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Sierra Nevada Forest Plan Amendment DSEIS
P.O. Box 221090
Salt Lake City, UT 84122-1090

RE: Comments on Draft Supplemental Environmental Impact Statement for the Sierra Nevada Forest Plan Amendment

This letter contains the comments of the Attorney General of the State of California regarding the United States Forest Service's Draft Supplemental Environmental Impact Statement for the Sierra Nevada Forest Plan Amendment ("Framework").

INTRODUCTION

The Attorney General submits these comments pursuant to his independent authority under the California Constitution, common law, and statutes to represent the public interest. Along with other State agencies, the Attorney General has the power to protect the natural resources of the State from pollution, impairment, or destruction. *See* Cal. Const. art. V, § 13; Cal. Gov. Code §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office. As noted more fully below, we also endorse and incorporate by reference the comments submitted separately by the California Resources Agency.

In January 2001, after over a decade of scoping, planning, drafting, scientific review and input, public process, and compromise, the U. S. Forest Service issued its final Sierra Nevada Forest Plan, covering eleven national forests in the Sierras and millions of acres of some of the most scenic and environmentally important land in California ("Framework"). The process required all participants to make difficult choices and significant concessions, but as a result, yielded a landmark management plan balancing competing uses for the Forests and protecting old growth stands, wildlife, and aquatic resources. No one suggested that the Framework was perfect, but it reflected the best thinking of hundreds of dedicated scientists and forest planners, as well as enormous public input.

The Forest Service under the Bush administration affirmed the wisdom and goals of the Framework in rejecting the various appeals that argued for greater consumptive and extractive uses of the National Forests. Its apparent commitment to the Framework was, however, short-lived. Now, little more than two years later, without any meaningful period for implementation, the Forest Service proposes massive, radical alterations to the Framework, gutting its basic

wildlife, habitat, and riparian protections, increasing timber harvesting by three- and four-fold, allowing fragmentation of wildlife corridors that were a centerpiece of the Framework, all in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706 *et seq.*, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* and other controlling environmental laws. While the Forest Service contends that it is simply “supplementing” the Framework based on “new information,” in reality its proposal to revise the Framework (“Plan Revision”) reflects a betrayal of the decade-long planning process and an about-face in management of California’s Sierra Nevada Forests to the detriment of the State’s natural resources. The Forest Service’s change in management direction comes without new information, without scientific study, without meaningful evaluation, and without compliance with the basic legal requirements for such a change.

California’s Attorney General has participated in the land management planning process for national forests in the Sierras for almost twenty years. We have worked with the Forest Service on the Framework since its inception. It is, therefore, with substantial disappointment that we submit these comments, reflecting our view that the Plan Revision represents an abdication of the Forest Service’s legal obligations both with respect to protection of the State’s resources and compliance with the basic requirements of law.

COMMENTS

The Attorney General's Office has a long history of participation in national forest planning in California. In the mid- to late- 1980s and early 1990s, this Office submitted extensive comments on a number of proposed forest plans (including Plumas, Sequoia, Tahoe, Modoc, Shasta-Trinity, and Lassen), appealed and intervened in several plans after the plans were approved by the Forest Supervisor, and participated in a seventeen-month mediation process for the Sequoia National Forest land management plan that culminated in an agreement which still governs aspects of management of that forest.

Our involvement in the forest planning process reflects the importance of national forests and forest resources to the people of this State. National forests cover millions of acres in California, including some of the most spectacular and sensitive areas of the Sierra Nevada region. For example, the Sequoia National Forest (and, now, Monument) contains world-renowned groves of Giant Sequoia trees, among the oldest and largest trees in the world; the Tahoe National Forest has among the best and most important freshwater fishing areas in the country; and the Inyo National Forest is among the most-used national forests in the country. The Sierra Nevada region provides habitat for the California spotted owl, as well as several other species that are imperiled. In addition, the Sierra Nevada region, and its national forest land in particular, provides a significant proportion of the State’s drinking and agricultural water resources.

Consistent with our long-standing interest and participation in forest planning issues, in January of 1999, we submitted comments in response to the Notice of Intent (“NOI”) to prepare an environmental impact statement (“EIS”) for the Framework, which proposed to amend the

Land and Resource Management Plans for the Modoc, Lassen, Plumas, Tahoe, Eldorado, Stanislaus, Sequoia, Sierra, and Inyo National Forests in California, the Lake Tahoe Basin Management Unit, and the portion of the Humboldt-Toiyabe National Forest in the Sierra Nevada, and the Regional Guides for the Intermountain and Pacific Southwest Regions.¹ In our comments, we stated our support for the Forest Service's decision to prepare an EIS and the general focus of the EIS as described in the NOI. In addition, we requested that the EIS focus on restoration and protection of old growth portions of the forests and of riparian and aquatic zones, and address the important topics of inventories of resources, monitoring, enforcement and restoration. Our participation has continued through the administrative appeal, in which we supported the Framework, and the Forest Service's most recent decision to review and amend the Framework. We have expressed our view that the review and revision as proposed and pursued by the Forest Service violate the law.²

Now, the Forest Service has issued its Draft Supplemental Environmental Impact Statement for the Sierra Nevada Forest Plan Amendment ("DSEIS") for the proposed Plan Revision. As we have noted in previous comment letters, the mere continued existence of dispute and controversy cannot justify the Forest Service's abrupt change in course. The Forest Service's Plan Revision is improper. Even assuming that the Forest Service's proposal to revise the Framework passes substantive legal muster, the DSEIS violates NEPA in multiple aspects. The Forest Service has failed to identify "new information" giving rise to a supplemental EIS, failed in its use of the "supplement" process under NEPA, and failed to discuss the environmental impacts of its radical alternation of the Framework. These deficiencies and others are addressed below.³

¹The NOI was published at 63 Fed. Reg. 64,452 (1998).

²See, for example, Letter from Ken Alex, Supervising Deputy Attorney General, to Steve Clauson, EIS Team Leader, Sierra Nevada Framework Project, January 14, 1999; letter from Janill Richards, Deputy Attorney General, to Dale Bosworth, Chief U.S. Forest Service, July 13, 2001; letter from Janill Richards, Deputy Attorney General, to Dale Bosworth, Chief U.S. Forest Service, March 14, 2003; Letter from Janill Richards, Deputy Attorney General, to Dale Bosworth, Chief U.S. Forest Service, February 6, 2002; letter from Sally Knox, Deputy Attorney General, to Mark Rey Under Secretary for Natural Resources and Environment, December 7, 2001.

³Our comments focus on major concepts and are not an exhaustive discussion of all issues.

I. The Forest Service's Decision to Abruptly Reject the Results of a Decade-Long Planning and Decision Making Process is Arbitrary and Capricious under the APA

According to the Forest Service, the Sierra Nevada Framework Plan Record of Decision ("ROD") must be amended due to "changed circumstances and new information" concerning the California spotted owl; aquatic, riparian, and meadow ecosystems; fire and fuels; and the implementation of the Quincy Library Project. DSEIS at 27. In fact, despite its best *post hoc* efforts to justify the evisceration of the original Framework, the Forest Service has failed to identify any substantive changed circumstances or new information that has come to light in the 22 months since the Framework was affirmed on administrative appeal. All of the issues identified by the Forest Service as "new" or "changed" existed during the planning period and were considered by the Forest Service as part of its decision making on the original Framework.

In short, the Forest Service has turned the Framework on its head, while stating to the public that it is merely fine-tuning its previous decision to protect forest health. The Forest Service's reversal is arbitrary and capricious.

A. APA: The Legal Standard

It is well-established that agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Periman Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)). Reappraisal, even if brought about by a change in administration, clearly is not prohibited. *See id.* at 59 (Rehnquist, J., concurring and dissenting). But "[w]hile an agency may properly rely on an 'incumbent administration's views of wise policy to *inform* its judgments,' . . . it may not casually *substitute* those considerations for a rational evaluation of the merit and efficacy of its policies." *National Black Media Coalition v. FCC*, 775 F.2d 342, 305 n.6 (D.C. Cir. 1985) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) (emphasis in original).

Where an agency revokes its former decision, its action "constitutes a reversal of the agency's views as to the proper course." *State Farm*, 463 U.S. at 41.

A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."

