

Appendix K

Final Public Comments & Responses



Appendix K
Initial Public Comments & Responses

Public Comments

As a result of direct mailings and newspaper legal notice in the Clarion Ledger, the district received a total of one comment. The respondent was Ray Vaughn from Wildlaw Inc. The comments received by Wildlaw were the same as the comments received during the first public comment period. The letter received by Wildlaw is included here and the responses to their comments are included in Appendix H.



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May 4, 2004

District Ranger
Homochitto National Forest
1200 Hwy 184 East
Meadville, MS 39653

Re: Comments on Environmental Assessment for the Unit 24 Project

Dear Ranger:

On behalf of Wild South and the Friends of Mississippi Public Lands, non-profit outdoor recreation and environmental organizations, I am filing the following comments on the Environmental Assessment (EA) for the AU 24 project.

We support your plans to do Longleaf Pine forest ecosystem restoration. To make sure such restoration work is the best it can be and will be maintained well into the future, your District needs to address the fact that there are no planning documents or programmatic NEPA analysis that support such restoration. Either a new plan with Longleaf restoration as its goal or a restoration EIS which projects such as this can tier to is needed in order to make such restoration valid and sustained.

We trust that you will consider our concerns seriously. You may judge issues presented by interest groups to be "non-relevant or out of the scope of the analysis," as you suggest on page 43 of Chapter 1 of your Environmental Assessment. However, our comments are not merely "a laundry list of all possible issues that might occur." *Id.* We raise only flaws in your document that have legal implications.

Expired Plan

The project must be suspended until the National Forests in Mississippi revise the land and resource management plan and until the Forest Service develops a Renewable

Resources Program.

As you correctly stated in you EA, "Forest Planning revision was specifically delayed by Congress in order to evaluate and revise planning regulations." EA at 35. This means that a new Land and Resource Management Plan (LRMP) must be formulated in accordance with new regulations. It is not logical to conclude, as you suggest, that the need for new regulations obviates the requirement that any projects comply with an up-to-date management scheme presented in a LRMP. Your assertion that the analysis required for a proposed project does not relate to "decisions made at higher levels" is simply nonsensical. *Id.* This flip dismissal of the fatal flaws in your procedure is no more legitimate when repeated regarding your outdated Renewable Resources Program (RRP). *Id.*

The Forest and Rangeland Renewable Resources Planning Act ("RPA") and the National Forest Management Act Amendments ("NFMA") provide unambiguous direction to the Forest Service regarding forest planning duties at the national and local levels. The purpose of these planning requirements is to insure that all site specific decisions made by the Forest Service are consistent with goals, objectives, standards, and guidelines established for the National Forest system as a whole as well as for individual National Forests. Plans completed at the national, regional, forest, and project levels are integrated to provide a consistent framework for achieving these goals and objectives. 36 C.F.R. § 219.4. Project-level decisions are tiered to forest-level decisions which are tiered to regional- and national-level decisions. *Id.*

In addition, the RPA Program's supporting analyses contained in the RPA Assessments are critical for determining whether or not individual projects authorized by the Forest Service are consistent with resource demands placed on individual National Forests by the American people as a whole taking into consideration the demands placed on forests in all ownerships. 16 U.S.C. § 1601(a).

The RPA requires the Forest Service to develop a Renewable Resources Program at least every five years, and Assessment at least every ten years. 16 U.S.C. § 1602 and § 1601(a). The last Renewable Resource Program was developed by the Forest Service in 1990. The last Assessment was prepared in 1989.

The NFMA requires each National Forest to revise land and resource management plans *at least* every 15 years. 16 U.S.C. § 1604(f)(5). These requirements are reiterated and amplified in forest planning regulations at 36 C.F.R. § 219.10(g) and the Forest Service Handbook at FSH 1922.6.

The land and resource plan for the National Forests in Mississippi has expired. Thus, there is no legally adequate RPA Program or land and resource management plan to which the project can be tiered. There have been no rulings by any federal courts, no legislation passed by Congress, and no directives issued by the National Headquarters of the U.S. Forest Service authorizing the Forest to continue implementing its outdated LRMP. Until the Forest Service

develops a new RPA Program and new LRMP for the Forest, implementation of individual actions, including this project must be suspended.

