

July 10, 2003

ACS EIS

PO Box 221090

Salt Lake City, Utah 84122-1090

801-517-1014 (fax)

acs\_comments@fs.fed.us

*VIA FACSIMILE, EMAIL, AND USPS MAIL*

**Re: Draft Supplemental Environmental Impact Statement—Clarification of Language  
in the Record of Decision for the Northwest Forest Plan**

Dear ACS EIS Team:

We have reviewed and are attaching comments regarding the proposed changes to the Northwest Forest Plan's Aquatic Conservation Strategy that are contained in the Draft Supplemental Environmental Impact Statement (DSEIS) entitled "Clarification of Language in the Record of Decision for the Northwest Forest Plan." Based on our analysis we conclude that while any purported misinterpretations of the Aquatic Conservation Strategy (ACS) could be easily addressed, the proposal instead severely and unacceptably weakens the protections that the ACS offers.

Adopting this proposal would be a major step backward for federal forest management in the Pacific Northwest. The Northwest Forest Plan was constructed on the collaborative work of the region's top scientists nearly a decade ago and to this day remains the most comprehensive example of ecosystem planning for Forest Service or Bureau of Land Management lands. A cornerstone of the Northwest Forest Plan, the Aquatic Conservation Strategy is a groundbreaking, science-based approach to watershed protection and restoration on federal lands. While we have long advocated for strengthening certain aspects of the ACS, the absolute minimum required by both the science and the law is its full and faithful implementation.

If the proposed weakening of the ACS is adopted, the legality of the Northwest Forest Plan is clearly in question for a number of reasons explained in the attached comments, including non-compliance with the National Environmental Policy Act and the National Forest Management Act. Additionally, it would appear unlikely that valid Endangered Species Act Biological Opinions could be granted from the National Oceanic and Atmospheric Administration Fisheries or the US Fish and Wildlife Service for several of the listed species dependent on the Northwest Forest Plan. Further, weakening the Northwest Forest Plan also brings into question the adequacy of several other decisions, rules and plans that are tiered to it.

We urge you to abandon this proposal and reassess whether clarification of the Aquatic Conservation Strategy is needed and, if so, how to achieve this in a manner consistent with the ACS.

Thank you for your consideration of the attached comments. We would be happy to discuss our concerns with this proposal further with you at your convenience.

Sincerely,

David Bayles

Executive Director

Pacific Rivers Council

*for the following (verification available upon request):*

***Glen Spain***

Northwest Regional Director

Pacific Coast Federation of Fishermen's

Associations & Institute for Fisheries

Resources

PO Box 11170

Eugene, OR 97440-3370

(541) 689-2000, 689-2500 (fax)

Bill Arthur

Regional Director

Sierra Club Northwest/Alaska Regional Office

180 Nickerson, Suite 202

Seattle, WA 98109

(206) 378-0114 x303, 378-0034 (fax)

***Doug Heiken***

Western Field Representative

Oregon Natural Resources Council

PO Box 11648

Eugene, OR 97440-3848

(541) 344-0675, 343-0996 (fax)

***Rein Attemann***

Forest Watch/Selkirk Project Coordinator

The Lands Council

423 West 1st Ave. Suite 240

Spokane, WA 99201

(509) 838-4912, 838-5155 (fax)

***Chuck Willer***

Executive Director

Coast Range Association

PO Box 2250

Corvallis, OR 97339-2250

(541) 758-0255, 752-3146 (fax)

Anthony Ambrose

National Forest Conservation Coordinator

Environmental Protection Information Center

P.O. Box 818

Arcata, CA 95518

(707) 923-2931, 923-4210 (fax)

**Comments Regarding the DSEIS for Changes to the Aquatic Conservation Strategy of the Northwest Forest Plan (“Clarification of Language in the Record of Decision for the Northwest Forest Plan”)**

The Aquatic Conservation Strategy (ACS) is a science-based approach to watershed protection and restoration. We do not see the proposed changes as “limited changes to language” of the ACS, or as simply “clarify[ing] how projects should be designed to follow the ACS.” DSEIS, p. 4. Rather the proposal includes significant deletions and additions, which substantially reduce the level of protection offered by the ACS, make the ACS mandate less clear, and are not consistent with the intent of the Forest Ecosystem Management Assessment Team (FEMAT), which designed the ACS. FEMAT 1993. The ACS is not a simple rule-based strategy, but also employs multiple scale analyses designed to fit land management to individual sites and watersheds. While we appreciate that this kind of analysis can be challenging, the answer to this challenge is not to gut the strategy.

Weakening the ACS raises questions regarding the overall legal sufficiency of the Northwest Forest Plan (NWFP) not just for fish but also for a myriad of other species. We note that with respect to both aquatic and terrestrial species, judicial review of the NWFP found it to be adequate but with very little margin for error. *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff’d*, 80 F.3d 14-1 (9<sup>th</sup> Cir. 1996) (finding that full implementation of all components is necessary for the NWFP to remain within legal requirements). Weakening the NWFP also brings into question the adequacy of several other decisions, rules and plans that are tiered to it. In light of the significant changes being proposed, the National Environmental Policy Act (NEPA) analysis contained in the DSEIS and appendices is clearly inadequate because it does not analyze the real impacts, including the cumulative impacts, of the proposal.

We believe that adopting this proposal would be a major step backward for federal forest management in the Pacific Northwest. We begin our comments by explaining why some of the proposed language changes have unacceptable global impacts on the ACS. We then present the ways in which each of the four components of the ACS are substantially weakened by the proposal, and we close with a legal analysis of the proposal.

**I. THE DSEIS PROPOSES TO ELIMINATE THE CORE ACS REQUIREMENT THAT SITE-SCALE PROJECTS BE CONSISTENT WITH THE ACS OBJECTIVES**

The DSEIS proposes to both add new language and delete existing language regarding the role that site-scale projects play in attaining the ACS objectives. The net effect of the DSEIS proposal on this issue is to eliminate the requirement that site-scale projects be consistent with the ACS objectives, thereby allowing degradation at each site across the landscape and removing this ACS safeguard against cumulative watershed impacts. This goes directly against the clear intent behind the ACS, court rulings on the ACS, the best science, and the current working interpretation of the federal agencies involved in the NWFP (*see* DSEIS, Appendix A).

While the DSEIS states that the goal of the ACS is to meet the ACS objectives at the watershed and broader scales, it has failed to explain how this would be achieved in the absence of site-scale consistency analysis. The DSEIS does propose to use the not yet fully developed or tested

Aquatic Riparian Effectiveness Monitoring Plan (AREMP) to evaluate the effectiveness of the ACS at the province scale in a decade or more. DSEIS, p. 32. However, while AREMP certainly holds promise for some uses, it is no replacement for project level assessment of consistency with the ACS objectives.

A. The DSEIS deletes the key ACS requirement that projects be found consistent with ACS objectives and replaces it with an unnecessary and confusing statement explaining that site-scale projects cannot “fully attain” objectives

The DSEIS deletes the following key requirement of the ACS:

The intent (of the ACS) is to ensure that a decision maker must find that the proposed management activity is consistent with the Aquatic Conservation Strategy objectives.

ROD, Attachment A, Standards and Guidelines (ROD), p. B-10 (proposed for deletion by the DSEIS at p. 18).

The DSEIS replaces this core requirement with the following statement that is misguided, unnecessary and only adds confusion to the ACS:

By itself, no site-scale project can, or should be expected to fully achieve ACS objectives. These objectives are intended to be met over time at watershed and broader scales.

DSEIS, p.18.

This language change eliminates a core requirement of the ACS that is supported by every source we know to have considered it, and essential to the functioning of the ACS. The ACS was intended to employ multi-scale analysis, including at the landscape, watershed and site-scale. Proper analysis at each scale is necessary for the ACS to function. Rather than eliminate site-scale analysis, we believe the proper approach would be to ensure that the necessary analyses occur and that management decisions be required to appropriately incorporate the results of each analysis.

*1. The Aquatic Conservation Strategy cannot meaningfully function without site-scale consistency analysis*

First, there is no evidence in the record, or elsewhere to our knowledge, that anybody has ever asserted that the ACS requires any single site-scale project to “fully attain” all of the ACS objectives. In fact, since such attainment is a physical impossibility it is unclear why the DSEIS must clarify this point. However, while it may be true that no site-scale project can “fully attain” the ACS objectives, a single project can certainly be inconsistent with meeting these objectives at the site and/or watershed scale, and if so the ACS clearly prohibits that project.

To be more specific, the ACS requires consistency with the ACS objectives in two ways:

1. For projects inside of Riparian Reserves, decision makers must make findings that projects comply with the Standards and Guidelines found in Section C. These Standards and Guidelines contain language such as "adjust practices that retard or prevent attainment of ACS objectives, meet ACS objectives by . . . , apply practices needed to attain ACS objectives." ROD, p. C-31-38.
2. For projects inside and outside of Riparian Reserves, the ACS states that "The intent (of the ACS) is to ensure that a decision maker must find that the proposed management activity is consistent with the Aquatic Conservation Strategy objectives." ROD, p. B-10.

For all of these projects, in some cases some ACS objectives can be "fully attained" at the site-scale (for that site) (e.g. (3) "Maintain and restore the physical integrity of the aquatic system, including shorelines, banks, and bottom configurations."). Others can only be achieved at the watershed or landscape scale (e.g. (1) "Maintain and restore the distribution, diversity, and complexity of watershed and landscape-scale features to ensure protection of the aquatic systems to which species, populations and communities are uniquely adapted.").

In either case, the ACS clearly calls for an analysis at the site-scale regarding whether the project is consistent with the Aquatic Conservation Strategy objectives. This means the project must contribute towards meeting the objectives, or at least not prevent or retard attainment. In other words, for each ACS objective that cannot be "fully attained" at a site-scale, any site-scale project is still clearly required to be consistent with meeting that objective at the watershed scale.

Rather than clarify what the site-scale requirements are for meeting ACS objectives, or the analysis required to show this compliance, the DSEIS would completely remove the requirement for any analysis of project compliance with the ACS. The DSEIS has failed to show that the ACS can function in the absence of the requirement that projects go forward only if consistent with attainment of ACS objectives.

*2. The record shows clear agreement regarding the existence of the ACS requirement to conduct site-scale consistency analysis*

The ACS sentence requiring project consistency with the ACS objectives was not an unclear statement that has been misinterpreted, as the DSEIS seems to assert. Rather it clearly states an essential requirement of the ACS that is undisputed in the record. The NWFP Final Supplemental Environmental Impact Statement (FSEIS), the Regional Ecosystem Office, Dr. Gordon Reeves and courts that have looked at the ACS all rely on a site-scale consistency assessment as part of ACS compliance analysis.

*(a) The NWFP FSEIS Environmental Consequences section includes site-scale consistency with ACS objectives in its description of the ACS*

The Affected Environment and Environmental Consequences section of the NWFP FSEIS (which this proposal is attempting to tier to) explains the site-scale consistency requirement this way:

The overall intent of the Aquatic Conservation Strategy is to restore and maintain the ecological function and processes of watersheds and aquatic ecosystems and aquatic ecosystems within natural disturbance regimes. **Proposed projects must meet Aquatic Conservation Strategy objectives and will be approved based on the restoration and maintenance criteria.** . . Under the Aquatic Conservation Strategy, a project cannot have a negative effect, in the long term, on riparian-dependent resources. The risk has been shifted under the Aquatic Conservation Strategy because **each project must meet the maintenance and restoration criteria by maintaining or restoring the physical and biological processes required by riparian-dependent resources within a watershed.**

NWFP FSEIS, 3&4-68-9 (*emphasis added*).

Thus it is clear that the NWFP fully intended that projects must meet the ACS objectives; the statement on page B-10 was not just a fluke statement that has been taken out of context, as the DSEIS might lead one to believe.

(b) The Regional Ecosystem Office and the Regional Interagency Executive Committee fully recognize that site-scale consistency with ACS objectives is required by the ACS

Not only is the DSEIS approach in direct conflict with the NWFP FSEIS and ROD, but also with the interpretation of the Regional Ecosystem Office (REO). In response to a request by the Regional Interagency Executive Committee, REO wrote up the agreed to interagency interpretations of three ACS consistency issues. The memo containing these interpretations is included as an appendix to the DSEIS. REO explains the required site-scale consistency analysis this way:

Thus, the ROD requires decision makers to confirm (i.e., make findings) that projects that comply with the S&Gs, either meet, attain, or do not retard or prevent attainment of the ACS objectives. This requirement applies to all FS and BLM management actions in the NFP, not just actions within Key Watersheds and Riparian Reserves.