Id. (quoting *Atchison, Topeka & Santa Fe Railroad Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-808 (1973)). In light of this presumption, "[a]n agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond which may be required when an agency does not act in the first instance." *Id.* at 42.

This is more than an exercise in "minimum rationality." *Id.* at 43, n.9. An agency may

not, for example, “merely recite the terms ‘substantial uncertainty’ as a justification for its actions.” *Id.* at 52. If an absence of evidence plays a role in the agency's decision, “one aspect of that explanation would be a justification for rescinding the regulation before engaging in a search for further evidence.” *Id.* “The agency must explain the evidence which is available, and must offer a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Failure to do so renders the agency's action arbitrary and capricious. *Id.* at 43.⁴

Here, the Forest Service has rejected not only the Framework, a culmination of more than a decade of public participation, but also the studies, reports and regulations that preceded and supported the Framework, including the 1993 California Spotted Owl Interim Guidelines (“CASPO”). To this point, the cautious approach adopted in CASPO and the Framework has been accepted as necessary to protecting forest ecosystems in the long term. As discussed below, the Forest Service has failed to supply a reasoned analysis to support its dramatic departure from this settled approach or its failure to obtain additional evidence before doing so.

B. None of the Purported “New Information” or “Changed Circumstances” Justify the Forest Service’s Abrupt About-Face

1. Spotted Owl

According to the Forest Service, the following new information and changed circumstances compelled the proposed Revision Plan with respect to the spotted owl:

- a. recent spotted owl studies show a “pulse in reproduction” not considered in the original Framework Plan. DSEIS at 28;
- b. California state law requires private industrial timberlands to be managed in a manner that considers owl habitat. DSEIS at 29;
- c. The U.S. Fish and Wildlife Service declined to list the California spotted owl as an endangered species. DSEIS at 29.

a. U.S. Fish and Wildlife Service’s Listing Decision

The Forest Service’s use as “new information” of the U.S. Fish and Wildlife Service

⁴In *State Farm*, the National Highway Traffic and Safety Administration attempted to justify its rescission of a passive restraint rule passed under the previous administration by stating that there was no longer a basis for reliably predicting that the standard would lead to any significant increase use of restraints, and the rule would require approximately \$1 billion to implement. Just four years previously, the agency had predicted significant safety benefits. *Id.* at 38-39. The Court held the rescission arbitrary and capricious because the agency gave no consideration to requiring airbags or other technology that could not be circumvented by consumers. *Id.* at 51, 55-56.

(“USFWS”) determination not to list the California spotted owl as threatened or endangered under the Endangered Species Act (“ESA”) is disingenuous. The USFWS decision not to list the California spotted owl is *based explicitly on the protections for the owl set forth in the Record of Decision for the Framework*. See USFWS listing decision, 68 Fed. Reg. 7,604 (2003). In fact, the USFWS decision explicitly states that it must revisit the listing decision if the Forest Service changes the Framework:

The [Framework] addresses five problem areas: old forest ecosystems and associated species; aquatic, riparian, and meadow ecosystems, and associated species; fire and fuels; noxious weeds; and lower westside hardwood ecosystems. The [Framework] included a conservation strategy for California spotted owls, which replaced the interim guidelines.

Subsequent to the establishment of management direction by the Record of Decision of the [Framework], Region 5 of the Forest Service has undertaken two efforts that may result in changes in the anticipated impacts of the [Framework]. The first is a management review of the [Framework], and the second is planning for implementation of an Administrative Study on the Lassen and Plumas National Forests that would evaluate the effects of extensive fuels treatments on the California spotted owl. As of yet, neither of these efforts have formally established management direction, so their potential effects are not included in the assessment of threats to the California spotted owl under this 12-month finding. However, because the outcome of each of these efforts could substantially affect California spotted owls, we will monitor the development of management direction, offer scientific assistance, and review the effects at a later date if necessary.

68 Fed. Reg. 7604 (Feb. 14, 2003) (emphasis added).

In addition, the USFWS listing decision identifies the fact that all Framework Standards and Guidelines will be implemented in the Quincy Project area. The Revision Plan changes those Standards and Guidelines and explicitly exempts the Quincy Project from the environmental protection aspects of the Framework.

The USFWS listing decision is not new information upon which the Forest Service can rely for a change in the Framework. It is quite clearly and explicitly the opposite. The changes proposed by the Revision Plan are dramatically new information which the USFWS must consider in reopening the listing decision. Changes in canopy cover, elimination of Standards and Guidelines setting minimum protection for owl habitat, changes to timber harvesting tree size minimums, and the inclusion of the full-scale Quincy project in the middle of prime spotted owl habitat, as set forth in the Revision Plan, could each impact the listing decision. By citing the USFWS decision not to list the spotted owl, the Forest Service misapplies the decision, mischaracterizes it as new information, and fails to meet its legal obligations under the Endangered Species Act, the National Forest Management Act, and NEPA. In no way is the listing decision new information forming the basis for a principled change in management direction and a radical change in the Framework.

b. California State Law Has Not Changed

The Forest Service contends that California law requiring consideration of owl habitat by private forest land holders is a new circumstance giving rise to the need to amend the Framework. As California's chief law officer, the Attorney General is aware of no such change in California state laws or regulations. In fact, the USFWS spotted owl listing decision sets forth a good summary of California state law requirements, all of which were in place at the time the Framework was approved. *See* 68 Fed. Reg. 7,604-06 (2003). The legal requirements are not new, and it is difficult to understand to what the Forest Service refers on this issue.

c. Reproductive Pulse

"As one of the most intensively studied birds in the United States, the spotted owl has been the focus of research for well over two decades." USFWS listing decision, 68 Fed. Reg. 7,590 (2003). "Several analytical methods have been applied to the analysis of population trend in spotted owls, and each method carries certain strengths and weaknesses. Thus, to best understand population trend, it is important to concurrently assess the results of all methods instead of relying on a single analytical approach." *Id.* at 7,590-91. "There is no definitive evidence that the population [of California spotted owls] is decreasing across its range, and various analytical results of the individual study areas are not wholly supportive of conclusions regarding declines in any given study area." *Id.* at 7,595.

The Forest Service's observation of a spotted owl "reproductive pulse" must be placed in this context. The "pulse" – an apparent increase in reproduction – must be evaluated in the context of decades of research and observations that includes areas of decline as well as the USFWS's inability to determine, even with decades of information, the overall population trend for the owl. The DSEIS fails to analyze how or whether the observed pulse affects the calculation of the finite rate of population change. Additional information concerning reproduction during the past few months is certainly relevant for consideration, but only in the context of the decades of information and the intensive study in areas of the national forests. A short-term reproductive pulse without context or analysis, certainly does not form the basis for radical change in management and habitat protection.

2. Aquatic, Riparian, and Meadow Ecosystems

In the DSEIS, the Forest Service states that new information is "available about the likely reductions in grazing activity that will be caused by the existing standards and guidelines for meadows and meadow-associated species" – specifically, the endangered willow flycatcher⁵ and candidate species Yosemite toad. DSEIS at 29. (The willow flycatcher and Yosemite toad are

⁵The willowfly catcher is listed by the State as endangered; one subspecies, the southwestern willow flycatcher, is listed by the federal government as endangered. FEIS, vol. 3, ch. 3, pt. 4.4, p. 143.

also Forest Service sensitive species. *See* FEIS at vol. 3, ch. 3, pt. 4.4, pp. 1, 143, 218.) The agency further states that “there is new information to consider about the population status and distribution of the Yosemite toad and willow flycatcher gained from two years of field surveys This information supports the need to consider local data and conditions when planning projects in associated habitats.” DSEIS at 3. According to the Forest Service, it has proposed changes to the Framework “to allow more economic benefits to be retained while continuing to minimize the risks to sensitive species.” *Id.*

In plain language, the Forest Service has now decided to favor continued grazing in the habitat of the willow flycatcher, Yosemite toad, and other species associated with sensitive aquatic ecosystems, contending that new information reasonably allows the agency to re-strike the balance. Its claims to “new information” are, however, misleading and disingenuous.