The suspension of the project is necessary because the goals, objectives, standards, and guidelines contained in the old, expired LRMP are no longer relevant or defensible in light of significantly changed resource demands by the public, significantly changed environmental and economic conditions, and significant changes in Forest Service management direction. These include:

1. Significant new information about the status, distribution, and effects of management activities on threatened, endangered, sensitive, and management indicator species.
2. Significant new scientific information about the beneficial role of natural disturbance and the detrimental effects of suppressing fires, insect outbreaks, or floods and salvaging timber from areas affected by these disturbances.
3. Significant changes in the social and economic setting in which the Forest operates including far less demand for commodities produced by the Forest and far greater demands for preservation of old growth forests, wildlife habitat, clean water, recreation sites, and other goods and services produced by natural forest ecosystems.
4. Significant changes in management direction, including the adoption of integrated resource management, ecosystem management, and principles of ecological and economic sustainability set forth in the Forest Service's new forest planning regulations. FR Vol. 65 No. 218, Thursday, November 9, 2000.
5. Vast changes in the composition and structure of forests managed by non-Forest Service landowners caused by increases in road building, development, oil and gas leasing, industrial tree farming, developed recreation, and other uses that have caused detrimental cumulative impacts to terrestrial and aquatic ecosystems managed by the Forest.
6. New information about the inadequacy of the original LRMP's goals, objectives, standards, guidelines, and land allocations in protecting environmental, economic, social, and cultural resources.
7. New information about the ecological and economic suitability of the Forest lands for logging, mining, grazing, and other forms of commodity uses.

These significant changes have been well documented by the Forest Service in the context of its annual monitoring and evaluation reports, as well as the very scoping notice for this project. These significant changes in public demands, conditions, and management direction render the goals, objectives, standards and guidelines in the original, expired LRMP obsolete and inadequate for protecting and restoring ecological and economic sustainability.

These significant changes have also been well documented in the scientific literature as well as many other publications prepared by federal, state, and local agencies with jurisdiction over resources on the Forest, but have been ignored by the Forest Service since it has failed to complete adequate five year reviews of the LRMP as required by 36 C.F.R. § 219.10(g) and failed to implement relevant portions of its monitoring and evaluation plan. Nonetheless, the significant changes in public demands and conditions exist, and render the goals, objectives, standards, guidelines, and land allocations in the original, expired LRMP obsolete and inadequate for protecting and restoring ecological and economic sustainability.

The project must be suspended until the National Forests in Mississippi publish a new Final Environmental Impact Statement supporting a revised LRMP.

Continued implementation of the original, expired LRMP not only violates the RPA and the NFMA, but violates the National Environmental Policy Act ("NEPA"). This is because those working in the National Forests in Mississippi have failed to correct, update, revise, amend, or supplement the Final Environmental Impact Statement ("FEIS") prepared for the LRMP, and continue to tier project decisions to this FEIS despite the fact that it is woefully outdated, inaccurate, and obsolete.

For instance, the project relies on the analyses contained in the expired LRMP FEIS to disclose and mitigate effects on resources. The FEIS's analyses of direct, indirect, and cumulative impacts to these resources, however, is now so outdated and so inaccurate that it is meaningless for all practical purposes.

The project also relies on the FEIS's outdated and insufficient analysis of timberland suitability, an analysis that the Forest Service has failed to update and modify as required by its monitoring and evaluation plan.

The Forest Service's regulations implementing NEPA clearly recognize that EISs that cover program and project activities over an extended time need regular updating. For instance, the Environmental Policy and Procedures Handbook requires a review of EISs every three to five years, and requires that EISs be corrected, amended, or revised when "the agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "there are significant new circumstances or information relevant to environmental concerns" that have "bearing on the proposed action or its impacts." (FSH 1909.15.18.03, 18.1, 18.2).

In addition, the Council on Environmental Quality has noted in its response to question 32 in its *Forty Most Asked Questions*:

"As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an on-going program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel

preparation of an EIS supplement. If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.”

