



October 19, 2007

Planning Rule Comments  
P.O. Box 162969  
Sacramento, CA 95816-2969

**Re: Public Comments Concerning the August 23, 2007, Proposed Rule for National Forest System Land Management Planning; and the August, 2007, Draft Environmental Impact Statement**

Dear Madam or Sir,

Please accept these comments regarding both the August 23, 2007, Proposed Rule for National Forest System land management planning (“2007 Proposed Rule”), and the August, 2007, Draft Environmental Impact Statement (“2007 DEIS”) concerning National Forest System land management planning. These comments are submitted on behalf of the following organizations and their members:

**Center for Biological Diversity**, a non-profit organization with over 35,000 members. The Center is dedicated to protecting imperiled species and their habitats by combining scientific research, public organizing, and administrative and legal advocacy. The Center regularly submits comments and is involved in projects that are proposed on national forests, and utilizes the National Forest Management Act and its implementing regulations in its efforts to conserve and protect national forests in the West.

**Wildlands CPR** works to revive and protect wild places by promoting watershed restoration through road removal, preventing new road construction, and stopping off-road vehicle abuse. Wildlands CPR works cooperatively with diverse communities to protect and restore our remaining wild places while fostering a growing citizenry that supports our goals. Wildlands CPR routinely submits comments on numerous forest management decisions across the nation.

**Forest Service Employees for Environmental Ethics** (“FSEEE”) is a nonprofit organization headquartered in Eugene, Oregon. FSEEE’s mission is to forge a socially responsible value system for the Forest Service based on a land ethic that ensures ecologically and economically sustainable resource management. Thousands of concerned citizens, present, former, and retired Forest Service employees and other resource managers comprise FSEEE.

**Idaho Sporting Congress** is a non-profit conservation organization based in Boise, Idaho whose members reside mostly in Idaho but also in many other states and countries. The Idaho Sporting Congress actively participates in the agency proceedings and decisions concerning the management of national forests within Idaho. The Idaho Sporting Congress and its members

have participated in Forest Service management decisions and programs since 1983. The Idaho Sporting Congress has commented on, appealed, and litigated many Forest Service timber sales and grazing plans, participated in many field trips with Forest Service personnel and joined in agency consensus groups intended to guide Forest Service management.

**Environmental Protection and Information Center** (“EPIC”) is a non-profit corporation organized under the laws of California, dedicated to the protection and restoration of forests, watersheds, and biodiversity in northern California. Formed in 1977, EPIC has approximately 2,000 members and supporters, and maintains offices in Garberville and Eureka in Humboldt County, California. EPIC’s National Forest Program monitors projects on four national forests in California: the Klamath, Shasta-Trinity, Six Rivers, and Mendocino. EPIC’s members, staff, and board use and enjoy each of these forests, and are particularly interested in those parts of the national forests where relatively intact, mature and old growth forests remain.

**Oregon Wild** is a nonprofit corporation organized under the laws of the State of Oregon. Oregon Wild’s mission is to protect and restore Oregon's wild lands, wildlife, and water as an enduring legacy. Oregon Wild has approximately 6000 individual and organizational members, many of whom use and enjoy the national forests and BLM lands of Oregon, Washington, and California for recreational, educational, aesthetic, and other purposes.

**The Lands Council** is a regional nonprofit environmental organization with its principal office in Spokane, Washington. The Lands Council has members in Washington, Oregon, Idaho, Montana, and other states. The Lands Council is dedicated to promoting long-term community and biological sustainability of the greater Columbia River Basin through education and participation in public agency decision-making processes. The Lands Council oversees forest-watch groups in Washington, Oregon and Idaho.

**Cascadia Wildlands Project** is a 501(c)(3) conservation organization based in Eugene, Oregon, with members in Washington, Oregon, and California. The Cascadia Wildlands Project advocates for biodiversity on public lands, with a particular emphasis on the national forests in the Cascadia region. The Cascadia Wildlands Project has a long-standing interest in the sound management of public lands in the region, and is involved with a number of projects and campaigns to protect salmon and other threatened and endangered fish species.

**Wild West Institute** is a non-profit corporation based in Missoula, Montana. Wild West’s mission is to protect and restore forests, wildlands, watersheds and wildlife in the Northern Rockies. Wild West empowers citizens to effectively participate in the public land management decision processes on nearly 20 national forests. Its staff and board also work to help craft positive solutions that promote sustainability in communities in the Northern Rockies through restoring naturally functioning ecosystems.

**Klamath Siskiyou Wildlands Center** is an advocate for the forests and wildlife of the Klamath and Rogue watersheds of northwest California and southwest Oregon. We use environmental law, science, collaboration and education to defend healthy ecosystems and help build sustainable communities.

**Conservation Congress** is a non-profit 501 (c) (3) organization incorporated in the state of California, dedicated to maintaining, protecting, and restoring the native ecosystems of northern California. The Conservation Congress has an organizational interest in the proper and lawful management of the national forests located in northern California. The Conservation Congress's members, staff, and board members participate in a wide range of wildlife viewing, bird watching, and other recreational activities on these national forests.

**Utah Environmental Congress** is a 501(c)(3) environmental organization dedicated to the protection and preservation of Utah's national forests and native wildlife species. The Utah Environmental Congress currently has 250 individual, 25 organization, and 45 business members representing about 30,000 citizens. Seventy percent of the State of Utah is held in trust as public land for all American citizens. The Utah Environmental Congress is committed to holding public land management agencies accountable to federal environmental laws.

**Conservation Northwest** (formerly Northwest Ecosystem Alliance) is a nonprofit corporation organized under the laws of Washington state, with its principal place of business in Bellingham, Washington, and offices in Seattle, Spokane, and Republic. Conservation Northwest and its members are dedicated to protecting and restoring wildlands in Washington and southern British Columbia. Conservation Northwest carries out research and advocacy, and works with scientists, conservationists, policymakers, and the general public to advance conservation of biological diversity and ecological integrity on public lands.

**Gifford Pinchot Task Force** is a nonprofit conservation organization headquartered in Portland, Oregon. The mission of the Gifford Pinchot Task Force is to protect and restore the ecosystems and communities of Southeast Washington, with a particular focus on the Gifford Pinchot National Forest. The Gifford Pinchot Task Force serves as an informational and educational resource on forest ecosystems of southwest Washington for interested citizens and organizations through a variety of avenues, including grassroots organizing and legal advocacy. The Gifford Pinchot Task Force has over 3,000 members who use the Gifford Pinchot National Forest for many purposes including recreational pursuits, wildlife study, and Native American traditional ceremonies.

**Friends of the Clearwater** is a conservation group based in Moscow, Idaho, concerned about the national forests in the Clearwater Basin. Friends of the Clearwater has nearly 1000 members who use the wildlands in north-central Idaho.

## **I. The August 23, 2007, Proposed Rule for National Forest System Land Management Planning**

The National Forest System includes 192 million acres of land in 42 states, the Virgin Islands, and Puerto Rico, and is composed of 155 national forests and 20 national grasslands. Most of these national forests were created by President Theodore Roosevelt in the early 1900s in an effort to keep these lands in the public domain and out of the hands of private corporations. The national forest lands provide a tremendous diversity of fish and wildlife habitat for hundreds of species, and are critically important for their long-term survival and viability. The importance

of the national forests and grasslands for a wide variety of recreational uses also continues to increase along with the human population.

In the decades following World War II, the Forest Service significantly increased logging and clearcutting in the national forests, eventually resulting in Congress enacting the National Forest Management Act of 1976 (“NFMA”), 16 U.S.C. §§ 1600-14. As stated by Senator Humphrey:

The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers’ thinking and actions.

122 Cong. Rec. 5619 (1976).

NFMA sets forth a “three-tiered” approach to forest management. *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961, 965 (9<sup>th</sup> Cir. 2003). First, NFMA directs the Forest Service to promulgate “national uniform regulations,” which “constitute the highest tier of regulatory oversight of the forest management system.” *Citizens for Better Forestry*, 341 F.3d at 965. The nationwide regulations govern the development and revision of regional and forest-wide plans. *Id.*, citing 16 U.S.C. § 1604(g). “In addition, they set broad guidelines (to be followed when preparing regional and site-specific plans) regarding plant and animal species conservation, timber management, and water management.” *Id.*, citing 16 U.S.C. § 1604(g)(3).

The second tier comprises regional “land and resource management plans” (“forest plans”), which operate like zoning ordinances to define the uses allowed in various forest regions, and set goals and limits on various uses. *Citizens*, 341 F.3d at 966. The content and promulgation of these second-tier plans must comply with the nationwide regulations. *Id.* “At the lowest tier of forest rules are the so-called ‘site-specific’ plans, which are prepared to effect specific, on-the-ground actions; these plans must be consistent with both sets of higher-level rules.” *Id.*, (citing 16 § U.S.C. 1604(i)).

Pursuant to NFMA, the Forest Service promulgated the initial national level of forest management regulations in 1979, which were revised in 1982 (“1982 Rule”). *Citizens for Better Forestry*, 341 F.3d at 966. The 1982 Rule set forth a process for developing and revising forest plans. 36 C.F.R. § 219.1 (1982). The 1982 Rule also contained “specific management requirements” to set forth “mandatory directives which all [forest plans] must follow, and specific, quantifiable baselines below which no [forest plan] or site-specific plan can fall.” *Citizens*, 341 F.3d at 966. “These requirements included, *inter alia*, establishment of 100-foot buffers around bodies of water and specific limits on tree-cutting.” *Id.* The 1982 regulations further required that “[f]ish and wildlife habitat shall be managed to maintain viable populations,” and defined viable populations as “one which has the estimated numbers and distribution of reproductive individuals to *insure* its continued existence is well distributed in the [relevant] area.” *Id.*, citing 36 C.F.R. § 219.19 (1982) (emphasis in original). And the regulations required “regional guides” to provide standards “for addressing major issues and

management concerns which need to be considered at the regional level to facilitate forest planning.” *Id.*, citing 36 C.F.R. § 219.8-9 (1982).