The Forest Service is correct in stating that the Framework’s Standards and Guidelines may reduce the amount of grazing allowed in the Sierra national forests. The Forest Service, however, is clearly wrong in suggesting that this is new or changed information. The Forest Service was fully aware when it approved the Framework that the grazing Standards and Guidelines would reduce grazing opportunities. As Regional Forest Bradley E. Powell acknowledged in the ROD, “[t]he effect of habitat and ecosystem conservation measures are expected to reduce the number of animal unit months (AUMs) in the Sierra Nevada by approximately 83,000 over the next ten years[,]” though he noted that “[o]ne third of these reductions were already scheduled to occur under existing plans and policies.” ROD at p. 28. Similarly, in the FEIS, the Forest Service pointed out that the “conservative standards” selected in the Framework would remain in effect until a site-specific analysis “could be completed to determine the condition of the range”; “since it would take many years to complete the analysis on several hundred allotments, it is assumed that many permittee would give up their permits.” FEIS, vol. 1, Summary at p. 36; *see also* FEIS, vol.1, ch. 2, p. 194; FEIS, vol. 2, ch. 3, pt. 5.3, pp. 399-416. The Forest Service’s new position is no more than a change in view based on a desire to increase grazing opportunities and has nothing to do with new or changed information about impacts to permittees.

The Forest Service’s argument to increase grazing based on “new information” about population status and distribution of the willow flycatcher and Yosemite toad is similarly flawed. In the FEIS, the Forest Service noted the precarious position of these species. “[T]he willow flycatcher population in the Sierra Nevada is known to have dramatically declined after 1940[,]” and in the last decade, the Yosemite toad has “declined substantially or disappeared from over 50% of the sites where it was known historically.” FEIS, vol. 3, ch. 3, pt. 4.4, pp. 162, 218. In the FEIS, the Forest Service found that grazing, among other activities and factors, likely had adverse direct and indirect impacts on these species. *See, e.g.*, FEIS, vol. 3, ch. 3, pt. 4.4, pp. 146-147, 152-157, 218-221. The Forest Service’s conclusions were reiterated in the Biological Assessment, *see, e.g.*, Biological Assessment at pp. 75, 77, 79-80 (willow flycatcher), and affirmed in the FS’s January 11, 2001 Biological Opinion Biological Opinion (1/11/01) at pp. 55, 79, 104-109, 119, 141-143, 161, 163-164.

In the FEIS, the Forest Service found that grazing, unlike some other risk factors – *e.g.*, severe weather or disease outbreak – was in control of the Forest Service; accordingly, it decided to reduce this specific risk in order to reduce overall risk. *See, e.g.*, FEIS, vol. 3, ch. 3, pt. 4.4, p. 162 (willow flycatcher). The Forest Service acknowledged that there were gaps in the data concerning current populations of the willow flycatcher and Yosemite toad and the impacts of grazing to these species. *See, e.g.*, FEIS, vol. 3, ch. 3, pt. 4.4, pp. 155, 180, 220. It reasonably resolved to address this issue by requiring monitoring and reassessment of management practices based on the information thereby acquired. FEIS, vol. 3, ch. 3, pt. 4.4, p. 180-181.

Two years after it made these findings, the Forest Service has reversed course, minimizing the risk that grazing poses to these species and rejecting the “cautious approach” it took in the Framework. Now the Forest Service emphasizes the certainty that grazing will be impacted and suggests that impacts to aquatic species, in contrast, are uncertain. Management Review and Recommendations (“MR&Rs”) at 61. For the willow flycatcher, the Review Team opines that “significant restrictions were placed on grazing to mitigate questionable and, in our judgment, relatively minor risks.” *Id.* at 67. And for the Yosemite toad, the Review Team advises that “by attempting to eliminate all risks from grazing, the ROD used an overly cautious approach” *Id.* at 71.

A review of the materials cited by the Forest Service in the DSEIS shows that there is in fact little new information, and none of the information establishes that grazing does not pose a risk to these species. For example, the DSEIS states summarily that the “recently completed conservation assessment for the willow flycatcher includes updated information about the status of the species and possible refinements to managing and restoring suitable habitat.” While the 2003 “conservation assessment” is mentioned in passing in the DSEIS, *see, e.g.*, pp. 2, 3, 29 (references to Bombay and Morrison 2003), and is cited in the references DSEIS, p. 361, how the document and its findings support the Forest Service’s proposal to increase grazing in willow flycatcher habitat is not discussed. Indeed, the cites to Bombay and Morrison 2003 appear to undermine, rather than support, the Forest Service’s proposal. In the DSEIS, Bombay and Morrison 2003 is cited for the proposition that there is an “alarming” downward trend in the number of willow flycatcher territories in the north central Sierra and that there has been a recent “increase in cowbird parasitism” of this species. DSEIS at pp. 116-117. The conservation assessment specifically discusses livestock grazing as one of several activities (including water developments, recreation and pesticide use) that could directly impact willow flycatchers. Bombay and Morrison 2003 at p. 36. Specifically, these authors state that “[c]urrent grazing schemes that allow grazing within willow flycatcher breeding habitat may upset flycatcher nests . . . , alter willow habitat . . . , facilitate cowbird parasitism, and exacerbate chronic conditions (gullies).” *Id.* at p. 37. Further, impacts from grazing are not limited to those from past activities; “[p]reliminary results from grazing studies in the Sierra Nevada indicate that there are impacts from contemporary livestock grazing” *Id.*⁶ Plainly, the conservation assessment in no way supports the Forest Service’s proposal to continue the grazing status quo.

⁶Not surprisingly, the DSEIS does not discuss these aspects of the conservation assessment.

The Forest Service also states, somewhat cryptically, that new information “supports the need to consider local data and conditions . . .” DSEIS at 29. The Forest Service's argument cannot be that allocation-specific data is not relevant under the existing Framework. As discussed, the Framework requires extensive monitoring and collection of data which, through adaptive management, inform future management decisions. In truth, the argument appears to be a restatement of what the Review Team euphemistically refers to as “flexibility” – or reservation of local management control. MR&Rs at 61. In the Framework, the Forest Service specifically rejected an emphasis on local management control as ill-advised. In the FEIS, the Forest Service found that where “bioregional standards . . . default to local management control, they may be widely interpreted and will have . . . higher potential risks for focal species.” FEIS, vol. 3, ch. 3, pt. 4.4, p. 163. The Forest Service has not here explained why its previous decision was in error and has failed to justify its reversal on this fundamental issue.

For these reasons, the Forest Service's proposal to risk the long-term health of aquatic ecosystems and survival and recovery of their associated species in order to benefit grazing interests is arbitrary and capricious.

3. Fire and Fuels

According to the Forest Service, the following new information and changed circumstances compelled the proposed Revision Plan with respect to fire and fuels:

- a. The National Fire Plan was issued, and changes need to be made to the Framework to make it consistent with the Fire Plan. DSEIS at 30;
- b. There is a need to make more money from timber sales to allow more fire hazard treatments. DSEIS at 30;
- c. Framework imposed Standards and Guidelines are too restrictive to ensure sufficient fire hazard treatment. DSEIS at 30.

a. National Fire Plan

According to the Forest Service, the original Framework is consistent with the National Forest Plan. In response to an administrative appeal of the Framework, the Chief of the Forest Service specifically stated,

[A]fter my review of the ROD, FEIS and the Administrative Record, I find that the standards and guidelines for fuels treatments are consistent with the National Fire Plan and the Cohesive Strategy. The standards and guidelines offer managers broad discretion in implementation of fuels reduction projects. They apply to the entire forest and allow managers to set priorities in each land allocation, be it mapped or unmapped. The scale and pace of fuel treatments comply with national direction and strategy.