As discussed above, there is no question that there have been both substantial changes in how the Forest LRMP has been implemented as well as significant changes in environmental, economic, social and cultural conditions since the record of decision for the LRMP was signed. Despite these changes, the Forest has not corrected, amended, revised, or supplemented the LRMP’s FEIS and, more than 15 years later, continues to tier project level decisions to this irrelevant document.

The Forest Service is also in violation of NEPA because it is authorizing site specific actions, like this project, that have adverse environmental consequences and which preclude the choice of reasonable alternatives that will be considered in the revised LRMP and accompanying EIS. Taking actions that result in adverse environmental impact or which preclude alternatives while an EIS is being prepared is prohibited by 40 C.F.R. § 1506.1(a) and (b).

In the project area, there are many resources of concern that may be offered additional levels of protection by the revised LRMP. For instance the project area may contain resources that are specifically identified by the Forest Service’s new planning regulations as necessary for promoting ecological or economic sustainability.

In the context of this project, the Forest Service has failed to even inventory and assess such areas, and, thus, has eliminated any possibility that such areas will be offered the protection they deserve when the Forest Plan is revised.

Alternatives

You fail to fully examine alternatives that propose prescribed burning only, that consider doing this work without a commercial timber sale, or that use less-damaging harvest techniques (in whole and in part), such as cut-to-length logging equipment, and that do less logging. EA at 46-49. While a burning-only alternative would not do as much restoration as you may like, it is a valid restoration alternative in that it does move the treated stands further toward their natural conditions and make it more possible in future decisions to restore those stands fully to Longleaf Pine.

You do not adequately explain why uneven-aged management was not seriously considered as an option for this project. There is nothing to clarify why “[t]his alternative does not meet direction outlined in the Forest Plan, for the stands where management is prescribed this entry.” EA at 54. “If regeneration and older age classes are mixed in close proximity,

regeneration is damaged.” EA at 55. There is no support for this claim.

“The ‘existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’ *Idaho Conservation League v. Mumma*, 956 F. 2d 1519 (9th Cir. 1992). An agency’s consideration of alternatives is adequate ‘if it considers an appropriate range of alternatives, even if it does not consider every available alternative.’ *Headwaters, Inc. v. Bureau of Land Management*, 914 F. 2d 1174, 1180-81 (9th Cir. 1990).

“The alternative section is ‘the heart of the environmental impact statement,’ 40 C.F.R. § 1502.14; hence, ‘[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’ *Citizens for a Better Henderson v. Hodel*, 768 F. 2d 1051, 1057 (9th Cir. 1985). While the practicalities of the requirement are difficult to define, NEPA provides that all agencies of the Federal Government shall, to the fullest extent possible, ‘[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.’ 42 U.S.C. § 4332(2)(E). *Kunzman*, 817 F. 2d at 492; see also *Citizens for a Better Henderson*, 768 F. 2d at 1056.

In addition, you inexplicably present environmental effects as foregone conclusions of your proposed actions. “Due to existing influences (private land uses, past harvesting practices, roads, and geological processes), effects would occur to the water resources in the analysis area regardless of the alternative chosen.” EA at 69. This is illogical as under the NEPA scheme you are supposed to compare the effects of different proposed actions, not simply say they are all the same because of the current conditions. The reality is that YOUR ACTIONS will ADD to the effects that are already occurring; saying that sediment is occurring already does not justify the failure to consider the impacts of your additional sediment from your actions. NEPA does not assume that nothing is happening in the world; that is why you are legally commanded to identify other impacts in order to assess the CUMULATIVE impacts of those impacts and the impacts from your proposal.

Your discussion of the potential effects on water quality is particularly nonsensical. You state, “[a]quatic health is an essential aspect of the water resource and is included in the term ‘water resource.’” EA at 69. And “[b]ecause a cause and effect relationship has not been found from the effects of the proposed management on water quality, there is no basis for cumulative effects analysis for this project.” EA at 71. A cumulative effects analysis includes all effects of actions. Your conclusion that your activities will have no downstream consequences is not supported by facts and data as required by NEPA.

Your plan is to build temporary roads on ridge tops, and you assert that the runoff will not have “direct leadoff into drainage.” EA at 72. Soil erosion does not need a “direct leadoff” to cause water quality problems. You do not address the issue of water quality and erosion with any factual background or basis. Although the requirement for presenting alternatives in an EA under

NEPA is procedural and not substantive, you are required to thoroughly consider the different consequences of possible alternatives, not simply dismiss the exercise by saying there will be no consequences at all.