The 1982 Rule was used by the Forest Service to prepare the first generation of forest plans for every national forest in the country. After nearly two decades of implementation, the Forest Service and the concerned members of the public became intimately familiar with the overall structure and specific, substantive requirements of the 1982 Rule for both Forest Plan amendments and revisions, and site-specific projects. While the 1982 Rule could have benefited from some minor updating, the Forest Service’s only significant problem with the Rule was that it was infrequently used in court by members of the concerned public to occasionally block the implementation of poorly-supported site-specific projects.

The 1982 Rule sets forth common sense, straight-forward regulations that were promulgated by the Reagan Administration and based on the advice and recommendations of a Committee of Scientists, as required by NFMA. 16 U.S.C. § 1604(h)(1). The Forest Service never lost a case challenging the compliance of the 1982 Rule with NFMA, or for complying with the provisions of the 1982 Rule. Instead, the Forest Service occasionally lost cases only because it was failing to comply with the mandatory provisions of the Rule. Rather than simply gathering the data and information required by the 1982 Rule, and instructing local forests as how to increase compliance, the Forest Service decided to risk the familiarity and certainty of the established regulations with a significant revision and weakening of the 1982 Rule.

Therefore, in 1999, the Forest Service issued a proposed rule to revise the 1982 Rule. *Citizens for Better Forestry*, 341 F.3d at 967. The new Rule was finalized in 2000 (“2000 Rule”), and “substantially modified” the 1982 NFMA regulations. *Id.* at 967. As explained by the United States Court of Appeals for the Ninth Circuit,

First, it relaxed the species “viability” requirement . . . . The 1982 Rule had more stringently required that the USDA “insure” continued species existence. The 2000 Rule also eliminated the requirement of developing and issuing “regional guides” to maintain regional consistency in forest management. It further eliminated many of the “minimum specific management requirements.”

*Id.* at 967-968 (citations omitted) (emphasis in original).

A coalition of conservation groups filed suit to challenge the 2000 Rule. *See Citizens for Better Forestry*, 341 F.3d 961. After the suit was filed, the Forest Service announced that it was already considering revising the 2000 Rule, noting that serious concerns had arisen regarding some of its provisions, including the Rule’s impact on ecological sustainability and species viability. *Id.* at 968; 66 Fed. Reg. 27552 (May 17, 2001). However, because the Forest Service did not propose to cure the procedural violations that accompanied adoption of the 2000 Rule, and was still allowing national forests the option of using the 2000 Final Rule, the plaintiffs in *Citizens for Better Forestry* moved for summary judgment on their procedural claims and sought to enjoin further implementation of the Rule. *Id.* at 969.

While the district court held that the plaintiffs' suit was not justiciable for lack of standing and ripeness, its decision was reversed by the Ninth Circuit. *Citizens for Better Forestry*, 341 F.3d 961. In finding that the plaintiffs had standing, and that their claims were ripe, the Ninth Circuit also determined that the Forest Service violated NEPA in the development of the 2000 Rule by completely failing to involve the public in an environmental analysis for the Rule. *Id.* at 970.

In light of the problems identified with the 2000 Rule, and the NEPA violations found by the Ninth Circuit, the Forest Service could have returned to the certainty and familiarity of the 1982 Rule. Instead, the Forest Service under the Bush Administration published a new final rule in 2005 ("2005 Rule"), which eliminated any resemblance to the 1982 Rule. 70 Fed. Reg. 1023 (Jan. 5, 2005). As acknowledged by the Forest Service, the 2005 Rule embodied a "paradigm shift" in land management planning, and is "less prescriptive in nature" than the 1982 Rule. 70 Fed. Reg. at 1024. In fact, the 2005 Rule sought to provide nearly complete discretion for Forest Service officials by removing all mandatory management requirements of the 1982 Rule.

In opening the floodgates with the 2005 Rule, the Forest Service again failed to involve the public in preparing an environmental analysis of the potential impacts of the 2005 Rule, as required by NEPA. The 2005 Rule also continued to significantly weaken protection for fish and wildlife species on national forests. While the 1982 regulations imposed a strong and mandatory requirement upon the Forest Service to insure the viability of fish and wildlife species, and whereby the 2000 Rule only required the Forest Service to provide a "high likelihood" of viability, the 2005 Rule simply provided a "goal" of providing ecological conditions to support the diversity of plant and animal species. 36 C.F.R. § 219.10(b) (2005).

The 2005 Rule also entirely failed to include "many of the specific analytical processes and requirements set out in the 2002 proposed rule." 70 Fed. Reg. at 1028. Even though NFMA plainly requires numerous and mandatory standards and guidelines to be included within the regulations, the 2005 Rule stated that these requirements would instead be found in internal Forest Service directives, which courts have found are not judicially enforceable. *Id.*; 36 C.F.R. § 219.12(b)(2) (2005). Moreover, while the 1982 Rule and 2000 Rule applied to both programmatic forest plans and individual site-specific projects on national forests, *see Inland Empire Public Lands Council*, 88 F.3d at 760 n. 6; 67 Fed. Reg. 72770, 72771 (Dec. 6, 2002), the Forest Service declared that the 2005 Rule only applied to forest plans, and not site-specific projects. *See* 67 Fed. Reg. at 72776 ("in contrast to the 2000 rule, § 219.3 in this proposed rule does not contain direction for site-specific actions."). While initiating the process of revisiting the NFMA regulations because it occasionally lost a lawsuit, the Forest Service had now bet the house with the 2005 Rule's drastic rewrite and weakening of the required NFMA regulations.

A number of local, regional, and national conservation organizations, along with the State of California, filed suit to challenge the 2005 Rule, and in March, 2007, the Forest Service was enjoined from implementing the Rule because it again failed to follow the law in developing the regulations. *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007). However, because this process started with the agency's desire to avoid the mandatory, enforceable provisions of the 1982 regulations, the Forest Service still refuses to revert back to the certainty and familiarity of the lawfully developed 1982 Rule. The Forest

Service instead instructed its Regional Foresters to again implement the 2000 Rule, the same Rule which it previously acknowledged is virtually impossible to implement, and the same Rule that the Ninth Circuit already determined was developed in violation of NEPA.

The Forest Service now proposes the 2007 version of the NFMA regulations (“2007 Proposed Rule”) - which is simply a carbon copy of the already enjoined 2005 Rule. As with the 2005 Rule, the 2007 Proposed Rule completely fails to comply with the minimum and explicit requirements of NFMA, and is therefore once again unlawful and will again be challenged and enjoined if implemented as a final rule.

In a time of unprecedented global climate change, which will result in significant but unknown changes to the habitat for hundreds of species that depend on National Forest System lands, the public demands strong leadership from the caretakers of these critically important 190 million acres of public lands. The national forests and grasslands, along with the National Park System, National Wildlife Refuges, and Bureau of Land Management lands, should be considered as a stronghold for fish and wildlife species’ survival and maintaining biodiversity until we fully understand and solve the current climate crisis. Instead, however, the political arm of the Forest Service continues to seek ways to placate industry, and to greatly increase its discretion, despite a track-record that demonstrates no such discretion is warranted.

Excessive clear-cutting and abuses of discretion by the Forest Service resulted in Congress enacting NFMA in 1976. Due to continued resource extraction, increased population and sprawl, and uncertain global climate change, the fish, wildlife and plant species that depend on the national forests require an increase in protection from 1982 in order for the Forest Service to meet its NFMA obligation to provide for the diversity of plant and animal communities. The Forest Service must therefore make drastic changes to the Proposed 2007 Rule in order to restore and strengthen the substantive protection for fish, wildlife, plants, and other forest resources, as required by NFMA.

**A. The 2007 Proposed Rule Fails to Comply with NFMA by Setting Forth the Statutorily Required Standards and Guidelines within Internal Directives Instead of Enforceable Regulations**

In enacting NFMA, Congress was clear and explicit concerning what standards and guidelines must be included within the NFMA regulations. Section 1604(g) requires the Forest Service to promulgate regulations that set out both the process for developing and revising forest plans *and* “the guidelines and standards prescribed by this subsection.” 16 U.S.C. § 1604(g). The regulations “*shall include,*” but not be limited to -

- (1) specifying guidelines to insure that forest plans are prepared in accordance with NEPA, including direction on when and for what plans an EIS must be prepared;
- (2) specifying guidelines which -
  - (A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on renewable resources such as soil and water; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which -

(A) insure consideration of the economic and environmental aspects of renewable resource management, including the protection of forest resources;

(B) provide for the diversity of plant and animal communities based on the suitability and capability of the specific land area;

(C) insure continuous research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system so that it will not produce substantial and permanent impairment of the productivity of the land;

(E) insure that timber will be harvested from National Forest lands only where -

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) to insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where -

(i) for clearcutting it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan; . . .

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation . . . ; and

(v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

16 U.S.C. § 1604(g).

Following the recommendations of a Committee of Scientists, the 1982 Rule established “minimum specific management requirements,” set forth at 36 C.F.R. § 219.27 (1982), which included mandatory standards for riparian areas, numeric limits on the size of clearcuts for various forest types, and additional standards to guide and limit activities on national forests, as required by NFMA. The 2007 Proposed Rule, however, eliminates these management requirements from the 1982 Rule and fails to include substitute standards and guidelines, in direct violation of NFMA. 16 U.S.C. § 1604(g).

Rather than include the required standards and guidelines within the NFMA regulations, as required by NFMA, the Forest Service instead proposes in the 2007 Proposed Rule to place any standards and guidelines required by NFMA into its internal directive system. The United States Court of Appeals for the Ninth Circuit has stated, however, that while the Forest Service regulations have the force and effect of law, the Forest Service Manual and Handbook are not regulations and do not have the independent force and effect of law. *Western Radio Services Co. v. Espy*, 79 F.3d 896, 900-01 (9<sup>th</sup> Cir. 1996). As further stated by the Ninth Circuit, “Mere incorporation does not convert a procedural guideline into a substantive regulation. We therefore have no authority to bind the Service to the guidelines in the Manual or Handbook.” *Id.* at 902.

