THE WILDERNESS SOCIETY

Planning Rule Comments
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Dear Forest Service,

These comments are submitted in response to the Federal Register Notice on the National Forest System Land Management Planning Proposed Rule and Draft Environmental Impact Statement (DEIS). Federal Register, Volume 72, No. 163, pages 48514-48541. The Wilderness Society and the undersigned organizations have always had an interest in both the management of the National Forests and Grasslands, and in the rules and regulations guiding said management. We welcome this opportunity to comment.

We have a number of issues, concerns and questions regarding both the proposed changes to the Forest Service planning rule and the accompanying DEIS. Overall, we find the DEIS wholly inadequate and believe the proposed rule and DEIS should be withdrawn. As with the proposed move of the Forest Service National Environmental Policy Act (NEPA) guidance to the Code of Federal Regulations (CFR) we believe the proposed planning rule appears to grant to the agency discretion for analysis and action we do not believe is legally warranted. Our concerns are described in detail below. In addition, we concur with and support Defenders of Wildlife's comments on this proposed rule and DEIS.

This proposal to categorically exclude forest and grassland planning from NEPA continues this administration's disturbing and unfortunate trend towards undermining NEPA, from categorically excluding project-level decisions from NEPA analysis and documentation; to the proposed NEPA regulations which would allow the agency to drop analysis of the no action alternative and allow changes in project implementation after a decision is made; to the proposal

to move NEPA implementation work out of local agency offices and into regional "super centers."

The Land Management Plan Proposed Rule and CE Ignores Important Elements

We believe the agency overstepped its authority and failed to adequately analyze the effects of the proposed categorical exclusion (CE) for land management planning. Land management plans are federal actions. Land management plans make decisions. And intensity analysis to assess the severity of the impact of potential effects shows that land management plans clearly pass the threshold for significance of environmental effects and thus trigger NEPA. We examine the Forest Service's own experience with one of the land management plans that had been proceeding under the 2005 Planning Rule to show that this is the case.

Land Management Plans are Federal Actions

The National Environment Policy Act mandates that all federal agencies prepare a "detailed statement by the responsible official," (i.e., an EIS) for any proposed "major federal action significantly affecting the quality of the human environment" (42 U.S.C. § 4332 (2)(C)):

> Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (Sec. 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking (40 C.F.R. §1502.4(b)).

Forest and Grasslands Land Management Plans constitute a meaningful point in agency planning and thus fall under this provision.

Forest and Grassland Planning Constitute "Major Federal Actions" Requiring an EIS

The Council on Environmental Quality (CEQ) regulations that implement NEPA regards the development of formal plans and guidance documents to be "federal actions" that fall within the scope of NEPA. Section 1508.18, referred to in the provision above, includes the definition of "major federal action," which includes "actions with effects that may be major." Section 1508(a) further defines the term "actions" to include "new and continuing activities … new or revised agency rules, regulations, plans, policies, or procedures…." The Land Management Plans for the National Forests and Grasslands in the national forest system are obviously plans, even under the 2005 Rule, and so fall under this definition of "actions." Section 1508.18(b) describes categories of federal actions and includes in subsection 2 the "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based." Land Management Plans are very clearly formal plans/official documents prepared by a federal agency specifically to guide uses of Federal resources, upon which later projects or actions will be based.

Further, as discussed below, Land Management Plans meet the second prong of the NEPA analysis, that they "significantly affect[] the quality of the human environment" (42 U.S.C. §

4332 (2)(C)). Land Management Plans will determine how every acre of the each national forest and grassland are managed for up to fifteen years, and every action on every acre of these forests and grasslands during this time will have to comply with the final plans.

Plans Make Decisions

Plans Determine How Areas Will Be Managed and How Projects Will Be Implemented

The National Forest Management Act requires that

> Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. 16 U.S.C. 1604(i).

Thus if not first authorized in a land management plan, projects and activities could not occur.

The Forest Service had relied on the *Ohio Forestry* case to justify no longer requiring NEPA documentation for Forest Plans. See 70 Fed Reg 1062, January 5, 2005. However, it is important to review *Ohio Forestry*; it merely stated that specific provisions of a specific forest plan were not ripe for judicial review. It did not say the Wayne National Forest Plan was exempt from NEPA documentation, because that was not at issue in the case. Although, the Court did note that one part of the Plaintiffs' case could have proceeded if they had brought a NEPA violation against the forest plan, and that NEPA challenges to Forest Plans in general would be ripe for review. Indeed, note the following from Justice Breyer's majority opinion, referring to logging levels approved in a national forest plan that was challenged in the case:

> Despite the considerable legal distance between the adoption of the Plan and the moment when a tree is cut, the Plan's promulgation nonetheless makes logging more likely in that it is a logging precondition; in its absence logging could not take place. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 730 (U.S. 1998).

Further, the "considerable legal distance" the Supreme Court relied in large part on was shrunk considerably by the now enjoined rule. Of the Court's five elements of this "distance," three were eliminated by the 2005 rule and one minimized. The Court made its ruling based on the fact that regulations "ensure that the project is consistent with the Plan," Id., whereas the now enjoined regulations would have allowed forest managers to readily exempt projects from forest plans at the project level. 36 C.F.R. Sec. 219.8(e)(3) ("[t]he Responsible Official may . . . Amend the plan contemporaneously with the approval of the project or activity so that it will be consistent with the plan as amended. The amendment may be limited to apply only to the project or activity."). The Court relied on the prospect that the Forest Service would have to "conduct an environmental analysis pursuant to [NEPA] . . . to evaluate the effects of the specific project and to contemplate alternatives," Ohio Forestry at 730, but legal and regulatory changes now allow many projects, including large timber sales, to be implemented without any NEPA analysis or consideration of alternatives for others, as discussed below. Finally, the Court was partially swayed that the Forest Service "provide[s] those affected by proposed logging notice and an

opportunity to be heard." Ohio Forestry at 730. It is questionable whether the lessened opportunities for public notification and involvement on categorically excluded and otherwise fast-tracked projects would still meet this prong of the Court's analysis.

Thus the Forest Service misconstrued the intent of Ohio Forestry in suggesting that it forms a legal basis for exempting Forest Plans from documentation under NEPA.

In addition to the legal reasons why an EIS is necessary, the Forest Service cannot sufficiently account for significant environmental impacts and conduct a meaningful cumulative effects analysis at the project level alone. Analyses at this level, by definition, cover only a small portion of a national forest or grassland. Thus waiting until the project stage would mean that significance assessments and cumulative effects analysis would never occur on a Grassland- or Forest-wide basis. Such reviews are very important to anticipate effects of proposed actions. Even small, localized action can have far-reaching effects on, for example, watersheds, migratory species, and to wide-ranging wildlife species such as pronghorn, swift fox, and imperiled fishes. This is especially the case when numerous actions take place over the life of a forest or grassland plan.

Furthermore, the 2005 planning regulations treatment of NEPA, as well as any new rules to be proposed in light of the District Court ruling, need to be viewed in the context of other NEPA-related actions by the Bush Administration. This Administration has adopted a series of regulatory changes – mostly under the umbrella of the "Healthy Forests Initiative" -- aimed at reducing the Forest Service's duties to comply with NEPA at the project level, such as for timber sales. NEPA analysis will therefore never be done at all for many significant timber sales and other projects. The recent Forest Service proposal to move its NEPA directives to the CFR contains a number of other proposals which would result in actions to significantly limit NEPA analysis. In addition, the Bureau of Land Management (BLM) leases the subsurface minerals for units of the national forest system. BLM does not conduct NEPA analysis prior to leasing. The impacts of oil and gas are never considered through NEPA until the application for permit to drill (APD) stage. And, BLM has recently instituted a policy which greatly increases the use of categorical exclusions in processing APDs (BLM Instructional Memorandum No. 2005-247, September 30, 2005).