In *Kern v. United States Bureau of Land Management*, 284 F.3d 1062 (9th Cir. 2002), the court noted: "NEPA regulations contain only a brief description of the requirements for an EA, and do not specifically mention cumulative impact analysis. . . . We have held that an EA may be deficient if it fails to include a cumulative impact analysis or to tier to an EIS that has conducted such an analysis." See *Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001); *Blue Mountains Biodiversity Project*, 161 F.3d at 1214; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998).

Other circuits have also recognized the requirement that, in appropriate cases, an EA must include a cumulative impacts analysis. See, e.g. *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 180 (3d Cir. 2000) ("[I]f the cumulative impact of a given project and other planned projects is significant, an applicant can not simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project . . ."); *Newton County Wild- life Ass'n v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998) (holding that an EA adequately addressed cumulative impacts where it covered a timber sale involving 1,871 acres but considered environmental impacts on 26,699 acres).

The importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared. The Council on Environmental Quality noted in a recent report that "in a typical year, 45,000 EAs are prepared compared to 450 EISs. . . . Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully." Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* at 4, Jan. 1997, also available at <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm> (last visited Feb. 26, 2002) (emphasis added).

Cumulative effects mean the collective impact of agency actions on resources including wildlife. The statement in the biological evaluation that because the bear population has been decimated by other impacts in the area this project can't further impact the remaining population is further evidence that you are not applying NEPA regulations in the spirit of the legislative language.

In asserting there will be no cumulative impacts on the threatened Louisiana Black Bear, you state, "[t]he proposed project does not contribute to other unconnected actions within the project area to create unacceptable levels of negative cumulative impacts." EA App.D. at 8.

Courts have used "EIS" regulations as guidance in evaluating EAs. See, e.g., *Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transportation*, 113 F.3d 1505 (9th Cir. 1997) (using regulation to determine whether an EA should have been supplemented); *D'Agnillo v. U.S. Dep't of Housing and Urban Development*, 738 F. Supp. 1443, 1447 (S.D.N.Y. 1990) ("While the

regulations do not specifically address how an agency is to determine the appropriate scope of an EA, some guidance may be found in the provisions that relate to the scope of EIS's.”).

An EA which leads to a Finding of No Significant Impact (FONSI) is subject to the same general requirements as an EIS. *Save our Ecosystems v. Clark*, 747 F.2d 1240, 1247 (9th Cir. 1984); *Southern Oregon Citizens Against Toxic Sprays v. Clark (SOCATS)*, 720 F.2d 1475, 1480 (9th Cir. 1983). In an EA an agency must “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,” as well as “brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), [and] of the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1508.9; see also 40 C.F.R. § 1502.9(c)(1)(ii).

Thus, an EA “must support the reasonableness of the agency’s decision not to prepare [an] EIS.” *SOCATS*, 720 F.2d at 1480. “Were an EA simply a statement that an agency can take an action without filing an EIS, EA’s would not fulfill the mandate of NEPA nor provide the decisionmaker or the public with information about the choice.” *Sierra Club v. Watkins*, 808 F. Supp. 852, 871 (D.D.C. 1991). In an EA the agency must take a “hard look” at the project and its impacts, “as opposed to bald conclusions, unaided by preliminary investigation,” and must “identify the relevant areas of environmental concern.” *Maryland-National Capital Park and Planning Commission v. U. S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

The Ninth Circuit held in *Foundation for North American Wild Sheep v. U. S. Dept. of Agriculture* that the government, in an EA, “failed to take the requisite ‘hard look’ at the environmental consequences of its action, noting that the EA “failed to address certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS.” 681 F.2d 1172, 1178, 1179 (9th Cir. 1982). The omitted factors in *Wild Sheep* included increased traffic and impacts on bighorn sheep, and “significant questions raised by respondents to the initial draft of the EA were similarly ignored or, at best, shunted aside with mere conclusory statements.” *Id.* at 1179-80. Because of these omissions, the Ninth Circuit rejected the EA. See also *Save the Yaak Committee v. Block*, 840 F.2d 714, 719 (9th Cir. 1988) (holding EA inadequate for lack of wildlife discussion).