Appeal Decision at A-12. The Forest Service cannot now contend, just months after its appeal decision, that the same National Fire Plan is inconsistent with the same Framework. Even

current Regional Forester Jack Blackwell recently admitted that “the FEIS is pretty good in conforming to the NTP [National Fire Plan]” Notes of Meeting with CA Spotted Owl Scientists, June 28, 2003 at p. 4. Clearly, this is a change in policy rather than circumstance or information.

b. Insufficient Funds

The Forest Service identifies the lack of funds available to do the number of fuel treatments recommended as a new or changed circumstance requiring a change in direction. It then determines that timber harvesting is the manner in which to increase funding for fuel treatment. In fact, the lack of funds is not new. The Forest Service faces a longstanding shortage of funds to do all of its proposed fuel reduction work, its watershed maintenance and restoration, its monitoring, or a whole host of other items, usually related to ecosystem health. The information and issue are not new and were considered in the Framework. In addition, while the Forest Service determined for purposes of the Revision that increased funds from increased timber harvesting is to be spent on fuel treatments, it could just as easily be spent on watershed improvement or monitoring or other underfunded programs on the forests. It could also be spent dealing with problems resulting from increased sedimentation caused by increased timber harvesting and road building. The DSEIS discusses none of these tradeoffs. With respect, insufficient funds – an on-going issue on all national forests – does not amount to new information or changed circumstances.

c. Standards and Guidelines

Once again the Forest Service seeks to alter the Standards and Guidelines approved earlier this year, not based on new information or changed circumstances, but because of a change in management direction. In this instance, the Forest Service actually acknowledges the point. It states in the DSEIS that “[t]he potential for this problem was recognized in the FEIS with a statement that ‘Modified 8 would have stand level structural requirements that could preclude full implementation of the fuels strategy.’” DSEIS at 30. By so stating, the Forest Service recognizes that the issue was identified and considered in the Framework process and was part of the information available when the Framework was approved.

4. Implementation of Quincy Library Project

According to the Forest Service, the following new information and changed circumstances compelled the proposed Revision Plan with respect to the implementation of the Quincy Library Project:

- a. The Framework Plan prevents the Project from proceeding in a meaningful manner. DSEIS at 31;
- b. The Quincy “goal of commodity production” was “compromised” by the original Framework Plan. DSEIS at 31.

The Forest Service presents no new information with respect to Quincy. The Framework decision was made knowing that it would likely preclude full implementation of Quincy. The Quincy law recognizes that the Framework Plan and other Forest Service actions could limit implementation of Quincy. This is, plain and simple, a change in management direction, a political decision with no basis in science. In fact, as discussed in more detail below, the change calls into question the determination not to list the spotted owl as a threatened or endangered species under the Endangered Species Act, raises issues concerning species viability under the National Forest Management Act, and violates NEPA by failing to discuss the environmental impacts of the management change on the owl, the habitat, and the related resources.

5. General Inability to Implement the Plan

The Forest Service states that, based on surveys of district rangers, it has determined that the Framework creates substantial problems for implementation and too severely limits flexibility at the local level. DSEIS at 28. The following chart reflects the projects implemented – and not implemented – under the Framework:

AS OF SEPT. 2002

Ranger Districts that had not implemented projects

6B, 6D, 3B, 11B, 11A, 2C, 1B, 2B, 3A, 3C, 9C, 9B, 8B, 7A, 4D, 4B, 4E			
Ranger Districts that had implemented projects	# Modified Pre-Framework Projects	# Post-Framework Projects	Post-Framework Project Issues
6A	3	0	
6C	1	0	
2A	4	0	
1A	1	0	
9D	2	0	
9A (several small projects)	?	?	canopy cover requirement no problem, but some difficulties w/ RCA and owl/goshawk survey costs
8A	several	0	
7D	3	0	
7C	several	several	problems w/ PAC fuel reduction limits, SPLAT implementation, diameter

			limits, lwd requirements, and funding
7B	several	0	
4A	several	0	
4C	several	1	mostly smooth; problem interpreting/applying 20" dbh limit for projects outside of old forest emphasis areas

key:

- | | | |
|--------------------|----------------------|-----------------------------|
| 1. Modoc | D. Forest Hill | B. High Sierra |
| A. Devils Garden | E. Nevada City | 9. Sequoia |
| B. Warner Mountain | | A. Hume Lake |
| C. Big Valley | 5. LTBMU | B. Tule River - Hot Springs |
| | 6. Eldorado | C. Greenhorn |
| 2. Lassen | A. Placerville | D. Cannell Meadow |
| A. Hat Creek | B. Georgetown | |
| B. Almanor | C. Amador | 10. Inyo |
| C. Eagle Lake | D. Pacific | A. Mammoth/Lee Vining |
| 3. Plumas | E. Eldorado "I" Team | B. White Mtn/Mt. Whitney |
| A. Mt. Hough | 7. Stanislaus | 11. Humboldt -Toiyabe |
| B. Beckworth | A. Calaveras | A. Carson |
| C. Feather River | B. Summit | B. Bridgeport |
| 4. Tahoe | C. Miwok | |
| A. Downieville | D. Groveland | |
| B. Truckee | 8. Sierra | |
| C. Sierraville | A. Bass Lake | |

A full 17 of the 29 district ranger stations have implemented no projects whatsoever under the Framework. Of the 12 district ranger stations that have implemented projects under the Framework, only one project (other than at Stanislaus–MiWok) was proposed and implemented under the Framework. All other projects were proposed before the Framework took effect and modified to proceed after the Framework was approved. In the words of the Forest Supervisor for the Tahoe National Forest, “[w]e can’t show you where it didn’t work because we didn’t go very far” Notes of Meeting with CA Spotted Owl Scientists, August 7, 2003 at p. 11. The Forest Service cannot reasonably argue that these projects reflect a meaningful attempt to implement the Framework. Instead, it appears that the Forest Service determined not to implement the Framework and not give the Framework any chance of success. The number of projects implemented under the Framework does not give rise to “new information.” From this data set, the Forest Service cannot determine whether the Framework can be implemented or not.⁷

Additionally, it is not surprising and not new that the district rangers (1) are resistant of change, and (2) want more, rather than less, flexibility for local project implementation. It is hard to imagine that district rangers would not have such a reaction. District rangers expressed similar views during the Framework process. *See, e.g.*, FEIS Administrative Record (“AR”)

⁷It is interesting to note that with respect to the Quincy Project, the Forest Service states that it was given only 17 months before it was superceded by the original Framework, and that, as a result “the opportunity to fully test the original design for [the Project] is foregone.” Framework Review at 54. Apparently, the Forest Service cannot evaluate fully the Quincy Project in 17 months but can make its determination about the far larger and more complex Framework in less than 12.

1126, 1129, 45; e-mail 2/21/03 from D. Yasuda, Assistant Resource Officer/Wildlife Biologist to Sam Wilbanks, FS R5 (“a lot of the concern from Rangers collectively seems to be based upon the hypothetical rather than through IDTs trying to actually work on a piece of new ground and apply the ROD from scratch”). Nothing in the district ranger letters reflects new information.

Third, a careful reading of the district ranger letters reflects that in conjunction with concerns about local flexibility and normal resistance to change, the rangers identify economic issues as the most basic issue. There is not enough money to fully implement the Framework. This is not new information and it should not be presented as such. It led the Forest Service in its proposed Revision Plan to increase timber harvesting in order to raise funds for fuel load reductions and other action on the Forests. In fact, there are any number of other ways to fund fuel treatments and other projects, none of which (1) impact the environmental health of the Forests and (2) are discussed in the DSEIS as alternatives (or in any other way). Certainly, the Forest Service was aware of its economic issues and funding problems when it approved the original Framework. Once again, the Forest Service has failed to identify new information or changed circumstances.

II. The Forest Service’s DSEIS is Misleading and Fails to Fully and Adequately Disclose the Nature of the Revision Plan and its Impacts in Violation of NEPA

A. NEPA: Legal Standard

The purpose of NEPA is to ensure that the agency is well informed before it takes action that may impact the environment, and to involve the public and other government agencies in the decision making process. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Environmental documents, *e.g.*, the EISs and SEISs, are central to NEPA’s purposes. Accordingly, such documents must contain “a reasonable, good faith and objective presentation” of the issues. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988) (internal quotation omitted). “[T]he comprehensive “hard look” mandated by Congress and required by the statute . . . must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

As discussed below, the Forest Service excluded the public from the decision making process by failing to engage in scoping. Moreover, the Forest Service is attempting to cloak its wholesale revision of the Framework as a mere fine-tuning, thereby misleading the public. Accordingly, the DSEIS does not satisfy the purposes of NEPA.

B. The Forest Service Inexplicably Failed to Engage in Scoping for the Revision Plan

For unknown reasons, the Forest Service chose to draft and issue the proposed Revision Plan and DSEIS without a scoping process under NEPA. As the Forest Service Handbook states, scoping is “an integral part of environmental analysis.” Forest Service Handbook, § 1908.15, ¶ 11. That point is underlined here by the Forest Service’s failure to evaluate and analyze a

meaningful range of alternatives to the Revision Plan. (See subsection D.2. below). The California Resource Agency's on-going request, for example, that the Forest Service seriously consider and evaluate particular adaptive management approaches was ignored. A public scoping process would have led the Forest Service to pay closer attention to alternatives and concerns of the public. As discussed extensively below, the Revision Plan radically alters the Framework; it does not simply supplement it. Under these circumstances, the issuance of an environmental document without a scoping process is a serious failure.