In the case of the Comanche-Cimarron Grasslands (and no doubt a number of other NFS units) two other Categorical Exclusion (CE) categories might also apply to the management of the grasslands. Under CE category 10, up to 4500 acres of prescribed burning to reduce hazardous fuels can be categorically excluded from NEPA documentation. See FSH 1909.15, section 31.2.; now proposed as 36 CFR 220.6(e)(10). See also 70 Fed Reg 33826, June 5, 2003. Similarly, category 11 allows categorical exclusion on up to 4200 acres for post-fire rehabilitation activities, which can include repair of roads, trails, and minor facilities. See FSH and Fed Reg, id.; and the proposed 36 CFR 220.6(e)(11).

Finally, Section 339 of the 2005 Consolidated Appropriations Act (P.L. 108-447), created a "new" type of CE, which applies throughout fiscal years 2005 – 2007, and grants the Forest Service the authority to reauthorize livestock grazing on as many as 900 allotments with no NEPA analysis.

As the agencies own experience shows, the combination of CEs has the potential to eliminate consideration of environmental effects. Any new planning rules proposed must take into account the lack of NEPA analysis applied at the project specific stage for many types of projects and activities.

Intensity Analysis

Land management plans in progress under the 2005 Rule included desired conditions, objectives, and guidelines that would lead to significant impacts on the quality of the human environment and thus trigger NEPA and the requirement for preparation of an EIS. The CEQ regulations list ten factors to be considered in evaluating the severity of impact [40 C.F.R. § 1508.27(b)]. If, under these ten factors, a major federal action such as a forest or grasslands plan might have environmental impacts, then an Environmental Impact Statement is required. A few examples of elements of a Land Management Plan that would lead to significant impacts are identified below. We use the Cimarron and Comanche National Grasslands Land Management Plan (as proposed when the 2005 Planning Rule was enjoined) to show the ways in which even the Forest Service's "new plans" have significant environmental impacts precluding the use of a CE. Examination of the elements shows that Land Management Plans are likely to pass the significance test. Therefore, an environmental impact statement must be prepared. A few of these elements are discussed below.

> *1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.*

The Forest Service argues that since plans set forth strategic guidance and information and do not propose any specific action, that the Plans themselves will not have any effects on the environment. We do not believe this is true. The "strategic guidance" is imbedded with a number of decisions that have environmental effects. Designation of a Research Natural Area (RNA) carries with it numerous measures to protect habitat conditions that are not available to non-designated areas. Once the decision has been made to not recommend areas for RNA status, those protections are precluded for those areas, and significant adverse effects to unique resources become more likely. And if suitability decisions have been made that preclude protection of that habitat (for example, by allowing grazing or oil and gas development in unique habitats), then significant adverse effects are likely. In the case of the Cimarron and Comanche National Grasslands (CCNG) Plan this was further compounded by the decisions made to lump a number of unique ecosystems together into just four recognized ecosystems. The unique characteristics of each ecosystem have been lost in the act of combining, and hence the unique habitat needs are lost to management oversight. This is likely to result in adverse effects to a number of unique and rare ecosystems.

3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

Again, the Forest Service argues that because plans do not propose any specific actions, the plans themselves will have no effect. We do not agree with this conclusion. The decisions on suitability (or in some cases the decisions not to revisit decisions made in the past) are and will continue to have significant adverse effects to unique characteristics such as historic and cultural resources, wetlands, and ecologically critical areas.

For example, in the case of the CCNG plan the desired condition for livestock grazing includes the role that the Grasslands would have in contributing to local economies by continuing to offer livestock grazing permits (Plan at 60). The continuance of livestock grazing in certain areas is causing and will continue to cause significant impacts, including destruction of significant habitat for species-of-concern and ecologically critical areas, harm to wildlife from fencing, and continued persecution of native fauna seen as harmful to ranching. The Specialist's Report on Water Resources noted that certain riparian areas have been damaged due to livestock grazing and are classified as "non-functioning" (Water Resources, pg. 10). The damages caused to these riparian areas by livestock grazing are significant environmental impacts, and the continuance of livestock grazing will only further add to these impacts.[1]

6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

In the case of the CCNG (and indeed in making their case for the 2005 Rule), the Forest Service argued that:

> "The Plan itself does not require, compel, or establish a precedent for future actions, with or without significant effects, and does not represent a decision in principle about an implementing action." (EA, pg. 2)

This test of intensity is one of the central reasons a land management plan requires an EIS. The whole purpose of Land Management Plans under the 2005 rule was to set desired conditions, objectives, and guidelines that establish precedent for future actions and decisions. The plan's desired conditions and objectives would determine the future purpose and need statements for projects, which would limit the range of those future projects. The 1982 planning regulations used slightly different terminology, but the principle was the same. Project purpose and need at the site-specific level is set by the Plan. The Plan may not compel future action, but no project will be proposed, let alone implemented, that is inconsistent with Plan components. If this is not the case, if the plan is essentially meaningless due the ability to change it at will without adequate assessment and disclosure, then the Rule fails the test of the implementing the requirements of the NFMA.

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[1] Under the CCNG Plan, all ecosystems and all but two proposed Special Areas would remain suitable for livestock grazing. Plan at 100-102.

The agency is in effect arguing that nothing has to happen just because there is a Plan, but this is disingenuous. The Forest Service will continue to actively manage the National Forests and Grasslands and those actions will be guided and directed by the individual unit Plans. Actions inconsistent with plan components and direction will not occur without plan amendment. Because all future actions having significant impacts on the quality of the human environment will be carried out based on the desired conditions, objectives and guidelines in the Plan, the Plan itself represents a decision in principle about future considerations.

By the Forest Service's own description, Forest Plans establish "desired conditions, objectives, guidelines, suitability of areas and special areas" that guide how National Forest and Grasslands lands and resources will be used, and upon which future agency actions will be based, and are the "starting point for project and activity NEPA analysis." (70 Fed. Reg. 1063, 1064). Final decisions and guidance for future decisions that result from any Forest or Grassland Plan amendment and revision include:

1. *Determining the Forest-wide multiple-use goals, objectives, and guidelines for the Forest, including estimates of the goods and services expected*. The CCNG Plan provided goals (Desired Conditions), objectives (Strategy), and guidelines (Design Criteria) to guide Grassland management and resource uses and laid the foundation for future project-level decisions that, by law, must conform to provisions of the land management plan. The CCNG Plan outlined specific goals, objectives and guidelines to govern future land administration (i.e. land ownership; land acquisition by the Forest Service, and land exchanges); management and protection of ecological resources (including specific wildlife species, plant species, and ecosystems); extraction of oil and gas from the Grasslands and revenue and employment generation from this use; wind power development on the Grasslands; livestock grazing management, promotion of recreational opportunities to benefit the local community (which included increasing access to areas and improving roads and trails); maintenance of physical resources (including heritage resources; oil, gas, and other minerals; and paleontological resources); and Special Area designations.

2. *Identifying land that is suitable for timber production, mineral development (including oil and gas), livestock grazing, and/or other commercial and non-commercial uses*. The CCNG Plan was very specific in identifying areas suitable for uses that included livestock grazing, oil and gas development, OHV use, and utility corridors. The Plan presented suitable uses for each ecosystem, (as defined by the Forest Service) and for each proposed Special Area.

3. *Recommending special areas, research natural areas, wilderness areas, and wild and scenic river status.* The CCNG Plan recommended the designation of nine Special Areas to protect "their unique or special characteristics" (Plan Appendix D). The Plan provided specific management objectives for these proposed Special Areas that included: removing roads, eliminating noxious weeds, and protecting a species-of-concern from predators via tree removal. Plan at 91-93. The Plan established a set of suitable uses for the proposed Special Areas (Plan at 79-80) and provided guidelines for managing these areas that included: managing off-highway vehicle (OHV) use to

protect plants of concern; advising that "new structures, facilities, and pipelines" should avoid unique geological features; and managing livestock grazing in some areas to protect plant and animals of concern. Plan at 112-114.