In *SOCATS*, BLM argued that section 1502 of the CEQ regulations applies only to preparation of an EIS. 720 F.2d at 1480. The court rejected that view, holding that it also applies to EAs when, as here, the EA is “an integrated part of the overall environmental analysis.” *Id.* In *SOCATS* the Ninth Circuit held: “Together, the EA and the programmatic EIS must ‘provide the information ‘necessary reasonably to enable the decision-maker to consider the environmental factors and to make a reasoned decision.’ . . . The label of the document is unimportant. We review the sufficiency of the environmental analysis as a whole.” 720 F.2d at 1480.

Furthermore, 40 C.F.R. § 1500.3 states, “These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations

apply to the whole of section 102(2).” Section 102 of NEPA does not expressly mention either EAs or FISs and is the basis for both.

Compliance with NEPA procedures must be in good faith. “Genuine commitment to scrutiny is required of the federal agency. It may not merely go through the motions. An agency’s ‘grudging, pro forma’ compliance with these regulations violates NEPA’s procedural safeguards. See *Block*, 690 F.2d 753 at 769 (internal quotations and citation omitted).” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1116 n.18 (U.S. App., 2002)

“Specific guidance for when a full environmental impact statement must be prepared is provided by regulations promulgated by the Council on Environmental Quality. The regulations require the preparation of an environmental assessment that ‘briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.’” *Tillamook County v. United States Army Corps of Eng’rs*, 288 F.3d 1140, 1144 (U.S. App., 2002).

MIS and PETS Species Surveys

The negligent treatment of the information on MIS and PETs is consistent with other inadequate EAs prepared by your office. No matter how many times you present the same faulty language and insufficient data, it will not be sufficient to comply with the law. These repeated failures again underline your lack of good faith in attempting to appear to comply with NEPA.

Your BE and EA need to have full, complete and scientifically-defensible population surveys for all MIS and PETS species that could occur in the project area. Without these surveys covering the project area and the district as a whole, you are not complying with your NFMA and ESA requirements to ensure the viability of these species on your district. See *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999). You neither present evidence of such surveys, nor a full analysis of why your violations of the regulations and case law are acceptable. Instead you continue to present conclusions that you are complying with legal requirements with no evidence of having done so.

“It was determined that the actions of all Forest Service action alternatives do not contribute to the loss of viability of any Sensitive Species. Most species are associated with mesic conditions along drainages. By maintaining critical habitats, and protecting populations, the potential for cumulative effects appears to be remote.” EA at 109.

You present no current data on the populations of the threatened and endangered species known or thought to be found in the project area. Instead you rely on old data and anecdotal evidence. You fail even to present current site specific population data for the species which are both PETS and MIS, such as the Bachman’s sparrow and red-cockaded woodpecker (RCW). Even for the RCW, the only known threatened or endangered species confirmed to occur in the analysis area, your data dates from 2002. EA app. D at 10.

The EA shows neither site-specific population trend data nor evidence of an acceptable population survey for any of the MIS in the proposed project area. Your analysis relies exclusively on the condition of habitat for these crucial indicators of forest health, not any actual observations of them. You even recycled language attempting to justify this dereliction of duty from past EAs. “This analysis uses habitat availability for MIS as the coarse filter for ensuring that a mix of habitat types is provided across the landscape.” EA at 110. You then state that the “Biological Evaluation... serves... to ensure those species most at risk of losing viability... are not negatively affected.” *Id.*

Your discussion reveals willful disregard of the difference between the roles of MIS and PETS. As we have explained in the past, the Biological Evaluation is a population survey of threatened, endangered, and sensitive species. The role of MIS under NFMA, as you cited in your discussion is “to ensure that National Forests are managed to ‘maintain viable populations of existing native and desirable non-native vertebrate species.’” EA at 110.

MIS serve as indicators of the health of the whole ecosystem and not only species in particular peril. For this reason, it is necessary to conduct a scientific population survey for MIS in order to determine the effects of the proposed project on them. The Forest Service is required to maintain biological diversity and viable populations of Forest fauna and flora. Under 36 C.F.R. § 219.26, the Forest Service is required to gather and keep data, as it states in relevant part:

“Forest Planning shall provide for the diversity of plant and animal communities and tree species consistent with the overall multiple use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.”

