Spirit Lake tunnel intake gate. We support the Forest Service's efforts to protect downstream communities; however, in the unlikely event of a gate or tunnel failure, it would take many

months of inaction combined with a series of abnormal climatic conditions before downstream communities would be affected.¹ We ask the Forest Service to consider the unique geology and ecology of the area as well as the ongoing need to replace the tunnel intake gate and provide access for tunnel maintenance.

We submitted timely comments on the Forest Services Notice of Proposed Action (NOPA).² Our comments advocated for an alternative that mitigates both ecological harm and impacts to research, as well as the need for adequate environmental review in the form of an Environmental Impact Statement (EIS). This objection also addresses issues that have arisen after previous comment periods. The public notice Draft Decision was published on April 7, 2020 in *The Columbian*. This objection is submitted electronically within 45 days of the publication date, and is, therefore, timely under 36 C.F.R. § 218.7.

2. Issues and parts of the decision to which the objection applies.

As presented in part 3, we believe the Forest Service's decision, including Draft DN, FONSI, and EA, violates law, regulation, or policy in numerous ways, including:

- a. The Forest Service's determination to issue a FONSI and failure to prepare an EIS in violation of NEPA.**
- b. The Forest Service's failure to consider and fully analyze all reasonable alternatives.**
- c. The proposed action violates the Northwest Forest Plan's Aquatic Conservation Strategy**
- d. The Forest Service's failure to adequately address or respond to comments in a meaningful way.**
- e. The Forest Service's failure to allow the public adequate opportunity to provide meaningful comments.**
- f. The Forest Service's failure to analyze the long-term management of Spirit Lake outflow as connected actions.**
- g. The Forest Service's failure to consider direct, indirect, and cumulative effects.**
- h. The proposed Comprehensive Management Plan amendment is inadequate and violates NFMA.**

3. Cascade Forest Conservancy identified the following parts of the decision for objection.

- a. The Forest Service's determination to issue a FONSI and failure to prepare an EIS in violation of NEPA.**

¹ Grant, *et al.*, Geologic, Geomorphic and Hydrologic Context of the Spirit Lake Outlet (2017).

² January 16, 2020 Cascade Forest Conservancy, Comments on Spirit Lake Intake Gate Replacement and Geological Drilling Notice of Proposed Action, submitted to the Gifford Pinchot National Forest Supervisor (hereafter, "NOPA comment").

Our comments urged the Forest Service to prepare an EIS because the Spirit Lake Project may have a significant impact on the environment. Under NEPA, an agency must prepare an EIS if a proposed federal action “*may significantly affect the quality of the human environment.*”³ The significant effect need not actually occur to trigger the preparation of an EIS; it is sufficient if a substantial question is raised whether the project may have a significant effect on the environment.⁴

The Council on Environmental Quality regulations provide that “significance” has two components: context and intensity.⁵ Context refers to the setting in which the proposed action takes place.⁶ Context is important because significance can vary dependent on the location and setting of the proposed action. Proposed actions can have environmental implications on a small local, an affected region, or the whole world, and this context helps determine the significance of the project. Intensity refers to “the severity of impact” on the environment.⁷

When an agency is determining the severity of a potential environmental impact, it considers up to 10 different factors to inform the significance of the project, and just “one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.”⁸ The factors are as follows:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics, such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects are likely to be highly controversial.
- (5) The degree to which the possible effects are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. 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 into small component parts.
- (8) The degree to which the action may adversely affect [sites/structures] listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

³ 42 U.S.C. §4332(c).

⁴ *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir 1998).

⁵ 40 C.F.R. §1508.27

⁶ *Id.* at §1508.27(a).

⁷ *Id.* at §1508.27(b).

⁸ *Ocean Advocates v. US Army Corps of Engineers*, 361 F.3d 1108, 1125 (9th Cir. 2004).

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.⁹

The EA concludes the project will not have a significant impact.¹⁰ But this project may have a significant impact because, *inter alia*, it:

- **Will cause significant impacts, both beneficial and adverse.** The Forest Service concludes that adverse and beneficial impacts have been assessed and were not found to be significant.¹¹ However, as explained throughout this objection letter and in our previous comments, the Forest Service relies on unsupported assumptions and insufficient analysis and fails to consider the adverse impacts this decision will have on research, recreation, and the unique ecology of the Pumice Plain. For example:
 - The proposed road would cross 10 riparian channel crossings as well as many other seasonal and ephemeral crossings.¹² These channels make up five separate watersheds, globally unique to the pumice plain—the proposed road crosses three of these watersheds at their headwaters. The impacts of road construction from sediment plumes, dispersal, and soil erosion will cause significant harm to watershed’s aquatic insects and fish and may incite downstream migration, increasing turbidity and damage to benthic habitat. The road would experience 1,980 passenger vehicle passes, large equipment weighing over 50,000 pounds, 84 tractor-trailer passes, 464 single-unit truck passes, and 6-10 drill rigs passes¹³ per season—all of which will cause road and compaction, soil erosion, sediment dispersal and the redirection of water onto previously unaffected soils and rocks. As discussed *infra*, these effects also constitute a violation of the Aquatic Conservation Strategy. *See also*, 40 C.F.R. § 1508.27(b)(10).
 - The proposed road will have irreversible adverse impacts on scientific research. The proposed alternative would destroy 25 research plots, directly impact 58 individual research plots, and indirectly impact the rest of the studies on the pumice plain. Researchers like Dr. Cari Leroy, studying the creation of watersheds on the pumice plain, suggest that “Building a road across the Pumice Plain would irreparably harm the development of these watersheds and negatively impact our research and our ability to explore in-stream primary succession.”¹⁴ The Forest Service never addressed this comment or issue in its EA.
 - The proposed road will have long-term, permanent impacts on recreation. The project will impact hiking, birding, biking, hunting, and scenic views. The disturbance from the proposed project will be visible from a vast array of locations including Harry’s Ridge, Windy Ridge, Johnston Ridge, and Mount Margaret Backcountry. Additionally, the proposal identifies Windy Ridge as a staging zone, which will lead to the closure of the ridge and any associated trails for the duration of the project. This closure also includes the popular mountain

⁹ *Id.* at §1508.27(b).