The Forest Service is clearly trying to avoid any possibility of being held accountable for its actions by public citizens in future appeals or litigation. Not only is the Forest Service attempting to remove all previous standards and guidelines that imposed substantive limits on its choice of projects and activities, it is also trying to shift any of the remaining, weaker provisions to its non-binding internal handbook. This is obviously not what Congress intended when it enacted NFMA to in fact limit the Forest Service’s discretion and impose substantive restrictions on the agency’s projects and activities in national forests.

In sum, NFMA explicitly directs that the Forest Service regulations must include guidelines to insure that timber will only be harvested where soils and watershed conditions will not be irreversibly damaged, *see* Section 1604(g)(3)(E)(i), and yet the 2007 Proposed Rule entirely fails to address soils or watershed conditions. NFMA directs the regulations to include guidelines to insure that timber will only be harvested where lands can be adequately restocked within five years after harvest, *see* Section 1604(g)(3)(E)(ii), but the 2007 Proposed Rule is entirely silent on this requirement. NFMA directs that the regulations shall include guidelines to insure that timber will only be harvested where protection is provided for streams and other waterbodies from detrimental changes in water temperature, blockages of water courses, and deposits of sediment, *see* Section 1604(g)(3)(E)(iii), and yet there is no mention of streams,

waterbodies, water temperature, blockages of water courses, or sediment anywhere in the 2007 Proposed Rule. And NFMA directs that the regulations shall include guidelines to insure that clearcutting will be used only where there are established maximum size limits for areas to be cut, *see* Section 1604(g)(3)(F)(iv), but there is no mention of size limits or clearcuts within the 2007 Proposed Rule. While the 2007 Proposed Rule at least mentions the statutory requirement to provide for the diversity of plant and animal communities, as required by Section 1604(g)(3)(B), the 2007 Proposed Rule provides no assurance that such diversity will be achieved or maintained.

By failing to include the required standards and guidelines within the agency's regulations, as directed by Congress, the 2007 Proposed Rule violates NFMA. 16 U.S.C. § 1604(g). The Rule must therefore be significantly revised to include the statutorily required standards and guidelines within the regulations themselves, as required by NFMA.

## **B. The 2007 Proposed Rule Fails to Satisfy NFMA's Diversity Requirement**

At the time NFMA was enacted, Senators noted an increased concern for forest resources such as fish and wildlife. Senator Humphrey proclaimed that fish and wildlife must become integral parts of resource managers' thinking and actions. *See* C. F. Wilkinson and H.M. Anderson, *Land and Resource Planning in the National Forests*, 64 Oregon Law Review at 70 (1985), *quoting* 122 Cong. Rec. 5619 (1979). Senator Haskell recognized that the protection of nontimber resources must be assigned as great a priority in any forest management policy as the production of timber. *Id.* And James Moorman, a primary author of NFMA, noted that "[o]ne big concern to the public . . . is the protection of nontimber resources impacted by timber management, principally soils, fish and wildlife, and the natural ecosystems of the forest." *Id.* at 292, fn 1561, *quoting* Senate NFMA Hearings at 517. NFMA was enacted by Congress to impose limits on Forest Service discretion by imposing mandatory procedural requirements and substantive limitations on Forest Service actions and decisionmaking.

Congress therefore mandated that the NFMA regulations include standards and guidelines for forest plans which "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." 16 U.S.C. § 1604(g)(3)(B). This was intended to provide meaningful, substantive protection for fish and wildlife resources:

When the section is read in light of the historical context and overall purposes of NFMA, as well as the legislative history of the section, it is evident that Section 6(g)(3)(B) requires FS planners to treat the wildlife resource as a controlling, co-equal factor in forest management and, in particular, as a substantive limitation on timber production.

C. F. Wilkinson and H.M. Anderson, *Land and Resource Planning in the National Forests*, 64 Oregon Law Review at 173.

In drafting the initial NFMA regulations, the Forest Service convened a Committee of Scientists, *see* 16 U.S.C. § 1604(h)(1), which considered NFMA's diversity requirement and

recommended that the Forest Service commit to insuring the viability of all vertebrate species. See Noon, B.; Parenteau, P.; Trombulak, “*Conservation Science, Biodiversity, and the 2005 U.S. Forest Service Regulations*,” *Conservation Biology*, Volume 19, No. 5 (Oct., 2005). This led to the 1982 Rule’s requirement that fish and wildlife habitat would be managed to maintain viable populations of existing native and desired non-native vertebrate species, with “viable population” defined as “one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.” 36 C.F.R. § 219.19 (1982). In order to insure that viable populations were maintained, the Forest Service was required by the 1982 Rule to provide sufficient habitat to support, at least, a minimum number of reproductive individuals, and that habitat was required to be well distributed so that individuals could interact with others in the planning area. *Id.*

In recognition that the Forest Service cannot provide for the diversity of plant and animal species, as required by NFMA, without insuring viable populations, the United States Court of Appeals for the Ninth Circuit has linked the “viability” requirement of the 1982 Rule with the statute’s “diversity” requirement:

NFMA imposes substantive requirements on the Forest Service. In particular, “the forest plan must comply with substantive requirements of the Forest Act designed to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the forest.”

*Lands Council v. McNair*, 2007 U.S. App. LEXIS 15749, \*6 (9<sup>th</sup> Cir. 2007), quoting *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 961 (9<sup>th</sup> Cir. 2002); 16 U.S.C. § 1604(g)(3)(B); see also *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 759 (9<sup>th</sup> Cir. 1996) (stating that NFMA imposes substantive duties on the Forest Service, including the duty to provide for the diversity of plant and animal communities, and that 36 C.F.R. § 219.19 (1982) was promulgated to ensure such diversity).

The Proposed 2007 Rule violates the statute’s diversity requirement by eliminating the long-standing viability requirement. Instead of including a mandatory, substantive requirement to insure viable fish and wildlife populations, the Proposed 2007 Rule merely sets forth a goal “to provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of plant and animal species in the plan area.” 36 C.F.R. § 219.10(b) (2007). The Forest Service is wrong that this is all that is required to “satisfy” NFMA’s substantive diversity requirement. *Id.* Rather, the new provision falls far short of NFMA’s mandatory diversity requirement and is therefore invalid. *Pacific Gas and Electric Co. v. United States*, 664 F.2d 1133, 1136 (9<sup>th</sup> Cir. 1981) (stating that regulations, to be valid, must be consistent with the statute under which they are promulgated, and that an agency’s interpretation of the statute cannot supersede the language chosen by Congress).

The plain language and Congressional intent of NFMA demonstrates that by including a mandatory requirement to provide for the diversity of plant and animal communities, Congress intended the Forest Service regulations to include meaningful, measurable, and mandatory standards and guidelines in order to insure such biodiversity. The Forest Service has failed to show that its 2007 Proposed Rule would meet this statutory requirement. Moreover, the Forest

Service has failed to plainly disclose that it is substantially weakening the protection that was provided to fish and wildlife species by the previous regulations, and explain how this substantial weakening of protection would still somehow provide for the required diversity of plant and animal communities. The Forest Service is not allowed to make such drastic changes to the 1982 and 2000 Rules regarding the viability and protection of fish and wildlife populations without providing the public with a sufficient explanation, justification, and rationale for its radical change in direction. *See Motor Vehicles Manufacturers Assoc. v. State Farm*, 463 U.S. 29, 42 (1983) (in reviewing the decisions of federal agencies, Congress has established a presumption against changes in current policy that are not justified by the record).

Similarly, both the 1982 and 2000 Rules were preceded by Committee of Scientists reports that recommended strong protection for fish and wildlife species. *See* 16 U.S.C. § 1604(h)(1) (requiring Secretary of Agriculture to appoint a committee of scientists to “provide scientific and technical advise and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted. . . The views of the committees shall be included in the public information supplied when the regulations are proposed for adoption.”). The Forest Service failed to convene a Committee of Scientists for the 2005 or 2007 Rules, and is now ignoring the recommendations of the prior Committees regarding NFMA’s plant and animal diversity requirement, despite the explicit direction from Congress to consider and disclose such information. *Id.* The agency’s failure to consider and address this directly relevant science, while adopting new regulations that are directly contrary to the earlier scientific recommendations, would again render its decision to adopt the 2007 Rule as arbitrary, capricious, and an abuse of discretion. *Motor Vehicles Manufacturers Assoc. v. State Farm*, 463 U.S. at 43.

In addition, even under the relatively strong protection of the 1982 Rule for fish and wildlife species, numerous fish and wildlife species were either designated by the Forest Service as “sensitive species,” or designated by the United States Fish and Wildlife Service as a threatened or endangered species under the Endangered Species Act. A substantial amount of fish and wildlife habitat on the National Forest System is in worse shape today than it was in 1982. The Forest Service must therefore once again explain how it can substantially weaken the mandatory, substantive protection set forth within the 1982 Rule, and still claim to be providing for the diversity of plant and animal communities, as required by NFMA. *Motor Vehicles Manufacturers Assoc. v. State Farm*, 463 U.S. at 42.

In making a decision, an agency must demonstrate that it examined the relevant data and must articulate a satisfactory explanation for its action. *Motor Vehicles*, 463 U.S. at 43. An agency’s rule will be considered arbitrary and capricious if the agency fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.* For the 2007 Proposed Rule, there are a number of species or populations that depend on National Forest System lands, which are currently on the brink of extinction, including the Mt. Graham red squirrel, the Cabinet-Yaak and Selkirk grizzly bear populations, and woodland caribou. The Forest Service, however, has again failed to consider or explain how its substantial weakening of the prior substantive protection for fish and

wildlife species will still provide for the diversity of plant and animal communities in light of the substantial risks already faced by these severely endangered species.<sup>1</sup>

The Forest Service has also entirely failed to consider or address an unmistakably fundamental factor - global climate change - in making its decision to substantially weaken the NFMA regulations. There is no longer any reasonable doubt that human-caused pollution is already resulting in substantial changes to the global environment. *See, e.g.*, Intergovernmental Panel on Climate Change (“IPCC”) February, 2007, Summary for Policymakers, “*Climate Change 2007: The Physical Science Basis*,” available at <http://ipcc-wg1.ucar.edu/wg1/wg1-report.html>. Moreover, scientists, including Forest Service researchers, have already recognized global warming as a key threat to biodiversity. *See e.g.*, Malcom, Jay R.; Liu, Canran; Neilson, Ronald P.; Hansen, Lara; Hannah, Lee, “*Global Warming and Extinctions of Endemic Species from Biodiversity Hotspots*,” *Conservation Biology*, Vol. 20(2): 538-548 (2006).<sup>2</sup> In fact, The United States Government Accountability Office recently recommended that the Secretary of Agriculture develop guidance to advise managers on how to address climate change effects on the resources that they manage. August, 2007, U.S. GAO Report, “*Climate Change: Agencies Should Develop Guidance for Addressing the Effects on Federal Land and Water Resources*,” available at <http://www.gao.gov/new.items/d07863.pdf>.