36 C.F.R. § 219.19 mandates the Forest Service specifically monitor MIS:

“Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area . . . (1) in order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as MIS . . . (6) population trends of the MIS will be monitored and relationships to habitat changes determined.”

To comply with the plain language of 36 C.F.R. §219.19, “[h]abitat trend data may not be used as a proxy for population inventories.” *Forest Guardians v. United States Forest Serv.*, 180 F. Supp. 2d 1273 (D.N.M. 2001). The Forest Service must compile quantitative population data for the management indicator species (e.g., the number of animals, including reproductive animals, found in the Forest and the planning area at issue here), not just manage habitat for a hypothetical population. See *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999), disagreeing with *Inland*

Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754 (9th Cir. 1996). In the *Forest Guardians* decision, the court engages in a thorough discussion of the split between *Sierra Club* and *Inland Empire*, in light of the Tenth Circuit's decision in *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999), concluding that "the Forest Service is obligated by the plain language of [NFMA]'s implementing regulations to acquire and analyze hard population data of its selected management indicator species for" its proposed timber sales.

While the implementing regulations technically apply to the "formulation of Forest Plans rather than to specific projects proposed under already enacted Forest Plans," the Forest Service's obligations under the Forest Plan "continue throughout the Plan's existence." *Sierra Club v. Martin*, 168 F.3d 1, 6 (11th Cir. 1999) (citing 36 C.F.R. § 219); see *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 760 n.6 (9th Cir. 1996) (rejecting proposition that 36 C.F.R. § 219.19 applies only to promulgation and management of forest plans and not to site-specific projects and reasoning that areas contained within National Forest boundaries would be covered by a forest plan and thus also would be governed by § 219.19). The Forest Service must constantly monitor the Forest Plan's impact, including the impact of specific management actions, on the forest environment so that compliance with the Forest Plan is achieved and any needed revisions to the Forest Plan are ascertained. See *Martin*, 168 F.3d at 6; 16 U.S.C. § 1604(j) (site-specific management actions implemented by the Forest Service "must be consistent with the Forest Plan"); *Dombeck*, 185 F.3d at 1168 ("[P]roposed projects must be consistent with the Forest Plan."). Therefore, to avoid an absurd result, courts have concluded that the National Forest Management Act and the implementing regulations at issue apply to site-specific projects.

The purposes of the NFMA are frustrated by an end-run around the MIS survey requirement. A true analysis of the effects of the various alternatives on a species cannot be based on projections about habitat, such as you have presented for the White-tailed Deer, Bobwhite Quail, Eastern Wild Turkey, Pileated Woodpecker, Eastern Gray Squirrel, Eastern Meadowlark, American Kestrel, Pine Warbler, Screech Owl, 8 species of southwest stream fish, and 8 species of lake and pond fish. EA at 110. Thorough scientific surveys must be conducted in the proposed project area to determine whether any of the MIS species are present. If a species is found, the Forest Service is required to present habitat trend data and a rigorous analysis showing the affects of the proposed action. Speculation, assumptions, and a "see no evil" approach are not compliance with NFMA and NEPA.

The statutes, implementing regulations, and case law require the Forest Service to monitor and maintain population data on MIS. The Forest Service has not performed site-specific surveys for or obtained current population or inventory data on any of the MIS in the project areas. With no background information, you cannot make conclusions about whether these critical indicators of ecosystem health will face a significant impact or will even benefit from this project. It is illegal under NFMA to make major decisions (with decades of implications) until trend data (even at the plan level) is available.

The Forest Service is required to obtain and maintain current inventory data and use

accurate scientific information. This may require the preparation of special studies or inventories. Data shall be periodically evaluated for accuracy and effectiveness. The Forest Service is required to continually monitor and evaluate their management activities. 16 U.S.C. § 1604(g) and 36 C.F.R. § 219.11(d). If monitoring, evaluation, or public comments indicate a need to amend the Forest Plan, the Forest Plan can be amended. 36 C.F.R. § 219.10(f). Management plans must insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land. 16 U.S.C. § 1604(g)(3)(C).