¹⁰ FONSI at 1.

¹¹ FONSI at 2.

¹² EA at 53.

¹³ EA at 12.

¹⁴ Carri LeRoy, PhD, NOPA comments, January 13, 2020, at 1.

biking and hiking trail, the Plains of Abraham, that would be rendered unusable for the foreseeable future. The Truman Trail will be most significantly affected by the project: the trail will be closed for over five years and turned into a motorized road access—no longer resembling a hiking trail.

- **Will affect public health and safety.** The primary purpose and need for the project are “to ensure the protection of public safety, health, property, and the environment from a catastrophic breach of the Spirit Lake natural debris blockage caused by the 1980 debris avalanche.”¹⁵ The Forest Service predicts a “catastrophic” failure, leading to the extensive destruction of downstream life and property. While we dispute the temporal urgency of the proposed project, we agree that public health and safety is essential and that the potential harm from a failure of the Spirit Lake Access Tunnel is significant.
- **Will significantly impact the unique geography of the area.** The Forest Service improperly concludes that because there are no “parkland, prime farmland, or wild and scenic rivers”¹⁶ within the project area, there would be no significant impacts to the unique characteristics of the geographic area. The examples in the regulation follow “such as,” denoting that these are merely suggestions and not an exhaustive list of qualifying unique characteristics. The project is proposed in a Class 1 research area of a volcanic National Monument—a landscape wholly unique to the region, the United States, and the world. Few if any ecosystems in modern times have been given the chance to regenerate and repopulate in a protected landscape with no motorized vehicle use and off-trail travel after a monumental natural disturbance event. For nearly 40 years, the Forest Service has cherished and protected the unique ecologic and scientific values of the pumice plain. It is disingenuous at best to conclude that the project will not have a significant effect on this unique landscape and the critical research it provides to society.
- **Will result in highly controversial effects to the human environment.** The Forest Service concludes that there is no scientific controversy over environmental effects. However, the FONSI inadequately analyzed this factor because building a motorized route across the Pumice Plain is a significant departure from how the Monument has been managed since its creation. A cacophony of voices from the scientific community has raised concerns about the proposed access route across the Pumice Plain due to the impacts to decades-long scientific research. In several instances, the concerns raised by these scientists directly contradict the information contained within the EA and Draft DN and Specialist Input reports. Additionally, there remains substantial scientific debate about whether core sampling is necessary at this time.
- **Involves effects that are highly uncertain or involve unique unknown risks.** The Forest Service concludes there were no highly uncertain or unique risks identified for the selective alternative or its effects.¹⁷ The EA is replete with admissions that much is unknown about the project planning area and the Pumice Plain in general.

¹⁵ EA at 3.

¹⁶ FONSI at 3.

¹⁷ FONSI at 4.

- Our comments highlighted concern over the project’s potential introduction of invasive species onto the Pumice Plain. The New Zealand mud snail, a known invasive species, has already been introduced to the Spirit Lake system, and the introduction of barges, machinery for drilling equipment, and materials for road construction, without adequate decontamination protocols, could result in unique unknown risks to the entire system. The Forest Service is aware of the threat of the invasive snail, and states that under the proposed alternative “any streams not yet infested with the New Zealand mud snail would likely become infested” and that streams “may become infested at a faster rate as a result of construction activities.”¹⁸ The dispersal of the mud snails downstream into the Toutle River system is a unique unknown risk that has the potential to cause catastrophic ecological harm.
 - All researchers with plots impacted by the project proposal were asked by the Forest Service to fill out a questionnaire explaining and quantifying the significance of their research and the potential impacts to it. None of these responses are included in the NOPA, Draft DN, or EA. The effects of this project on the scientific research on the Pumice Plain are highly uncertain and are not adequately included in the Forest Service’s analysis.
 - Additionally, the Forest Service states the proposed alternative does not cross wetland areas,¹⁹ but wetlands are prevalent throughout much of the western alignment based on hydrology (flowing, standing or pooled water), hydric soils, and wetland indicator plant species. The proposed road construction may result in severe impacts to these wetlands, risks that are highly uncertain due to the Forest’s Service failure to disclose their existence.²⁰
- **Will establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.** Since the Monument’s designation in 1982, the Pumice Plain has been managed for nonmotorized recreation and scientific study. Not since the designation has the Forest Service constructed a road across the geologically active Pumice Plain: indeed, the agency has never before built a road (temporary or otherwise) across an active volcano that is actively eroding and accreting. The project is precedent-setting and maybe just the first action in a series of actions that lead to dramatic changes in the Pumice Plain’s ecology and human use. These are potentially significant effects that should have been assessed in an EIS.
 - **Will have cumulatively significant impacts.** The project has two main components: construction of a route to Duck Bay to repair or replace the Spirit Lake Access Tunnel; and construction of a route from the Duck Bay route cut-off to the “drilling area” north of Duck Bay on Spirit Lake. The EA is silent, however, about the ultimate purpose of the proposed geotechnical drilling. Presumably the information gathered from the drilling will be used for future project design and development, indicating that the current project

¹⁸ EA at 58. Altering the biotic composition of waterways on the Pumice Plain also violates the Aquatic Conservation Strategy, which prohibits such alterations. *See* Northwest Forest Plan Standards and Guidelines (“NFP S&Gs”), B-11.

¹⁹ *Id.*

²⁰ *See* Attachment 2.

is simply the first in a series of projects addressing the use and management of Spirit Lake and the Pumice Plain. There are connected actions with cumulative effects.