The Cimarron and Comanche Land Management Plan clearly established a precedent for future actions, and thus it met the significance test. This factor alone required an EIS. As the Forest Service itself acknowledged, the plan would set the goals, objectives, and guidelines for how the Grasslands would be managed. It is simply untenable to argue that the plan did not set a precedent for future action.

7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

The Forest Service argued that "there cannot be cumulative significant effects of the (CCNG) Plan when the Plan itself does not have effects" (EA, pg. 8). As we pointed out in our draft plan comments at the time, this statement appeared without any supporting evidence, thus we disagreed with the agency conclusion.

The Strategy section of the CCNG Plan indicated that Off-Highway Vehicle use would be suitable in three of the four identified ecosystems in the Grasslands (Plan at 100). OHV use may be an individually insignificant impact when considered on one small area alone. However, the cumulative impact of OHV use on three out of the four ecosystems collectively makes it reasonable to anticipate a cumulatively significant impact on the environment.

The Strategy section of the Plan also indicated that livestock grazing, fire use and management, oil and gas development, and utility corridors would be suitable on all four of the identified ecosystems, (Plan, id). The designation of each ecosystem as suitable for all these uses presented cumulatively significant impacts on the environment. Even the special areas were found suitable for most uses. Plan at 100-102.

8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

As noted in the Design Criteria section of the CCNG Plan, "[p]rior to ground disturbing activities, significant paleontological resources would be salvaged and curated in a federally approved repository" (Plan at 112). This shows that ground disturbing activities would occur with the capacity to damage or destroy paleontological resources. It also assumes that salvage would constitute an acceptable method of preserving site integrity and would not result in an adverse effect under the National Historic Preservation Act (NHPA). We believe this assumption was premature and could have resulted in adverse effects to significant scientific, cultural, and historical resources.

We use the example of the Cimarron and Comanche National Grasslands Plan to show that the Forest Services' implementation of the 2005 Rule (Alternative A, D and E in the DEIS) was problematic in its dismissal of the need for analysis under NEPA. The other national forest plans that had been proceeding under the 2005 Rule had the same problems. We believe the Forest Service must prepare environmental impact statements for all Land Management Plans that disclose the possible impacts from implementing these plans. The disclosure must include the effects on a multitude of resources from implementing various projects likely to be authorized under the plan.

Land Management Plans Resolve Conflicts

"Unresolved Conflicts"

The Forest Service proposed NEPA regulation § 220.7(2)(i), regarding EAs, states that "[w]hen there are no unresolved conflicts concerning alternative uses of available resources (NEPA section 102(2)(E)), the EA need only analyze the proposed action and proceed without consideration of additional alternatives." Leaving aside the fact that we think this proposed regulation oversteps Forest Service authority; it is instructive to review in light of the agency contention that land management plans make no decisions.

The Forest Service has long argued that multiple use management in and of itself means there will always be conflicts over potential uses of limited natural resources. If the agency believes there are actions for which there are no conflicts concerning alternative uses of available resources it has to mean that conflicts over said alternative uses were resolved at the forest planning stage via resource decisions made in the plan. The plan is the only appropriate vehicle for such resolution. Project level activities must be consistent with land management plans. If the plan hasn't made a decision that resolves an issue (resolution coming for example by designating a special area off limits to commercial harvest) then the possible alternative uses of resources would always be at issue and always result in an unresolved conflict. In asserting that there would likely be projects of a scale requiring NEPA analysis in an EA that did not involve unresolved conflicts, the agency is making the case that conflicts were resolved via decisions made at the planning stage. Therefore, plans do make decisions and the impacts of those decisions must be analyzed under NEPA.

The Forest Service Ignored the Ninth Circuit Court's Ruling

The requirement for an EIS to analyze the effects of the proposed rule and alternatives is provided by the decision in Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059 (N.D. Cal., 2007). The Federal court ruled that the agency's planning regulations do have an effect on the environment, thus a categorical exclusion (CE) cannot be used, and documentation in an EA or EIS is necessary.

The Ninth Circuit court stated:

> "NEPA requires *some* type of procedural due diligence - even in cases involving broad, programmatic changes. … NEPA does indeed contemplate preparation of EAs and EISs in the case of programmatic rules and changes."
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> Citizens for Better Forestry, 481 F.Supp.2d at 1085 (emphasis in original).

The DEIS the Forest Service has prepared in response to the court's ruling is completely inadequate. The DEIS' cumulative effects analysis of the various alternatives is contained entirely within one paragraph. It merely reiterates the Agency's conclusions that none of the alternatives, including the Proposed Rule, dictate how national forests are to be managed; that the alternatives merely establish administrative procedures and that the Agency does not expect any of the alternatives to dictate the mix of uses on any of the units of the National Forest System. *See* 2007 DEIS, *supra* note 246, at 49. No further analysis or basis for these conclusions was provided. This "analysis" makes a mockery of the NEPA review process.

According to the Ninth Circuit in *Citizens for Better Forestry*, substantial revision of the NFMA regulations, as proposed now by the Forest Service, may result in an actual, physical effect on the environment in national forests and grasslands. *Citizens for Better Forestry*, 341 F.3d at 973. As such, the Forest Service was obligated to thoroughly analyze, consider and disclose the direct, indirect and cumulative effects of its proposed action. Furthermore, the cumulative effects analysis in no ways meets the sufficiency requirements for environmental impact statements. It neither provides "decisionmakers with sufficiently detailed information to aid in determining whether to proceed with the action in light of its environmental consequences" (*Dubois*, 102 F.3d at 1287) nor "rigorously explore[s] and objectively evaluate[s]" (*See id.)* the cumulative effects of all reasonable alternatives.

The Forest Service Failed to Meet Its Own Purpose and Need

The DEIS describes the primary purpose of the proposed rule as follows:

> "The primary purpose is to improve upon the 2000 rule by providing a planning process that is readily understood, is within the Agency's capability to implement, is consistent with the capabilities of National Forest System lands, recognizes the strategic programmatic nature of planning, and meets the intent of the National Forest Management Act (NFMA) while making cost effective and efficient use of resources allocated to the Agency for land management planning."
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> DEIS at 5, emphasis added.

If this is the primary purpose and need then the Forest Service has failed to provide sufficient information to determine whether the proposed rule or the alternatives meet the purpose and need, a fundamental element of NEPA.

Cost-Effective

The only information disclosed in the DEIS about the cost-effectiveness of the proposed action and alternatives appears in the chart comparing alternatives to the purpose and need. A series of number are presented for each alternative. Reference is made to a document entitled "Cost-Benefit Analysis – The Proposed Rule (36 CFR 219) for National Forest Land Management Planning" (2007). First of all, we would like a copy of this document. Secondly, merely listing a series of numbers without any discussion as to how these numbers were calculated, and whether they are estimates or based on actual expenditures is not sufficient for determining whether the purpose and need has been met. More information must be disclosed. It is particularly important that this cost determination be based on real expenditures and not estimates.

Agency Capability

Again, a chart that basically says under each alternative that the agency is capable does not constitute adequate analysis. No other information is presented to back up this finding. We also question the extent to which the agency is capable given the Forest Service's own recent findings in the proposal to move NEPA analysis off NFS units. More explanation is needed.

Compliance with NEPA: The Decision Memo and Project or Case File

Review of the proposed NEPA regulations (36 CFR 220) would lead one to believe that the decision at issue in this DEIS has already been made. The NEPA regulations propose a categorical exclusion for land management plans that would require a project or case file and a decision memo. This Planning Rule proposes that plans will be done with whatever level of NEPA is required. But that's a bit disingenuous when a concurrently proposed set of NEPA regulations has already made the "decision" (in the form a proposal with no explanation or alternatives) that a decision memo is all that is required. The agency would seem to have already decided the outcome of the proposed planning rule. In addition, no explanation is provided in either the proposed rule or regulations for the decision to prepare a decision memo. The Forest Service needs to explain its reasoning on this point.