DSEIS, Appendix A, REO Response to the January 17, 1999 Regional Interagency Executive Committee Request for REO Assistance in Facilitating Interagency Agreement on Four Aquatic Conservation Strategy Issues (REO Proposed Interagency ACS Interpretations), p. 2.

Regarding this analysis, the REO states that:

(r)egardless of the approach used, it must culminate in a synthesized conclusion of overall ACS consistency that considers all of the ACS objectives relevant to a given action.

*Id.*

The REO memo further states that “(a)dditionally, all actions in all land allocations must comply with the ACS objectives. (ROD, B-10).” *Id.*, p. 6. Thus there is no question that interagency agreement exists regarding the requirement for site-scale analysis of ACS objective consistency.

(c) Site-scale analysis of ACS consistency is required for ACS compliance as explained in the DSEIS appendices authored by Dr. Reeves, a FEMAT Aquatics Group co-leader

In his declaration in the *Pacific Coast Federation of Fishermen’s Associations v. National Marine Fisheries Service (PCFFA)* litigation, Dr. Reeves explains how site-scale projects fit analytically within the ACS:

If the current distribution of conditions was determined to be within the acceptable range of variability for the watershed or subwatershed, then presumably sites are in compliance with the ACS. If the distribution of conditions was outside the acceptable range of variability then the watershed or subwatershed is out of compliance. **Management actions that would degrade a site or small subwatershed were not expected to proceed under such circumstances** unless it was established that the actions would bring the system back within the acceptable level of variability in the long-term and this outweighed any short-term negative impacts. Management activities are focused on restoration in such cases.

DSEIS, Appendix A, Dr. Reeves *PCFFA* declaration, ¶ 16 (*emphasis added*).

Dr. Reeves clarifies under what conditions site-scale degradation would not comply with the ACS, not that analysis of site-scale impacts is never necessary. In fact, it appears that site-scale analysis of the impacts of each project, and specifically how these impacts relate to meeting ACS objectives at the watershed or subwatershed scale, would be an essential part of this approach. The site-scale impacts would indicate if the project were appropriate given the watershed scale analysis that had been conducted.

(d) The courts in the *Pacific Coast Federation of Fishermen’s Associations v. National Marine Fisheries Service [PCFFA]* litigation stressed the importance of site-scale analysis in meeting the ACS

The *PCFFA* courts recognized that ACS compliance required site-scale analysis of project consistency with the strategy. For example, in the first *PCFFA* District Court opinion, the court found that in the absence of adequate site-scale analysis “NMFS could not have rationally concluded, based on the evidence before it, that the proposed actions were consistent with the ACS’s mandate that agencies maintain and restore aquatic systems within the range of the northern spotted owl.” No. C97-775R, Amended Order on Summary Judgment at 27-28 (W.D. Wash., May 29, 1998). See comments submitted by Patti Goldman, Earthjustice for a detailed discussion of this issue.

*3. The scientific literature, including the literature cited in FEMAT, is inconsistent with an approach that abandons site-scale analysis of ACS consistency*

Although aquatic ecosystems are most intimately tied to and affected by the health of riparian areas, it is well recognized that they are influenced by the condition of the whole watershed within which they reside. A healthy riparian area is unlikely to retain its integrity and resiliency through time if the surrounding watershed is degraded—a damaged watershed can overwhelm the capacity of a healthy riparian area to absorb insults. Further, even a healthy riparian area cannot protect the aquatic system when extensive road construction and use, logging and other land management activities are conducted outside of the riparian areas. See Attachment A, p. 15-20 for discussion of these impacts.

B. The DSEIS wrongly equates simply complying with Standards and Guidelines in Sections C and D with ACS compliance

The following statement proposed by the DSEIS to be added to the ACS significantly and unacceptably weakens the NWFP Aquatic Conservation Strategy:

To follow the ACS at the site-scale, decision makers must demonstrate that projects comply with standards and guidelines in Sections C and D.

DSEIS, p. 18.

Given that Section C is entitled “Standards and Guidelines,” yet has subsections within it that are also so titled, it is unclear which of these Section C Standards and Guidelines the DSEIS means to require compliance with at the site-scale. If the intent is only to require site-scale compliance with those rules in Section C or D that are located in subsections titled “Standards and Guidelines,” then the agencies need to clarify the status of the rules and direction located in the Section C narrative that is associated with individual land allocations, but not located in Standards and Guidelines subsections. For example, the direction regarding delineation of interim Riparian Reserve widths is not located in a Standards and Guidelines subsection (ROD, C-30, 31).

Regardless of the finer intent on this point, compliance with the ACS clearly requires more than simply complying with either the broader or narrower set of Standards and Guidelines in Sections C and D, which only pertain to specific land allocations. (Section C is titled “Standards and Guidelines” and Section D is titled “Adaptive Management Areas” but has a subsection titled “Standards and Guidelines.” Since Section D pertains only to Adaptive Management Areas, it is often not included in reference to generally applicable Standards and Guidelines.) The ROD makes clear the requirement that all projects and portions of projects not covered directly by a Section C or D Standard and Guideline must still be consistent with the ACS objectives. Again, the ROD states, and the DSEIS proposes to delete,

The intent (of the ACS) is to ensure that a decision maker must find that the proposed management activity is consistent with the Aquatic Conservation Strategy objectives.

ROD, p. B-10 (proposed for deletion by the DSEIS at p. 18).

Additionally, the DSEIS approach on this issue is again in direct conflict with the interpretation of the interagency REO, whose memo states in part:

However, the S & Gs in Section C do not by themselves always guarantee that actions will be consistent with ACS objectives, in part due to the need to consider the results of watershed analysis. Thus, the ROD requires decision makers to confirm (i.e., make findings) that projects that comply with the S&Gs, either meet, attain, or do not retard or prevent attainment of the ACS objectives. This requirement applies to all FS and BLM management actions in the NFP, not just actions within Key Watersheds and Riparian Reserves.

DSEIS, Appendix A, REO Proposed Interagency ACS Interpretations, p. 2.

Further, the NWFP FSEIS also explains that any project affecting aquatic habitat must meet the ACS, not just Section C and D Standards and Guidelines:

Comment: Alternative 9 should be revised to include standards and guidelines that preclude further degradation of aquatic and riparian habitat.

Response: ...The standards and guidelines are designed to prohibit activities that retard or prevent attainment of Aquatic Conservation Strategy objectives. **Future management decisions affecting aquatic and riparian habitat must comply with the Aquatic Conservation Strategy.** Under this strategy, management of aquatic and riparian-dependent resources under all the alternatives in this SEIS emphasizes the prevention of further degradation. **Future actions that affect or potentially affect the aquatic and riparian habitats will be those that maintain or restore the physical and biological processes operating within a watershed,** and are based on the range of natural variability.

FSEIS, p. F-165 (*emphasis added*).

The DSEIS proposal to equate ACS compliance with only Section C and D Standard and Guideline compliance would result in significantly weaker protection for aquatic systems than the existing ACS provides.

C. The DSEIS proposes to delete a ROD statement that clearly and concisely addresses one of the ACS site-scale implementation problems identified in the DSEIS

Another significant problem with the DSEIS's changes to the ACS site-scale analytical framework is its proposed deletion of the following ACS statement:

Management actions that do not maintain the existing condition or lead to improved conditions in the long term would not “meet” the intent of the Aquatic Conservation Strategy and thus, should not be implemented.

ROD, p. B-10 (proposed for deletion by the DSEIS at p. 18).

We are at a loss as to why the DSEIS would propose to delete this statement given the stated Purpose and Need of the proposal. The Need section of the DSEIS presents a list of “(t)ypes of projects likely to be stopped or delayed because of misapplication of the ACS.” DSEIS, p. 6. Leading off the list is “Watershed Restoration,” including culvert removal and replacement. The statement above, that the DSEIS proposes to delete, helps clarify that there is a temporal aspect to meeting the ACS objectives when conducting restoration projects. Obviously short-term impacts of such projects must not prevent or retard attainment of ACS objectives in “the long term,” but this sentence implies that such short-term impacts do not automatically cause project non-compliance with the ACS under such circumstances.

For example, if a watershed analysis identifies the need for decommissioning a particular road in order to meet the ACS objectives in the long term, and short-term impacts will not prevent or retard attainment of these objectives (e.g. by killing the last remnant population of an aquatic species in the watershed), then such an action is in compliance with the ACS. Such actions went forward under the *PCFFA* litigation and it is our understanding that they are currently going forward under NMFS concurrence letters.

We think that the DSEIS has failed to recognize that there is a temporal scale aspect to assessing restoration projects under the ACS and that the ACS already provides adequate guidance on this issue. Eliminating the site-scale consistency requirement, and the sentence above, is not a well-targeted or rational way to add any clarification.

D. The DSEIS proposes to make reference to the ACS objectives in the Standards and Guidelines essentially irrelevant, in spite of the fact that the ROD states that these references are “the important phrases” in the ACS Standards and Guidelines

Unfortunately, although the DSEIS proposes to base ACS compliance only on the Standards and Guidelines in Sections C and D, it has also confused the meaning of these Standards and Guidelines by adding the following statements:

References to ACS objectives in the standards and guidelines in Sections C and D do not require that decision makers find that site-scale projects, in themselves, will fully attain ACS objectives.

DSEIS, p. 18.

Some standards and guidelines refer to attaining, being consistent with, meeting, or achieving ACS objectives. The intent of these references is that projects will use relevant information from applicable watershed analysis to provide context for project planning.

These references do not mean that decision makers must find that a site-scale project, by itself, will fully attain ACS objectives.

*Id.*, p. 19.

This proposed language is in direct conflict with the clear intent of the ROD and makes it nearly impossible to apply the Standards and Guidelines in any consistent or meaningful way.

*1. The ACS objectives are the “important phrases” in the Standards and Guidelines*

The ROD emphasizes the importance of the ACS objectives in the Standards and Guidelines in a sentence proposed for deletion by the DSEIS. This sentence, located on the opening pages of the ACS section in the ROD, states:

The important phrases in these standards and guidelines are “meet Aquatic Conservation Strategy objectives, “does not retard or prevent attainment of Aquatic Conservation Strategy objectives, and “attain Aquatic Conservation Strategy objectives.”

ROD, p. B-9 (proposed for deletion by the DSEIS at p. 17).

Including ACS objectives in Standards and Guidelines was clearly intended to have more of an effect than just that “projects will use relevant information from applicable watershed analysis to provide context for project planning.” For the DSEIS to minimize the importance of the ACS objectives in the Standards and Guidelines, in spite of the ROD’s clear statement of their importance, appears to be a flagrant attempt to undermine the protections provided by the strategy.

*2. Many ACS Standards and Guidelines would make little sense after the proposed changes regarding the role of the ACS objectives*

The proposal renders many Section C and D Standards and Guidelines unclear and ineffective when considered along with the proposed language regarding the role of the ACS objectives within them. For example, consider the following Section C Standard and Guideline:

TM-1(a). Where catastrophic events such as fire, flooding, volcanic, wind or insect damage result in degraded riparian conditions, allow salvage and fuelwood cutting if required to attain Aquatic Conservation Strategy objectives. ROD, p. C-32.

The DSEIS proposes that the reference to the ACS objectives here is intended to mean “that projects will use relevant information from applicable watershed analysis to provide context for project planning.” Taken together with the fact that the DSEIS has decoupled watershed analysis from any reference to the ACS objectives (see III(A)(1) below), the DSEIS has succeeded at obfuscating what it might mean to ever comply with this Standard and Guideline. We think it was much more clear before the DSEIS attempted to “clarify.”

Other examples include:

TM-1(c). Apply silvicultural practices for Riparian Reserves to control stocking, reestablish and manage stands, and acquire desired vegetation characteristics needed to attain the Aquatic Conservation Strategy objectives. ROD, p. C-32.

GM-1. Adjust grazing practices to eliminate impacts that retard or prevent attainment of Aquatic Conservation Strategy objectives. If adjusting practices is not effective, eliminate grazing. ROD, p. C-33.