The nation’s public lands, and especially the national forests, play a critical role in providing habitat and protection for hundreds of fish and wildlife species. The vast majority of the public has repeatedly made clear that it places a high value on the use of National Forest System lands for fish and wildlife protection. With a growing and sprawling population, resulting in the continued fragmentation of private lands, along with the unprecedented uncertainty created by the current climate crisis, the Forest Service must reconsider NFMA’s diversity requirement, address the demands and concerns of the public, and change the Proposed Rule to provide meaningful protection for the fish and wildlife that rely on our national forests.

In sum, in light of the plain language and intent of NFMA, the 2007 Proposed Rule fails to comply with NFMA’s mandatory obligation to provide for the diversity of plant and animal communities. 16 U.S.C. § 1604(g)(3)(B). In addition, the Forest Service has failed to explain its substantial change from the 1982 Rule’s mandatory protection for fish and wildlife populations,

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<sup>1</sup> Significantly, the Forest Service’s obligations under NFMA still apply for species that have been listed as threatened or endangered under the Endangered Species Act. *Seattle Audubon Society v. Evans*, 952 F.2d 297, 301-02 (9<sup>th</sup> Cir. 1991) (“The effect of the Forest Service’s position in this litigation, were it to be adopted, would be to reward the Forest Service for its own failures; the net result would be that the less successful the Forest Service is in maintaining viable populations of species as required under its regulations, the less planning it must do for the diversity of wildlife sought by the statute. This is directly contrary to the legislative purpose of the National Forest Management Act.”).

<sup>2</sup> *See also* Matthews, Stephen N.; O’Connor, Raymond J.; Iverson, Louis R.; Prasad, Anantha M., “*Atlas of Climate Change Effects on 150 Bird Species of the Eastern United States*,” Forest Service Northeastern Research Station Gen. Tech. Report NE-318 (2004) (projecting that as many as 78 of 150 common bird species may decrease by at least 25 percent due to global climate change); *and* the IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability*,” available at <http://www.ipcc-wg2.org/index.html>.

and has failed to consider and address significant, fundamental factors, including the already severely endangered fish and wildlife populations, and the implications of global climate change. *Motor Vehicle Manufactures Assoc.*, 463 U.S. at 43. We urge the Forest Service to make substantial changes to the 2007 Proposed Rule or revert back to the 1982 Rule's provisions regarding fish and wildlife protection and viability.

**C. The 2007 Proposed Rule Fails to Insure that Logging Will Occur Only Where Soils, Watersheds, and Streams Are Protected, and that Lands Can be Adequately Restocked Within Five Years After Harvest**

In enacting NFMA, Congress required that the NFMA regulations must include standards and guidelines which insure that timber will be harvested from National Forest System lands only where soil, slope and other watershed conditions will not be irreversibly damaged, there is assurance that lands can be restocked within five years, protection is provided for streams and other waterbodies from sediment and detrimental changes in water temperatures. 16 U.S.C. § 1604(g)(3)(E). The 2007 Proposed Rule entirely fails to include any substantive standards, guidelines, or protection for soils, streams, or watersheds, and therefore fails to provide the assurances required by the statute. Unless the Proposed Rule is significantly revised to include these required standards and guidelines, the Rule violates NFMA.

**D. The 2007 Proposed Rule Fails to Insure that Clearcutting Will be Used Only Where It is Determined to be the Optimum Method, an Interdisciplinary Review has been Completed, Cuts are Blended with the Natural Terrain, Maximum Size Limits Have Been Established, and Such Cuts are Consistent with the Protection of Other Forest Resources**

NFMA also requires that the NFMA regulations must include standards and guidelines which insure that clearcutting is only used as a logging method where it is determined to be the optimum method, an interdisciplinary review has been completed with all impacts assessed, the cut blocks or patches are shaped and blended with the natural terrain, there are established maximum size limits based on geographic areas, and protection is provided for soils, watersheds, fish, wildlife, and other resources. 16 U.S.C. § 1604(g)(3)(F). The 2007 Proposed Rule again entirely fails to include any standards, guidelines or protection regarding clearcuts, as plainly required by the statute. This is particularly problematic given the fact that NFMA was largely enacted in response to the public outcry over extensive clearcutting on national forests. The Proposed Rule must be significantly revised to include the required standards and guidelines regarding clearcuts, or the Rule violates NFMA.

**E. The 2007 Proposed Rule Fails to Insure Forest Plans are Prepared in Compliance with NEPA**

NFMA requires that the Forest Service regulations include procedures to insure that forest plans are prepared in accordance with the National Environmental Policy Act ("NEPA"), including direction as to when and for what plans an EIS is required under NEPA. 16 U.S.C. § 1604(g)(1). Because forest plans govern all Forest Service projects and activities across millions of acres of land for a 10-15 year period, the Forest Service properly recognized in the 1982 Rule

that an EIS would be required not only for the preparation of a forest plan, but also for significant amendments to a forest plan. 36 C.F.R. § 219.10 (1982). Similarly, for the 2000 Rule, the Forest Service recognized that an EIS would be required for both revisions to forest plans, and for proposed forest plan amendments that may cause a significant effect on the environment. 36 C.F.R. §§ 219.8, 219.9 (2000).

For the 2007 Proposed Rule, however, the Forest Service again makes a radical departure from NFMA itself and the 1982 and 2000 Rules by stating that the approval, revision, and amendments of forest plans may all be “categorically excluded” from NEPA review. 36 C.F.R. § 219.4 (2007). The agency’s new approach significantly undercuts the level of meaningful public involvement envisioned by Congress when it enacted NFMA, as well as NEPA’s requirement that federal agencies prepare an EIS for all major federal actions significant effecting the environment, 42 U.S.C. § 4332(2)(C), and NEPA’s overall purpose and intent that government officials and the public have available the relevant information concerning the potential environmental impacts of proposed government actions before those actions are approved or commence. *See e.g.*, 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”).

The Forest Service’s attempt to categorically exclude forest plan revisions and significant amendments from NEPA review fails to comply with NFMA. 16 U.S.C. § 1604(g)(1). Because the new proposal regarding NEPA compliance runs directly counter to the statute, it would be declared invalid and therefore must be significantly revised. *See Pacific Gas and Electric Co. v. United States*, 664 F.2d at 1136 (stating that to be valid, regulations must be consistent with the statute under which they are promulgated). Similarly, as with the diversity requirement discussed above, the Forest Service has failed to adequately explain why an EIS was required for forest plan revisions and significant amendments under the prior 1982 and 2000 Rules, but are suddenly no longer required. *Motor Vehicles*, 463 U.S. at 42 (stating that Congress established a policy against changes in policy that are not justified by the record).

The Forest Service’s current position, that forest plans are “merely programmatic documents” that will result in no direct, indirect, or cumulative impact on the environment (and therefore do not require an EIS or even an EA), has in fact already been rejected by the Ninth Circuit. The Forest Service made this same argument in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9<sup>th</sup> Cir. 1994). The Ninth Circuit recognized, however, that forest plans are “comprehensive management plans governing a multitude of individual projects. Indeed, every individual project planned in . . . national forests . . . is implemented according to the [forest plans].” *Id.* at 1053. Forest plans are therefore considered agency actions that may result in environmental impacts because they set forth the criteria for harvesting timber and other ground disturbing activities. *Id.* at 1055; *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9<sup>th</sup> Cir. 1992) (stating that “short of assuming that Congress imposed useless procedural safeguards, . . . we must conclude that the management plan plays some, if not a critical, part in subsequent decisions.”). Moreover, the Ninth Circuit’s reasoning in *Pacific Rivers Council* and *Idaho Conservation League* was recently reaffirmed in *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 975 (9<sup>th</sup> Cir. 2003).

## **F. The 2007 Proposed Rule Violates NFMA by Allowing the Amendment of Forest Plans Without Sufficient Public Notice and Involvement**

NFMA provides that forest plans can only be amended after public notice, and that significant amendments require substantial public involvement. 16 U.S.C. § 1604(f)(4). The 2007 Proposed Rule, however, would allow the Forest Service to make significant changes to forest plans, including changes in timber management projections and changes in the monitoring program, without any public notice or involvement. 36 C.F.R. § 219.7(b) (2007) (labeling such plan amendments as “administrative corrections”). NFMA provides no exception for “administrative corrections,” and regardless, changes to a forest plan such as modifying harvest projections and monitoring requirements are far more than “administrative corrections, and therefore must be proposed through a forest plan amendment with public notice. Section 219.7(b) of the 2007 Proposed Rule therefore violates NFMA and must be revised.

## **II. The August, 2007, Draft EIS Concerning National Forest System Land Management Planning**

Regarding the potential environmental impacts of the 2007 Proposed Rule, the Forest Service has its head firmly in the sand, which is where it has been for a number of years. The 2007 Proposed Rule, which is identical to the 2005 Rule, substantially weakens and eliminates the nationwide standards and guidelines that govern all forest plans and site-specific projects across the National Forest System, and will obviously result in significant environmental impacts which need to be assessed and disclosed in an “environmental impact statement” (“EIS”). The document that the Forest Service puts forth as a Draft EIS for the Proposed Rule entirely fails to meet the minimum requirements of an EIS, as outlined below. (*See e.g.*, 40 C.F.R. §§ 1502.15, 1502.16, 1502.22, 1502.24 for EIS requirements).