The DEIS is Inadequate

Fails to Complete Adequate Analysis of Cumulative Effects

In 2005, the 9th Circuit Court of Appeals stated: "the general rule under NEPA is that, in assessing cumulative effects, the Environmental Impact Statement must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how

these projects, and differences between the projects, are thought to have impacted the environment." Lands Council v. Forester of Region One, 395 F.3d 1019, 1028 (9th Cir. 2005). In that case, it was not sufficient to disclose only "broad environmental harms from prior harvesting," because "the data disclosed would not aid the public in assessing whether one form or another of harvest would assist the planned forest restoration with minimal environmental harm." Id. The court explained that, "[f]or the public and agency personnel to adequately evaluate the cumulative effects of past timber harvests, the Final Environmental Impact Statement should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment. The Forest Service did not do this, and NEPA requires otherwise." Id.

In addition, CEQ already defined "cumulative impact" as follows,

> "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."
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> 40 CFR 1508.7

The DEIS cumulative effects analysis for the planning rule boils down to the following paragraph:

> "For cumulative impacts to accrue there must first be an impact from the action under review that can then be added to the impacts of other past, present, and reasonably foreseeable future actions. Neither the proposed planning rule nor any of the alternative planning rules dictate how administrative units of the National Forest System are to be managed. These alternative rules establish administrative procedures. The agency does not expect that any of these rules would dictate the mix of uses on any or all units of the National Forest System. There are no direct or indirect effects to be added to the effects of any past, present, or reasonably foreseeable future actions. Consequently, there are no cumulative effects."
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> National Forest System Land Management Planning DEIS at 49.

This is a disingenuous interpretation of the meaning of cumulative impact. The agency can attempt to redefine every term used in NEPA analysis and it will not change the requirements of the statute or the requirement of the Court. The analysis of cumulative impacts presented in the DEIS is completely insufficient. The DEIS and Proposed Rule must be withdrawn.

Connected Actions and the Reasonably Foreseeable Future

There are two significant connected actions which are reasonably foreseeable that should have been analyzed together with the alternatives in the DEIS. The failure to consider these two actions in the cumulative effects analysis is yet another reason the DEIS is inadequate and should be withdrawn.

The Proposed NEPA Regulations: 36 CFR Part 220

The Forest Service recently ended comment on the proposed rule to move agency NEPA procedures to the Code of Federal Regulations (CFR). The proposed regulations:

- Allow the agency to drop analysis of the no action alternative should there be no unresolved conflicts
- Do not specify the minimum number of alternatives that must be analyzed
- Redefines the past actions that must be considered in cumulative impact analysis
- Redefines "reasonably foreseeable future actions" to limit the types of actions that have to be considered in cumulative impact analysis
- Codify a number of categorical exclusions (CE) for a range of activities previously analyzed in EAs that together with the Planning Rule CE proposed here would leave a large number of activities (including prescribed burns up to 4,500 acres, mechanical fuel treatment up to 1,000 acres and salvage harvests up to 250 acres) and a great deal of the landscape without any analysis under NEPA at all.
- Expand the emergency categories to include the undefined "important resources" that allow the agency to take ground disturbing action and complete NEPA analysis afterward
- Allow the Forest Service to make changes to a project after a decision has been made during implementation as long as the possible actions to take have been previously analyzed

The proposed NEPA regulations are clearly reasonably foreseeable. The agency has just ended comment. The final steps are to analyze the comments received and issue the new regulations. The effect of the type of "visionary" land management plans envisioned here and the lack of NEPA analysis at the plan level, along with the lack of NEPA analysis under various CEs, the narrowing of both the past and future actions to be considered, the expansion of the definition of emergency, the ability to drop analysis of the no action alternative with no minimum number of alternatives to consider and the ability to change the decision after it has been made would combine to radically redefine agency responsibilities under NEPA which undoubtedly would have a significant effect on the environment. The cumulative impact of the proposed NEPA regulations and the alternatives herein should have been considered in the DEIS.

The Proposed Removal of NEPA Analysis from Forest and Grassland Units of the National Forest System (NFS) to Regional Centers or Third-Party Contractors

The Forest Service has also erred in failing to consider the cumulative impacts of reasonably foreseeable future actions in ignoring its own proposal to remove NEPA analysis from units of

the NFS to regional centers or third-party contractors. First of all, this proposal fits the definition of a major federal action, defined in part as:

> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies or procedures, and legislative proposals…
>
> 40 CFR 1508.18

The proposed move of NEPA analysis from NFS units is clearly an activity "…financed, regulated or approved by Federal agencies." The effects of this removal would clearly be major as the ability to complete site-specific analysis would be subject to a whole new set of obstacles. The most obvious would be that the people doing the analysis would be far removed from the location of the project. The list of additional obstacles would be long.

Secondly, even using the newly proposed definition of reasonably foreseeable future actions as described in § 220.3: "those activities not yet undertaken, for which there are existing decisions, funding, or identified proposals," these likely Forest Service actions should have been examined. Please note that we do not agree with this new definition for reasonably foreseeable future actions. However, we will use this new definition here to show that even using the Forest Service's own proposed definition, the (likely near future) action of removing NEPA analysis from forest and grassland units of the NFS to regional super centers or to third party private contractors should have been examined in combination with the alternatives in the DEIS.

The Forest Service is currently engaged in a "transformation" effort at least partially prompted by the need to cut costs. A team of Forest Service employees has been engaged in examining potential changes in where and how NEPA analysis is performed, so <u>funding</u> exists for their time on this effort. Secondly, an <u>identified proposal</u> exists, itself written by a third-party contractor (also obviously funded to do the work). The report goes to great lengths to identify the possible options. A review of this document shows that the "no action" or current method of doing NEPA analysis on each NFS unit is highly unlikely to be chosen when a final decision is made. In fact, materials detailing union notification and answering employee questions indicates that at least some <u>decisions</u> have been made to proceed with the proposal. In summary, the proposal to move NEPA analysis off the units would appear to meet all three criteria of the new definition of reasonably foreseeable future actions.

The effects of this action are very troubling and point to likely significant impacts to the (human) environment. For example, we are concerned that NEPA analysis prepared far from the location where management activities would take place would be missing the necessary "reality

check" provided by ground-truthing conditions as analysis indicates possible conflicts. That college students with little experience could replace professional field technicians in doing the essential field surveys, as the proposal suggests, lends greatly to our concerns about the impact of these proposed regulations and the impact to the environment.

In another example, greater authority "on the ground" (at the field unit level) combined with a NEPA process that takes longer to engage given distance, competing project priorities at the super centers and /or additional time for contracting activities, could lead to a greater number of "emergencies" being declared. The addition of effects to "important resources" to the reasons for declaring an emergency could only make it easier for Forest Service officials to circumvent NEPA in an effort to avoid longer NEPA preparation timeframes created by the move of NEPA analysis off the forests and grasslands. Combined with the lack of landscape level analysis formerly performed at the land management plan level, significant effects could accrue to forest resources without any NEPA analysis ever having been performed.

There are any number of other combinations of potential impacts when considering the proposed planning rule, the proposed NEPA regulations and the proposed move of NEPA analysis that could result in significant impacts which must be disclosed. As the DEIS failed to examine these connected actions (in fact, any connected actions) it is inadequate and must be withdrawn.

Landscape or Regional Level Evaluation and Impacts to Species

The DEIS failed to evaluate impacts on wide-ranging species where conservation must be focused at the multi-forest or regional level (e.g., grizzly bear, lynx, wolverine), especially since the 2005 rule eliminates the "regional guide" approach to planning and the Forest Service has excluded forest planning from the EIS requirement so that no further NEPA will occur until site-specific project decisions. This lack of a regional approach will have wide-ranging effects in assessing the impacts to species such as Indiana bat and Canada lynx. Without a regional approach project specific analysis will be far more difficult and more likely to fail legal scrutiny.