C. The Revision Plan Is A Wholly New Project Requiring A New EIS

The NEPA regulations require an agency to supplement a previously-prepared EIS where "the agency makes substantial changes in the proposed action" 40 C.F.R. § 1502.9(c)(1)(i). The Framework became final in January 2001 and was affirmed on appeal in November 2001. As of that date, it was in no respect "proposed"; as a regulatory decision, there was nothing left for the Forest Service to do but implement the Framework. Accordingly, if the Forest Service now proposes to reverse course, jettisoning the "cautious approach" adopted in the Framework and its supporting EIS and adding consumptive uses as an additional purpose and need, it cannot simply supplement the previous document, but must prepare a new EIS, justifying its abrupt about-face. The Plan Revision includes new issues, including timber harvesting for purposes of project funding and grazing to protect the industry. These and other issues have not been subject to scoping.

A new EIS is required not only by the language of the regulations, but is consistent with its purposes. By utilizing the SEIS process, the Forest Service is misleading the public that the Plan Revision is a mere fine-tuning of the Framework. It is not, and the Forest Service should be required to disclose in good faith the scope and magnitude of the changes it proposes to the current management plan.

D. Even if a DSEIS Is Procedurally Appropriate for the Revision Plan, the DSEIS Prepared Is Inadequate

Even if the Forest Service could, consistent with NEPA, jettison the Framework through the SEIS process, the document that the Forest Service has prepared fails to fully and fairly disclose the Revision Plan's attributes and potential impacts. As discussed below, the SEIS fails to disclose and analyze the nature and purpose of the Revision Plan, alternatives to the Revision Plan and their consequences.

1. The DSEIS Does Not Contain an Adequate Project Description

The FEIS focused on five problem areas – addressing these areas was the FEIS's purpose and need. FEIS, vol. 1, Summary at p. 3. The DSEIS for the Revision Plan in effect adds new "purposes and needs" – e.g., forest products extraction as source of funding for projects and the need to maintain grazing. These new purposes and needs are not disclosed or properly discussed in the DSEIS.

2. The DSEIS Does Not Discuss A Reasonable Range of Alternatives or Compare the Predicted Impacts of Those Alternatives

The DSEIS fails to evaluate an adequate range of alternatives and rejects reasonable alternatives that deserve consideration. Although the DSEIS purports to analyze ten alternatives (DSEIS at 6), in reality, the SEIS seriously considers only two: S1 (the no action alternative) and S2 (the proposed action) and rejects or fails to consider other reasonable alternatives which do not propose as dramatic a revision of the existing Framework FEIS, but which still meet the Forest Service's purpose and need.⁸

NEPA requires that federal agencies prepare a detailed statement disclosing the environmental impact of a proposed action and present alternatives to the proposed action. 42 U.S.C. § 4332(c). The alternatives must "present the environmental impacts of the proposal and the alternatives in comparative form [in order to] sharply defin[e] the issue," and are considered "the heart of the" EIS. See 40 C.F.R. § 1502.14. A fundamental goal of the NEPA process is to "identify and assess reasonable alternatives to proposed actions" in order to "avoid or minimize adverse impacts on the environment." 40 C.F.R. § 1500.2(e); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (1990) (Forest Service required to analyze alternative that would have yielded less commercial timber). Finally, NEPA requires agencies "to the fullest extent possible" to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

While an agency is not required to analyze alternatives that do not meet its proposed goal, an agency cannot narrowly define its purpose in order to exclude reasonable alternatives. *Border Power Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997, 1030 (S.D. Cal. 2003) (DOE improperly confined scope of its action and thus failed to consider reasonable alternatives that considered actual nature of project). In addition, an EIS is rendered inadequate by the existence of a viable but unexamined alternative. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) ("an agency must look at every reasonable alternative, within the range dictated by the nature and scope of the proposed action"); *Blue Mountains Biodiversity Project v. U.S. Forest Service*, 229 F. Supp. 2d 1140, 1147 (D. Or. 2002), *Oregon Natural Desert Association v. Singleton*, 47 F. Supp. 2d 1182, 1195 (D. Or. 1998); *League of Wilderness Defenders v. Marquis-Brong*, 259 F. Supp. 2d 1115, 1124 (D. Or. 2003) (EA unreasonably excluded consideration of any alternative that provided for restoration of the burned area without salvage logging).

The alternatives considered in the FEIS are, for the most part, irrelevant to the potential impacts of the project proposed by the Plan Revision. The Forest Service must evaluate alternatives *to the Revision*, based on the purposes identified in the DSEIS. In the DSEIS, the

⁸ Alternative S3 is not given comparable level of scrutiny throughout the DSEIS contrary to CEQ guidance. See 40 C.F.R. § 1502.14(a). It is obvious from a review of the document, that only S1 and S2 were given any serious consideration.

Forest Service's stated purpose and need is: "to adjust existing management direction to better achieve the goals of the SNFPA." DSEIS at 2. Although this purpose is articulated broadly, and despite the fact that the original FEIS evaluated nine alternatives in detail, the supplemental EIS only analyzes essentially one – other than the no action proposal. The Forest Service merely sets up a straw man and knocks it down, allowing the public only the choice between no action and the Forest Service's preferred action. This is essentially no choice at all. *See Oregon Natural Desert Association v. Singleton*, 47 F. Supp. 2d 1182, 1195 (D. Or. 1998) (court held BLM did not take "hard look" at its Owyhee River Plan EA where it evaluated only alternatives at odds with the Wild and Scenic Rivers Act policy objectives, its preferred alternative and a "no action" alternative). Incorporating by reference the alternatives considered in the prior NEPA process which resulted in the Framework FEIS, (DSEIS, at 6, 38), the Forest Service improperly avoids taking a comprehensive look at these forest-wide "changed" circumstances.

Thus, the Forest Service could have considered any number of alternatives that address the purposes identified by the DSEIS. For example, the DSEIS identifies insufficient funds for fuel treatments as a basis for the Revision. The Forest Service did not consider sources of funding other than increased timber harvesting and cattle grazing. It could seek a special appropriation from Congress in conjunction with the Healthy Forests Initiative; it could re-prioritize other funding; it could alter its fuel treatment program; it could seek foundation and state funding. The DSEIS identifies the need for local flexibility in implementing projects as a new or changed condition and proposes eliminating Standards and Guidelines. It does not consider, for example, addressing the issue through adaptive management; through a specific process for obtaining relief from particular Standards and Guidelines on a project basis, or through a pilot project for a section of the Sierras. For each and every issue the Forest Service identifies as "new" or "changed circumstance," and for the purposes of the Plan Revision identified more broadly, the Forest Service needs to consider alternatives that could achieve the same goals with different – often lesser – environmental consequences in order to give the reader a real sense of the environmental tradeoffs and impacts of the Plan Revision. The Forest Service has completely failed to do so.⁹

The existing alternatives discussion, even on its own terms, falls far short. In addition to the fact that the FEIS alternatives are essentially irrelevant to the impacts of the proposed Plan Revision, the discussion of alternatives is confusing and uninformative. For example, because alternatives F2 through F8 were carried over from the Framework FEIS, they were not analyzed using the new analysis, assumptions, data and methodology applied in this DSEIS. As a result, only S1 and S2 were analyzed in light of the information identified as "new" (forest inventories, PAC boundaries, WUI boundaries, and completed treatment units) and "new" methodologies (SPLAT locations, watershed analysis, and treatment costs and values). DSEIS at 304-05. In addition, because the DSEIS uses a different method of comparison for S1 through S3 for

⁹ The Forest Service's decision not to receive public input on its scoping process directly contributes to the lack of meaningful alternatives in the DSEIS. Through these comments the California Attorney General is alerting the agency to the existence of viable, yet unexamined alternatives. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1021-1022 (9th Cir. 1986).

impacts of grazing, any comparison to the original alternatives in the FEIS is meaningless. DSEIS at 77-78. Further, the Forest Service compares S1 to S2, but considers F1 through F8 separately. To make matters worse, the Forest Service has apparently changed its basis of comparison from the FEIS to the DSEIS. For example, the “effect of wildfire” table appears in both documents. In the DSEIS, Alternative S1 will result in only a 2% decrease in annual wildfire in the first decade to the fifth decade. DSEIS at 23. In the FEIS, Mod 8 (the identical alternative to DSEIS S1), is predicted to result in a 15% decrease. Similar inconsistencies exist for forest products tables (which use different time frames, making comparison extremely difficult) and economic impacts, which lists different numbers of jobs for the same alternatives in the different documents. These inconsistencies call into question the entire analysis.