Notably, the majority of the “Roads Management” ACS standards and guidelines are prefaced with the statement “(m)eeet Aquatic Conservation Strategy objectives by.” ROD, p. C-32, 33. It is unclear what any of the Road Management standards and guidelines would mean under the DSEIS proposal.

Under the DSEIS proposal all of these Standards and Guidelines, and more, could be taken as advisory or optional. The proposed language leaves them with no meaningful enforceability.

*3. The agencies must analyze the effects of significantly changing the emphasis of the ACS objectives within the Section C and D Standards and Guidelines*

In light of the significant change in emphasis on the core objectives in the Section C & D ACS Standards and Guidelines, the agencies must clarify how compliance with each of these would be assessed, how this would differ from current requirements, and what the environmental impacts of any changes would be.

It is also important to recognize that one of the five factors that the FEMAT Aquatics Group considered in evaluating the effects of the alternatives on fish was “the amount of Riparian Reserves and type and level of management activity allowed within them.” NWFP FSEIS, 3&4-190. Ratings for other species also relied in part on Riparian Reserves (see VI(A)(3) below). Thus any increase in activities within the Riparian Reserves due to a weakening of the Standards and Guidelines could invalidate the FEMAT ratings for fish (see VII and VIII below). The agencies need to evaluate whether this language change would impact the FEMAT ratings for fish.

F. Suggested language regarding the proposal to delete the site-scale consistency requirement

If the DSEIS is hoping to convey that not all ACS objectives can be fully achieved at the site-scale, something with which we fully agree, we recommend that all of the language in the ROD be left fully intact and that the language proposed below in italics be added:

The important phrases in these standards and guidelines are “meet Aquatic Conservation Strategy objectives, “does not retard or prevent attainment of Aquatic Conservation Strategy objectives, and “attain Aquatic Conservation Strategy objectives. *While some objectives can only be fully achieved at a watershed or landscape scale, each project*

*must be analyzed for its consistency with each Aquatic Conservation Strategy objective, taking into account existing conditions and other actions in the watersheds, and must be found to be consistent with the standard specified in the Standard and Guideline (for example, must “attain” or “not retard or prevent attainment.”) The analysis must culminate in a synthesized conclusion of overall ACS consistency that considers all of the ACS objectives relevant to a given action. (ROD, p. B-9).*

The intent (of the ACS) is to ensure that a decision maker must find that the proposed management activity is consistent with the Aquatic Conservation Strategy objectives. *While some objectives can only be fully achieved at a watershed or landscape scale, each project, including projects or portions of projects not located within Riparian Reserves or Key Watersheds, must be found to be consistent with the ACS objectives. Projects that would retard or prevent attainment of these objectives would not comply with the ACS. The analysis must culminate in a synthesized conclusion of overall ACS consistency that considers all of the ACS objectives relevant to a given action. (ROD, p. B-10 (proposed for deletion by the DSEIS at p. 18)).*

## II. THE DSEIS REMOVES STANDARD AND GUIDELINE STATUS FROM ALL BUT TWO SECTIONS OF THE ROD, ELIMINATING SEVERAL IMPORTANT RULES THAT ARE CENTRAL TO THE ACS

The ROD states twice that “the direction in all sections of this document constitutes standards and guidelines.” ROD, p. A-6 and p. C-1. This was also confirmed by the Regional Interagency Executive Committee (RIEC) (see DSEIS, Appendix A, RIEC memo, p. 2). Yet the DSEIS deletes both of these statements. DSEIS, p. 15, 19.

The apparent effect of these changes is to remove Standard and Guideline status from many critical rules in the NWFP, in addition to removing this status from the ACS objectives. However, it is unclear whether this was intended because neither of these rules nor the significant impacts of losing these rules is ever discussed in the DSEIS. The agencies need to clarify the status of all of the rules and standards located in sections other than the Standards and Guidelines subsections of Sections C and D.

If indeed the intent is to remove Standard and Guideline status for each of these rules, the agencies must analyze the environmental impacts rule by rule. For example, it is unclear what is intended by the statement that “all components of the ACS are retained” when Standard and Guideline status is being removed from the Section where the components are described and where rules are presented for each (Section B).

Below we discuss a few examples of rules that lose Standard and Guideline status due to their location in Section B or in Section C in a section not titled “Standards and Guidelines;” more are included in the discussion specific to ACS components in Section III. We caution that this is not an exhaustive list and urge the agencies to conduct a careful study of this issue.

### A. Impacts on the Aquatic Conservation Strategy

There are many important ACS rules located in Section B that apparently would become unenforceable text under the proposal. In addition to changing the status of Section B, the DSEIS would add a statement elsewhere in Section B that:

To follow the ACS at the site-scale, decision makers must demonstrate that projects comply with standards and guidelines in Sections C and D.

DSEIS, p. 18.

This simply emphasizes that any ACS rules located in sections other than C or D will no longer be considered Standards and Guidelines. Some of these rules are discussed below but we urge the agencies to fully disclose and evaluate how this change in status would affect the success of the ACS.

### *1. ACS objectives*

The DSEIS indicates that the central rationale for removing Standard and Guideline status from most of the ROD is to remove this status from the ACS objectives. Although the DSEIS quotes a statement in the NWFP FSEIS that the ACS objectives “do not meet the definition of standards and guidelines and thus, are not included (in the S&G section),” this apparently was not the final judgment of the EIS team or decision makers since the whole ROD was designated as Standards and Guidelines. DSEIS, p. 10, *citing* NWFP FSEIS, p. 166.

Whether or not the ACS objectives fit the definition of Standards and Guidelines, we think that the critical point is to retain them as mandatory reference points against which to measure projects as well as progress at the watershed and landscape scales. The ACS objectives are the criteria by which to measure consistency with and ultimately success of the ACS, and reducing their role significantly undermines the whole approach of the ACS.

We note that one of the five factors that the FEMAT Aquatics Group considered in evaluating the effects of the alternatives on fish was “the amount of Riparian Reserves and type and level of management activity allowed within them.” NWFP FSEIS, 3&4-190. Thus any increase in activities within the Riparian Reserves due to a weakening of the Standards and Guidelines – including weakening consideration of the ACS objectives in determining compliance - could invalidate the NWFP environmental analysis regarding fish and the “viability” ratings for fish (*see* Sections V(A)(3)(a) and VI(C)(1) below).

### *2. Other ACS rules*

In Section III below, we discuss several examples of Section B standards and guidelines, in addition to the ACS objectives, that are of concern for particular components of the ACS.

## B. Impacts on non-ACS rules

### *1. Focusing Late-Successional Reserve thinning on managed stands*

Section B states that “Stand management in Late-Successional Reserves should focus on stands that have been regenerated following timber harvest or stands that have been thinned.” NWFP ROD, p. B-6. In contrast to this Standard and Guideline, Section C states only that “(t)hinning (precommercial and commercial) may occur in stands up to 80 years old regardless of the origin of the stands (e.g. plantations planted after logging or stands naturally regenerated after fire or blowdown).” ROD, p. C-12. This demonstrates that the ACS DSEIS, as written, affects more than just the aquatic protection of the NWFP. These other effects must be analyzed.

## 2. FSEIS references to Standards and Guidelines

Each time the ROD or the FSEIS refers to “standards and guidelines,” the intended set of rules was the set found in all sections of the ROD. Changing the meaning of the term could change the reach of any number of statements found in the FSEIS or ROD. The FSEIS needs to disclose these.

### III. IMPACTS OF THE PROPOSAL ON THE FOUR COMPONENTS OF THE ACS

The ACS has four basic components, watershed analysis, Key Watersheds, Riparian Reserves, and Watershed Restoration. Although the DSEIS states that it retains all of these four components, several proposed changes when considered together have the effect of weakening the protections they offer. These four components are also featured in The Report of the Scientific Analysis Team (USFS 1993), a central owl region report that preceded the Northwest Forest Plan, and in PACFISH (USFS 1995). They are also essentially included in Alternatives for Management of Late-Successional Forests of the Pacific Northwest (watershed analysis was not yet so-named but a cumulative effects analysis was required to “aid in the timing and location of timber harvest and location of roads and landings.”) Johnson et al. 1991.

#### A. Watershed analysis

Watershed analysis is widely recognized as a critical component of aquatic conservation programs (FEMAT 1993; Mantech 1996; PACFISH 1995). While PRC supports the use of watershed analyses because they provide invaluable information and context for land-management activities, we cautioned in our comments on the NWFP DSEIS that watershed analysis as described in the NWFP is “unproven, unduly complicated, and not organized so as to provide effective decision points and cost-effective action priorities.” We advocated for strengthening and clarifying the watershed analysis process, along with creating restoration-only plans in Key Watersheds. We believe that the highly variable quality and relevance of watershed analyses conducted under the NWFP prove the need for the strengthening and clarification we sought. Unfortunately, the ACS DSEIS does just the opposite by deleting and demoting existing watershed analysis sideboards.

By weakening the role of watershed analysis, the DSEIS ensures that ACS compliance will never be achieved. FEMAT described watershed planning as an essential tool for implementing the Aquatic Conservation Strategy. The ROD instead adopted watershed analysis, a non-NEPA process yet still intended to be a critical tool in planning for attainment of the ACS objectives. The DSEIS states that the action it proposes was modified in response to scoping comments, and

that the “role of watershed analysis was emphasized.” DSEIS, p. 11. Perhaps watershed analysis is emphasized in the DSEIS as compared to the Notice of Intent, but for at least three reasons the language in the DSEIS has the opposite effect when compared to the NWFP.

*1. The DSEIS removes the requirement that the results of watershed analysis be used to find projects consistent with the ACS objectives*

The ROD states, and the DSEIS proposes to delete:

The decision maker will use the results of watershed analysis to support the finding (that the proposed management activity is consistent with the Aquatic Conservation Strategy objectives.) In order to make the finding that a project or management action “meets” or “does not prevent attainment of” the Aquatic Conservation Strategy objectives, the analysis must include a description of the existing condition, a description of the range of natural variability of the important physical and biological components of a given watershed, and how the proposed project or management action maintains the existing condition or moves it within the range of natural variability.

ROD, p. B-10 (proposed for deletion by the DSEIS at p. 18).

The passage above is where the ACS clearly spells out one of the most important roles of watershed analysis – ensuring that activities meet the ACS objectives - and what analyses must be in a watershed analysis in order to support finding of ACS compliance. While perhaps this list could be gleaned from the description of watershed analysis (ROD, pp. B-20 to B-30), deleting this passage from the introduction to the ACS obviously does not help “emphasize[]” the role of watershed analysis. Experience tells us that there are unacceptable risks involved when managers are given broad discretion to translate the results of watershed analyses into management direction.

*2. The proposed language regarding watershed analysis decouples the process from the ACS objectives, is weak, and is not a Standard and Guideline*

The only language proposed by the DSEIS regarding watershed analysis decouples watershed analysis from the heart of the ACS, the ACS objectives, leaving the purpose of the analysis unclear. The DSEIS states,

The project record will demonstrate how the agency used relevant information from applicable watershed analysis to provide context for the design and site-specific assessment of the project, recognizing that watershed analysis is not a decision-making process in and of itself.

DSEIS, p. 18.

We acknowledge that requiring project records to document how the agencies used watershed analyses would be an improvement on the narrow issue of documentation. However, there are two reasons why this rule is not really an improvement. First, because it would be located in

Section B, it is not a Standard and Guideline and therefore its enforceability under this proposal is questionable.

Second, for the reasons discussed above, the “rule” would only require documentation of information that will fail to address the real questions of project compliance with the ACS. Stating that “relevant information from watershed analysis ” will be used to “provide context” for project design does not specify that watershed analysis results will be used in assessing project compliance with the ACS. In fact the “rule” makes no reference at all to the ACS or the ACS objectives. The proposed language is significantly weaker than the existing language in this regard.

*3. The DSEIS removes Standard and Guideline status from the watershed analysis subsection (in Section B of the ROD)*

There is no watershed analysis sub-section in Section C. There are a very few Section C Standards and Guidelines regarding watershed analysis as it relates to specific land allocations. This means that if the proposal is adopted, there will be essentially no Standards and Guidelines in place for watershed analysis, making the sideboards for the process unclear. This is opposite of the direction in which we should be going. The agencies must clarify which Standards and Guidelines the proposal retains regarding watershed analysis.