Failure to Disclose Endangered Species Act (ESA) Consultation Results

The DEIS failed to disclose the results of Forest Service consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). In fact, the Forest Service failed to disclose whether the preparation of a Biological Assessment (BA) and required consultation with either agency has even occurred, though the agency's conclusion that "preparation of a biological assessment is not required" would lead us to believe that the Forest Service has not engaged in consultation. DEIS at 51. This information should have been provided in the DEIS.

The results of this consultation, including the likely preparation of a Biological Opinion (BO) by the FWS and / or NMFS would have notified the public as to whether listed species were

likely to be adversely affected. Had a BO been prepared and the results disclosed the public as well as the Responsible Official would have been presented with a list of Terms and Conditions that would have described the likely avenues of harm to listed species and by extension the environmental impacts of the Proposed Action and alternatives. In this case, the Forest Service stated that:

> "Although a biological assessment is not required, an analysis was conducted in order to examine whether the proposed rule or alternatives have effects on threatened, endangered, or proposed species or critical habitat such that consultation or conferencing under Section 7 of the ESA would be necessary."
>
> DEIS at 51.

However, no further description of this analysis was provided. Who conducted the analysis, what specifically the analysis looked at and the results of the analysis are not disclosed. Rather, the agency relies on the same statements without accompanying evidence it used in the Ninth Circuit Court to claim that consultation is not necessary. See Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059 (N.D. Cal., 2007). The Court ruled against the agency on this issue in the case, so it is curious that the agency would again use the same argument.

Regardless, the Forest Service should have presented the results of its consultation in the DEIS as it is clearly a connected action to promulgation of the Rule. Disclosure of the results would have allowed the public to make informed and substantive comments on the issue. The DEIS is inadequate, and the decision is not ripe failing this lack of disclosure.

Problems with the Alternatives

No Real Comparison of the Effects of the Alternatives

NEPA commands federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternate uses of available resources." 42 U.S.C. § 4332(2)(E) (2005).

The Council on Environmental Quality's (CEQ) regulations implementing NEPA instructs federal agencies to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e) (emphasis added). In addition, consideration of alternatives is "the heart of the [EIS]," 40 C.F.R. § 1502.14, and EISs "shall" "rigorously explore and objectively evaluate all reasonable alternatives," § 1502.14(a).

The courts have further explained the agency's responsibilities. The Forest Service must consider a "broad range of reasonable alternatives." Curry v. United States Forest Service, 988

F. Supp. 541, 553-54 (W.D. Pa. 1997) (citing NEPA and 36 C.F.R § 219.12(f) (1997), which directed interdisciplinary teams to "formulate a broad range of reasonable alternatives according to NEPA procedures.").

What is clear is that a chart listing alternatives and issues does not constitute an assessment of effects. It is absent any detail that would allow both the public to comment meaningfully and the Responsible Official to make an informed decision. Secondly, as we reiterate elsewhere in this letter, the DEIS' cumulative effects analysis of the various alternatives is contained entirely within one paragraph. It merely reiterates the Agency's conclusions that none of the alternatives, including the Proposed Rule, dictate how national forests are to be managed; that the alternatives merely establish administrative procedures and that the Agency does not expect any of the alternatives to dictate the mix of uses on any of the units of the National Forest System. *See* 2007 DEIS, *supra* note 246, at 49. No further analysis or basis for these conclusions was provided. As such, the DEIS is insufficient and any decision made on the basis of the information contained within would be arbitrary and capricious.

ISO 14001 and the Environmental Management System (EMS)

We understood the requirement for ISO 14001 and completion and maintenance of an EMS to be the result of Executive Order 13148, issued April 21, 2000, which directed Federal agencies to develop and implement environmental management systems. We do not then understand by what authority the Forest Service proposes to drop this requirement from Alternatives D and E. In addition, it would appear that Alternatives B and C should also have a requirement for development and implementation of an EMS. The requirement for the Executive Order is independent of the planning rule, yet tied to planning through the nature of the ISO 14001 and the EMS. The agency needs to explain its authority in this case.

Inadequacies of Alternative A and D

NFMA Requirements for Timber Suitability

The proposed rule must fulfill the requirements of the NFMA. This includes among other things, the following requirements:

- "[Describe] the planned timber sale program and the proportion of probable methods of timber harvest…."
- "Determine forest management systems, harvesting levels, and procedures in light of all of the [multiple] uses… and the availability of lands and their suitability for resource management."
- "Require the identification of the suitability of lands for resource management."
- "Insure coordination of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish."

- “Insure that timber will be harvested from National Forest System lands only where [watersheds will not be damaged, reforestation is assured, and aquatic resources are protected].”
- “Insure that clearcutting and [other even-aged cutting methods will only be used under certain circumstances and with specified environmental safeguards].”

These NFMA requirements are not optional and should not have been treated as elements which may vary in whether they are addressed from alternative to alternative. All must be addressed. The manner in which they might be fulfilled could vary by alternative, but not whether they are addressed at all. Alternatives A and D clearly turn timber management on its head. We note in particular the definition of long-tern sustained yield (LTSY) which, as with many other elements of the 2005 Rule underwent a complete and unforeseeable change in definition between the draft and final rule. LTSY is defined as follows in FSH 1909.12, Chapter 60.5:

> Long-term Sustained-yield Timber Capacity. The highest uniform wood yield that may be sustained under specified management intensities consistent with multiple-use objectives after stands have reached desired conditions.

This definition completely overturns the long held understanding of long-term sustained yield. Desired conditions are aspirational elements of plans under the 2005 Rule. As such, they are “visionary” and set long term goals to strive for. They are not specific in nature, nor are they likely to be reached in the plan period or even in the planning horizon. And yet they now set the long-term sustained yield capacity. This means that LTSY is whatever the Forest Service says can be produced under the management intensity it wants to set for the multiple-use objectives it wants to achieve AFTER the Forest Service has determined that stands have reached their desired conditions. This definition gives the Forest Service unbridled power and discretion to harvest whatever, whenever and (in combination with changes in timber suitability) almost wherever they want to harvest for as long as they want. This is precisely the type of abusive management the NFMA was created to stop. The proposed action would codify the authority for this type of abuse.

Inadequacies of Alternatives A, D and E

The DEIS Fails to Evaluate the Effects of Weakening or Eliminating Substantive Resource Protection Standards and Regulatory Standards Required by NFMA

The adoption of the NFMA in 1976 “reflected the nation’s collective view of the national forests” in the mid-1970s: “…serious mistakes had been made and… it had become necessary to put sideboards on the agency’s discretion. No longer would it be acceptable for the Forest Service to run the national forests as it saw fit…” Charles F. Wilkinson, The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead, 68 U. Colo. L. Rev. 659, 666-67 (Summer 1997).

To that end, the NFMA established a tiered approach to forest management. The Forest Service's land management regulations and plans must "insure consideration of the economic and environmental aspects of . . . resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish." 16 U.S.C. § 1604(g)(3)(A). Regulations and plans also must "require the identification of the suitability of lands for resource management," "provide for the diversity of plans and animal communities," and permit timber harvesting only when streams and soils are protected, with special limits on clearcutting and other even-aged regeneration. § 1604(g)(2-3). In turn, site-specific projects must be consistent with the applicable forest plan. § 1604(i).

In keeping with this framework, the prior planning regulations adopted in 1982 imposed mandatory, enforceable and substantive sideboards for the management of various forest resources, such as recreation (including ensuring the consideration of roadless areas), soils, water, fish and wildlife habitat and timber, to ensure forest plans and the projects implementing them met these and other NFMA requirements. The 2005 Rule (here embodied in the Proposed Rule and Alternatives A, D and E) eliminates these substantive standards or substantially weakens these substantive standards and guidelines that NFMA explicitly requires, replacing them with unspecified, discretionary direction that has little resource protection value.