3. The DSEIS Fails to Analyze the Impacts of and Justify the Revision Plan’s Fundamental Shift in Addressing Uncertainty

The proposed Revision Plan radically alters the use of the concepts of “risk” and “uncertainty” from their use in the original Framework and FEIS. In the Framework, the Forest Service adopted a cautious approach, which seeks to avoid short term losses to irreplaceable species and habitat while working toward long-term recovery and improvement. In the DSEIS, in contrast, the Forest Service has elected to favor long-term, hypothetical gains over certain short-term losses. The Forest Service now argues that decades in the future, species such as the California spotted owl will benefit from increased timber harvesting and other actions. Under the DSEIS, the Forest Service proposes to proceed with the assumption that risk and uncertainty are equivalent to a determination of no harm. But the DSEIS contains no analysis of the potential impacts of its rejection of the cautious approach. This change profoundly alters the Framework’s relation to the environment, and the Forest Service’s failure to address the impacts of the change violates the basic tenets of NEPA.

Nor has the Forest Service justified its rejection of the cautious approach adopted in the Framework. In fact, the Forest Service fails to mention that the longer term of the projection, the less reliable is the result. *See, e.g.,* M.A. Bergman, et al., *Risk Assessment in Conservation Biology*, 3-4 (1993) (discussing need for short-term evaluations and concerns about long-term projections); S.R. Beissinger and D.R. McCullough, *Population Viability Analysis*, 71-72 (2002) (time frame of evaluation is important). Because of increased uncertainty in long-term modeling, in the area of environmental protection, the cautious approach is generally-accepted. *See, e.g.,* K. Shrader-Frechette, “Methodological Rules for Four Classes of Scientific Uncertainty,” *Uncertainty and Environmental Problem Solving*, 20 (1996) (“[I]n situations of statistical uncertainty affecting human and environmental well-being, we should be reluctant not to posit effects such as serious harm. Therefore, in a situation of statistical uncertainty in which we cannot adequately assess effects, we should place the burden of proof on the persons who create these potentially adverse effects. . . .”) Accordingly, the Forest Service’s rejection of the cautious approach is not consistent with “the best available science” *See* 36 C.F.R. § 219.22(a); *see also Earth Island Institute v. Evans*, 256 F. Supp. 2d 1064, 1074 (N.D. Cal. 2003) (holding that Secretary of Commerce’s decision to decline to find significant adverse impacts to dolphin population caused by purse seine fishing based on absence of “conclusive evidence” not consistent with “best available scientific evidence” required by Dolphin Protection Consumer

Information Act); FEIS, vol. 3, part 4.4 at 87 (Forest Service acknowledges, in the context of evaluating effectiveness of fuel treatments that “confidence in these longer-term future projections is further lowered due to additional uncertainty regarding future conditions.”)

4. The DSEIS Fails to Analyze the Impacts of Substantially Increasing Timber Harvesting and Logging Intensity

Under the proposed Revision Plan, green timber harvesting and salvage harvesting each triple in the first decade as compared to the Framework, and quadruple in the second decade. DSEIS at 82. In fact, timber harvesting levels could be higher, as the Revision Plan does not limit the amount of “forest health” treatments allowed, which translate to additional logging. DSEIS at 187. Yet, the DSEIS contains *no* discussion of the impact of that tripling and quadrupling on the forest or its resources, including sedimentation impacts, aquatic and watershed degradation, soils. Further, the DSEIS contains no discussion of the need for additional timber roads and the impact of additional roads, and no discussion of the impact on wildlife, from any aspect of the increased harvesting, or even from the increased disturbance of mechanical entry.

The Revision Plan expands the scope of logging, limited in the original Framework to a means of reducing risk of catastrophic wildfire, to now, inter alia, generate revenues through commercial forest products. DSEIS at 45. The Revision Plan increases logging intensity by removing the diameter limits on trees to be cut and reducing the canopy cover. DSEIS at 53. The Revision Plan eliminates Standards and Guidelines for old growth stands, allowing more logging in old growth forest. DSEIS at 53. The DSEIS contains no discussion of the impacts of these proposed actions on the forests or the forest resources. The absence of meaningful discussion violates NEPA.

5. The DSEIS Fails to Analyze the Impacts to the Spotted Owl.

The Revised Plan promises to fragment and disturb spotted owl habitat. “The best scientific information available indicates that high survival of spotted owls is achieved by maintaining large unfragmented areas of suitable habitat.” USFWS listing decision, 68 Fed. Reg. at 7,595. The DSEIS fails to discuss the impact of the fragmentation of habitat on the spotted owl caused by full implementation of the Quincy Project, squarely in prime owl habitat. This failure makes the DSEIS facially deficient under NEPA. In fact, the original Framework FEIS reported that “in the central Sierra Nevada (represented as Plumas, Tahoe, Eldorado and Stanislaus National Forests, which contain about 46 percent of the owl sites in the Sierra), 58 percent of the home ranges contained less than 60 percent suitable habitat.” *See id.* at 7,596. Yet, the Revision Plan allows the large-scale Quincy Project in the middle of this prime habitat without discussion of impacts on the owl beyond the concept of “uncertainty.”

In the original Framework ROD, the Forest Service identified “ensuring the long term protection and recovery of old forest conditions and the spotted owl and other species” as of greatest concern. It would accomplish that goal, inter alia, through protection and management of spotted owl home range core areas, including in the Plumas National Forest and by managing

the “general forest outside of the owl core areas to maintain and increase the amount of suitable spotted owl habitat.” *See id.* at 7598. Virtually every action identified in the Revision Plan undermines or calls into question those protections, including the full implementation of the Quincy Project in prime owl habitat, the reduced canopy cover goals, the increased timber harvest, the decreased protection for trees between 24 and 30 in dbh, and the overhaul of various Standards and Guidelines. The impact of these changes on the owl and on owl habitat is not addressed in the DSEIS in violation of NEPA.

6. The DSEIS Fails to Analyze the Impacts of Implementing the Quincy Library Project

Under the Revision Plan, the large-scale Quincy Project in the Plumas and adjoining national forests will proceed, exempted from certain harvesting limitations and Standards and Guidelines in the original Framework. This will substantially enlarge the Project, increase timber harvesting and fragment wildlife habitat, which are a key feature of the Framework. The DSEIS states that the Quincy project “may lead to increases in fragmentation and habitat patchiness. The increases in fragmentation and patchiness are likely to isolate subpopulations [of spotted owls] and limit the opportunity for interactions across NFS lands.” DSEIS at 193. The Forest Service then states that the impacts on the owl from this fragmentation are “ambiguous” and “uncertain.” This conclusion is entirely at odds with the findings of the USFWS, which states unambiguously that “the best scientific information available indicates that high survival of spotted owls is achieved by maintaining large, unfragmented areas of suitable habitat.” 68 Fed. Reg. at 7,595. “Important habitat components, especially large trees, large snags, and large down logs, are currently in short supply across the range of the California spotted owl.” *Id.* The DSEIS neglects to note that the Quincy project area contains these important habitat components.

In fact, the DSEIS fails entirely to address the potential impacts of fully implementing the Quincy Project. Its statements of “ambiguity” and “uncertainty” are wholly inappropriate for the environmental review document. Unquestionably there is uncertainty in projecting possible environmental impacts. Any environmental impact projection faces such uncertainty, but NEPA, nonetheless, requires the evaluation. We express no opinion concerning whether and how the Quincy Project should be implemented, but the lack of discussion of projected impacts for the full implementation of the Quincy Project underlines the importance of comparative analysis of meaningful alternatives. What are the comparative impacts of a small scale Quincy Project? Of a different configuration? Of different Standards and Guidelines? Of different corridor routes? Of specific owl protections? Any number of reasonable alternatives could be evaluated. It is not of any value to simply state that impacts are “uncertain,” particularly where the USFWS has identified continuous, unfragmented habitat and the presence of large trees as essential to the survival of the spotted owl.