Will adversely affect sites listed in the National Register of Historic Places and will cause the loss and destruction of significant scientific, cultural, or historical resources. The research occurring at Mount St. Helens takes place nowhere else in the world. As discussed in this objection and the comments of researchers such as Dr. Carrie LeRoy, the project will destroy dozens of research plots and will confound numerous studies, casting doubt on the continued viability of those studies. Similarly, the historical resources of the Pumice Plain are directly linked to their ecological value: the Pumice Plain is an unprecedented living laboratory that has allowed mankind to observe the creation of new lands and waters. Destroying the research and natural recovery occurring on the Pumice Plain threatens to erase the historical record being created in real-time. The EA does not address these issues. Additionally, in 2013, 12,501 acres of the Mount St. Helens National Volcanic Monument were officially listed on the National Register of Historic Places.²¹ The location of the proposed access route has the possibility of causing visual impacts and adversely affecting the property listed on the National Register of Historic Places.

- **May affect listed species or critical habitat under the Endangered Species Act (ESA).** The Forest Service states that there will be no effect to threatened, endangered, or proposed aquatic, wildlife, or botanic species because none are present in the area.²² Our comments raised concerns about the population of Lower Columbia River steelhead in Spirit Lake.²³ Anadromous steelhead, Lower Columbia River distinct population segment, are listed as Threatened under the ESA.²⁴ Under the ESA, any federal action that may affect threatened or endangered species or its habitat, the agency contemplating an action must consult with the consulting agency.²⁵ For anadromous species, the consulting agency is the National Marine Fisheries Service (NMFS) or NOAA Fisheries. If the proposed activity is likely to adversely affect the listed species,²⁶ the Forest Service is required to consult with NMFS and request the issuance of a Biological Opinion.²⁷ Our comments raised concerns that the debris block drilling, gate replacement, and road construction may harm the habitat and survival of the steelhead.
- **Threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.** As discussed in this objection, the project violates NEPA, NFMA, the Northwest Forest Plan, and other laws for the protection of the environment. The project also violates the Comprehensive Management Plan for the

²¹ Lawetlat'la (Mount St. Helens), was listed on the National Register of Historic Places for its significance as a Traditional Cultural Property to the Cowlitz Indian Tribe and the Confederated Tribes and Bands of the Yakama Nation on September 11, 2013. See database for the National Register of Historic Places.

²² FONSI at 5.

²³ Major, J.J., *et al.*, A MULTI-DECADE ANALYSIS OF FLUVIAL GEOMORPHIC EVOLUTION OF THE SPIRIT LAKE BLOCKAGE, U.S. GEOLOGICAL SURVEY OPEN-FILE REPORT (Draft, Publication expected 2020).

²⁴ See 50 C.F.R. §223, §224.

²⁵ *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012).

²⁶ 50 C.F.R. §402.13(a), §402.14(a)-(b).

²⁷ 50 C.F.R. § 402.14(g),(h).

Monument, and as such, the Forest Service has proposed a project-specific forest plan amendment to exempt the project from compliance with the CMP: because without the amendment, the project would violate the CMP. Although the proposed amendment itself is also legally infirm, the fact is that the project as conceived is inconsistent with the land management plan, which is a “requirement” “imposed for the protection of the environment.” An EIS is therefore required.

Suggested resolution: Because the Spirit Lake Project may have a significant impact on the environment, prepare an EIS.

b. The Forest Service’s failure to consider and fully analyze all reasonable alternatives

NEPA requires federal agencies to explore and objectively evaluate all reasonable alternatives and to discuss the reasons for eliminating alternatives not developed in detail.²⁸ The EA is inadequate due to its lack of alternatives. In considering alternatives to the proposed project, the Forest Service “must look at every reasonable alternative within the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice.”²⁹ The existence of a viable but unexamined alternative renders an EA inadequate.³⁰ Informed and meaningful consideration of the alternatives is an integral part of the statutory scheme.³¹ An alternative that is consistent with the policy goals of the project and is potentially feasible must be analyzed in-depth and not preliminarily eliminated.³²

We are concerned that the Forest Service has failed to consider, or dismissed without adequate analysis, a range of alternatives that protect the Monument values. The Forest Service has suggested two alternatives for the gate replacement and drilling, both of which require the construction of a motorized access route across the pumice plain, which will be harmful to the unique ecology, geology, and recreational values of the Monument. Initial scoping meetings and prior projects proposed a utility terrain vehicle (UTV) trail for the motorized accessed route. A constructed motorized access route will leave a permanent scar on the landscape, impair the visual quality of the Monument, invite unwanted motorized access, and expedite the spread of the invasive New Zealand mud snail onto the pumice plain. Our comments, and our input during scoping meetings, urged the Forest Service to explore and develop analysis for alternatives that do not require the construction of a road across 3.5 miles of the pumice plain and risk permanent alteration to this unique landscape.

Our comments also suggested that the Forest Service explore an alternative that uses the Duck Bay access route. The Duck Bay access route alternative (Gate Replacement 3) would transport equipment in and out of Spirit Lake seasonally by helicopter to Duck Bay and by barge to the

²⁸ 40 CFR §1502.14

²⁹ *Id.* (internal citations omitted).

³⁰ *Alaska Wilderness v. Morrison*, 67 F.3d 723 (9th Cir. 1995).

³¹ *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988).

³² *Muckleshoot Indian Tribe v. U. S. Forest Serv.*, 177 F.3d 800, 813–14 (9th Cir. 1999).

gate structure. Work crews would travel daily by UTV and boat to the intake structure. This alternative would mitigate both environmental impacts and harm to research plots.