While the 2005 Rule suggests the planning directives would set some of these guidelines, the directives are not the regulations required by the NFMA, may be more difficult to enforce, and generally provide non-binding direction which does not ensure a minimum level of protection needed for consistency and to limit those officials who lack the desire to protect forest resources.

The 2005 Rule and its directives scrap binding forest plan standards in favor of loose guidelines which rangers may deviate from at the project level, turning the entire NFMA concept of tiered, accountable forest planning and implementation on its head. The rule affords individual rangers too much discretion, allowing officials to act within the range of guidelines and to depart from guidelines when an official deems circumstances to warrant it. The rule also allows forest officials to implement projects that are inconsistent with the forest plan by simply writing a project-specific exemption. Thus, any direction adopted in forest plans with public involvement can be ignored almost at will. When implementing the 2005 regulations, the Forest Service has gone to absurd lengths to ensure that new Forest Plans do not limit project decision-making, going so far as to prohibit use of imperative wording in forest plan standards and guidelines. This approach seeks to render forest plans meaningless and undermines and circumvents the NFMA requirement to adopt forest plans and carry out projects consistent with those plans. 16 U.S.C. § 1604. Again, this runs contrary to the intent of the NFMA. See Wilkinson at 675. This approach to forest planning defeats NFMA's purpose of establishing a "minimum" level of natural resources protection below which the Forest Service will not fall and eliminates the environmental benefits of coordinated resource planning adopted under NFMA. It is not logical to assume that an agency which cannot meet specific obligations and generally lacks accountability somehow will achieve better results only if afforded more discretion.

The EIS failed to examine the effects of this change on the human environment. The total absence of enforceable standards in the forest planning regulations or in forest plans means, for example, the Forest Service will no longer be able to ensure that its forest managers will avoid activities that harm species in the plan area. *Cf*. Or. Nat. Res. Council v. Daley, 6 F.Supp. 2d 1139,1155 (D. Or. 1998)("Absent some method of enforcing compliance, protection of a species can never be assumed").

In addition, centralized forest planning under NFMA allowed the Forest Service and the public to balance resource values and multiple uses across the forest, with attention to environmental consequences. Purely aspirational plans are absent this assessment of environmental effects, which then must be completed at the project level. The DEIS failed to evaluate the ability of the agency to complete forest-wide analysis at the project level. This should have included an assessment of the lack of a Land Management Plan EIS to tier to for project level decisions. The Forest Service needed to assess and disclose the impact on the "first project after a plan is finalized" (a reasonably foreseeable future action) to understand the effect forest-wide analysis at the project level would have.

Traditionally, planning regulations have standards and guidelines, as required by NFMA, to ensure a mix of uses in the NFS. The EIS should have evaluated the effect of the loss of regulatory sideboards in Alternatives A, D and E when comparing all the alternatives against each other. These changes undermine, for example, the ability to evaluate uses which can only be effectively addressed and provided at the forest-wide level, such as securing large tracts of mature forest for forest interior species, distributing opportunities for backcountry recreation, and assessing timber harvest levels for the planning period. The agency cannot have it both ways: opening the forest to all uses in an aspirational plan while failing to analyze the effects of this decision at both the plan and project levels.

Splitting the Decision: A Violation of NEPA

Forest Service action in the short time in which the agency began to implement the 2005 Rule would seem to indicate agency agreement that land management plans do indeed have effects which require analysis under NEPA. Unfortunately, the agency has chosen not to acknowledge this. Instead, the Forest Service has attempted to circumvent NEPA and split these various facets into separate processes and decisions. This is a violation of NEPA.

Significance under NEPA cannot be avoided by breaking an action down into smaller component parts. 40 CFR 1508.27(b)(7). Yet, that is exactly what it appears the agency had been doing under the 2005 Planning Rule. The Forest Service argued that land management plans "do(es) not approve projects or activities with accompanying environmental effects" and that analysis under NEPA was not needed. CCNG, June 24, 2006 Response to Comments at 11 (and elsewhere in numerous Forest Service materials). However, over time, the agency began to acknowledge that certain key decisions made in land management plans do require analysis under NEPA. Each of these plan elements are discussed below.

Roadless Inventory / Wilderness Evaluation

The Forest Service seems to have changed its mind mid-stream. After a long delay Chapter 70 of the FSH 1909.15 was released. In it the agency added a requirement that the Wilderness evaluation process must be completed with a decision under NEPA. FSH 1909.15 Chapter 70. Wilderness evaluation has from the beginning been an integral component of land management plans and has typically been listed by the agency as one of the "decisions" made in a land management plan. We are happy to see agency acknowledgement that analysis and a decision under NEPA are required. However, rather than call for a separate decision, the Forest Service should recognize that land management plans are not the solely aspirational vehicles the agency has claimed.

Landscape Level Assessments and Decisions

The Forest Service has also begun to pull landscape level assessments and decisions out of the plans and to complete them under separate NEPA analysis. The Travel Management Rule (36 CFR 212) is now being completed across the national forest system in a separate NEPA process. Oil and gas leasing analysis which is conducted at the forest or grassland-wide level must be prepared with NEPA analysis. 36 CFR 228.102(c). The Forest Service is conducting Recreation Facility Site Planning outside the comprehensive land management planning process. All of these processes should be considered in an integrated fashion at the land management plan level. Decisions in any of these processes should not preclude decisions at the plan level. At a minimum the DEIS should have examined the cumulative and indirect effects of conducting these various assessments in a piecemeal fashion.

Section 106 Compliance under NHPA

Finally, the agency acknowledged in direction provided to the field on December 15, 2006 that land management plans are considered undertakings under the National Historic Preservation Act (NHPA) and as such necessitate another level of review with State Historic and Tribal Historic Preservation Officers in order to meet Section 106 requirements. The Forest Service had not yet detailed how this was to take place before the 2005 Planning Rule was enjoined. Agency Section 106 compliance has always proceeded in concert with evaluation under NEPA to take advantage of the public participation and integrated analysis of significance components of NEPA.

In the case of the Cimarron and Comanche National Grasslands Plan (the lead plan in the country in use of the 2005 Planning Rule) we believe the analysis of adverse effects on listed and eligible National Register of Historic Places properties under Section 106 review would have triggered NEPA because the suitability decisions made in the plan threatened historic and pre-historic resources on the Grasslands. This included, among others, the decision that the Santa Fe National Historic Trail was suitable for OHV use.

Just as the Forest Service must consult with expert agencies under the Endangered Species Act the agency has consultation responsibilities under the various archaeological and historic resource protection laws. Because the proposed planning rule is an undertaking the agency must

also fulfill its duties under the National Historic Preservation Act (NHPA), which requires that federal agencies whose activities have the potential to affect a listed property must give the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on the undertaking and its effects on listed or eligible properties.

The Forest Service must disclose how it intends to meet its Section 106 obligations without triggering NEPA if it intends to use a land management plan CE. We believe review of this and the other issues in this section show that land management plans do make decisions with the potential for significant adverse effects that necessitate analysis in an EIS under NEPA. In addition, we believe that Alternatives A, D and E contain violations of NEPA in splitting a decision in order to avoid significance.

The Proposed Rule is Deficient

The Proposed Rule's "Sustainability" Provision Fails To Meet The NFMA Mandate To Achieve The Goal Of Providing For A Diversity Of Plant And Animal Communities

The NFMA Diversity Mandate

NFMA requires the Forest Service to maintain biodiversity on national forests. Specifically, NFMA requires that the Forest Service's planning regulations shall "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." NFMA § 1604(g)(3)(B). Further, the regulations must, "where appropriate, and to the degree practicable," proscribe steps that "preserve the diversity of tree species similar to that existing in the region controlled by the plan" that are "within the multiple-use objectives of a land management plan…." Id.