*4. The DSEIS’s treatment of watershed analysis is inconsistent with the DSEIS Appendices authored by Dr. Reeves, a FEMAT Aquatics Group co-leader*

The DSEIS contains both a declaration and a science review by Dr. Reeves, a co-leader of the FEMAT Aquatics Group that drafted the ACS. Yet it appears to us that the DSEIS misses one of the essential points that Dr. Reeves makes: the ACS depends on appropriate watershed analysis that guides management actions. In Dr. Reeves’ view:

Watershed analysis as proposed by FEMAT should identify this range of variability at the watershed level. This was then expected to guide management actions in the watershed and establish the criteria for determining consistency with the ACS at the watershed or subwatershed level.

DSEIS, Appendix A, Dr. Reeves *PCFFA* declaration, p. 8; and

The watershed analysis is supposed to guide planning that achieves the ACS within the watershed.

*Id.* p. 4.

It appears to us that the implementation scheme proposed in the DSEIS (allowing degradation at each site while at the same time decoupling watershed analysis from ACS consistency requirements) will not achieve the goals identified by Dr. Reeves. Since the proposed DSEIS language regarding watershed analysis makes no reference to the ACS or its objectives, and the DSEIS eliminates the requirement that the results of watershed analysis be used to support

findings of project consistency with the ACS objectives, it seems unlikely that such analyses would be able to meaningfully “guide management actions in the watershed.” Further, it is unclear how watershed analysis would “guide planning that achieves the ACS within the watershed” in the absence of the requirement to use the results of watershed analysis to show that projects are consistent with the ACS.

*5. At least one proposed language change has been taken out of context*

The proposal would move one sentence from the end of the first paragraph on ROD, p. B-10 to the end of paragraph 5 on page B-9. DSEIS, p. 16, 17. The sentence reads: “The baseline from which to assess maintaining or restoring the condition is developed through watershed analysis.” In its original location it was referring to managing riparian dependent resources at the site-scale. After the proposed change it relates to overall landscape scale ACS compliance. The problem with moving the sentence is that watershed analysis is not capable of assessing the range of natural variability or other conditions at the landscape scale, rather landscape scale (river basin/province) analysis is required for this.

*6. Suggested language regarding watershed analysis*

We suggest that all the language in the ROD regarding watershed analysis be left in place, and that the following text (in italics) be added as a Section C watershed analysis Standard and Guideline:

*Watershed analysis must include a description of the existing condition, a description of the range of natural variability of the important physical and biological components of a given watershed. Once a watershed analysis is completed for a watershed, the project record for each project proposed in that watershed will demonstrate how the decision maker used the watershed analysis to find that the management activity is consistent with each of the Aquatic Conservation Strategy objectives, including a finding that the proposed project or management action maintains the existing condition or moves it within the range of natural variability.*

B. Key Watersheds

A broad scientific consensus has been reached that “important areas,” (including Key Watersheds and riparian areas) must be identified and protected if efforts to conserve aquatic habitats and the species that depend upon them are to be successful (FEMAT 1993; USFS 1996; USFS 1997; PACFISH 1995; Eastside Forests Scientific Society Panel 1994; Pacific Rivers Council 1998). Although we do not think that the protection level for Key Watersheds in the NWFP is adequate, as was stated in our comments on the NWFP DSEIS, their designation and the protections offered are a step in the right direction.

Special protection and restoration efforts directed at Key Watersheds and other aquatic refugia, although much weaker than what we believe to be necessary, are a central component of the ACS. The overall impact of the proposed changes on the protection and restoration of Key Watersheds and other refugia, discussed below, results in an inadequate ACS. For more

discussion on the scientific aspects of this point, see Attachment A, p. 17-19 (“In aggregate, the Action Alternative plainly allows continued degradation of aquatic resources in key watersheds. The ROD’s Chapter C includes no standards and guidelines that explicitly require that the extent, intensity, and scale of aquatic degradation be reduced.”). The agencies must explain how the ACS would be expected to provide the protection it promised in the absence of any mechanism to deliver the special protection these areas were intended to have.

*1. The DSEIS eliminates the mechanism for ensuring that Key Watersheds are adequately protected by deleting the requirement that projects outside Riparian Reserves be consistent with ACS objectives*

Complying with the ACS at the watershed and landscape scale requires, in some cases, increased protection outside of Riparian Reserves in identified refugia and Key Watersheds. The DSEIS has eliminated the chief mechanism for ensuring that, once these areas are identified through landscape and watershed scale analysis, they are afforded the protection indicated in the ACS.

*2. The DSEIS proposes to remove Standard and Guideline status from the following important Key Watershed protection rules*

a) “Watersheds currently containing the best habitat or those with the greatest potential for recovery should receive increased protection and receive highest priority for restoration programs.” ROD, p. B-9.

While Section C contains a Standard and Guideline stating that Key Watersheds are highest priority for restoration, there is no Section C Standard and Guideline indicating that Key Watersheds are to receive increased protection.

b) “Road closures with gates or barriers do not qualify as decommissioning or a reduction in road mileage.” ROD, p. B-19.

This rule is critical to proper implementation of the Standard and Guideline requiring either a reduction or “no net increase” of roads in a Key Watershed. ROD, p. C-7. If this rule is eliminated the result could be much higher densities of fish habitat damaging roads in the very watersheds that are intended to contribute most to recovering fish. See Attachment A for discussion of the impacts of roads on aquatic systems.

*3. The DSEIS reduces the role that watershed analysis will play in protecting Key Watersheds*

By eliminating the requirement that watershed analysis results be used to find projects consistent with the ACS objectives, the role of watershed analysis in meeting Key Watershed protection goals is severely weakened. Section C does require a watershed analysis to be conducted in Key Watersheds before most activities can occur, but there is no Section C requirement that a watershed analysis have any substantive effect on the level, type or locations of watershed degrading projects in Key Watersheds (see Attachment A, p. 17). This was to come from the site-scale consistency

analysis. Further, it is almost certain that watershed analysis has already been conducted in all Key Watersheds; thus the requirement to conduct the analysis has long been met.

*4. The DSEIS fails to properly emphasize the role of landscape analysis (river basin or province scale) in refining the Key Watershed system*

We believe that if the agencies are going to do an EIS regarding proper scales of analysis, the EIS should clarify that it was the clear intent of FEMAT that landscape analysis would be a necessary component of proper implementation of the ACS. *See e.g.* FEMAT, p. V-54. Though focused on analysis scales, the DSEIS contains no information regarding how landscape scale analysis fits into the proposed analysis scheme. This level of analysis is critical to proper implementation of the ACS, including for the refinement of the Key Watershed system. Additionally, the range of natural variability cannot be fully assessed at a watershed or smaller scale.

C. Riparian Reserves

The importance of riparian areas in maintaining aquatic habitat and supporting a myriad of species is well documented (*see e.g.* FEMAT 1993; Spence et al. 1996; PACFISH 1995; Johnson et al. 1993). The NWFP protects these areas by specifying interim widths, the process to use in adjusting the widths, and by placing controls on the types of activity within them. The proposal weakens the protection offered by the Riparian Reserve system by demoting the role of the ACS objectives in the Riparian Reserve Standards and Guidelines, removing any limits on changing widths after watershed analysis, and apparently removing the requirement to add unstable or potentially unstable lands to the fish-bearing and permanently flowing nonfish-bearing stream buffers. The proposal may also impact interim widths of Riparian Reserves.

We know of no science that supports reducing the protection offered by the existing NWFP Riparian Reserve system. In fact, we believe it is appropriate to consider increasing NWFP widths on the smaller perennial and intermittent streams based on several studies conducted since the NWFP was established. *See* Attachment A, p. 9-10. (Several studies conducted since the NWFP have “stressed the importance of providing as much, or more, riparian protection to smaller perennial and intermittent streams, in order to protect resources and habitats in perennial streams.”)(citations omitted). The agencies have failed to clearly explain the proposal’s impacts to the Riparian Reserve system or to provide justification for the weakened protection.

*1. Loss of ACS objectives as Standards and Guidelines in the Riparian Reserve Standards and Guidelines*

As discussed at length in Section I above, the proposal demotes the ACS objectives in the Standards and Guidelines and explains their new role in a way that makes the Standards and Guidelines rather nonsensical. The agencies could clarify that meeting these objectives is a multi-scale endeavor, but must retain the importance that the ROD places on the role of the objectives in the Standards and Guidelines.

*2. Possible loss of Standard and Guideline regarding interim widths of Riparian Reserves*

As discussed in Section I(B) above, the DSEIS would equate compliance with the Standards and Guidelines in Section C and D with ACS compliance at the site-scale. It is unclear what impact this would have on the narrative sections included in Section C, and this narrative includes the specifics regarding delineation of interim Riparian Reserves that precedes the Riparian Reserve Standards and Guidelines subsection. It is critical to retain the interim width descriptions as Standards and Guidelines. The agencies need to clarify the intent on this point.

*3. Loss of Standard and Guideline regarding post-watershed analysis boundaries on permanently flowing streams*

The description for changing Riparian Reserves and setting the boundaries after a watershed analysis is fully contained in Section B. We have been unable to find any Section C Standard and Guidelines governing this process or the result. There is one sentence on p. C-31 that states “Watershed analysis and appropriate NEPA compliance is required to change Riparian Reserve boundaries in all watersheds,” but it does not reflect the important rules below. Several watershed analysis rules are included in this Section B passage:

Watershed analysis will identify critical hillslope, riparian, and channel processes that must be evaluated in order to delineate Riparian Reserves that assure protection of riparian and aquatic functions. Riparian Reserves are delineated during implementation of site-specific projects based on analysis of the critical hillslope, riparian, and channel processes and features. Although Riparian Reserve boundaries may be adjusted on permanently-flowing streams, the prescribed (interim) widths are considered to approximate those necessary for attaining Aquatic Conservation Strategy objectives. Post-watershed analysis Riparian Reserve boundaries for permanently-flowing streams should approximate the boundaries prescribed in these standards and guidelines.

ROD, p. B-13.

Additionally, post-watershed analysis Riparian Reserve widths are currently constrained by the requirement to conduct site-scale ACS objective consistency analysis. The proposal would remove all of these Standards and Guidelines governing delineation of post-watershed analysis by way of removing Standard and Guideline status from Section B, and eliminating the site-scale consistency requirement, resulting in a total lack of controls on the process. This is highly unlikely to result in adequate aquatic protection. For a description of degradation likely to result from inadequate Riparian Reserve widths, *see* Attachment A, p. 1-13).

The Effects Findings Consistency Assessment of the DSEIS seems to indicate that changes to post-watershed analysis delineation of Riparian Reserves are anticipated. In assessing the proposal’s consistency with the ROD statement “The riparian reserve system will conserve aquatic resources as well as provide dispersal habitat for spotted owls and suitable habitat for numerous species,” the DSEIS states,

The Proposed Action **does not alter the size of interim Riparian Reserves** nor does it alter the Standards and Guidelines that were developed to direct management activities within the Riparian Reserves.

DSEIS, p. B-22 (*emphasis added*).

One of the five factors that the FEMAT Aquatics Group considered in evaluating the effects of the alternatives on fish was “the amount of Riparian Reserves and type and level of management activity allowed within them.” NWFP FSEIS, 3&4-190. In assessing the likelihood of attaining a set of outcomes for habitat of certain fish stocks, FEMAT “considered the prescribed widths on permanently-flowing streams to approximate those necessary for attaining Aquatic Conservation Strategy objectives.” NWFP FSEIS, 3&4-194. Thus the FEMAT ratings for fish rely in part on interim widths remaining on permanently-flowing streams after watershed analysis. This is also likely the case for many other species whose viability ratings depended on Riparian Reserves (see (VI(A)(2) and V(A)(3)(b) – (d) below).

The agencies need to be very clear regarding whether the proposal alters in any way the required analysis for changing Riparian Reserves that is presented in Section B, or the Section B rules regarding post-watershed analysis Riparian Reserve widths on permanently flowing streams, including their enforceability. Any changes to this process or rule will result in significant environmental impacts, none of which the DSEIS alludes to.