Our comments expressed that the need for core sample drilling is premature and the Forest Service should explore an alternative that does not include the drilling project. The National Academy of Science report³³ highlighted a need to fill a data gap, not an urgent need for core samples to prevent an imminent catastrophic event. Our comments stated concerns that there is not a legitimate need for drilling additional cores, and by combining the gate replacement and drilling projects, adequate alternatives have been dismissed. The Colorado School of mines report was able to discover most, if not all, the data on the condition of the debris avalanche block through Ground Penetrating Radar (GPR).³⁴ The data collection study shows that the spatial continuity of debris avalanche and the pyroclastic and ash deposit boundary are all visible with seismic and GPR. The Forest Service has this report in the project file and is aware of its findings.³⁵

The perceived need for drilling is driving the need for access west of Spirit Lake and across the Pumice Plain. Exploring an alternative that does not incorporate the drilling would mitigate environmental impacts and harm to research plots.

Additionally, while we believe the drilling for core samples could provide valuable data and insight, combining the drilling project with the intake gate replacement project prevents the consideration of viable alternatives.

Suggested Resolution: The Forest Service should revise the EA to consider, or prepare an EIS that considers, a reasonable range of alternatives, including (1) and actional alternative that does not include the Geotechnical Drilling; (2) the Duck Bay access route.

c. The proposed action violates the Northwest Forest Plan’s Aquatic Conservation Strategy.

The Ninth Circuit has explained that the “purpose of ACS is to maintain and restore ecosystem health at watershed and landscape scales to protect habitat for fish and other riparian-dependent species and resources and restore currently degraded habitats. This general mission statement in NFP does not prevent project site degradation and does nothing to restore habitat over broad landscapes if it ignores the cumulative effect of individual projects on small tributaries within watersheds.” *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1035–36 (9th Cir. 2001). Projects must comply with the nine ACS Objectives at all spatial and temporal scales. *Id.* “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 ACS and thus, should not be implemented.” NFP S&Gs, B-10.

³³ A DECISION FRAMEWORK FOR MANAGING THE SPIRIT LAKE AND TOUTLE RIVER SYSTEM AT MOUNT ST. HELENS, NATIONAL ACADEMIES OF SCIENCE. ENGINEERING. MEDICINE (2018).

³⁴ *Colorado School of Mines*. MOUNT ST. HELENS: A GEOPHYSICAL INVESTIGATION OF THE SPIRIT LAKE BLOCKAGE (2020)

³⁵ Report obtained through FOIA request FS-R6-01692-F, Item 4-Batch 6, released May 7, 2020.

Our comments raised numerous concerns over the proposed alternative's impacts to aquatic features and processes in the project area and the project's failure to comply with the ACS. For example, the project will cross 17 waterways and channels: three perennial, seven seasonal, seven seasonal/perennial, and numerous ephemeral stream channels.³⁶ The proposed alternative crosses many of these streams very close to their spring sources. Red Rock Creek Spring is located below the proposed road. This spring could experience sediment deposits, soil erosion, stream blockage, and loss of connectivity within watersheds and maintain the physical integrity of the aquatic system. The mitigation proposed for this Red Rock Spring merely states "to limit the loss of geologic feature."³⁷ This does not comply with the ACS, which prohibits the alteration of sediment regimes, water flows, watershed connectivity, and the physical integrity of water features.

Similarly, Willow Creek Spring is located upstream of the proposal. This spring has the propensity to wash out during storms and carry sediment, fill, and construction materials into the neighboring terrestrial and aquatic habitat. There are no mitigation measures for this in the EA. Likewise, Clear Creek Springs is located upstream of the Truman Trail and connects with the proposed road route in the summer months—the season a majority of the construction is intended to commence. This again incites concern over sediment and construction material delivery into the stream channel and the ability to maintain the integrity of the aquatic system, and consequently a violation of the ACS. Additionally, Geo West springs are located upstream of the trail and connect to two perennial springs downstream from the trail. Road construction here could have serious impacts to the connectivity between watersheds and the integrity of the aquatic system. The Forest Service was notified of the impacts to these springs and surrounding watersheds in November by the Forest Service Aquatic Ecologist.³⁸ These watersheds, springs, and stream crossings on the Pumice Plain are very sensitive areas and the road construction, as proposed, would violate the ACS.

The EA also omits any discussion of numerous effects to other aquatic resources: NEPA requires the disclosure and discussion of these effects, and the Northwest Forest Plan ACS prohibits the alteration of these resources. For example, given the instability and constant terraforming ongoing on the Pumice Plain, the entire Plain should have been designated as a Riparian Reserve. The ACS requires the designation of Riparian Reserves around "Seasonally flowing or intermittent streams, wetlands less than 1 acre, and *unstable and potentially unstable areas*."³⁹ Given the acknowledged instability of the Pumice Plain (including as evidenced by the erosion of the 2019 Duck Bay Route), the Forest Service should have designated as a Riparian Reserve all areas of instability, which includes at least the proposed road and likely also includes the vast majority of the Pumice Plain. The failure to designate as Riparian Reserves the full extent of unstable and potentially unstable areas in the project area, and to comply with the ACS within and adjacent to those Riparian Reserves, violates the ACS.

³⁶ EA at 53.

³⁷ EA at 19.

³⁸ Email from Shannon Claeson to Michelle King and Chris Strebiger, November 20, 2019; obtained from FOIA request FS-R6-01692-F, Item 2 – Batch 5, released on May 05, 2020.

³⁹ NFP S&Gs, C-30.

Similarly, the EA explains that water withdrawals will be necessary for construction and operation of the project. However, the EA does not indicate from where water will be withdrawn or where it will be discharged. The ACS prohibits water withdrawals and discharges that alter aquatic integrity and processes.⁴⁰ Likewise, the project proposes to dredge portions of Spirit Lake in order to facilitate repair of the Spirit Lake tunnel and gate and to deposit those spoils within the lake. But the ACS precludes altering “the physical integrity of the aquatic system, including shorelines, banks, and bottom configurations.”⁴¹ And, the Forest States that the “selected alternative does not cross any wetland,”⁴² however, wetlands are clearly evident throughout much of the western alignment.⁴³ The Forest Service’s denial in the existence of wetlands does not preclude the agency from its responsibility to comply with the ACS⁴⁴ and the Clean Water Act.