The Proposed Rule's "sustainability" provision, which replaces the "viability" provisions of past rules, and purportedly implements the NFMA's diversity requirement, fails to ensure that a diversity of plant and animal communities is "provided for."

The Proposed Rule's "Sustainability" Provision Falls Far Short Of Implementing the NFMA Diversity Mandate

NFMA is structured so that its intended effect is achieved through the regulations governing the development of and implementation of land management plans, and the implementation of projects consistent with those plans. The regulations are the means of actualization for the mandated goals of the statute.

The Proposed Rule attempts to address NFMA's diversity mandate through a "sustainability" section (§ 219.10). It identifies three interrelated components of sustainability, economic, social and ecological sustainability. 2007 Proposed NFMA Planning Rule, 72 Fed. Reg. at 48,538 (to be codified at 36 C.F.R. § 219.10). According to the Rule, forest plans *contribute to* overall

sustainability by providing a "framework" that "guides" on the ground management of projects and activities. In order to contribute to the overall goal of sustainability, the sub-goal of ecological sustainability is pursued by "provid[ing] a framework to *contribute* to sustaining native ecological systems by providing ecological conditions to *support* diversity of native plant and animal species." *Id.* (to be codified at 36 C.F.R. § 219.10(b)) (emphasis added).

The Rule sets forth two means by which a plan purportedly contributes to the sustenance of ecological systems. The first requires that plan components (desired conditions, objectives, guidelines, special area designations and suitability of areas) "establish a framework to provide the characteristics of ecosystem diversity in the plan area." *Id.* (to be codified at 36 C.F.R. § 219.10(b)(1)). The second measure provides the responsible official with discretion to address species diversity. It permits the inclusion of "additional provisions" in the plan to provide for specific threatened and endangered species, "species-of-concern" and "species-of-interest," if the responsible official determines that additional provisions are necessary to provide "appropriate ecological conditions" for these species. *Id.* (to be codified at 36 C.F.R. § 219.10(b)(2)).

The Proposed Rule's "Sustainability" Provision Is Obfuscatory, Inexecutable and Provides Unfettered Discretion in Contravention of the NFMA

The Forest Service contends that the "sustainability" provision of the Proposed Rule sets forth a "scientifically credible and realistic approach" that meets legal requirements and the Agency's stewardship responsibilities to provide for diversity. *Id.* at 48,521. In actuality, this provision is so wholly convoluted that the reader, whether it is members of the public or those Forest Service personnel charged with implementing the provision, will not have any clear understanding of what, specifically, the provision requires. Moreover, it contains no mandatory requirements, in contravention of the NFMA's requirement that planning regulations shall contain "*specifying* guidelines" providing for a diversity of plant and animal communities. NFMA § 1604(g) (emphasis added).

The mandate, if any, of the sustainability provision is vague and confusing, at best. The Proposed Rule offers up the *goal* of a "framework" that will "contribute to" sustaining native ecological systems by "providing ecological conditions to support diversity of native plant and animal species" as the means to satisfy the NFMA's diversity mandate. The Rule explicitly states that the framework identified in the Rule "will satisfy the statutory requirement to provide for diversity of plant and animal communities…." Id. However, the Rule does little to *specify* how this "framework" is to be crafted, or how the "framework" will "contribute to" sustaining native ecological systems. The only elaboration as to what form the "framework" shall take is the subpart relating to "ecosystem diversity." However, this provision, too, offers up yet another "framework", this time "providing for the characteristics of ecosystem diversity" in the plan area, characteristics that are undefined in the Rule. Section 1905 of the Forest Service Manual defines "characteristics of ecosystem diversity" as "[p]arameters that describe an ecosystem; composition (major vegetation types, rare communities, aquatic systems, and riparian systems), structure (successional stages, water quality, wetlands, and floodplains), principal ecological

processes (stream flows and historical and current disturbance regimes), and soil, water, and air resources." FSM § 1905. Notably missing from this definition is any reference to wildlife resources. In contrast, the 2000 planning rule did define this term to include a reference to "focal species." *See* 36 C.F.R. § 219.20(a)(1)(i)(E) (2000).

By crafting the Rule using such vague terms as "framework" and "contribute to," neither the public nor forest managers will be able to ascertain exactly how the Rule provides for diversity. This is in contrast to past planning rules, which contained detailed specifications for diversity that could be quantified, monitored and measured to determine if the diversity mandate was being met.

The provision on "species diversity" fares no better. Not only does the Rule fail to define "species diversity," but also the species diversity provision provides no specific direction to forest managers as to when and how species of concern, species of interest and threatened and endangered species should be "provided for" in the plan. The provision permits, but does not require, forest managers to include "additional provisions" in plan components that will "provide appropriate ecological conditions" for these species, when the forest manager deems them necessary. 2007 Proposed NFMA Planning Rule, 72 Fed. Reg. at 48,538 (to be codified at 36 C.F.R. § 219(b)(2)). There is no specificity in the Rule with regard to what form these "additional provisions" will take, when the use of "additional provisions" will be appropriate, the standards through which "appropriate ecological conditions" will be achieved, or the force and effect of these "additional provisions." This does not even address the fact that the types of species protected under the Rule have been severely limited in contrast to protections under previous rules. "Species of concern" are defined as those species for which management actions may be necessary to prevent listing under the Endangered Species Act. *See id.* at 48,540 (to be codified at 36 C.F.R. § 216). Previous Forest Service planning rules had extended protection to species proposed for listing under the ESA, "candidate species" under the ESA, State-listed species, Forest Service "sensitive species" and other species for which loss of viability, including reduction in distribution or abundance, is a concern. "Species of interest" are species for which "the responsible official determines that management actions may be necessary or desirable to achieve ecological or other multiple use objectives." Id. Again, this is a purely non-mandatory duty that the responsible official may undertake at his discretion. There is no guidance relating to when the responsible official should utilize "management actions" to achieve "ecological or other multiple use objectives" for these undefined "species of interest." Nor does the provision provide specific guidance as to what management actions might be appropriate, or the end-goal of utilizing these management actions (i.e., the 1982 planning rule required that populations of native and non-native plant and animal communities be managed to maintain viable populations.).

By requiring that plans establish the above-described framework, which will purportedly *contribute to* ecological sustainability that will then purportedly *contribute to* overall sustainability, the Forest Service contends that the mandate to provide for diversity has been fulfilled. However, as noted above, the Rule's "sustainability" provision contains absolutely no

clear mandates, and thus is completely inexecutable and unenforceable. No concrete obligations are imposed on forest managers, in contravention of the NFMA's mandate to provide "specifying guidelines" to achieve the goal of providing for diversity. The Proposed Rule is replete with discretionary language, essentially requiring only that the responsible official establish undefined "frameworks." In a "should" versus "shall" comparison of the proposed and existing regulatory language, the "shoulds" and "mays" in the proposed rule are in the clear and obvious majority. Any mandatory language, such as "musts," in the Proposed Rule relate to words like "consider" and which are qualified by phrases such as "as appropriate," thus having no clear on-the-ground results or relationship to maintaining diversity.