The agency is also required to maintain biological diversity and viable populations of Forest fauna and flora. 36 C.F.R. Section 219.26 requires the Forest Service to gather and keep data, as it states in relevant part:

“Forest Planning shall provide for the diversity of plant and animal communities and tree species consistent with the overall multiple use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.”

36 C.F.R. Section 219.19 mandates the Forest Service specifically monitor MIS:

“Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area . . . (1) in order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as MIS . . . (6) population trends of the MIS will be monitored and relationships to habitat changes determined.”

Recently, the District Court of Utah agreed with *Sierra Club v. Martin and Forest Guardians*. In *Utah Environmental Congress v. Zieroth*, 190 F. Supp. 2d 1265, 1271-72 (D. Utah 2002), Judge Kimball held:

“Although the Forest Service’s methodology is entitled to deference, its actions must be in accord with the governing regulations. Section 219.19 specifically states that ‘population trends of the management indicator species will be monitored and relationships to habitat changes determined.’ 36 C.F.R. § 219.19(a)(6). Section 219.26 similarly requires the Forest Service to use quantitative data to measure a project’s impact on forest diversity. In reviewing these regulations, the court agrees with the analysis of the *Martin* court:

“‘MIS are proxies used to measure the effects of management strategies on Forest Diversity; Section 219.19 requires that the Forest Service monitor their relationship to habitat changes. Section

219.26 requires the Forest Service to use quantitative inventory data to assess the Forest Plan's effects on diversity. If Section 219.19 mandates that MIS serve as the means through which to measure the Forest Plan's impact on diversity and Section 219.26 dictates that quantitative data be used to measure the Forest Plan's impact on diversity, then, taken together, the two regulations require the Forest Service to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest's diversity. To read the regulations otherwise would be to render one or the other meaningless'

"*Martin*, 168 F.3d at 7. Similarly, in analyzing the applicable regulations, a district court in the Tenth Circuit has also recently found that 'under this clear language, [the Forest Service] may not rely solely on habitat trend data as a proxy for population data or to extrapolate population trends.' See *Forest Guardians v. United States Forest Service*, 180 F. Supp.2d 1273, 2001 WL 1705942 (D.N.M. Oct. 2, 2001). In reaching this conclusion, the Forest Guardians court recognized that 'management indicator species represent a management short-cut Consequently, there is generally no reason to further short-cut the management monitoring process by relying on habitat trends to project management indicator species population data.' *Id.*

"In this case, the Forest Service admits that population data has not been collected since 1991. Given this lack of data, there is no way for the Forest Service to meet the requirements in the regulations to analyze population trends. Therefore, the Forest Service's approval of the Project without actual or trend population data is contrary to the governing regulations. Accordingly, Plaintiffs have met their burden for reversal of the Forest Service's decision. See *Martin*, 168 F.3d at 4 (quoting *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir.1986) ('courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself'); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) (no deference due to agency interpretation that contradicts regulation's plain language)."

While the implementing regulations technically apply to the "formulation of Forest Plans rather than to specific projects proposed under already enacted Forest Plans," the Forest Service's obligations under the Forest Plan "continue throughout the Plan's existence." *Sierra Club v. Martin*, 168 F.3d 1, 6 (11th Cir. 1999) (citing 36 C.F.R. § 219); see *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 760 n.6 (9th Cir. 1996)(rejecting proposition that 36 C.F.R. § 219.19 applies only to promulgation and management of forest plans and not to site-specific projects and reasoning that areas contained within National Forest boundaries would be covered by a forest plan and thus also would be governed by § 219.19). The Forest Service

must constantly monitor the Forest Plan's impact, including the impact of specific management actions, on the forest environment so that compliance with the Forest Plan is achieved and any needed revisions to the Forest Plan are ascertained. See *Martin*, 168 F.3d at 6; 16 U.S.C. § 1604(i)(site-specific management actions implemented by the Forest Service "must be consistent with the Forest Plan"); *Dombek*, 185 F.3d at 1168 ("[P]roposed projects must be consistent with the Forest Plan."). Therefore, to avoid an absurd result, courts have concluded that the National Forest Management Act and the implementing regulations at issue apply to site-specific projects. See generally *Parker Decision* at 10.