When the Forest Service weakened the 1982 NFMA Rule with the promulgation of the 2000 Rule, the agency argued that there would no direct, indirect, or cumulative environmental impacts. The Ninth Circuit rejected this argument in *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961 (9<sup>th</sup> Cir. 2003), as the court found that the 2000 Rule would result in indirect effects on the environment:

Its environmental impact is indirect: because the Rule controls the development of LRMPs and site-specific plans, it is through these that it poses an actual, physical effect on the environment in national forests and grasslands.

*Citizens for Better Forestry*, 341 F.3d at 973. The Ninth Circuit similarly rejected the Forest Service’s argument that lowering environmental safeguards at the national programmatic level would not necessarily result in a lowering of environmental safeguards at the site-specific level. *Id.* at 975.

Despite the directly relevant decision from the Ninth Circuit regarding the environmental impacts of the 2000 Rule, the Forest Service again argued in the context of the 2005 Rule that its complete evisceration of the nationwide NFMA regulations would result in no direct, indirect, or

cumulative impacts on the environment. The Forest Service's argument was again rejected, this time by the United States District Court for the Northern District of California:

Application of the CEQ regulations suggest at least three reasons why the 2005 Rule *may* have significant environmental effects. First, there can be little question that the effects of the 2005 Rule are "highly controversial" . . . Second, the 2005 Rule may establish a precedent for further action with significant effects; and finally, the 2005 Rule may be related to other action which has individually insignificant, but cumulatively significant impacts. Moreover, the Ninth Circuit's decision in *Citizens* further undermines the defendants' position regarding the existence of significant effects.

*Citizens for Better Forestry v. U.S. Department of Agriculture*, 481 F. Supp. 2d 1059, 1089 (N.D. Cal., March 30, 2007) (emphasis in original) (citations omitted).

Undeterred, the Forest Service responded by requesting the Court to amend its March 30, 2007, decision, which the Court refused in a subsequent July 3, 2007 Order:

Significantly, in addition to the broad scope of the 2005 Rule, the court also found a possibility of significant effects (constituting extraordinary circumstances) including specifically, among other things, the 2005 Rule's "effects on future site-specific plans, species diversity, species monitoring, logging, and forest planning."

*Citizens for Better Forestry v. U.S. Department of Agriculture*, 2007 U.S. Dist. LEXIS 51378, \*50 (N.D. Cal., July 3, 2007); *id.* at \*51 ("A careful reading of the order reflects that the court simply rejected USDA's argument (which it has now denied making) that preparation of an EA or EIS was not feasible for broad, programmatic rules under NEPA.").

After three strikes, one would expect even the most stubborn agency to see the light and change course. In its Draft EIS on the 2007 Proposed Rule, however, the Forest Service instead continues to wrongly maintain that the Rule would result in no direct, indirect, or cumulative effects. In doing so, the Forest Service continues to entirely ignore that it is not writing new NFMA regulations on a blank slate, but is instead substantially weakening the previous, nationwide NFMA regulations that had been in effect for 20 years, and which provided relatively strong protection for fish, wildlife, and other resources across the National Forest System. As recognized by the Ninth Circuit, the weakening of these previous standards and protection will result in indirect impacts on the environment, and for the Forest Service to continue to argue otherwise indicates that this is all a meaningless, paper exercise that is once again headed to court.

**A. The DEIS Fails to Properly Assess Alternatives, and the Forest Service Has Arbitrarily Refused to Consider a Reasonable Alternative that Meets the Proposal's Purpose and Need**

NEPA requires federal agencies to prepare an EIS for any action that may significantly affect the environment. *California Coastal Commission*, 150 F. Supp. 2d. 1046, 1055 (N.D. Cal. 2001), *citing* §42 U.S.C. § 4332(C). The EIS must consider (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action would it be implemented. 42 U.S.C. § 4332(C). Prior to preparing the EIS, the agency must consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. *Id.*

The alternatives section is the “heart” of an EIS. 40 C.F.R. § 1502.14; *see also* 42 U.S.C. § 4332(2)(E). The Forest Service must “[r]igorously explore and objectively evaluate all reasonable alternatives. *Id.* at § 1502.14(a). The EIS must present the environmental impacts of the proposal and all of the reasonable alternatives “in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.* at § 1502.14. The Forest Service is also specifically directed to consider a “no action” alternative. *Id.* at § 1502.14(d). And, the Forest Service must use 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.” *Id.* at § 1500.2(f).

The alternatives section in the DEIS, together with the “environmental consequences” section, fails to meet the basic, minimum NEPA requirements for an analysis of alternatives. Because the DEIS provides no analysis of the potential environmental impacts of any of the alternatives, it fails to “sharply define the issues,” as required by the NEPA regulations. 40 C.F.R. § 1502.14. For instance, there would be obvious differences in the likely environmental impacts to fish and wildlife species depending on whether the Forest Service implements the relatively strong and mandatory standards of the 1982 Rule (including the species’ viability requirement), as opposed to the significantly weakened and largely discretionary guidelines provided for fish and wildlife species within the 2005 Rule or 2007 Proposed Rule, but this difference is ignored in the DEIS. As a result, the DEIS fails to provide the public or decisionmaker with a “clear basis for choice among options,” as NEPA requires. *Id.*<sup>3</sup>

In addition, as set forth in the scoping comments submitted by the Center for Biological Diversity, the Forest Service must fully consider an alternative that provides a substantial increase in protection for the fish and wildlife species that depend on National Forest System lands due to global climate change and the expected, foreseeable, but uncertain impacts to forests and biodiversity. NFMA directs that the regulations provide for the diversity of plant and animal

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<sup>3</sup> The Forest Service offers no support and is simply wrong in concluding that the alternatives would all result in “similar resource protection.” DEIS, p. 72.

communities based on the suitability and capability of the land. 16 U.S.C. § 1604(g)(3)(B). Scientists, including Forest Service researchers, have recognized global warming as a key threat to biodiversity. *See e.g.*, Malcom, Jay R.; Liu, Canran; Neilson, Ronald P.; Hansen, Lara; Hannah, Lee, “*Global Warming and Extinctions of Endemic Species from Biodiversity Hotspots*,” *Conservation Biology*, Vol. 20(2): 538-548 (2006).<sup>4</sup> Due to uncertainties over the extent and impacts of climate changes on biodiversity and NFMA’s mandate to provide for diversity, the Forest Service must consider and fully analyze an alternative that errs on the side of caution by offering a safe harbor and refuge for fish and wildlife species.

The Forest Service responded to the Center’s proposed alternative in the DEIS with one conclusory sentence: “Substantive increases in protection and insurance of diversity or security of populations are beyond the capability of the National Forest System lands and, therefore, do not meet the purpose and need to provide for diversity of plant and animal species, consistent with the capabilities of National Forest System lands.” DEIS, p. 23. The Forest Service provides no support whatsoever for its determination that increasing protection for fish and wildlife species is somehow “beyond the capability” of National Forest System lands. To the contrary, based on the already significant number of declining and imperiled populations that depend on National Forest System lands, along with the already occurring and future impacts to biodiversity resulting from climate change, an increase in protection for these species is in fact required in order for the Forest Service to meet NFMA’s diversity requirement. The agency’s brushing aside this alternative, with no scientific support or justification, violates its NEPA obligation to properly consider all reasonable alternatives.

Again, NFMA requires the Forest Service to provide for the diversity of plant and animal communities in order to meet multiple-use objectives, which include fish and wildlife. 16 U.S.C. § 1604(g)(3)(B). Former Forest Service Chief Dale Bosworth recognized that the greatest number of imperiled species in the United States are found on the National Forest System, and that “the national forests and grasslands have always been the best refuges - the best places for endangered species to make a final stand.” Bosworth, Dale, “*Managing the National Forest System: Great Issues and Great Diversions*,” Speech to Commonwealth Club in San Francisco, CA (April 22, 2003). In response to global climate change and in recognition of the importance of the National Forest System lands for imperiled species and biodiversity, the Forest Service must fully consider the Center’s more protective “refuge” alternative in the Final EIS.

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<sup>4</sup> *See also* Matthews, Stephen N.; O’Connor, Raymond J.; Iverson, Louis R.; Prasad, Anantha M., “*Atlas of Climate Change Effects on 150 Bird Species of the Eastern United States*,” Forest Service Northeastern Research Station Gen. Tech. Report NE-318 (2004); IPCC’s April, 2007, Summary for Policymakers, “Climate Change 2007: Impacts, Adaptation and Vulnerability,” available at <http://www.ipcc-wg2.org/index.html>; and the U.S. Climate Change Science Program, September, 2007 Draft Report, “The Effects of Climate Change of Agriculture, Land Resources, Water Resources, and Biodiversity,” (recognizing “observable impacts of climate change on terrestrial ecosystems in North America, including changes in the timing of growing season length, phenology, primary production, and species distribution and diversity.”), available at <http://www.climate-science.gov/Library/sap/sap4-3/public-review-draft/sap4-3prd-all.pdf>.

## B. The DEIS Fails to Adequately Describe the Affected Environment

An EIS must “describe the environment of the area(s) to be affected or created by the alternatives under consideration.” 40 C.F.R. § 1502.15. As set forth in the Center for Biological Diversity’s scoping comments, for the National Forest System this should include, at a minimum: (1) the present status and distribution of sensitive, threatened, and endangered species that depend on national forests and grasslands; (2) the current condition of rivers and streams on national forests and grasslands; (3) the amount and distribution of remaining old growth habitat on the National Forest System; (4) the extent and impacts of invasive species; (5) a description and assessment of the existing network of roads and trails; (6) an assessment of the current extent of livestock grazing across the National Forest System; (7) the current status of oil, gas, and mineral development on national forests; and (8) the extent of past timber harvest and clearcutting. Past Forest Service management practices have resulted in substantial impacts to National Forest System lands that must be plainly and fully disclosed to the public in the EIS.