The proposed Revision Plan creates two exceptions to the Quincy Project set forth and approved in the Quincy ROD: (1) the mitigation measure to avoid conducting resource management activities in suitable owl habitat is dropped and (2) certain construction can now proceed in old growth areas. DSEIS at 53. First, there is no explanation for these changes. Second, there is no discussion of the environmental impact of these changes. And, third, there is

no discussion of the fact that the DSEIS for the Revision Plan is making a substantive change to the Quincy Project – duly approved by ROD and EIS – without going through any NEPA or public review process. All of these deficiencies violate NEPA.

7. The DSEIS Fails to Analyze the Impacts of Removing Prescriptive Standards and Guidelines and Reversion to Pre-Framework “Local Control”

The Forest Service proposes to delete certain Standards and Guidelines from the Framework because of their “prescriptive nature.” The Forest Service proposes to replace them with “local flexibility.” The DSEIS states that the change will not impact the environment because the “management direction is unchanged.” *See, e.g.*, DSEIS at 160-61. In fact, the Standards and Guidelines were established in the original Framework as a floor, to create a bright line rule and to ensure a level of environmental protection that could not be altered. By deleting that floor and creating local discretion, the Revision Plan alters the nature of decision making and precludes the bright line. This approach almost certainly has potential substantial environmental impacts, particularly in light of the fact that the DSEIS does not identify ways, other than a general management direction, that discretion will be limited. For example, “forest health treatments” – a form of timber harvesting – are identified in the DSEIS for use on 1,000 acres per year, but there are no actual limits in the proposed Revision Plan, and the harvesting could actually take place on hundreds of thousands of acres a year. Without standards and guidelines as baseline protection, the environmental damage could be very large.

8. The DSEIS Fails to Analyze the Impacts of Increased Grazing and Timber Harvesting

The Revision Plan increases grazing and timber harvesting. Despite these changes, the Forest Service concludes that, even though timber harvesting is tripling and quadrupling and grazing will increase, the effects on the aquatic resources *are not changed from the Framework* because the management goal is the same. DSEIS at 160-61. The Forest Service fails to discuss impacts on, *inter alia*, aquatic resources, of increased timber harvesting, mechanical entry, and road building. With respect to grazing impacts, the DSEIS states that there is an “alarming” downward trend in the number of willow flycatcher territories in the north central Sierra and that there has been a recent “increase in cowbird parasitism” of this species. DSEIS at 116-117. Livestock grazing is one of several activities (including water developments, recreation and pesticide use) that could directly impact willow flycatchers. These impacts and issues are not addressed in the DSEIS, as required by NEPA.

9. The DSEIS Fails to Analyze the Cumulative Impacts of “Healthy Forest” Initiatives

The DSEIS identifies the potential for cumulative impacts from related projects in the national forests as an issue for consideration. The discussion of in the DSEIS of cumulative impacts, however, completely misses the point and the legal requirements. Under NEPA, a federal agency is required to evaluate whether a project's impacts, though individually limited,

are cumulatively significant. 40 C.F.R. § 1502.16; *City of Carmel-by-the Sea v. DOT*, 123 F.3d 1142, 1160 (9th Cir. 1997). A 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. 40 C.F.R. § 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7. “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(7).

The Forest Service identifies the proposed revisions to the NFMA regulations as well as the various proposals set forth under the rubric of the “Healthy Forest” Initiative as relevant to the discussion of cumulative impacts. DSEIS at 141-44. Then, inexplicably, the Forest Service fails to discuss the potential cumulative impacts of the Revision Plan in combinations with the revisions and the Initiative. Instead, the Forest Service simply states that the Revision Plan will be implemented consistent with the revisions and Initiative. Actions proposed under the revisions and initiatives could have significant environmental impacts that will be exacerbated by the Revision Plan. As just one example, the proposed rules limiting project appeals act in conjunction with the Department of Agriculture’s proposal to create a categorical exemption for projects related to fire suppression on national forest lands. The proposed appeal rules preclude comment on and appeal of projects categorically exempted from the NEPA process. As a result, massive projects may proceed without any right to public input, review or appeal. The proposed Revision Plan increase both green and salvage logging and increase fire treatments. The combination of appeal rules, categorical exemptions, and increased logging and fire suppression activities could have large-scale cumulative impacts. The Forest Service fails to properly address these and many other potential cumulative impacts. This is a major deficiency that must be addressed.

IV. The Revision Plan Places in Jeopardy Both Habitat and Species Including the Spotted Owl and Violates Both the Endangered Species Act and the National Forest Management Act

1. The Forest Service's Rejection of a "Cautious Approach" to Species and Ecosystem Protection Violates the Endangered Species Act and the Forest Service's Own Regulations

In the Framework and FEIS, the Forest Service took a cautious approach to risk and uncertainty. If data suggested or were consistent with possible decline in population of particular species, the Forest Service assumed that, in fact, the species – such as California spotted owl, willow flycatcher, Yosemite Toad, and great grey owl – were at risk and took measures to reduce that risk. *See, e.g.*, FEIS at 93. The Forest Service was particularly concerned with short term risk and uncertainty, both because short term risk could lead to irreparable population declines and because long-term modeling is notoriously less accurate. As the Forest Service acknowledged in the Framework, banking on long-term benefits to a species in the face of a known short-term increase in risk is itself a risky proposition. *See, e.g.*, FEIS, vol. 3, part 4.4, at 87.

In the Revision Plan and DSEIS, the Forest Service has fundamentally altered its approach to risk and uncertainty. The Forest Service now assumes that where the data do not compel a finding that a species is suffering a decline or is at risk, it will simply assume that there is no decline or risk. *See, e.g.*, DSEIS at 39, 67. The Forest Service also relies heavily on long-term projections, which show hypothetical benefits to certain species in the Nth decade. This allows the Forest Service to propose increased logging in the habitat of many proposed, threatened and endangered species associated with old growth forests, continued grazing in habitat associated with proposed, threatened and endangered species dependent on aquatic ecosystems, and the unfettered implementation of the Quincy Pilot Project in the middle of habitat for the at-risk spotted owl.

The Forest Service's rejection of the cautious approach violates the ESA and related NFMA regulations requiring maintenance of species viability. *See* 36 C.F.R. § 219.20. “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994) (quoting *TVA v. Hill*, 437 U.S. 153 194 (1978)). Caution is inherent in section 7 of the ESA, which requires federal agencies to insure that its actions are not likely to jeopardize the continued existence or result in the destruction or adverse modification of listed species. 16 U.S.C. § 1536(a)(2). The section does not allow an agency to claim that it is “innocent” of section 7 violations simply “because it is not aware of any data that confirms” jeopardy; such a “head-in-the-sand attitude” is “in conflict with the underlying philosophy of the ESA.” *Greenpeace Foundation v. Mineta*, 122 F. Supp. 2d 1123, 1134-35 (D. Hawaii 2000); *see also id.* at 1132 (holding that agency “cannot speculate that no jeopardy to monk seals . . . will occur because it lacks enough information regarding the impact of fisheries on seals”).

If the Forest Service's scientific conclusions were sufficiently certain at the time of the ROD to say that reduced timber harvesting and restrictions on grazing were necessary to protect old-growth associated species like the California spotted owl and aquatic ecosystem-associated species such as the willow flycatcher, "it cannot now be heard to say that this same evidence is insufficiently certain [in order] to conclude that such harm is unlikely." *See Greenpeace v. National Marine Fisheries Service ("NMFS")*, 106 F. Supp. 2d 1066, 1078 (W.D. Wash. 2000) (holding that NMFS could not reverse its position that commercial fishing posed threat to Stellar sea lion based on argument that scientific analysis previously relied on was "speculative"); *see also Greenpeace Foundation v. Mineta*, 122 F. Supp. 2d at 1132 (rejecting NFMS's no jeopardy opinion as in conflict with its earlier determination that impacts to monk seal were uncertain, noting that agency was improperly "emboldened by its ignorance").