The Forest Service’s “analysis” of the project’s compliance with the ACS is wholly inadequate and a classic example of agency ipse dixit. Appendix B purports to demonstrate the project’s compliance with the ACS, but it instead merely restates each ACS Objective and claims that the project complies with each Objective.⁴⁵ But simply stating that a project complies with the law is not sufficient to demonstrate legal adequacy. As the Ninth Circuit has opined, courts “cannot defer to avoid.”⁴⁶ Furthermore, “the agencies would like this court to take their word for it and not question their conclusory assertions”; “their word, however, is not entitled to significant deference that courts give [agency methodology]”.⁴⁷ In this case, there is no actual analysis regarding the project’s compliance with the ACS, and what information is provided indicates that the project is inconsistent with a number of ACS requirements, including the designation of Riparian Reserves.

Suggested Resolutions: (1) Revise the EA or prepare an EIS to ensure compliance with the ACS; or (2) avoid all adverse effects to aquatic resources in project design and implementation.

d. The Forest Service’s failure to adequately address or respond to comments in a meaningful way.

The Forest Service fails to meaningfully respond to many comments in violation of NEPA’s implementing regulations. We did not raise this concern in our comments because it relates to the Forest Service’s response to comments, after the close of the official comment period. For example:

- Our comments urged the Forest Service to conduct an EIS for the proposed project due to the significant effect the proposed road construction will have on the environment, including impacts to streams, soils, vegetation, aquatic insects, and fish. In response, the Forest Service explains that an EIS is not needed because the proposed project does not

⁴⁰ NFP S&Gs, B-11.

⁴¹ *Id.*.

⁴² See Draft DN at 29; See EA at 54.

⁴³ Wetlands are identified on hydrology, hydric soils and wetland indicator plant species.

⁴⁴ See, NFP S&Gs, B-11, C-30 (requiring the designation of Riparian Reserves around all wetlands less than 1 acre).

⁴⁵ See EA Appendix B.

⁴⁶ *Oregon Nat. Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010).

⁴⁷ *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011).

fit within activities listed under 36 CFR 220.5 and the responsible official has determined effects to the environment will not raise to the level of significance.⁴⁸ While the proposed action does not fit exactly within this list of examples, the language in 36 CFR 220.5 says specifically activities necessitating an EIS are “not limited to” this list of examples. Additionally, the Forest Service fails to respond to any comments offering specific examples of where the environmental impacts raise to the level of significance.

- CFC requested the project file to gain a better understanding of the dismissed alternatives. We requested these documents through a Freedom of Information Act (FOIA) request, the proper and legal method. The Forest Service stated that they “followed the policy as detailed in the Freedom of Information Act for clarification and release of requested documents under a Freedom of Information Act request.”⁴⁹ This statement is inaccurate, as we are still waiting for a majority of these documents, months after the request was considered perfected—prejudicing our ability to object. The Forest Service cannot rely on materials not available to the public in reaching a decision.⁵⁰
- We urged the Forest Service to consider a comment period extension or an additional comment period to allow the public to meaningfully comment on the project proposal. CFC specifically requested an additional comment period because the timing of the comment period over the winter vacation period resulted in critical information requests to Forest Service officials left unanswered for weeks. For example; CFC sent a letter requesting a comment extension on December 19,⁵¹ to which the Forest Service did not respond until January 3—two weeks later and over half of the comment period.

Suggested resolution: Revise the EA and Draft DN to meaningfully respond to and address public comments.

e. The Forest Service’s failure to allow the public adequate opportunity to provide meaningful comments.

The Forest Service failed to allow adequate opportunity for the public to provide meaningful comments in violation of NEPA’s implementing regulations.

- CFC sent a FOIA request in January to gain a better understanding of the proposed alternatives, the condition of the Spirit Lake outflow tunnel, and the need for Geotechnical drilling. After clarifications and revisions, on February 12, 2020, our FOIA request was considered perfected and complete. On March 16, CFC received notification that all documents from the request had been gathered but, due to the large volume, a rolling release would be necessary. Reluctantly, we agreed to a rolling release, knowing that the Spirit Lake EA could be released at any point and that we would need the documents as soon as possible. We did not receive the first batch of documents until

⁴⁸ See Appendix C at 2.

⁴⁹ See Appendix C at

⁵⁰ *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 2014 WL 6977611, at *14–19 (D. Or. 2014).

⁵¹ CFC comment extension request letter submitted as official comment December 17, 2019.

April 1, the Spirit Lake EA was then published on April 7. On April 28 CFC sent a letter to the FOIA coordinator outlining concerns regarding the delays we were experiencing.⁵² We have only received a third of the requested documents at this time and it is prejudicing our ability to meaningfully object. We preserve the right to comment and object to issues that arise after the objection deadline from the remaining documents in our FOIA request.

- Our comments raised the concern that the Forest Service is rushing this project through without adequate consideration of public input. The NOPA was posted on December 17, allowing for a limited public comment window across the vacation period while agency staff are unavailable to answer public concerns and supply additional information. CFC sent a letter requesting a comment extension on December 19,⁵³ to which the Forest Service did not respond until January 3—two weeks later—when agency staff were back in the office.
- The subsequent Draft DN, EA, and FONSI were published in the middle of a global pandemic, allowing no accommodations or concessions to allow the public time to respond to the Draft DN and deal with the global restrictions and effects of Covid-19.
- We raised concerns that Forest Service is undermining the public comment process by failing to entertain a public comment period following the final EA. As stated throughout this objection, there are many concerns, substantial changes,⁵⁴ and new information from the NOPA to the EA and Draft DN. The proper implementation of NEPA would allow for a 30-day comment period following the EA publication, followed by an additional 45-day objection period.