As also set forth in scoping comments, the most recent scientific reports from the IPCC make clear that the atmospheric concentrations of greenhouse gases have significantly increased, which is unequivocally warming and changing global climate systems, and resulting in substantial environmental impacts across the globe.<sup>5</sup> In assessing and describing the affected environment, the Forest Service must therefore also consider and disclose the extent to which global climate change has already affected the National Forest System. As recently recognized by Forest Service and other agency scientists, the past century has already been a period of “dynamic change for many western mountain ecosystems.” Stephenson, N.; Peterson, D.; Fagre, D.; Allen, C.; McKenzie, D.; Baron, J.; O’Brian, K., “*Response of Western Mountain Ecosystems to Climate Variability and Change: The Western Mountain Initiative*,” (2006). “By documenting the past response of natural resources to climate variability at annual, decadal, and centennial scales,” the Forest Service will be able to establish “an important context for inferring the effects of a warmer climate.” *Id.*

Changes that have already occurred include increased droughts, increased severity of wildfires, forest dieback, vegetation type conversion, decreased snowpack, and changes in soils. *Id.*; see also U.S. Climate Change Science Program, Sept., 2007 Draft Report, “*The Effects of Climate Change of Agriculture, Land Resources, Water Resources, and Biodiversity*,” (recognizing “observable impacts of climate change on terrestrial ecosystems in North America, including changes in the timing of growing season length, phenology, primary production, and species distribution and diversity.”), available at <http://www.climate-science.gov/Library/sap/sap4-3/public-review-draft/sap4-3prd-all.pdf>.<sup>6</sup>

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<sup>5</sup> See IPCC’s February, 2007, Summary for Policymakers, “*Climate Change 2007: The Physical Science Basis*,” available at <http://ipcc-wg1.ucar.edu/wg1/wg1-report.html>; and IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability*,” available at <http://www.ipcc-wg2.org/index.html>.

<sup>6</sup> See also IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability*,” p. 2 (increased run-off and earlier spring peak discharge in many glacier- and snow-fed rivers; warming of lakes and rivers in many regions, with effects on thermal structure and water quality; earlier timing of spring events, such as leaf-unfolding, bird migration and egg-laying;

Only by properly recognizing, considering and disclosing current conditions can the Forest Service accurately and meaningfully predict the reasonably foreseeable, future management impacts on forest resources.

Despite NEPA's requirement to set forth the affected environment, and the significant changes to National Forest System lands that have been caused by past management practices by the Forest Service, along with additional impacts already resulting from global climate change, the DEIS for the 2007 Proposed Rule refuses to address or disclose the affected environment, in violation of NEPA. DEIS, p. 39. The Forest Service's refusal to set forth the affected environment stems from the agency's repeated argument that the 2007 Proposed Rule would do no more than establish procedures for the preparation of forest plans. This argument has been squarely rejected by the courts, as the proposed NFMA regulations not only establish procedures for forest plans, but also set forth the substantive standards and guidelines for all forest plans and site-specific projects across the 190-million acre National Forest System. By weakening and eliminating previous substantive standards, the Proposed Rule would cause significant environmental impacts, and there is no reasonable excuse for the agency's failure to address and disclose in detail the affected environment, as plainly required by NEPA.

### **C. The DEIS Fails to Consider and Disclose the Environmental Consequences of the Proposed Revision of the NFMA Regulations**

The "environmental consequences" section of the EIS "forms the scientific and analytic basis" for the comparison of alternatives. 40 C.F.R. § 1502.16. This discussion must include "the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented." *Id.* This section must include discussions of both direct and indirect effects and their significance, along with the environmental effects of the alternatives. *Id.*

As stated, the Ninth Circuit has already recognized that because the NFMA regulations control the development of both Forest Plans and site-specific projects, the substantial revision of the NFMA regulations, as proposed by the Forest Service, will result in an actual, physical effect on the environment in national forests and grasslands. *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 973 (9<sup>th</sup> Cir. 2003). The Ninth Circuit further recognized that lowering environmental standards at the national programmatic level, as with the proposed rule, will result in lower environmental standards at the site-specific level. *Id.* at 975. Pursuant to NEPA, the Forest Service must therefore analyze, consider, and disclose the direct, indirect, and cumulative environmental effects of the proposed action in the EIS.

Significantly, in analyzing the potential environmental impacts of its proposed action and alternatives, the Forest Service must recognize that it is not drafting new regulations on a blank slate. Rather, the agency must acknowledge and analyze the proposed changes in relation to the

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poleward and upward shifts in ranges in plant and animal species); *id.*, p. 3 (alterations of disturbance regimes of forests in Northern Hemisphere due to fire and pests).

previous and existing NFMA regulations. This is because by proposing new regulations, the Forest Service is thereby also proposing to eliminate the previous regulations that had been in place. Moreover, because the Forest Service continues to implement the 1982 Rule within the context of certain forest plan amendments and revisions, and should also be required to implement the 1982 Rule for site-specific projects since the agency also violated the law in promulgating the 2000 Rule, the Draft EIS must assess and disclose the environmental consequences of the 2007 Proposed Rule in relation to the mandatory standards and guidelines of the 1982 Rule.

As stated, despite the clear guidance and direction on this issue from both the Ninth Circuit and the United States District Court for the Northern District of California, the Forest Service continues to wrongly maintain that its proposed major revision of the NFMA regulations would result in no direct, indirect, or cumulative impacts. *See* Draft EIS at p. i. Even though the district court also already determined that the Forest Service's chosen "categorical exclusion" does not apply to the proposed revision of the NFMA regulations, the agency also continues to wrongly maintain that its proposal "clearly falls within this category." *Id.*, p. 39. The Draft EIS is therefore an EIS in name only, as it entirely fails to assess and disclose the potential environmental impacts of the Proposed Rule – which is the very point of a NEPA analysis - and the Forest Service therefore remains in substantial violation of NEPA.

Again, the Forest Service is wrong that the 2007 Proposed Rule would only establish the process for the development, revision, and amendment of forest plans, as the Rule would also substantially weaken and eliminate the previous substantive standards and guidelines that governed both forest plans and site-specific projects across the National Forest System. The substantial weakening and elimination of these previous substantive, regulatory standards and guidelines will at least indirectly result in environmental impacts. The Forest Service's argument that these impacts will not occur has already been rejected by the courts, and its continuation of that argument still violates NEPA.

Similarly, the Forest Service's continued complaint that it is simply unable to prepare an actual, programmatic environmental analysis for the 2007 Proposed Rule is in direct conflict with long-standing NEPA regulations and caselaw. NEPA specifically defines "major federal action" to include the adoption of regulations, as well as the adoption of formal plans "which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based." 40 C.F.R. § 1508.18(b). Moreover, the NEPA regulations expressly recognize that EISs are sometimes required for broad Federal actions such as the adoption of new agency programs or regulations. 40 C.F.R. § 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 the agency planning and decisionmaking." 40 C.F.R. § 1502.4(b). As summarized in *Citizens for Better Forestry*: "NEPA does indeed contemplate preparation of EAs and EISs in the case of programmatic rules and changes. The CEQ regulations governing NEPA specifically envision programmatic environmental statements. . . . Additionally programmatic EISs have been recognized and utilized in a number of cases before the Ninth Circuit. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1085-86, *citing Friends of the Yosemite Valley v. Norton*, 348 F.3d 789 (9<sup>th</sup> Cir. 2003); *Northern Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9<sup>th</sup> Cir. 2006);

*Northern Alaska Env'tl. Ctr. v. Lujan*, 961 F.2d 886 (9<sup>th</sup> Cir. 1992); *California v. Block*, 690 F.2d 753 (9<sup>th</sup> Cir. 1982).

Furthermore, the court's conclusion in *Citizens for Better Forestry* still applies to the agency's repeated assertions in the DEIS that it is unable to produce an actual programmatic environmental analysis:

Thus, defendants' argument that an EA or an EIS was not feasible based on the nature of the 2005 Rule is not particularly persuasive given the fact that such analysis has been undertaken in the past in the case of programmatic rules and actions.

*Citizens for Better Forestry*, 481 F. Supp. 2d at 1086. As further stated by the court,

EAs and EISs have been prepared in the case of programmatic and policy changes, and were prepared for both the 1982 and 2000 Rules. There is no reason that the same requirements should not apply to a *nationwide* programmatic change such as the promulgation of the 2005 Rule.

*Id.* at 1089. (citations omitted) (emphasis in original). And, as stated by the court in denying the Forest Service's motion to reconsider its original decision:

A careful reading of the order reflects that the court simply rejected USDA's argument (which it has now denied making) that preparation of an EA or EIS was not feasible for broad, programmatic rules under NEPA. The court subsequently explained why the 2005 Rule posed potential significant effects, and what those effects were.

*Citizens for Better Forestry*, 2007 U.S. Dist. LEXIS 51378, at \*51.

NEPA of course does not allow the Forest Service to simply prepare a document and call it an EIS. In addition to entirely failing to address the affected environment or environmental consequences of its proposal, the Draft EIS for the 2007 Proposed Rule also more specifically fails to address the following relevant factors:

- 1. The DEIS Fails to Consider Potential Impacts to Fish and Wildlife Species**

The 1982 NFMA regulations provided mandatory and meaningful protection for fish and wildlife species. The Forest Service was required to manage fish and wildlife habitat to maintain viable populations of existing fish and wildlife species. 36 C.F.R. § 219.19 (1982). In order to ensure viable populations, the agency was required to provide at least a minimum number of reproductive individuals and the habitat was required to be well distributed so that the individuals could interact with others in the planning area. *Id.* Moreover, in order to estimate the potential effects on fish and wildlife populations, the Forest Service was required to identify

“management indicator species,” and monitor their population trends. *Id.* And additional protection was provided to threatened and endangered species and their habitat. *Id.*

The mandatory requirements of the 1982 regulations resulted in forest plans that included mandatory and quantifiable protection for fish, wildlife, and their habitat. In turn, numerous timber sales and other proposed projects were stopped or modified by citizen administrative appeals and litigation due to the mandatory protection offered by the applicable Forest Plans and the regulations themselves. By contrast, the proposed 2005 regulations “completely eliminate the requirement that forest plans maintain viable populations of vertebrate species, along with the requirement that management indicator species be designated and monitored.” Noon, B.; Parenteau, P.; Trombulak, “*Conservation Science, Biodiversity, and the 2005 U.S. Forest Service Regulations*,” *Conservation Biology*, Volume 19, No. 5 (Oct., 2005). There is no question that the elimination of the 1982 viability requirements will lead to fewer if any mandatory standards and guidelines in Forest Plans, as the very purpose of the proposed rule is to provide individual Forests with more discretion and flexibility. *See* 70 Fed. Reg. at 1024 (acknowledging that Forest Plans under the proposed 2005 rule would be “less prescriptive in nature than under the 1982 planning rule.”).