Neither can the Forest Service simply ignore short terms risks to listed species, focusing instead on hypothetical, long-term gains to species predicted by its new models – which, coincidentally, would allow increases in timber harvesting and grazing. *See Greenpeace Foundation v. Mineta*, 122 F. Supp. 2d at 1133 ("The conclusion of 'not likely to adversely affect' does not square with NMFS's admission that the existing model grows increasingly uncertain"); *see also Idaho Dept. of Fish and Game v. NMFS*, 850 F. Supp. 886, 899 (D. Or. 1994) (holding that "NMFS's failure to adequately explain why it prefers uncertain favorable model results and rejects other equally uncertain model results tending to undermine a no jeopardy conclusion" rendered NMFS's decision arbitrary and capricious).

The Forest Service cannot proceed with the proposal set forth in the DSEIS, consistent with the ESA.

2. The Revision Plan Cannot Proceed Until the USFWS Completes a New Biological Assessment and Opinion for the Numerous Potentially Impacted Species Listed as Threatened or Endangered Under the Endangered Species Act

The Revision Plan could harm listed and candidate species under the Endangered Species Act. The Forest Service, therefore, is required to obtain a biological assessment and biological opinion concerning the impact on those species of the Revision Plan. The assessment and opinion must fully and fairly analyze the impacts of substantial changes to the Framework that the Forest Service proposes. We look forward to reviewing those documents.

3. The Revision Plan, if Adopted, Would Require a New Listing Decision For the California Spotted Owl Under the Endangered Species Act and Would Subject Each and Every Project Proposed Under the Amended Framework to Injunction For Potential Harm to the Owl

The USFWS listing decision under the Endangered Species Act for the California spotted owl is explicitly based on the specific protections of the owl and its habitat set forth in the original framework. The listing decision, further, explicitly states that significant changes to the Framework will necessitate further evaluation for listing. 68 Fed. Reg. at 7,604. The proposed Revision Plan, as set forth above, radically alters the Framework, and takes particular aim at

specific protections for the owl, including the size of trees to be cut, the nature and extent of the Standards and Guidelines, the change in use of the concept of risk and uncertainty, and the promotion of the full Quincy Project in the middle of California spotted owl habitat. The changes proposed in the Revision Plan each have implications for the California spotted owl and its habitat. Approval of the Revision Plan will require full re-evaluation of the listing decision. That listing re-evaluation must proceed before the Forest Service pursues any projects under any changed version of the Framework to ensure protection of the owl.

4. Under the National Forest Management Act, the Forest Service Must Ensure the Viability of Species; the Revision Plan Fails to Do So, in Violation of the Law

NFMA and Forest Service regulations mandate that the Forest Service 1) maintain viable populations of Forest Service-designated sensitive species, 2) analyze the adverse effects of a proposed action that may impact sensitive species habitat, populations and viability prior to taking such action and 3) avoid actions which may move a sensitive species towards threatened or endangered status. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002); 16 U.S.C. § 1604(g)(3)(B); Forest Service Manual §§ 2670.12, 2670.22, 2672.1. Unfortunately, as reflected in the Forest Service's own scientific findings regarding the adverse effects of its proposed action on certain sensitive species, the Forest Service places sensitive species' habitat, populations and viability at significant risk, thus moving sensitive species towards federal listing under the ESA. The Forest Service's DSEIS also lacks the requisite analysis of adverse impacts on habitat, population and viability for certain sensitive species.

The NFMA directs the Forest Service to "comply with [NFMA's] substantive requirements designed to ensure continued diversity of plant and animal communities and continued viability of wildlife in the forest." *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002); 16 U.S.C. § 1604(g)(3)(B)(2003). The agency's duty to ensure the continued viability of wildlife "applies with special force to 'sensitive' species." *Inland Empire Public Lands v. U.S. Forest Service*, 88 F.3d 754, 759 (9th Cir. 1996) (citing *Oregon Natural Resources Council v. Lowe*, 836 F. Supp. 727, 733 (D. Or. 1993)); *see also* Forest Service Manual, Title 2600 – Wildlife, Fish, and Sensitive Plant Habitat Management §§ 2670.22, 2672.1 (1995). Forest Service regulations further preclude the Forest Service from adopting management decisions or actions that may cause a sensitive species to become threatened or endangered, *i.e.* to cause the federal listing of sensitive species. Forest Service Manual at §§ 2670.12, 2672.1.

Although the Forest Service's DSEIS contains broad statements about the possible risks the proposed project, Alternative S2, poses to sensitive species habitat, it offers little or no discussion of the impacts the proposed alternative may have on the *viability* of certain sensitive species *populations* and it fails to show how risks posed to species *habitat* are linked to impacts on species *viability*. This lack of analysis violates Forest Service sensitive species regulations, which state:

There must be no impacts to sensitive species without an analysis of the significance of adverse effects on the *populations, its habitat, and on the viability* of the species as a

whole. It is essential to establish population viability objectives when making decisions that would significantly reduce sensitive species numbers.

Forest Service Manual § 2672.1 (emphasis added).

For instance, although the DSEIS acknowledges that dense canopy closure is a component of California spotted owl habitat correlated with greater owl reproductive output and that Alternative S2 would reduce canopy closure as compared to the Framework, the DSEIS includes no discussion of the possible impacts that such a canopy reduction may have on the viability of owl populations. DSEIS at 187. The DSEIS also identifies the disruptive effect Alternative S2 would have on the continuity of owl habitat (*i.e.* increased fragmentation, patchiness, and isolation of subpopulations), yet proffers no information or credible scientific evidence regarding the consequences that such a disruption would have on owl populations and viability. DSEIS at 193.

Similarly absent in the DSEIS is a discussion of Alternative S2's environmental consequences for the Foothill yellow-legged frog. DSEIS at 214-15. Although the DSEIS concedes that "the primary difference between [Alternative S1 and the Framework] for this species is in regard to management of livestock grazing," the document is silent on the impacts such a shift in allowable management activities would pose to frog populations, habitat, and viability. DSEIS at 214. The Forest Service acknowledges that "mechanical treatment to reduce hazardous fuels may change the microclimate of upland stands utilized by Foothill yellow-legged frogs during period of movement and ... will reduce the amount of large woody debris used by Foothill-yellow frog for resting or hiding cover." DSEIS at 215.

The Revision Plan potentially undermines the viability of numerous species and move species closer to listing under the ESA, thereby violating the NFMA and related Forest Service Regulations. The Revision Plan and DSEIS fail to address these issues in any meaningful manner.

5. Under the National Forest Management Act, the Forest Service Must Ensure the Best Available Science is Use For Decision-making; the Revision Plan Fails to Do So, in Violation of the Law

When undertaking a decision-making and planning effort for the national forests, the NFMA directs the Forest Service to use the best science available. 36 C.F.R. § 219.22. While the NFMA does not require an agency to adopt the most prudent course, it does charge the responsible agency with adopting a plan in the most-informed manner. Accordingly, where it advances management strategies that are unsupported by scientific information and merely cites scientific studies without showing any logical link between such data and its conclusions, the Forest Service fails to comply with NFMA's mandate requiring that an agency utilize the best science available for planning and decision-making. 36 C.F.R. § 219.22. Many of the examples set forth in this comment letter, *e.g.*, deficiencies concerning science and analysis for, inter alia, the California spotted owl, the willow flycatcher, the Pacific fisher, and the Yosemite toad,

reflect incomplete and insufficient analysis. We believe that the Forest Service can do better, and that the NFMA requires that it do so.

CONCLUSION

In the Forest Service's own words, "if participants trust the organization presenting the . . . information, they are more likely to accept the characterization. And the level of trust is a byproduct of the decision process. Experience in a variety of settings suggests that such trust is easily damaged and difficult to restore." DSEIS, at 37.

By jettisoning the Framework, a product of more than ten years of study, hard work, and extensive public participation, by changing direction without sufficient basis in science or rigorous evaluation and review, by characterizing its overhaul of the Framework as mere fine-tuning, the Forest Service appears set to cause irreparable damage not only to our forests, but to the public's trust of the agency as well. The DSEIS is legally and scientifically deficient, and does not support the Forest Service's proposed radical change in direction from the Framework.

We strongly urge the Forest Service to proceed with implementation of the Framework as drafted, and as approved in 2001. Such action will go a long way in restoring California's Sierra national forests and in rebuilding public trust in the agency.

Thank you for the opportunity to present our comments.

Sincerely,

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