*4. Unstable or potentially unstable lands are apparently removed from Riparian Reserves along fish bearing streams and permanently flowing non-fish streams*

Section B of the ROD lists “unstable and potentially unstable areas” as being included Riparian Reserve widths. ROD, p. B-14. The Section C Standards and Guidelines, though, adds these areas to the Riparian Reserves along some types of streams but not along fish-bearing or permanently flowing nonfish-bearing streams. ROD, p. C-30 - 31. While unstable and potentially unstable areas are often found along the seasonally flowing or intermittent streams, the agencies should make clear that these areas are part of the Riparian Reserve system no matter where located.

D. Watershed restoration

The proposal weakens the contribution of watershed restoration in two central ways. First, by decoupling watershed analysis from the ACS objectives, the proposal makes it unlikely that watershed analysis will be able to ascertain and direct the types of restoration needed in a particular watershed. Second, if the ACS were implemented correctly, watersheds in such bad shape so as to be out of the range of natural variability would not be made to suffer the further insult of site-scale projects that degrade the aquatic ecosystem. These watersheds would be in restoration-only mode. *See e.g.* DSEIS, Appendix A, Dr. Reeves *PCFFA* declaration, ¶ 16. But under this proposal, because there is no site-scale ACS objective consistency analysis, bad site-scale projects will continue even in watersheds that are in such bad shape that management actions should be focused on watershed restoration.

#### IV. THE DSEIS PROPOSAL IS NOT CONSISTENT WITH A “RANGE OF NATURAL VARIABILITY” APPROACH

The DSEIS needs to clarify whether it is attempting to utilize the concept of “range of natural variability” (“RNV”) to justify site level degradation or to eliminate site-scale consistency analysis. To the extent that RNV is being relied upon, we believe that the agencies are mistaken as to how a management system based on this concept would function. Obviously, applying the RNV concept is not as simple as the DSEIS proposal to eliminate site scale compliance requirements everywhere while never requiring meaningful relevant larger-scale analyses or their application. As Dr. Reeves points out in his “Review of Scientific Information” in the DSEIS:

It is imperative that the spatial scale be specified when RNV and cumulative effects are discussed or evaluated. At small scales the RNV is very large. Consequently, it could be argued that there would be no cumulative effects resulting from management actions, except from the most extreme impacts.

DSEIS, p. F-8.

This is exactly the failing of the DSEIS on this point – it never requires an RNV evaluation at a proper scale, and then seems to justify site-scale degradation with the logic that “not all sites were in good condition...” Without systematic, credible larger-scale analyses (landscape [river basin/province] and watershed) of RNV, we cannot know whether a particular landscape is currently within or outside RNV, and thus certainly could not pretend that RNV is somehow guiding management at the site-scale.

Importantly, as noted above, the DSEIS proposes to delete the following sentence:

In order to make the finding that a project or management action “meets” or “does not prevent attainment of” the Aquatic Conservation Strategy objectives, **the analysis must include** a description of the existing condition, **a description of the range of natural variability** of the important physical and biological components of a given watershed, and how the proposed project or management action maintains the existing condition or moves it within the range of natural variability.”

ROD, p. B-10 (*emphasis added*)(proposed for deletion by the DSEIS at p. 18).

This sentence is perhaps one of the clearest places where the ROD directs agencies to do an RNV analysis as part of watershed analysis and then apply it to project level planning. Any other references to including RNV in watershed analysis are found in Section B and would become unenforceable under the proposal. Thus if the DSEIS is attempting to rely in any way on the RNV approach, deleting this sentence makes no sense.

While we think the RNV concept holds promise, we also think it is important to note that the details of exactly how a RNV analysis would guide management have not been worked out certainly for aquatic systems. Also, while we agree that the fish habitat quality of different parts of the landscape in many cases varied through time, since the natural disturbance regime that

helped created this mosaic is largely still in effect, we find it highly unlikely that watersheds are deficient in acres at the more recently disturbed end of the spectrum.

Lastly, it would not be scientifically credible to simply allow timber management induced degradation to act as a surrogate for natural disturbance. Timber harvest and associated activities do not equal natural disturbance with regards to aquatic ecosystems and fish response. We do not think it is an accident that “Everest and Reeves (in review) reported that they found no evidence in the peer-reviewed literature where fish populations or habitat responded positively to or remained unchanged as a result of the impacts from intensive land management activities.” DSEIS, p. F-4. *See also* Reeves et al. 1993.

In closing, the information presented in the DSEIS Appendix “Review of Scientific Information” does not support the current proposal and, further, the DSEIS fails to articulate any argument to the contrary.

## V. ADEQUATE NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS HAS NOT BEEN CONDUCTED FOR THE PROPOSAL

We believe that this proposal would have significant effects if implemented and that the NEPA analysis is inadequate. The central problems with the NEPA analysis in the DSEIS include improper tiering to the NWFP NEPA analysis, failure to evaluate an appropriate range or set of alternatives, and failure to conduct proper cumulative impacts analysis. Given the real and significant changes of this major proposal, the analysis in the DSEIS is clearly inadequate while the NEPA analysis contained in the FSEIS for the NWFP no longer applies. For these reasons, we believe that the proposal lacks adequate NEPA analysis and that a new NEPA analysis must be conducted.

### A. The DSEIS has improperly tiered to the NWFP DSEIS

NEPA requires that the environmental impacts of the alternative be analyzed, including the direct and indirect effects and the significance of each. 40 C.F.R. § 1502.16; 1508.8 (a), (b). The DSEIS states that its Interdisciplinary Team (IDT) found that the “Proposed Action would not invalidate any of the assumptions or conclusions for the Selected Alternative 9.” DSEIS, p. 33. The DSEIS contains only an effects analysis that “supplements findings within the Northwest Forest Plan and its Final SEIS” and “incorporate(s) by reference” the NWFP discussions about the Affected Environment and the Environmental Consequences of the ACS. DSEIS, p. 33.

In light of the significant changes being proposed to the ACS, reliance on the NWFP FSEIS is clearly in error. The environmental effects of the DSEIS proposal are different from and exceed those analyzed for Alternative 9 in the NWFP FSEIS. The DSEIS has thus improperly tiered to the FSEIS in violation of NEPA. 40 C.F.R. § 1502.20. The IDT’s full analysis is contained in an appendix titled “Effects Findings Consistency Analysis.” DSEIS, Appendix B.

*1. The DSEIS states in several places that the four components of the ACS are maintained, but in fact the proposal would substantially weaken them, making several aspects of the NWFP analysis no longer applicable*

The IDT, in finding that the proposal does not invalidate NWFP effects findings, typically cites as rationale that the four components of the ACS are “maintained” in the Proposed Action. *See e.g.* DSEIS p. B-2. However, this is obviously a dramatic oversimplification of the proposal, which may retain the shell of each component but in fact has substantially reduced the protections they offer. Not only does weakening ACS protection change the environmental consequences analysis for fish, but also for many other species that use streams, wetlands and riparian areas. *See* NWFP FSEIS, Table 3&4-11, p. 3&4-62 for a list of such species that “depend on diverse and complex riparian and aquatic habitats.” *Id.* at 3&4-61; *see also* NWFP ROD, p. 23-4 (“The riparian reserve system will conserve aquatic resources as well as provide dispersal habitat for spotted owls and suitable habitat for numerous species.”). Some of these species are discussed below in Sections V and VI.

*2. The NWFP FSEIS analysis explicitly assumed that site-scale projects would be required to meet the ACS objectives*

The Affected Environment and Environmental Consequences section of the NWFP FSEIS is explicitly based on an understanding that the ACS prohibits projects that do not meet ACS objectives:

The overall intent of the Aquatic Conservation Strategy is to restore and maintain the ecological function and processes of watersheds and aquatic ecosystems and aquatic ecosystems within natural disturbance regimes. **Proposed projects must meet Aquatic Conservation Strategy objectives** and will be approved based on the restoration and maintenance criteria. . . Under the Aquatic Conservation Strategy, a project cannot have a negative effect, in the long term, on riparian-dependent resources. The risk has been shifted under the Aquatic Conservation Strategy because each project must meet the maintenance and restoration criteria by maintaining or restoring the physical and biological processes required by riparian-dependent resources within a watershed.

NWFP FSEIS, 3&4-68-9 (*emphasis added*).

The environmental consequences of an ACS with this requirement removed clearly would be different from what was evaluated in the NWFP FSEIS. Thus it is improper to tie to the analysis done there.

*3. The FSEIS analysis for many species explicitly relied on aspects and components of the ACS that are significantly weakened by the proposal*

The NWFP Affected Environment and Environmental Consequences section shows that the ACS provided protection relevant to the analysis of the NWFP’s impacts on not only fish but also on several non-fish species.

(a) Fish

Given the impacts of the proposal on the four components of the ACS discussed above, if this proposal is to move forward the aquatic effects analysis needs to be revisited. The five factors considered by the Assessment Team in evaluating the alternatives are listed at 3&4-190 of the NWFP FSEIS and a description of the ACS components assumed to be fully implemented by the fish ratings panel are found at 3&4-192. The agencies need to carefully evaluate how the proposal alters the assumptions relied on for the fish ratings.

For example, one of the five factors that the FEMAT Aquatics Group considered in evaluating the effects of the alternatives on fish was “the amount of Riparian Reserves and type and level of management activity allowed within them.” NWFP FSEIS, 3&4-190. In assessing the likelihood of attaining a set of outcomes for habit of certain fish stocks, FEMAT “considered the prescribed widths on permanently-flowing streams to approximate those necessary for attaining Aquatic Conservation Strategy objectives.” *Id.* at 3&4-194. Thus the FEMAT analysis regarding fish relies in part on interim widths remaining on permanently-flowing streams after watershed analysis. Additionally, any increase in activities within the Riparian Reserves due to a weakening of the Standards and Guidelines – including weakening consideration of the ACS objectives in determining compliance - could also change the FEMAT “viability” ratings for fish.

Additionally, the panel that performed the assessments of the alternatives was “instructed to assume that the Aquatic Conservation Strategy would be fully implemented.” *Id.* at 3&4-192. The components included “Watershed analysis, which is an analytical procedure used to support planning further protection or management (including restoration projects within a basin).” *Id.* Under the DSEIS proposal, since simply complying with Section C and D Standards and Guidelines is deemed compliance with the ACS, no “further protection” would ever be required, even if found necessary through watershed analysis. Thus the assumption that watershed analysis, as apparently presented to the panel, would be fully implemented would no longer hold under the DSEIS proposal.

#### (b) Northern Spotted Owls

In 1990, the Interagency Scientific Committee (ISC) designed a strategy to conserve northern spotted owl populations on federal lands. Thomas et al. 1990. The ISC strategy was subsequently incorporated into the Final Draft Recovery Plan for the spotted owl in 1992. USDO I 1992. In its 1990 report, the ISC identified a set of large owl reserves (“Habitat Conservation Areas”), and a rule for managing the lands between these reserves referred to as the 50-11-40 rule. The purpose of the 50-11-40 rule was to maintain adequate dispersal habitat so that owls could travel between reserves.

Specifically, the 50-11-40 rule required that “50 percent of the forest within a quarter-township be maintained with an average tree dbh (diameter at breast height) of 11 inches and 40 percent canopy closure.” The Report of the Scientific Analysis Team, Glossary, p. 499 (USFS 1993).

The FEMAT owl scientists concluded that the extensive Riparian Reserve system found in most of the options put forward, including the chosen Option 9, would suffice for owl dispersal habitat and that the 50-11-40 rule could be dropped. Our analysis shows that the current proposal could result in both activities within Riparian Reserves, and changes to post-watershed analysis

Riparian Reserve boundaries, not anticipated by FEMAT and the NWFP. The agencies must analyze the impacts of these changes on northern spotted owls whose viability ratings in the NWFP was dependent in part on these Riparian Reserves.

The relevance of Riparian Reserves to the NWFP's impact on spotted owls is recognized at several places in FEMAT. *See e.g.* FEMAT, p. IV-72, 183-184, 189. Additionally, the tables used by the assessment team in evaluating effects on the owl consistently include acres of Riparian Reserves. For example, see Table IV-15, p. IV-74, titled "Acres of Riparian Reserves by elevation bands, and percent (in parenthesis) of total federal land represented by those reserves in each elevation band."

#### (c) Amphibians

Regarding amphibians and buffer widths, FEMAT states: "Because of the preponderance of riparian-associated species, overall results of the viability assessment were strongly influenced by the level of riparian buffer protection along headwater and intermittent streams in each option." p. IV-146. Further, regarding activity within the buffers FEMAT states, "Because so many of the species of amphibians are associated with riparian systems, understanding the relationships between riparian management and population dynamics is a high priority." p. IV-148. Since both the level of activity within and the post-watershed analysis widths of Riparian Reserves are at issue under this proposal, the impacts on amphibians need to be carefully evaluated.