In assessing the potential impacts of the 2007 Proposed Rule, the EIS must include an analysis of the potential impacts to fish and wildlife species from the elimination of the 1982 viability requirement. Even with the protection offered by the 1982 regulations, and the Forest Plans prepared under the 1982 regulations, numerous fish and wildlife species were placed on the agency’s list of sensitive species or designated as threatened or endangered under the Endangered Species Act during the 1980s and 1990s.<sup>7</sup> It is also now known that these species face additional threats from global climate change, continued habitat fragmentation, and other factors.<sup>8</sup> Increased threats coupled with less protective standards and decreased opportunities for meaningful public oversight will undoubtedly decrease the overall protection offered to the fish and wildlife species that depend on the National Forest System. The EIS must therefore fully analyze and disclose the potential impacts of its 2007 Proposed Rule, including the elimination of the previous regulatory framework, on fish and wildlife species.

The 1982 regulations also required the Forest Service to prepare “regional guides” for each Forest Service region to “provide standards and guidelines for addressing major issues and management concerns which need to be considered at the regional level to facilitate forest planning.” 36 C.F.R. § 219.8(a) (1982). The EIS must also assess the 2007 Proposed Rule’s elimination of these previously required regional guides and the potential consequences to wide ranging and migratory species that need to be considered and addressed at the regional level.

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<sup>7</sup> As just one example, even with the mandatory viability requirement in the 1982 regulations, lynx was still designated as a threatened species in 2000 due to the lack of sufficient protection for lynx in Forest Plans. 65 Fed. Reg. 16052 (March 24, 2000). Decreasing and eliminating standards at the national level will only further decrease protection at the regional and local level, further worsening conditions for wildlife species dependant on national forests.

<sup>8</sup> *See* IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability*,” pp. 5-6 (recognizing increased risks to ecosystems and imperiled plant and animal species as result of rising temperatures and climate change).

## **2. The DEIS Fails to Consider the Potential Impacts to the Remaining Old Growth Forests**

Past timber harvest has decimated old growth forests throughout the National Forest System, and the many wildlife species that depend on these old growth forests are struggling for survival. The mandatory viability requirement of the 1982 regulations led to mandatory, numeric protection for old growth forests within forest plans, including the Northwest Forest Plan in the Pacific Northwest, the Northern Goshawk and Mexican Spotted Owl Plan Amendments in the Southwest, and the 10% Old Growth Standard included within numerous Forest Plans in the Northern Rockies. Many national forests are not meeting these numeric old growth requirements, and are thereby continuing to place old growth species at risk. Since the proposed rule would eliminate the 1982 viability requirement, and emphasizes agency discretion and flexibility over mandatory, numeric standards for individual Forest Plans, the proposed rule may result in attempts to eliminate the mandatory, numeric protection for old growth forests. The EIS must fully assess and disclose the potential impacts of the elimination of this protection for old growth forests and dependent species, and address how the Forest Service would still be able to meet NFMA's diversity requirement.

## **3. The DEIS Fails to Consider the Potential Impacts of Eliminating Enforceable, Numeric Standards for Additional Forest Resources**

In addition to the fish and wildlife viability requirement, the 1982 NFMA regulations included a number of mandatory, quantifiable standards referred to as "management requirements," including numeric limits on the size of clearcuts and stream side buffers. 36 C.F.R. § 219.27; *see* 16 U.S.C. § 1604(g)(3) (setting forth the provisions and protection that must be included in the NFMA regulations). The EIS must assess the likely and potential environmental consequences resulting from the proposed elimination of these enforceable, numeric standards.

## **4. The DEIS Fails to Consider the Potential Impacts of Authorizing and Increasing the Extent of Logging, Livestock Grazing, Oil and Gas Development, and Other Activities on Global Climate Change**

The IPCC, made up of over 1,000 scientists from over 100 countries, recently concluded that it is "very likely" (90 percent probability) that human activities are the main cause of global warming. The potential environmental consequences that may be caused by global climate change are both enormous and alarming. In this nation-wide EIS concerning the management, standards and guidelines for the 190 million acre National Forest System, the Forest Service must assess and disclose the potential contribution of projects and activities that are authorized on national forests and grasslands to the ongoing, human-caused changes to the national and global climate.

Forests are the most significant terrestrial stores of living carbon, and in fact slow global warming by storing and sequestering carbon. *See* Union of Concerned Scientists, "*Recognizing*

*Forests' Role in Climate Change*,” available at [www.ucsusa.org](http://www.ucsusa.org).<sup>9</sup> “Forest plants and soils drive the global carbon cycle by sequestering carbon dioxide through photosynthesis and releasing it through respiration.” *Id.* Through photosynthesis, plants capture carbon dioxide and convert it to plant matter that then feeds the base of the entire planetary food chain. *See* Heiken, D., “*The Straight Facts on Forests, Carbon, and Global Warming*,” available at <http://tinyurl.com/2by9kt>. Old-growth forests are able to store massive amounts of carbon in their trunks as well as in the soil. *Id.*

When forests are degraded or logged, their stored carbon is released back into the atmosphere during harvest and through respiration, thus becoming net contributors of carbon to the atmosphere. Union of Concerned Scientists, “Recognizing Forests’ Role in Climate Change.” Tropical deforestation, for instance, is responsible for approximately 20% of total human-caused carbon dioxide emissions each year. *Id.*

Forests are able to help mitigate for global warming in at least three ways: conserving existing forests to avoid emissions associated with forest degradation or clearing; sequestration by increasing forest carbon absorption capacity - occurring primarily by planting trees or facilitating the natural regeneration of forests, and the substitution of sustainably produced biological products. *Id.* In other words, to help our forest store more carbon, and thereby alleviate the leading cause of global warming, we need to let our forests grow. *Id.*

Because the 2007 Proposed Rule would decrease and eliminate existing limits on logging practices, the rule will likely result in an increase of the amount of logging occurring in the National Forest System. The EIS must consider and disclose the potential consequences of increased timber harvest on global warming.

The EIS must also consider the 2007 Proposed Rule’s continuation of existing livestock grazing and its contribution to climate change. A recent report from the Food and Agriculture Organization of the United Nations found that livestock are responsible for eighteen percent of greenhouse gas emissions, representing a larger share than that of transport. *See* Steinfeld, H.; Gerber, P.; Wassenaar, T.; Castel, V.; Rosales, M.; Haan, C., “*Livestock’s Long Shadow, Environmental Issues and Options*,” (2006). Livestock grazing is widespread across the National Forest System in the western United States, and the proposed rule is unlikely to lead to any significant decrease in the extent of grazing, but rather may further increase such use. The contribution of this widespread livestock grazing on climate change must be assessed and disclosed.

Relaxed mandatory standards and protection at the national level, coinciding with increases in demand, would also likely result in increased oil and gas development on national forests. The ultimate burning of these fossil fuels would further increase global warming pollution, which needs to be considered and disclosed in this EIS.

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<sup>9</sup> *See also* Heiken, D., “*The Straight Facts on Forests, Carbon, and Global Warming*,” available at <http://tinyurl.com/2by9kt>.

#### **D. The DEIS Entirely Fails to Consider and Disclose the Threats Posed by Global Climate Change to the National Forest System**

As explained (and ignored) in the Center for Biological Diversity's scoping comments, global warming and climate change is one of the foremost problems the nation faces today, and implicates all aspects of the management of our national forests. Global warming is also undeniably one of the greatest threats to our nation's biodiversity. Global warming is already adversely affecting numerous fish and wildlife species in the United States, and these impacts are expected to accelerate and continue. *See e.g.*, IPCC's April, 2007, Summary for Policymakers, "Climate Change 2007: Impacts, Adaptation and Vulnerability," pp. 5-16 (discussing "current knowledge about future impacts" resulting from climate change, including fresh water resources, ecosystems, forest products, and more specific information on North America).

Since submitting scoping comments, two additional reports have directly substantiated the Center's point on this issue, and make it unmistakable that the Forest Service must address climate change in this nationwide EIS. First, in August, 2007, the United States Government Accountability Office ("GAO") issued a report to Congress entitled, "Climate Change: Agencies Should Develop Guidance for Addressing the Effects of on Federal Lands and Water Resources." *See* <http://www.gao.gov/new.items/d07863.pdf>. GAO found that federal resources are vulnerable to a wide range of effects from climate change, "some of which are already occurring," including droughts, increases in insects and disease infestations, and shifts in species distribution. *Id.*, p. 1. Federal agencies, however, - including the Forest Service - have failed to make climate change a priority and have failed to provide resource managers with sufficient guidance to address climate change issues. *Id.* As further summarized by GAO:

[R]esource managers do not have sufficient site-specific information to plan for and manage the effects of climate change on the federal resources they manage. In particular, the managers lack computational models for local projections of expected changes and detailed inventories and monitoring systems for an adequate baseline understanding of existing local species. Without such information, managers are limited to reacting to already-observed climate change effects on their units, which makes it difficult to plan for future changes.

*Id.* The EIS for the Proposed Rule is where this climate change guidance needs to be assessed, especially in light of the Rule's substantial weakening of previous regulatory protection for fish and wildlife species. And its now or never for this necessary analysis to occur due to the agency's elimination of regional guides and stated intention to prepare no NEPA analysis for subsequent forest plans.