Suggested Resolutions: (1) Release all documents requested in the overdue FOIA request, (2) Extend the objection period to allow for an adequate opportunity to respond to the information contained in these documents.

f. The Forest Service’s failure to analyze the long-term management of Spirit Lake outflow as connected and/or cumulative actions.

In our comments, we raised the concern that there was no legitimate need for geotechnical drilling project and the project appears only to be filling a data gap (although existing information exists about the composition of the debris jam and flow). The Forest Service responded to our comments that the purpose of the drilling is to “obtain geotechnical subsurface drilling data could help when *planning future projects* for the overall management of Spirit Lake water level, but no such projects are proposed at this time.”⁵⁵ However, statements made by the Forest Service in news articles and prior iterations of this project confirm the drilling is intended to inform the long term management of the Spirit Lake

⁵² Letter to Kara Harden regarding FOIA delay, April 28, 2020. *See* Attachment 1.

⁵³ CFC comment extension request letter submitted as official comment December 17, 2019. 2019.

⁵⁴ *See* 36 C.F.R. §218.22.

⁵⁵ Appendix C at 14.

outflow and to possibly open a second outlet.⁵⁶ Additionally, the road, although described throughout the Draft DN, EA, and FONSI, as “temporary,” will become a long term motorized access route when the Forest Service proposes the construction of a second outlet. Therefore, the access for core sampling should be analyzed as connected actions related to the long-term intended management of the Spirit Lake outflow.

Moreover, the EA does not actually analyze the direct, indirect, and cumulative effects of the proposed geotechnical drilling. The EA discloses that it will occur, but does not describe the equipment that will be used, how the drilling will affect the environment or any other effects from the drilling itself: instead, the EA only discusses (albeit inadequately) the effects of the road to the drilling site. The failure to fully analyze the effects of the geotechnical drilling alone, and in concert with the future management of Spirit Lake that the drilling is meant to facilitate, violates NEPA.

Suggested resolution: The Forest Service should withdraw the Draft DN and include analysis of core sampling access as part of an EIS for long-term management of Spirit Lake outflow. Without analysis in the context of other connected actions, it is impossible to know the extent of the project's impacts as NEPA requires.

g. The Forest Service’s failure to consider direct, indirect, and cumulative effects.

There are direct, indirect, and cumulative effects that the Forest Service has failed to consider. For example, the proposed project will result in the disturbance, displacement, erosion, and compaction of soils.⁵⁷ Specifically, the EA states that in some instances the project would “further delay spill recovery” and “original soil layers and properties [will be] permanently altered.”⁵⁸ The Forest Service is required to minimize soil disturbance that may occur as a result of heavy equipment.⁵⁹ Mitigation measures that result in the permanent alteration of soil layers do not comply with the NWFP. Additionally, Van Dyke’s salamander⁶⁰ is a Survey & Manage (S&M) species—populations exist in the headwater seeps⁶¹ that feed into Duck Bay, and dispersing individuals may use the proposed project area as important dispersal habitat. The Forest Service is required to survey and buffer for S&M species at the project level prior to habitat-disturbing activities, within the known or suspected range, to avoid loss of undiscovered sites.⁶²

⁵⁶ Eric Wagner, The threat below Mount St. Helens, High Country News, (May 1, 2020), <https://www.hcn.org/issues/52.5/north-scientific-research-the-threat-below-mount-st-helens>

⁵⁷ EA at 50.

⁵⁸ *Id.*

⁵⁹ NFP S&Gs, D-11. “Other aspects to this standard and guideline include minimizing soil and litter disturbance that may occur as a result of yarding and operation of heavy equipment and reducing the intensity and frequency of site treatments. Soil compaction, and removal or disturbance of humus layers and coarse woody debris, may impact populations of fungi and arthropods.”

⁶⁰ U.S.D.A. Forest Service, Region 6; U.S.D.I.-Bureau of Land Management, Oregon/Washington – Sensitive in Washington; federal Survey and Manage species.

⁶¹ EA at 61.

⁶² See NFP S&G, C-5. See also Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measures Standards and Guidelines, S&G, 8

Suggested resolution: The Forest Service should withdraw the Draft DN and include analysis of the direct, indirect, and cumulative effects of the project as part of an EIS.

h. The proposed Comprehensive Management Plan amendment is inadequate and violates NFMA.

The proposed amendment exempting the project from compliance with forest plan visual requirements fails to comport with the requirements for project-specific forest plan amendments as described in the Forest Service's 2012 planning rule. NFMA and its implementing regulations subject forest management to two stages of administrative decision making. At the first stage, the Forest Service is required to develop a Land and Resource Management Plan, also known as a Forest Plan, which sets forth a broad, long-term planning document for an entire national forest. At the second stage, the Forest Service must approve or deny individual, site-specific projects. These individual projects must be consistent with the Forest Plan.⁶³

In 2012, the Forest Service revised its planning regulations applicable to all new, revised, and amended forest plans. In 2016, the Forest Service amended the 2012 Planning Rule to clarify how amendments of forest plans created under prior planning rules (e.g., the 1982 planning rule) must be undertaken. Responding to public comment that suggested that the 2012 Planning Rule allowed a responsible official to simply exempt a project from applicable forest plan requirements, the Forest Service explained:

...Other members of the public suggested an opposite view: That the 2012 rule gives the responsible official discretion to selectively pick and choose which, if any, provisions of the rule to apply, thereby allowing the responsible official to avoid 2012 rule requirements or even propose amendments that would contradict the 2012 rule. Under this second interpretation, some members of the public hypothesized that a responsible official could amend a 1982 rule plan to remove plan direction that was required by the 1982 rule without applying relevant requirements in the 2012 rule.