We would also like to bring to the agencies' attention two new studies that indicate that land use impacts on amphibians may be more detrimental than assumed in FEMAT. Both studies appear in the June 2003 issue of *Conservation Biology*. One study found that protection of riparian buffers alone was not nearly as highly correlated with high abundances of salamanders as was the percentage of disturbed area in the watershed. Wilson and Dorcas 2003. This may well have implications for the fate of salamanders under the proposal to equate ACS compliance with the Section C (Riparian Reserve) Standards and Guidelines.

The second study found that effects of alternative silvicultural treatments such as thinning on salamander populations were not significantly different from those of clearcuts. Knapp et al. 2003. This appears to have significant implications for silvicultural treatments within Riparian Reserves.

We note that the needs of amphibians were also intended to be significantly addressed by the Survey and Manage provisions of the NWFP. Currently the administration is proposing to severely weaken the Survey and Manage provisions. Taken together we believe that the Survey and Manage proposal, this ACS proposal, and the new science warrant a detailed analysis of the proposals' likely effects on amphibians.

#### (d) Many other species

The ratings for many other species were also dependent in part on Riparian Reserves and other ACS components. *See e.g.* FEMAT, for marbled murrelets (IV-162), other birds (IV-168), red

tree voles (IV-173), fishers and martens (IV-174), bats (IV-179) and possibly mollusks (IV-135). *See also* NWFP FSEIS, Table 3&4-11, p. 3&4-61-62 for a list of species that “depend on diverse and complex riparian and aquatic habitats;” and NWFP ROD, p. 23-4.

B. If the DSEIS “No Action” alternative effects are unclear, tiering is improper

The Environmental Consequences section of the DSEIS also contains a statement that contraindicates the tiering approach. This section asserts that

The environmental consequences of the alternatives are highly speculative. The effects of No Action are particularly uncertain because the current language contains ambiguities that can be misinterpreted. DSEIS, p. 34.

The DSEIS tiers to the NWFP FSEIS regarding analysis of the Proposed Action. However, the language of the No Action Alternative is exactly the language of the alternative that was evaluated in the NWFP FSEIS. Confusingly, the DSEIS asserts that the Environmental Consequences of No Action (the original ACS language) are “Less Similar to Alternative 9 in the Northwest Forest Plan” and that those of the Proposed Action are “More similar to Alternative 9 in the Northwest Forest Plan”. DSEIS, p. 26. Perhaps this is based on a false assumption that the environmental consequences were derived from the Probable Sale Quantity, when in fact they were derived specifically from the language and land allocations that detail how the options would function on the ground. In any case, if the No Action alternative effects are so unclear as to make an environmental consequences analysis “highly speculative,” then certainly tiering to the NWFP analysis raises NEPA compliance issues.

C. The DSEIS has not analyzed a proper range or set of alternatives

NEPA requires the agencies to explore and evaluate all reasonable alternatives, and briefly discuss why alternatives eliminated from detailed study were so eliminated. 40 C.F.R. § 1502.14(a). The agencies have failed to do so here.

The DSEIS includes only the chosen action alternative and a no action alternative but there are many other reasonable alternatives. An obvious alternative that warranted consideration was simply proper implementation of the ACS. In our scoping comments we stated that the SEIS must explore the alternative of faithful compliance with the ACS, and with the court rulings in the *PCFFA* litigation. Faithful implementation of the ACS is not represented in the Action alternative, or in the No Action alternative (*see e.g.* DSEIS p. 26, Figure 3 – showing the “Environmental Consequences of “No Action” to be “Less similar to Alternative 9 in the Northwest Forest Plan.”). In addition the decision to not analyze the alternative of faithfully implementing the ACS was arbitrary and capricious in violation of the Administrative Procedures Act. 5 U.S.C. § 706(2)(A).

D. The DSEIS lacks an adequate cumulative effects analysis

The agencies have failed to adequately consider the cumulative environmental effects of past, present and reasonably foreseeable future actions, including federal and non-federal, as required

by NEPA. Clearly the cumulative effects of projects undertaken pursuant to the current proposal will exceed those undertaken pursuant to the current NWFP. This is certainly true for impacts to aquatic systems and associated fauna, and also to other species as discussed above, thus the agencies cannot rely on the NWFP FSEIS analysis alone.

Additionally, the DSEIS has failed to consider the likely impacts of this proposal along with other current administration proposals including the Survey and Manage EIS, and the likely upcoming proposal to revert back to timber as the dominant use on Oregon and California railroad lands, and any others deemed pertinent. The change in Oregon and California lands management would have huge implications for the efficacy of the ACS in some basins in the NWFP area because in some places the Oregon and California lands are critical anchors for aquatic species. There are interrelated and significant impacts from these proposals that must be analyzed in one document.

E. The Purpose and Need statement in the DSEIS contains an overly narrow Purpose and includes misleading and/or false information

The stated Purpose of the proposal is to “improve agency success in planning and implementing projects that follow the Northwest Forest Plan principles, including a predictable and sustainable timber supply.” DSEIS, p. 10. We believe that this purpose is too narrow, and is not well served by the proposal for all the reasons discussed above. Faithful implementation of the NWFP is the key to a sustainable timber supply. Additionally, a Purpose of increasing timber harvest at the cost of some of the resource protections in the NWFP is not consistent with the Plan’s principles.

The Need section opens with a paragraph that contains several inaccuracies and unsupported statements. The implication is that there is a need to address ACS interpretation problems arising from the *PCFFA* litigation, but the DSEIS misinterprets or misrepresents the holdings and rationale of the *PCFFA* opinions, thus leaving unclear the real purpose and need for the EIS. This raises serious questions about the appropriateness of undertaking the proposed action; possibly the decision to proceed with the proposal is arbitrary and capricious and in violation of the Administrative Procedures Act. The DSEIS states:

Projects needed to achieve Northwest Forest Plan goals have been delayed or stopped due to misapplication of certain passages in the Aquatic Conservation Strategy. The ACS has been interpreted to mean that every project must achieve all ACS objectives at all spatial and temporal scales. This interpretation suggests land managers must demonstrate that a project will maintain existing conditions (or lead to improved conditions) at every spatial and temporal scale. Any project that may result in site-level disturbance to aquatic or riparian habitat, no matter how localized or short-term, could be precluded under this interpretation. This interpretation establishes a nearly impossible expectation for demonstrating that projects follow the ACS.

DSEIS, p. 6.

First, based on our knowledge of the *PCFFA* litigation, it appears that any misapplication of the ACS occurred as a result of the action agencies misunderstanding or misconstruing the *PCFFA*

litigation. For example, although restoration projects were explicitly excluded from the injunction in the first *PCFFA* District Court case, some Forest Service and BLM administrative units apparently held up restoration projects initially. We believe that a two-day training session for agency resource professionals, NEPA specialists and decision makers is the most productive way to address such a misapplication.

Second, the DSEIS fails to disclose when and where the ACS was “interpreted to mean that every project must achieve all ACS objectives at all spatial and temporal scales.” DSEIS, p. 6. This seems to be a central problem that the DSEIS is attempting to address, yet nothing in the record, or anywhere to our knowledge, indicates that anyone has ever interpreted the ACS this way. There is certainly nothing in the ACS to support such an interpretation, and it is clearly not what the courts found in the *PCFFA* litigation. For example, the second District Court opinion in the *PCFFA* litigation agreed with NMFS that some degradation at the project level does not, standing alone, constitute ACS noncompliance, as recognized in the Programmatic Biological Opinion for the Northwest Forest Plan.” 71 F. Supp.2d 1063 (W.D. Wash. 1999). Thus it was not the court’s view that all ACS objectives had to be met at all spatial and temporal scales.

Third, there is simply no evidence that anybody’s current interpretation is that “(a)ny project that may result in site-level disturbance to aquatic or riparian habitat, no matter how localized or short-term, could be precluded under this interpretation.” Restoration projects moved forward from the *PCFFA* litigation and it is our understanding that NMFS has been approving others with concurrence letters.

The Need statement goes on to cite the second *PCFFA* District Court opinion as “interpreting” the NWFP to require that “not only must the ACS objectives be met at the watershed scale . . . each project must also be consistent with the ACS objectives, i.e. it must maintain the existing condition or move it within the range of natural variability.” [*PCFFA v. NMFS*], 71 F.Supp.2d 1063, 1069 (W.D. Wash. 1999).” DSEIS, p. 7. We fail to see how this is an “interpretation” since everything the Court says is either stated verbatim or easily derived from almost exact language on page B-10 of the ROD. It also appears to us consistent with the declaration of Dr. Reeves that is appended to the DSEIS. Importantly, this is not the interpretation that the DSEIS identifies as the interpretation problem it is trying to solve. DSEIS, p. 6 (first page of the Need Section, discussed above.)

We believe that what the DSEIS is presenting as an interpretative problem is actually the Court understanding the NWFP language, citing it, and stopping projects that were out of compliance, while other projects were allowed to go forward. Further, the problem in the *PCFFA* litigation was not somebody’s unrealistic expectations for the ACS at multiple scales, rather the problem was that NMFS had not shown how it was requiring ACS compliance at any scale. The proper way to address these issues is to faithfully implement the ACS, not use purported interpretive problems to weaken the ACS.

Lastly, although the Purpose includes providing a stable timber supply, given the legal problems with this proposal we would suggest that the alternative that we recommended during scoping would better fulfill this Purpose. That alternative would be faithful implementation of the ACS in accordance with the *PCFFA* rulings. We believe that such implementation would provide the

most stable timber supply while meeting applicable legal requirements, thus avoiding a global injunction of the type seen prior to the existence of the NWFP.

F. The agencies failed to disclose the relationship between this DSEIS and the negotiations that occurred between the timber industry and the various federal agencies and departments

In April of 2003, several documents regarding Pacific Northwest federal forest management were released in response to a Freedom of Information Act lawsuit brought by Earthjustice for three environmental groups. See <http://www.earthjustice.org/news/display.html?ID=581>. The released documents show a pattern of timber industry influence on the Bush administration regarding the NWFP and federal forest management in the NWFP region more generally. Not surprisingly one of the top five timber industry demands was for the administration to weaken the ACS in a manner consistent with the current proposal. The role of these negotiations, and their relationship to the Purpose and Need statement and the substance of the proposal, need to be disclosed.

## VI. THE PROPOSAL LIKELY VIOLATES THE NATIONAL FOREST MANAGEMENT ACT

The National Forest Management Act (“NFMA”) is the central law guiding land and management planning on Forest Service lands. 16 U.S.C. 1600 *et seq.* The Forest Service’s implementing regulations for NFMA are found at 36 C.F.R. 219. The ACS DSEIS appears to violate several provisions of NFMA as implemented by regulation, primarily by failing to adequately consider and plan for ecosystem and species diversity, and by failing to use the best science available.

A. The agencies have failed to develop and supplement ecosystem and species diversity information as required by the NFMA regulations

The NFMA regulations require the responsible official, when doing a plan revision, to develop or supplement several listed types of information and analyses related to ecosystem and species diversity. 36 C.F.R. 219.20(a). For a plan amendment, this is to be done “to the extent the responsible official considers appropriate.” *Id.* Although the DSEIS identifies itself as a plan amendment (*see e.g.* DSEIS, p. 10), given the magnitude of changes being proposed by the DSEIS, this proposal should be considered a plan revision and thus the ecosystem information must be developed or supplemented. In the alternative, even if the proposal is properly considered a plan amendment, given the magnitude of changes being proposed the responsible official is acting in an arbitrary and capricious manner in violation of the Administrative Procedures Act in not choosing to develop and supplement the ecosystem and species diversity information.

B. The proposal violates the NFMA regulation requirement to provide for ecosystem and species diversity at appropriate spatial and temporal scales

The scientists who designed the ACS determined that the site scale was one of the scales at which to apply the requirement for maintaining ecosystem and species diversity. This is evidenced by the requirement for project (site) scale activities to be consistent with the ACS objectives. The responsible officials for the NWFP also determined that this was appropriate when they approved the NWFP, yet this plan decision would remove the requirement that ecosystem and species diversity be considered at the site scale. This appears to violate 36 C.F.R. 219.20(b).