The only operative language within the "ecosystem diversity" subsection of the "sustainability" provision provides that "[p]lan components *must* establish a framework to provide the characteristics of ecosystem diversity in the plan area." *Id.* at 48,538 (to be codified at § 219.10(b)(1) (emphasis added)). Although the responsible official must establish this undefined "framework" that provides for the "characteristics of ecosystem diversity," there are absolutely no requirements to actually maintain any species or take steps, like species surveys, that support that objective. To "establish a framework that provides the characteristics of ecosystem diversity" does not maintain diversity as required in the NFMA. This language does nothing to ensure that forest planners and managers will provide for diversity as required by NFMA. Similarly, the "species diversity" subpart of the sustainability section is wholly discretionary, containing no mandatory language whatsoever. It grants forest managers wide latitude to utilize management actions to conserve or not conserve individual some species as they please, and may be employed by forest managers at their whim. Moreover, although the Proposed Rule requires that procedures developed to implement Section 1604(g) of NFMA (the provision containing the diversity mandate) must be consistent with the ecosystem diversity and species diversity provisions of the Rule, no where is it explicitly stated in the Rule that procedures *must* be developed that sustain ecological systems. *Id.* at 48,534, 48538 (to be codified at 36 C.F.R. §§ 219.1(c) & 219.10(b)). (Section 219.1(c) of the Proposed Rule requires that the Chief of the Forest Service establish planning procedures for plan development, plan amendment, and plan revision in the Forest Service Directive System. Section 219.10(b) requires that procedures developed pursuant to section 210.1(c) for sustaining ecological systems be consistent with the Proposed Rule's requirements for "ecosystem diversity" and "species diversity."). Nor is it stated that the procedures for sustaining ecological systems have to *ensure* ecosystem diversity.

The language of the proposed regulations is confusing, discretionary and unenforceable. By failing to set forth any clear mandates, concrete obligations or measurable objectives to provide for diversity, and by requiring that plans establish indefinite "frameworks" that "contribute to" undefined goals, the Rule's "sustainability" provision places unfettered discretion in the responsible official and renders the diversity mandate effectively meaningless. The Proposed Rule does not comply with the diversity mandate because it grants unfettered discretion to the responsible official. There are currently 425 federally listed species under the Endangered Species Act (ESA) and another 3,250 Forest Service-designated sensitive species known to occur

on National Forest lands. A strong viability or ecological sustainability requirement is essential to recover the former, and forestall listing of the latter under the ESA. If the needs of these species are not met through a meaningful NFMA process, they will have to be met through an ESA process. Elimination of the viability rule and all meaningful standards for managing and maintaining non-ESA-listed species may also result in the unnecessary loss of forest and grassland species from National Forest System lands.

The Proposed Rule is shown to be even less adequate for meeting the NFMA diversity mandate when considered in the context of the many other changes to NFMA regulations proposed in this Rule. Elsewhere in these comments we note serious deficiencies in the Proposed Rule that should lead to its rejection or revision. For instance, it fails to address cumulative impacts resulting from the elimination of the viability requirements, the other modifications proposed to the NFMA regulations, and the numerous related rollbacks in environmental policies affecting viability on the national forests discussed in these comments.

The sustainability provision is an attempt at clever wordsmithing that seeks to disguise the Rule's real intent, which is to eliminate any real mechanism to ensure the conservation of all native and desired non-native plant and animal species.

The Unfettered Discretion Provided By the Proposed Rule Fails To Implement the Plain Language of the NFMA Diversity Mandate

The plain language of NFMA's statutory requirement, to "provide for," means that Congress intended the Forest Service to commit to achieving the goal of maintaining biological diversity. The Proposed Rule, however, requires only that the plan "establish a framework for the characteristics of ecosystem diversity", which is inconsistent with the statutory mandate for the regulations to include specifying guidelines that ensure the goal of maintaining biological diversity will be met. In order to provide for the achievement of a particular goal, affirmative action toward attainment is inherently part of providing for that goal. In other words, to provide for diversity requires more than considering that goal and assessing it; it requires regulations that ensure the agency will achieve it, by mandating and/or prohibiting agency action in pursuit of the maintenance and preservation of biological diversity.

None of the qualifying language in the NFMA diversity mandate obviates the baseline requirement to maintain the "diversity of plant and animal communities." The clause requiring diversity that is "based on the suitability and capability of the specific land area" does not modify the diversity mandate since native, natural diversity has always been based on the suitability and capability of the land. The language requiring diversity that meets "overall multiple-use objectives" also does not weaken the diversity mandate since wildlife, fish, and watersheds are core purposes of the MUSYA. *See* MUSYA § 528. Further, diversity must be maintained in order that multiple use objectives can be met. There is nothing in the NFMA diversity language to suggest that the goal of maintaining diversity is subordinate to maintaining multiple uses, or that multiple use objectives trump in any way the requirement to maintain diversity.

Nothing in the Proposed Rule, however, recognizes the essential element of maintaining diversity or requires forest managers to maintain any individual parts of communities or even the communities themselves. The practical effect of regulations that create a system with no required actions and no imposed duties is to render the diversity requirement meaningless.

Adaptive Management

We continue to be concerned with the agency's intention to use "adaptive management" to seemingly solve all problems. The promise of adaptive management generally has not been fulfilled. Adaptive management is meaningless without monitoring and evaluation to inform adaptation, and without disclosure through reporting. These are all areas where the Forest Service has historically fallen short. Moreover, to avoid successful legal challenges to the failure to follow through on monitoring commitments, many of the recently completed forest and grasslands management plans have greatly limited the amount and extent of monitoring required. The agency has moved monitoring plans and requirements out of land management plans and off into (as yet uncompleted) monitoring implementation plans in an attempt to avoid legal responsibility to actually complete any monitoring. In addition, many of these same plans have stipulated that the monitoring, evaluation and reporting that is required will only be done if there is enough money. Given the lack of requirements and competing demands for a shrinking set of funds, it is hard to believe that the Forest Service can actually complete the kind of monitoring envisioned by adaptive management, let alone complete sufficient evaluation and reporting. The picture doesn't look any better at the post-project monitoring phase with funds seemingly having dried up when it comes to doing much of the monitoring and mitigation stipulated in NEPA decisions. We will be watching closely to see that adaptive management as it is practiced by the Forest Service includes all of the elements of effective monitoring.

Effects on Public Involvement and Meaningful Participation

A vital component of NFMA is the guarantee of meaningful citizen participation in the national forest planning process. The public has an interest in the management of national forest resources and, pursuant to NEPA and NFMA, a right to participate effectively in the planning process. NFMA requires that the Secretary of Agriculture assure public participation in the development, review, and revision of land management plans. NFMA § 1604(d). This guarantee ensures that citizens can inform themselves about national forest management and planning at every juncture of the process, from development and approval of a plan, to revision of a plan, all the way through project approval. However, informed citizen participation can only be accomplished where consistent, specific, mandatory mechanisms are established in the planning rule. NFMA envisions and requires these specific mechanisms. *See id.* §§ 1604(d), (f)(1), (f)(4), f(5)(B), (g)(3)(F)(iv).

However, despite this clear mandate, the Proposed Rule forecloses meaningful citizen participation in the national forest planning process, and is therefore in violation of NFMA, on the grounds that:

- The Proposed Rule fails to follow the legislative intent to preserve post-decision appeals.
- The Proposed Rule limits the degree of public participation envisioned by NFMA by imposing burdensome conditions on the pre-decisional objection process and in granting the responsible official wide discretion in determining the methods and timing of citizen participation.
- The Proposed Rule fails to acknowledge that post-decision appeals are an important tool in fostering public participation.
- The effects of the Proposed Rule's weakened public participation requirements will be exacerbated by the elimination of public review afforded under the NEPA process, such that citizens' opportunities to participate in national forest planning will be all but eliminated.

The agency must create a public participation process in compliance with the NFMA, in order to be taken seriously in their stated goal of fostering collaboration.

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Overall, the Forest Service seems intent on narrowing the scope of its responsibilities under NEPA and its accountability to the American public. This proposed land management planning rule is but one example. The rule as proposed would eliminate landscape level environmental impact analysis and public disclosure of those effects. The agency once again attempts to assign to itself authority it does not possess in order to make changes which undermine statutory language and case law, unfortunately opening the agency to ongoing controversy. These efforts, along with the proposed agency NEPA regulations and agency plans to move NEPA analysis off the individual national forest system units, are troubling.

Once again, we believe the proposed rule and DEIS should be withdrawn due to the extent of their inadequacies. We look forward to continued discussion of this proposed rule and EIS.

Should you have any questions or need clarification on these comments, please contact Mary Krueger at the address below. Thank you for your time and consideration.

Sincerely,

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