This final rule clarifies that **neither of these interpretations is correct.**

...the responsible official's discretion to tailor the scope and scale of an amendment is not unbounded; **the 2012 rule does not give a responsible official the discretion to amend a plan in a manner contrary to the 2012 rule by selectively applying, or avoiding altogether, substantive requirements within §§ 219.8 through 219.11 that are directly related to the changes being proposed.** Nor does the 2012 rule give responsible officials discretion to propose amendments "under the requirements" of the

⁶³ 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15; *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 851 (9th Cir. 2013) ("the NFMA prohibits site-specific activities that are inconsistent with the governing Forest Plan"); *see also Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1062 (9th Cir. 2002) ("[s]pecific projects ... must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan").

2012 rule that actually are contrary to those requirements, or to use the amendment process to avoid both 1982 and 2012 rule requirements (§ 219.17(b)(2)).⁶⁴

Instead,

...the responsible official is required to apply those substantive requirements that are directly related to the plan direction being added, modified, or removed by the amendment. The responsible official must determine which substantive requirements are directly related to the changes being proposed based on the purpose and effects of the amendment, using the best available scientific information, scoping, effects analysis, monitoring data, and other rationale to inform the determination. The responsible official must provide early notice to the public of which substantive requirements are likely to be directly related to the amendment, and must clearly document the rationale for the determination of which substantive requirements apply and how they were applied as part of the decision document.⁶⁵

The requirements of the 2016 amendment to the 2012 Planning Rule twice have been interpreted by the Fourth Circuit Court of Appeals. The Court in *Sierra Club v. Forest Service* explained these requirements:

Specifically, the 2016 Revisions provide that the Forest Service “shall ... [d]etermine which specific substantive requirement(s) within §§ 219.8 through 219.11 are directly related to the plan direction being added, modified, or removed by the amendment,” and then “apply such requirement(s) within the scope and scale of the amendment.” 36 C.F.R. § 219.13(b)(5). Conversely, “[t]he responsible official is not required to apply any substantive requirements within §§ 219.8 through 219.11 that are not directly related to the amendment.” *Id.*

Thus, the issue we consider here turns on whether the requirements in the 2012 Planning Rule are directly related to the instant Forest Service amendments to the Jefferson Forest Plan.⁶⁶

In examining the “purpose” of the proposed amendments, the Court went on to explain that

The Forest Service admittedly needed to change the Forest Plan because the MVP project could not meet its requirements otherwise. See J.A. 1280 (“The amendment [to the Forest Plan] is needed because the MVP Project cannot achieve several Forest Plan standards that are intended to protect soil, water, [and] riparian ... resources.” (emphasis supplied)). Of note, elsewhere in the ROD, the Forest Service characterizes the purpose of the amendment as “ensur[ing] consistency between provisions of the Forest Plan and the

⁶⁴ Forest Service, *National Forest System Land Management Planning, Final Rule*, 81 Fed. Reg. 90,723, 90,725 – 90,726 (Dec. 16, 2016) (emphasis added).

⁶⁵ 81 Fed. Reg. 90,726.

⁶⁶ *Sierra Club, Inc. v. United States Forest Serv.*, 897 F.3d 582, 601 (4th Cir.), *reh’g granted in part*, 739 F. App’x 185 (4th Cir. 2018).

proposal to construct, operate, and maintain [the pipeline] on National Forest System land.” J.A. 1284. But there would be no need to “ensure consistency” if the Forest Plan need not be amended in the first place. Thus, the clear purpose of the amendment is to lessen requirements protecting soil and riparian resources so that the pipeline project could meet those requirements.

Having determined the purpose of the amendment, it is clear the Planning Rule sets forth substantive requirements directly related to that purpose: “soil and soil productivity” (36 C.F.R. § 219.8(a)(2)(ii)); “water resources” (36 C.F.R. § 219.8(a)(2)(iv)); “the ecological integrity of riparian areas” (36 C.F.R. § 219.8(a)(3)(i)). Therefore, there is no question that the 2012 Planning Rule requirements for soil, water, and riparian resources are directly related to the purpose of the Forest Plan amendment. The Forest Service acted arbitrarily and capriciously in concluding otherwise.

Id. at 603.

In a substantially similar Fourth Circuit case that relied on *Sierra Club* for its reasoning, the Court further explained in *Cowpasture River Pres. Ass’n v. Forest Service* that

If the substantive requirement is directly related to the amendment, then the responsible official must “apply such requirement(s) within the scope and scale of the amendment.” *Sierra Club*, 897 F.3d at 601 (quoting 36 C.F.R. § 219.13(b)(5)). Conversely, if the substantive requirement from the 2012 Planning Rule is not directly related to the amendment, the responsible official is not required to apply it to the amended Forest Plan. *See id.* Thus, Petitioners’ arguments on this point turn on whether the requirements in the 2012 Planning Rule are directly related to the Forest Service’s amendments to the GWNF and MNF Plans.

A substantive requirement is directly related to the amendment when the requirement “is associated with either the purpose for the amendment or the effects (beneficial or adverse) of the amendment.” *Sierra Club*, 897 F.3d at 602 (quoting 2016 Amendment to 2012 Rule, 81 Fed. Reg. 90,723, 90,731 (U.S. Dep’t of Agric. Dec. 15, 2016)); see also 36 C.F.R. § 219.13(b)(5)(i) (“The responsible official’s determination must be based on the purpose for the amendment and the effects (beneficial or adverse) of the amendment, and informed by the best available scientific information, scoping, effects analysis, monitoring data or other rationale.”). Further, regarding the adverse effects of an amendment, “[t]he responsible official must determine that a specific substantive requirement is directly related to the amendment when scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse effects associated with that requirement, or when the proposed amendment would substantially lessen protections for a specific resource or use.” 36 C.F.R. § 219.13(b)(5)(ii).⁶⁷

The Fourth Circuit then analyzed whether the Forest Service had conducted the requisite analysis:

⁶⁷ *Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 161–62 (4th Cir. 2018).