C. The proposal likely fails to “maintain viable populations of existing . . . vertebrate species” as required by the Forest Service implementing regulations

Under the NFMA, each national forest must protect watershed conditions, soil productivity, and biological diversity. 16 U.S.C. § 1604(g)(3)(E)(i) & (F)(i). The NFMA requires the Forest Service to adopt regulations to “provide for diversity of plant and animal communities,” and to “insure that timber will be harvested ... only where ... protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water ... where harvests are likely to seriously and adversely affect water conditions or fish habitat.” 16 U.S.C. § 1604(g)(3)(B),(E)(iii). The Forest Service’s NFMA regulations implementing these duties require that “[f]ish and wildlife habitat should be managed to maintain viable populations of existing native ... vertebrate species....” 36 C.F.R. § 219.19; *see also* 36 C.F.R. § 219.27(a)(6) (“minimum specific management requirements” for forest plans include providing “adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species”).

We note that with respect to both aquatic and terrestrial species, judicial review of the NWFP found it to be adequate but with very little margin for error. *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff’d*, 80 F.3d 14-1 (9<sup>th</sup> Cir. 1996) (finding that full implementation of all components of the NWFP is necessary for it to remain within legal requirements). Any backsliding now runs a serious risk of forcing the NWFP out of compliance with NFMA with regards to maintaining the viability of several species as discussed below. This would clearly have big consequences for the implementation of any projects proposed under the NWFP, until the problem could be fixed. The agencies must analyze and disclose the degree to which the proposal alters any assumptions regarding the ACS upon which these viability ratings are based.

*1. Fish*

Significant protections were added between the draft and final NWFP SEIS to bring the “viability” ratings for salmonids up to a level likely to meet the NFMA viability requirement. The current proposal likely fails to meet the NFMA viability standard for all of the reasons discussed above. *See* Section V(A)(3)(a) above for discussion of the NWFP analysis regarding alternative impacts on fish.

In addition, the ecological information that the NFMA regulations require to be developed or supplemented includes “(t)he viability of each species listed under the Endangered Species Act . . . must be assessed.” *Id.* at 219.20(a)(2)(ii)(A). We note that several salmonids have been listed under the Endangered Species Act since the NWFP was implemented and that viability

assessments should be done for these in light of the proposed changes. The listing decisions for these fish contain additional relevant information regarding the impacts of land management on these fish.

## 2. *Non-fish species*

Additionally, the FEMAT viability ratings for many other species were in part dependent on the components of the ACS, especially Riparian Reserves (*see e.g.* NWFP FSEIS, Table 3&4-11, p. 3&4-62). Many of these ratings are likely to fall under the proposal for all of the reasons discussed above and some may fall below legally acceptable standards. The agencies must properly analyze and disclose these impacts.

### D. Failure to include records of negotiations between the timber industry and various federal agencies and departments may violate NFMA planning requirement

We understand from information received in response to a Freedom of Information Act request filed by Earthjustice on behalf of three environmental groups that discussions took place between the timber industry and several federal agencies and the US Department of Justice regarding federal forest management in the Northwest Forest Plan area. *See* <http://www.earthjustice.org/news/display.html?ID=581>. One of the top requests by the timber industry was to make changes to the ACS seems to be mirrored in the DSEIS.

The NFMA regulations require a plan to “contain or reference a list of materials, Forest Service policies, and decisions used in forming plan decisions.” 36 C.F.R. 219.30(e). We believe that the substance of the timber industry meetings as they relate to the proposal should be included in this DSEIS.

### E. The plan amendment is not consistent with the best available science nor has the best available science been considered in planning as required by the NFMA regulations

The NFMA regulations state that the “responsible official must ensure that the best available science is considered in planning” and “when appropriate, should acknowledge incomplete or unavailable information, scientific uncertainty, and the variability inherent in complex systems.” *Id.* at § 219.22(a). Additionally the regulations require the responsible official to ensure that “plan amendments and revisions are consistent with the best available science.” *Id.* at 219.24(a).

In this case, the FEMAT Report is the best available science particularly on the specific issues being considered in the proposal, yet the proposal significantly diverges from FEMAT regarding several important ACS provisions, as explained above. We note that the National Marine Fisheries Service has recognized in a Biological Opinion that the FEMAT assessment of the aquatic impacts of NWFP management alternatives is the best available science on this issue. USDC 1997. The DSEIS offers no science in support of these departures, and in fact offers no discussion of the scientific issues surrounding these departures.

Importantly, the ACS EIS Team interviewed FEMAT scientists about the extent to which the changes that are now included in the DSEIS were consistent with their views of how the ACS

was intended to function. On several key points the scientists' responses diverge from the actions taken in the proposal. For example, scientists indicated support for site-scale evaluation of projects as they relate to meeting the goals of the ACS, and noted that some site-scale projects could be inconsistent with meeting the ACS objectives at the watershed or larger scales. Additionally, scientists stated that site-scale compliance with Section C and D alone was not consistent with their view of how the ACS was designed to function. Also, see Attachment A to our comments, which discusses additional relevant studies.

The agencies have violated 36 C.F.R. 219.22(a) by failing to "ensure that the best available science is considered in planning." Additionally, the agencies have violated 36 C.F.R. 219.24(a) because this plan amendment is not consistent with the best available science.

## VII. THE PROPOSAL LIKELY VIOLATES THE DATA QUALITY ACT

Section 515 of the Treasury and General Government Appropriations Act for fiscal year 2001, known as the Data Quality Act, directed the Office and Management and Budget (OMB) to issue government wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." Public Law 106-554; H.R. 5658 (codified at 44 U.S.C.A. § 3506). OMB published guidelines effective October 1, 2002. OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies. 66 Fed. Reg. 49, 718 (Sept. 28, 2001). Both the US Department of Agriculture and the US Department of Interior have issued their own implementing guidelines as directed by the OMB, which are applicable here along with the OMB guidelines because the decision makers are the Secretaries of Agriculture and Interior.

Pursuant to the Data Quality Act guidelines of both Departments we are raising our requests for correction of information in the ACS DSEIS in these timely comments on the DSEIS. Because the requirements for the content of requests for correction are nearly identical between the Departments, we have written one combined request but address it to both Departments.

### Requests for Correction

This is a request for correction of information contained in the Draft Supplemental Environmental Impact Statement entitled "Clarification of Language in the Record of Decision for the Northwest Forest Plan" (ACS DSEIS) made under the OMB, USDA and USDOJ Data Quality Act Information Quality Guidelines. The ACS DSEIS can be found on the web at: <http://www.reo.gov/acs/>. This request is directed at both the USDA and USDOJ and their respective Secretaries who are the decision makers for this DSEIS.

The requestors for these corrections are all of the co-signors on the cover letter accompanying these comments. Their addresses can also be found on the cover page.

Below, for each specific description of information that we seek to correct, we explain: a) why it is in noncompliance with the OMB, USDA and/or USDOJ Information Quality Guidelines; b)

the effect of the error and how it affects us; and c) a recommendation for how to correct the information.

Regarding all of the information discussed below, its portrayal by the agencies is “influential,” as defined by OMB, because it has a clear and substantial impact on the important public policies regarding salmon, watershed and old growth forest protection in the Pacific Northwest. Thus high standards for transparency apply to this information.

1. DSEIS statements characterizing the litigation entitled *Pacific Coast Federation of Fishermen’s Associations v. National Marine Fisheries Service (PCFFA)* need to be corrected

This litigation includes three judicial opinions, one of which is included in the ACS DSEIS. The litigation is referred to multiple times in the DSEIS and appendices but it is significantly misconstrued. *See e.g.* DSEIS, p. 6 (“The ACS has been interpreted to mean that every project must achieve all ACS objectives at all spatial and temporal scales); DSEIS, p. 41 (“Under No Action, projects with any short term impact could have the potential to be stopped or delayed due to ACS misinterpretations, appeals and litigation.”). Evidence of the clear and substantial impact of this information is the fact that the agencies base the Need for this DSEIS largely on this misrepresentation of the *PCFFA* litigation. Higher standards apply to this information due its influential nature.

*a) Non-compliance with applicable Data Quality Act guidelines*

i) The information is not reproducible

The agencies’ portrayal of the *PCFFA* litigation is not capable of being substantially reproduced because independent analysis of the original supporting data (the opinions) would not generate similar analytic results.

ii) The information is not of adequate quality, objectivity or utility, or integrity

Based on our analysis in Sections I through III and V(E) above, it is clear that the information that the agencies are disseminating regarding the *PCFFA* litigation is not substantively accurate, reliable or unbiased and is not presented in an accurate, clear, complete and unbiased manner.

iii) The information is not based on the best available science

Multiple reputable scientific sources clearly explain how the ACS was intended to function and these explanations show that the agencies are misunderstanding and/or misrepresenting the opinions in the *PCFFA* litigation. *See* Section V(E).

Scientific sources in disagreement with the DSEIS include the NWFP and the FEMAT Report upon which it was based, the REO memo found in Appendix A to the DSEIS, and the declaration by Dr. Reeves also found in Appendix A to the DSEIS. A careful review of these sources should

inform the agencies that their representation of the *PCFFA* litigation is inaccurate. We note that the National Marine Fisheries Service has recognized in a Biological Opinion that the FEMAT assessment of the aquatic impacts of NWFP management alternatives is the best available science on this issue. NFMS 1997.

*b) The effect of the error and how it affects us*

This information appears in a NEPA document containing a proposal to significantly weaken the NWFP and we are using it to respond to the NEPA document. Since the Purpose and Need of this DSEIS is primarily based on the agencies' misrepresentation of the implications of the *PCFFA* litigation, one effect of the error is the proposal contained in the ACS DSEIS. The proposal initially has affected us because we must respond to a groundless EIS. Another effect of the misinformation has been to require us to do our own analysis of the issue of how the litigation relates to the proposal because we cannot rely on the DSEIS representations on this issue. We are concerned that people reading the NEPA document at face value will be misled into incorrectly thinking the impacts of implementing the proposal would be minimal.

More importantly, because the proposed amendments to the ACS would severely weaken the protections offered by the NWFP, if the proposal is implemented we would be affected by reduced protection of our federal forests, harm to the species we work to protect (including those listed under the Endangered Species Act), and/or potentially another region wide injunction against implementing the amended NWFP.

*c) Recommendation and justification for how to correct the information*

If the agencies pursue this proposal, they should correct the information by simply representing the *PCFFA* opinions as judicial recognition of the requirements of the ACS. This is important because otherwise the agencies are misleading the public, making false statements, and justifying an EIS where one is not needed. We suggest that a better way to correct the problem is to abandon this proposal and instead focus on faithful implementation of the NWFP and the ACS.

2. DSEIS statements that the effects of the proposal are consistent with the effects of Option 9 of the NWFP need to be corrected

The DSEIS states that the "effects of the Proposed Action (in the ACS DSEIS) are consistent with the effects of Alternative 9 in the Northwest Forest Plan." DSEIS, p. 42. Similar representations are made throughout the document. These statements are flatly wrong because the proposal severely weakens the four components of the ACS, eliminates the core ACS requirement that projects be consistent with the ACS objectives, and eliminates Standard and Guideline status from most of the Attachment A to the ROD. See Sections I through III above.

*a) Non-compliance with applicable Data Quality Act guidelines*

i) The information is not reproducible

The agencies' analytical conclusions that the proposal's environmental effects are consistent with those analyzed in the NWFP FSEIS for Option 9 are not capable of being substantially reproduced because independent analysis of the original supporting data (FEMAT and the NWFP) would not generate similar analytic results.

For example, the proposal would delete an explicit core ACS requirement that projects be found consistent with the ACS objectives (*see* Section I above). Since this requirement is explicitly stated in the NWFP, it is highly unlikely that an independent analysis would find that it was not required. In fact, the analysis contained in the REO memo fully supports the requirement that site-scale projects be consistent with ACS objectives.

A second example is the new rule put forward in the DSEIS that compliance with the Standards and Guidelines in Sections C and D will be deemed compliance with the ACS at the site-scale. This is clearly not consistent with the intent behind the ACS and, given the important ACS requirements included in Section B and in narrative sections within Section C, an independent analysis would not come to the conclusion that the new DSEIS rule is consistent with the ACS.