Second, in September, 2007, the United States Climate Change Science Program ("CCSP") issued a draft report entitled, "The Effects of Climate Change on Agriculture, Land Resources, Water Resources, and Biodiversity." *See* <http://www.climatechange.gov/Library/sap/sap4-3/public-review-draft/sap4-3prd-all.pdf>. The CCSP confirms that there is a "robust scientific consensus" that human-induced climate change is occurring, and that human influences will continue to change the climate of the United States throughout the 21<sup>st</sup> century. *Id.*, p. 7. "We are very likely to experience a faster rate of climate

change in the 21<sup>st</sup> century than seen in the last 10,000 years,” which is expected to have significant effects on the ecosystems of the United States. *Id.*

More specifically, CCSP found that temperature increases and droughts have very likely influenced the massive insect outbreaks of the past decade, that the number of large, stand replacing fires are likely to increase, and that the range of large insect outbreaks is likely to increase. *Id.*, p. 12. Forest productivity will likely increase in portions of the Eastern United States while decreasing in portions of the Western United States. *Id.*, p. 13. In addition, there are already “observable impacts of climate change on terrestrial ecosystems in North America, including changes in the growing season length, phenology, primary production, and species distribution and diversity.” *Id.*

NEPA is recognized as “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA “is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Id.* at § 1500.1(c). Information in an EIS must be of “high quality,” and accurate scientific analysis is recognized as “essential to implementing NEPA.” *Id.* at § 1500.1(b). The Forest Service must use the NEPA process to identify reasonable alternatives that will avoid or minimize the adverse effects of its actions on the environment, and to use all practicable means to restore and enhance the quality of the human environment. *Id.* at § 1500.2(e-f). In light of these explicit purposes and policies, it is inconceivable and unreasonable for the Forest Service not to address and disclose the real threats to the national forests and grasslands resulting from the scientifically recognized changes in climate and the implications for the National Forest System within this nationwide EIS. *See also* 42 U.S.C. § 4331(b) (federal agencies have a continuing responsibility to use all practicable means to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”).

## **1. Potential Impacts of Climate Change on Forests**

Federal agency scientists recognize that global climate change will result in significant impacts and changes to forests in the western United States. Stephenson, N.; Peterson, D.; Fagre, D.; Allen, C.; McKenzie, D.; Baron, J.; O’Brian, K., “*Response of Western Mountain Ecosystems to Climate Variability and Change: The Western Mountain Initiative*” (2006). The Western Mountain Initiative is an agency research program focusing on understanding and predicting responses of western mountain ecosystems to climatic variability and change. *Id.* Scientists predict that the anticipated increase in temperature may shift the ideal range for many forest species by about 200 miles to the north. Insect and pathogen outbreaks may also increase in severity. *See* IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability*,” p. 10 (disturbances from pests and diseases projected to have increasing impacts on forests). The EIS must consider and disclose the findings of relevant scientific research regarding the expected impacts of climate change on forests as it analyzes the affected environment and the proposed rule’s potential environmental consequences.

## 2. Potential Impacts of Climate Change on Biodiversity

Global warming is recognized as a key threat to biodiversity. See Malcom, Jay R.; Liu, Canran; Neilson, Ronald P.; Hansen, Lara; Hannah, Lee, “*Global Warming and Extinctions of Endemic Species from Biodiversity Hotspots*,” *Conservation Biology*, Vol. 20(2): 538-548 (2006). One-third of U.S. species are already at risk and of conservation concern, with more than 500 species likely already extinct. See *Precious Heritage: The Status of Biodiversity in the United States*, (March, 2000); see also Matthews, Stephen N.; O’Connor, Raymond J.; Iverson, Louis R.; Prasad, Anantha M., “*Atlas of Climate Change Effects on 150 Bird Species of the Eastern United States*,” Forest Service Northeastern Research Station Gen. Tech. Report NE-318 (2004) (projecting that as many as 78 of 150 common bird species may decrease by at least 25 percent due to global climate change).

Moreover, twenty-six percent of imperiled species are found in the National Forest System, including about half all the populations of federally listed species that are found on federal lands. See former Forest Service Chief Dale Bosworth speech to Commonwealth Club of San Francisco, CA (April 22, 2003). For species that are already on the brink of extinction, such as the Selkirk and Cabinet-Yaak populations of grizzly bears and the few remaining woodland caribou, the expected changes in climate could be the final blow to these species’ survival unless the Forest Service takes action to significantly increase their protected habitat. The Forest Service must therefore assess and disclose the potential consequences of global climate change on the fish and wildlife species that depend on national forests for their survival, including the already sensitive, threatened, and endangered species.<sup>10</sup>

## 3. Potential Impacts of Climate Change on Wildfire

The increased atmospheric concentrations of greenhouse gases also means that the risk of large wildfires will remain high and will continue to increase in many forests. Westerling, A.L., “*Climate Change Impacts on Wildfire*,” Chapter 12 in *Climate Change Science and Policy* (2007); IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability*,” p. 10 (disturbances from fire are projected to have increasing impacts on forests in North America, “with an extended period of high fire risk and large increases in area burned.”). As recognized in a recent memo to Interior Secretary Dirk Kempthorne, forests are increasingly overgrown, the climate is getting warmer and drier, and the government is running short of money to employ firefighters. See November 21, 2006,

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<sup>10</sup> See also IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability*,” p. 5 (“The resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g., flooding, drought, wildfire, insects, ocean acidification), and other global change drivers (e.g., land use change, pollution, over-exploitation of resources.”); *id.*, p. 6 (“Approximately 20-30% of plant and animal species assessed so far are likely to be at increased risk of extinction if increases in global average temperature exceed 1.5-2.5°C.”); *id.* (“For increases in global average temperature exceeding 1.5-2.5°C and in concomitant atmospheric carbon dioxide concentrations, there are projected to be major changes in ecosystem structure and function, species’ ecological interactions, and species’ geographic ranges, with predominantly negative consequences for biodiversity, and ecosystem goods and services e.g., water and food supply.”).

Oregonian newstory by Michael Milstein, “*Fires Likely to Exceed Agencies’ Resources.*” A record 9.4 million acres burned in 2006, surpassing the previous record of 8.7 million acres that burned in 2005. *Id.* Climate studies predict that the West will grow warmer and drier, making forests more flammable and blazes more dangerous and unpredictable. *Id.* The EIS must therefore consider and disclose the implications of global climate change on the threat and intensity of future wildfires within the National Forest System.

#### **4. Potential Impacts of Climate Change on Recreation**

As stated, the proposed action would only exacerbate global climate change by likely increasing timber harvest, maintaining or increasing livestock grazing and allowing the Forest Service to proceed with its increased emphasis on oil and gas development. The EIS must explore and disclose the already occurring and expected impacts of climate change on the millions of recreational users of the National Forest System. This must include consideration of the adverse impacts to ski resorts located on national forests, snowmobile use, cold-water fishing, and other affected recreational uses.

#### **E. The DEIS Fails to Disclose or Address Directly Relevant Science, Including Conflicting Scientific Reports**

An EIS must include information of high quality, as “[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). Therefore, “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.” 40 C.F.R. § 1502.24. In addition, an EIS “must respond explicitly and directly to conflicting views in order to satisfy NEPA’s procedural requirements.” *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1172 (9<sup>th</sup> Cir. 2006).

The Draft EIS for the 2007 Proposed Rule entirely fails to disclose or address the following directly relevant reports, most of which directly conflict with the agency’s Proposed Rule:<sup>11</sup>

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<sup>11</sup> The citations for these reports is provide elsewhere within these comments, and the reports are either already in possession of the Forest Service or available on-line, as also already indicated in these comments. The commenters can also provide copies of these reports upon request. Additionally, this is not intended to be an exhaustive list, as it is the Forest Service’s responsibility under NEPA, and not the commenters, to identify, address, and respond to the relevant science. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9<sup>th</sup> Cir. 2000) (“Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.”), quoting *City of David v. Coleman*, 521 F.2d 661, 667 (9<sup>th</sup> Cir. 1975).

- (1) The 1979 Committee of Scientists report and recommendations regarding the NFMA regulations;
- (2) The 1999 Committee of Scientists Report, “Sustaining the People’s Land: Recommendations for Stewardship of the National Forests and Grasslands into the Next Century;
- (3) August, 2007, the United States Government Accountability Office (“GAO”) issued a report to Congress entitled, “Climate Change: Agencies Should Develop Guidance for Addressing the Effects of on Federal Lands and Water Resources.”
- (4) United States Climate Change Science Program, September, 2007 Draft Report, “*The Effects of Climate Change of Agriculture, Land Resources, Water Resources, and Biodiversity,*”
- (5) IPCC’s February, 2007, Summary for Policymakers, “*Climate Change 2007: The Physical Science Basis,*” and IPCC’s April, 2007, Summary for Policymakers, “*Climate Change 2007: Impacts, Adaptation and Vulnerability.*”
- (6) Stephenson, N.; Peterson, D.; Fagre, D.; Allen, C.; McKenzie, D.; Baron, J.; O’Brian, K., “*Response of Western Mountain Ecosystems to Climate Variability and Change: The Western Mountain Initiative*” (2006).
- (7) Malcom, Jay R.; Liu, Canran; Neilson, Ronald P.; Hansen, Lara; Hannah, Lee, “*Global Warming and Extinctions of Endemic Species from Biodiversity Hotspots,*” Conservation Biology, Vol. 20(2): 538-548 (2006).
- (8) Matthews, Stephen N.; O’Connor, Raymond J.; Iverson, Louis R.; Prasad, Anantha M., “*Atlas of Climate Change Effects on 150 Bird Species of the Eastern United States,*” Forest Service Northeastern Research Station Gen. Tech. Report NE-318 (2004)
- (9) Westerling, A.L., “*Climate Change Impacts on Wildfire,*” Chapter 12 in Climate Change Science and Policy (2007)

Unless the EIS is substantially revised to meaningfully address these well respected scientific reports and recommendations, the EIS is “fatally deficient.” *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992).

### III. Conclusion

Thank you for the opportunity to provide these comments. We hope that these comments and concerns are much better reflected in the Final Rule and FEIS than they were for the Draft EIS. Please contact me at 218-525-3884 with any questions regarding these comments.

Sincerely,



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