In its ROD, the Forest Service decided to apply project-specific amendments to a total of 13 standards in the GWNF and MNF Plans for the purpose of construction and operation of the ACP. The amendments exempt the ACP project from four MNF Plan standards and nine GWNF Plan standards that relate to soil, water, riparian, threatened and endangered species, and recreational and visual resources.

Petitioners assert that the Forest Service violated the NFMA and the 2012 Planning Rule because it skipped the “purpose” prong of the “directly related” analysis. Consistent with our decision in *Sierra Club*, we conclude that Petitioners are correct.⁶⁸

The Court concluded that:

There would be no need to amend the Forest Plans to “ensure consistency” if the ACP project could meet the Forest Plan standards in the first place. In other words, the ROD makes clear that the purpose of the amendments was to lessen certain environmental requirements in the GWNF and MNF Plans because the ACP project could not meet those Plans’ existing requirements.” *Id.* In failing to “apply the substantive provisions of the 2012 Rule,” the Forest Service violated NFMA. *Id.* at 163 (“This failure is significant because it is clear that the amendments (intended to lessen protections for soils, riparian areas, and threatened and endangered species in the GWNF and MNF Plans) are directly related to the 2012 Planning Rule’s substantive requirements for these same categories: “soil and soil productivity” (36 C.F.R. § 219.8(a)(2)(ii)); “water resources” (*id.* § 219.8(a)(2)(iv)); “ecological integrity of riparian areas” (*id.* § 219.8(a)(3)(i)); “ecological integrity of terrestrial ... ecosystems” (*id.* § 219.8(a)(1)); “appropriate placement and sustainable management of ... utility corridors” (*id.* § 219.10(a)(3)); and “recovery of federally listed ... species” (*id.* § 219.9(b)).”).

Taken together, it is clear that the 2016 amendment to the 2012 Planning Rule does not permit forest plan amendments that simply eliminate forest plan requirements. Instead, site-specific forest plan amendments – such as those at issue in *Sierra Club*, *Cowpasture*, and the present project – must: 1) analyze the scope and scale of a project’s effects necessitating a forest plan amendment (i.e., analyze “the purpose for the amendment and the effects (beneficial or adverse) of the amendment, and informed by the best available scientific information, scoping, effects analysis, monitoring data or other rationale”); 2) determine whether the proposed amendment is “directly related” to the substantive provisions of the 2012 Rule, e.g. 36 C.F.R. §§ 219.8 – 219.11; 3) apply those substantive provisions of the Rule to the amendment; and 4) create new forest plan components that address the same resource protection needs of the forest plan components that the proposed project cannot meet.

Here, the proposed forest plan amendments fail to conduct the requisite analysis. Instead, the proposed amendment simply exempts the project from complying with the visual retention

⁶⁸ *Id.* at 162 (also explaining that “Faced with a nearly identical situation in *Sierra Club v. Forest Service*, we concluded that the Forest Service acted arbitrarily and capriciously by failing to analyze the *purpose* of the amendment in its ROD (and instead focusing on only the effects) when “the clear purpose of the amendment [was] to lessen requirements protecting soil and riparian resources so that the pipeline project could meet those requirements.” *Sierra Club*, 897 F.3d at 603.”).

requirement of the Comprehensive Management Plan.⁶⁹ This is not how the 2012 planning rule works: instead, the Forest Service must propose an alternative method of complying with the intent of the obviated forest plan requirement. Thus, the project violates NFMA, which establishes a process for forest plan amendments.⁷⁰

Moreover, our comments raised concerns that the Forest Service has proposed this project-specific amendment to the Comprehensive Management Plan (CMP) without adequate environmental analysis. The Forest Service states that the forest plan amendment is only for the life of the project and will expire.⁷¹ However, the EA states that the life of the project is up to 6 years and that the physical environment is expected to return to pre-project conditions 2-15 years after the project implementation.⁷² This may result in significant impacts for over twenty years. The Forest Service is obligated to prepare an EIS for an amendment that causes significant impacts and is a major federal action.⁷³

The proposal to amend the visual quality objective from retention to partial retention will have significant impacts on the character and landscape of the monument and is a major federal action. The retention objective currently required in the CMP is “the most restrictive visual quality objective” and “management activities are not evident to the casual forest visitor.”⁷⁴ This visual quality objective is in place to preserve the aesthetic values of the Monument and maintain a landscape that has negligible visible human influence. Deviation from this objective will have significant effects on recreation, opportunities and access, and the scenic character of the Monument.

Suggested resolution: 1) Because the CMP amendment may have a significant impact on the environment, prepare an EIS; or 2) revise the project such that a project-specific forest plan amendment is not required.

Conclusion

The Cascade Forest Conservancy appreciates your consideration of the information and concerns addressed in this objection. Pursuant to 36 CFR 218.11, we respectfully request to meet with the reviewing officer to discuss these concerns and suggested resolutions.

Attachments submitted with objection:

1. Cascade Forest Conservancy Notice of Delayed FOIA Request, April 28, 2020.

⁶⁹ EA at 16-17, 75-76.

⁷⁰ We also note that there are numerous violations of forest plan requirements (e.g. ACS compliance) for which the Forest Service should have proposed amendments if it intends to implement the project despite the commandment of those plan components.

⁷¹ EA at 17.

⁷² EA at 28.

⁷³ “A proposed amendment that may create a significant environmental effect and thus requires preparation of an environmental impact statement.” 36 C.F.R. 219.13(b)(3).

⁷⁴ NOPA at 18; CMP, appendix P.

2. Photos of wetlands on the Pumice Plain

Sincerely,

A handwritten signature in blue ink, appearing to read "L. Brookham". The signature is fluid and cursive, with the first letter of the first name being a large, stylized 'L'.

Lucy Brookham
Policy Manager
Cascade Forest Conservancy