- ii) The information is not of adequate quality, objectivity or utility, or integrity

The DSEIS represents that it is simply clarifying language in the Record of Decision for the NWFP but is not altering the intent or effects of the ACS. Based on our analysis in Sections I through III above, it is clear that the information that the agencies are disseminating regarding the impacts of its proposal is not substantively accurate, reliable, or unbiased and is not presented in an accurate, clear, complete and unbiased manner.

- iii) The information is not based on the best available science

The DSEIS represents that it is simply clarifying language in the Record of Decision for the NWFP but is not altering the intent or effects of the ACS. However, multiple scientific sources clearly explain how the ACS was intended to function and these explanations clearly indicate that the DSEIS proposal is not consistent with the ACS. These sources include the NWFP and the FEMAT Report upon which it was based, and the REO memo and the declaration by Dr. Reeves both found in Appendix A to the DSEIS. We note that the National Marine Fisheries Service has recognized in a Biological Opinion that the FEMAT assessment of the aquatic impacts of NWFP management alternatives is the best available science on this issue. NMFS 1997. The DSEIS has failed to base its information on these best science sources, instead diverging significantly from them and offering no science in support.

Importantly, the ACS EIS Team interviewed FEMAT scientists about the extent to which the changes that are now included in the DSEIS were consistent with their views of how the ACS was intended to function. Scientists indicated support for site-scale evaluation of projects as they relate to meeting the goals of the ACS, and noted that some site-scale projects could be inconsistent with meeting the ACS objectives at the watershed or larger scales. Additionally, scientists stated that site-scale compliance with Section C and D alone was not consistent with

their view of how the ACS was designed to function. The DSEIS failed to analyze or present these responses and has thus failed to use the best science available.

*b) The effect of the error and how it affects us*

This information appears in a NEPA document containing a proposal to significantly weaken the NWFP and we are using it to respond to the NEPA document. One effect of the misinformation has been to require us to do our own analysis of the impacts of the proposal and how they differ from that of the NWFP because we cannot rely on the DSEIS representations on this issue. We are concerned that people reading the NEPA document at face value will be misled into incorrectly thinking the impacts of implementing the proposal would be minimal.

Additionally, if the environmentally damaging Action Alternative is chosen based on this non-complying information, another effect will be the loss of critical forest protections.

*c) Recommendation and justification for how to correct the information*

If the agencies pursue this proposal, they should correct the information by acknowledging the true impacts of the proposal and fully analyzing and disclosing how these are different from those of Option 9 as analyzed in the NWFP FSEIS. This is important because otherwise the agencies are misleading the public, making false statements, and will produce a FSEIS that likely violates several laws including NEPA and the National Forest Management Act. We suggest that a better way to correct the problem is to abandon this proposal and instead focus on faithful implementation of the NWFP and the ACS.

3. DSEIS statements that the four components of the ACS are “retained” in the proposal need to be corrected

The DSEIS states in numerous places that the four components of the ACS are “retained” in the proposal (*see e.g.* DSEIS, Appendix B-2.). However, this is clearly not the case as explained in detail in Section I through III above.

*a) Non-compliance with applicable Data Quality Act guidelines*

i) The information is not reproducible

The agencies’ analytical conclusion that the four components of the ACS are “retained” is not capable of being substantially reproduced because, given the proposal’s severe weakening of the four components, it is simply not possible that an independent analysis of the original supporting data (FEMAT, the NWFP and the proposal) would generate similar analytic results.

ii) The information is not of adequate quality, objectivity or utility, or integrity

The DSEIS represents that it is simply clarifying language in the Record of Decision for the NWFP but is not altering the intent or effects of the ACS. Based on our analysis in Sections I

though III above, it is clear that this information that the agencies are disseminating regarding the effects of its proposal on the four components of the ACS is not substantively accurate, reliable, or unbiased and is not presented in an accurate, clear, complete and unbiased manner.

iii) The information is not based on the best available science

The DSEIS has failed to base its statements that the four components are retained on any of the FEMAT scientist interview responses, or an accurate evaluation of FEMAT, the NWFP, or the REO memo. Any of these sources illuminate the fact that while the proposal may retain the names of the components, their functions in protecting and restoring aquatic habitat is severely weakened.

*b) The effect of the error and how it affects us*

This information appears in a NEPA document containing a proposal to significantly weaken the NWFP and we are using it to respond to the NEPA document. One effect of the misinformation has been to require us to do our own analysis of the impacts of the proposal and how they differ from that of the NWFP because we cannot rely on the DSEIS representations on this issue. We are concerned that people reading the NEPA document at face value will be misled into incorrectly thinking the impacts of implementing the proposal would be minimal.

Additionally, if the environmentally damaging Action Alternative is chosen based on this non-complying information, another effect will be the loss of critical forest protections.

*c) Recommendation and justification for how to correct the information*

If the agencies pursue this proposal, the agencies should correct the information by acknowledging the impacts of the proposal on the four components of the ACS and fully analyzing and disclosing the likely impacts of this weakening. This is important because otherwise the agencies are misleading the public, making false statements, and will produce a FSEIS that likely violates several laws including NEPA and the National Forest Management Act. We suggest that a better way to correct the problem is to abandon this proposal and instead focus on faithful implementation of the NWFP and the ACS.

## VIII. THE PROPOSAL MAY VIOLATE THE FEDERAL LAND POLICY AND MANAGEMENT ACT

The Federal Land Policy and Management Act deals primarily with the management of Bureau of Land Management lands. 43 U.S.C. §§ 1701-1784 (“FLPMA”). Although the NFMA regulations apply only to lands administered by the US Forest Service, during the development of alternatives for the NWFP the viability regulation was used “as a criterion” for development of alternatives that would also apply to Bureau of Land Management lands. *See* ROD, p. 44. This was seen as serving “the important policy goal of protecting the long-term health and sustainability of all of the federal forests within the range of the owl and the species that inhabit them,” and to be in accordance with several laws including FLPMA. *Id.*

FLPMA has several of its own natural resource management standards and while we agree that they were met when the Bureau of Land Management lands were being managed to the NFMA viability standard, we question whether they will be met under the current proposal which may fall well short of meeting the viability standard for many species. The agencies need to analyze whether the current proposal is in compliance with the natural resource management standards in FLPMA.

#### IX. THE PROPOSAL MAY VIOLATE THE OREGON AND CALIFORNIA LANDS ACT

The Oregon and California Lands Act governs certain lands in the Northwest Forest Plan area that are managed by the Bureau of Land Management. 43 U.S.C. §§ 1181(a) - (j). Although these lands are to be managed for permanent forest production, other stated purposes include “protecting watersheds, regulating streamflow, and contributing to the economic stability of local communities and industries.” *Id.* § 1181(a). The ROD explains how Riparian Reserves and other components of the ACS will meet the watershed protection and streamflow regulation purposes (ROD, p. 50), but this may no longer be true if the current proposal is adopted. The agencies need to analyze whether the current proposal is in compliance with the Oregon and California Lands Act.

Additionally, the ROD explains that without a federal management policy that minimized the need for future Endangered Species Act listings, such listings could contribute to economic instability of local communities and limit achievement of permanent forest production. *Id.* This analysis should also be revisited if the DSEIS proposal is pursued.

#### X. THE PROPOSAL MAY RESULT IN VIOLATIONS OF THE CLEAN WATER ACT ANTI-DEGRADATION PROVISION

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, Congress declared the national goal of eliminating the “discharge of [all] pollutants into navigable waters” by 1985, and of attaining “water quality which provides for the protection and propagation of fish, shellfish, and wildlife” by July 1, 1983.

FEMAT details the degraded state of many of the streams in the NWFP region, and the fact that many fail to meet CWA water quality standards. Similarly the DSEIS reports that “(a)pproximatley 83 sub-basins within the Northwest Forest Plan area contain streams that have been listed as impaired because of high water temperature and/or sediment loads” and that several listings have occurred since 1994. DSEIS, p. 31.

Under the CWA, any further degradation of the water quality of these streams is banned. Weakening the ACS may put the agencies at-risk of violating the anti-degradation provision of the Clean Water Act because it may allow land management induced sediment and temperature loading in water quality limited streams.

#### XI. THE PROPOSAL TO WEAKEN THE NORTHWEST FOREST PLAN JEOPARDIZES SEVERAL OTHER PLANS AND DECISIONS THAT ARE TIERED TO IT

Subsequent to establishment of the NWFP, many plans, rules and ESA decisions have tiered to the plan. To the extent that they counted on ACS protections being in place on federal lands, any weakening of the ACS puts their legality in question.

A. Reinitiation of Endangered Species Act Section 7 consultation regarding the Northwest Forest Plan by National Oceanic and Atmospheric Administration (NOAA) Fisheries and US Fish and Wildlife Service (USFWS) will be required

The changes proposed by the DSEIS will require that Endangered Species Act (ESA) §7 consultation regarding the Northwest Forest Plan be redone by NOAA Fisheries and by USFWS for the aquatic species under each agency's jurisdiction. Programmatic compliance with the ESA has been explicitly tied to full implementation of the ACS as written in mandatory terms and conditions of incidental take authorization by the National Marine Fisheries Service. *See e.g.* NMFS (Biological Opinion on NWFP) 1997, at 66-67 incorporating language at ROD B-10. For some or all listed aquatic species the proposal may no longer support a no jeopardy finding. In addition, given the reliance of viability ratings for many species on ACS components, reinitiation for some non-fish species may also be required.

B. Water Quality Management Plans prepared, along with Total Maximum Daily Load reports, pursuant to the Clean Water Act in the Northwest Forest Plan area may no longer be adequate

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 303(d) of the Clean Water Act requires states to develop a list of rivers, streams and lakes that cannot meet water quality standards through controls on industrial and sewage treatment plants alone ("303(d) list"). Section 303(d) further requires the states to estimate the total maximum daily load of pollutants that would meet the applicable water quality standards. By agreement with the Environmental Protection Agency, states develop and submit a Water Quality Management Plan (WQMP) that will result in reductions of pollutants to the level of the load allocations prescribed in the TMDL.

FEMAT details the degraded state of many of the streams in the NWFP region, and the fact that many fail to meet Clean Water Act water quality standards and have been placed on a 303(d) list. Similarly the DSEIS reports that "(a)pproximately 83 sub-basins within the Northwest Forest Plan area contain streams that have been listed as impaired because of high water temperature and/or sediment loads" and that several listings have occurred since 1994. DSEIS, p. 31.

Weakening the ACS throws into question the adequacy of the Water Quality Management Plans that have been or are being completed for watersheds with non-point source water quality problems, such as the Nestucca and Grayback/Sucker watersheds. If the proposal results in less aquatic protection on federal lands, protection on state and private lands would have to be increased just to meet the same standards.

C. Some Endangered Species Act listings and non-listings for some fish, Habitat Conservation Plans and 4(d) rules may have to be revisited.

Many decisions to list and not list fish in the Northwest Plan areas considered the role of the NWFP in maintaining habitat. For example, the US Fish and Wildlife Service's final decision not to list coastal cutthroat trout is replete with references to the protections offered by the NWFP, including these:

In addition, current regulations (described in the Forest Management and State Land Use Practices sections) greatly reduce the risk that significant additional modification of habitat will occur in the foreseeable future.

67 Fed. Reg. 44934, 44949 (July 5, 2002).

The proposed rule indicated that the Northwest Forest Plan's management policy provided important benefits for salmonids, including coastal cutthroat trout, though its effectiveness in conserving cutthroat trout was limited by the extent and distribution of Federal land ownership.

*Id.* at 44591.

Similarly some HCPs are tiered to the NWFP. Not only are HCPs for aquatic species reliant on the ACS but so too are HCPs for the northern spotted owl. This is because the NWFP replaces so-called 50-11-40 protection for the owls with the Riparian Reserve network. Thus it is well documented in FEMAT and the NWFP that the owls on federal lands are dependent on the Riparian Reserve network. It was these federal land owls whose populations were the basis for allowing destruction of owl habitat on adjacent private lands. Thus these HCPs will need to be revisited if the DSEIS allows habitat changes within, or post-watershed analysis boundary changes to, Riparian Reserves not previously anticipated.

Lastly, some 4(d) rules for fish and terrestrial species such as owls are likely tiered to the Northwest Forest Plan in such a way as to require analysis regarding their legitimacy if this proposal is adopted.

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