The Eleventh Circuit Court of Appeals found that the Forest Supervisor of the Chattahoochee and Oconee National Forests had to provide population data of MIS before a timber project could be approved. See *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999):

"The Forest Service admits in numerous places in the record that sensitive species do occur within the project sites and acknowledges that those individuals would be destroyed by the proposed timber sales. It then notes in each case that because the species also exist elsewhere within the Forest, the timber projects would not significantly impact the species' diversity or viability. Yet, the Forest Service reached this conclusion without gathering any inventory or population data on many of the PETS species. Though these species are, by definition, at risk, nothing in the record indicates that the Forest Service possessed baseline population data from which to measure the impact that their destruction in the project areas would have on the overall forest population. We are nevertheless asked to defer to the Forest Service's conclusion that there will be no significant impact upon these species from the proposed timber projects. Absent record support for the Forest Service's assertions, this we cannot do."

"...
"The regulations require that MIS be monitored to determine the effects of habitat changes. The timber projects proposed for the Chattahoochee and Oconee National Forests amount to 2000 acres of habitat change. Yet, despite this extensive habitat change and the fact that the [sic] some MIS populations in the Forest are actually declining, the Forest Service has no population data for half of the MIS in the Forest and thus cannot reliably gauge the impact of the timber projects on these species."

The Fifth Circuit Court of Appeals, the circuit in which Mississippi sits, agreed with the holding of the Eleventh Circuit in *Sierra Club v. Martin*. Although the Fifth Circuit, *en banc*, later changed that ruling and vacated the case due to the case not being ripe, the Court clearly "telegraphed" how they would rule on the MIS issue in a case that is ripe. The Fifth Circuit stated:

"Our analysis in this case is persuasively supported by a recent opinion of a

sister circuit. In *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999), the Eleventh Circuit ruled on this exact issue. See 168 F.3d at 3-7. In *Martin*, the Forest Service argued that its decision to sell the timber rights to seven tracts of land within a Georgia National Forest was one committed to agency discretion. The sale would have allowed logging in the form of clearcutting, road building, and other related activities. See *id.* at 2. Over 155 tons of sediment would have been discharged into the Forest's rivers and streams as a result of these undertakings. See *id.* In theory complying with the NFMA, the Forest Service developed an LRMP and conducted a study of the projected impact of the sales, concluding that no adverse results would obtain. See *id.* at 2-3. The Sierra Club and other environmental groups argued, however, that the decision to proceed was arbitrary and capricious because the Forest Service had failed to inventory or to monitor endangered species of flora and fauna as required by the LRMP and the Forest Service's own regulations. See *id.* at 3. The district court held that the Forest Service was not required to obtain any population data before proceeding with the sales because the regulations at issue deal only with the formulation of LRMPs and not site-specific actions initiated under an LRMP.

"The Eleventh Circuit reversed. In her opinion for the court, Judge Barkett ruled that (1) the NFMA and its attendant regulations do require actual on-the-ground population data for inventorying and monitoring of species and that the Forest Service's failure to comply with those regulations was arbitrary and capricious. See *id.* at 5-6. In the case at bar, we are faced with an identical situation and, for the reasons explained supra, agree with the Eleventh Circuit that the NFMA requires on-the-ground inventorying and monitoring and is not simply a planning statute. The *Martin* court also held that the Sierra Club could challenge the Forest Service's compliance with a Forest Plan as part of its challenge to site-specific timber sales. See *id.* at 6. Indeed, the court observed that '[a] contrary result would effectively make it impossible for a plaintiff to even seek review of the Forest Service's compliance with a Forest Plan.' *Id.* As noted above, we essentially adopt the same rationale for allowing Appellees to proceed in this case and to challenge the Forest Service's actions with respect to the Texas National Forests.

"In *Sierra Club I*, we implied that the NFMA has a substantive component. See *Sierra Club I*, 38 F.3d at 800. We found that the approval of even-aged management techniques were within the discretion of the Forest Service. See *id.* This court reasoned that the Forest Service could take actions anywhere along the continuum between 'preservation of the status quo' on one end and 'eradication of species' on the other. Allowing even-aged management was just such a discretionary action. This discretion is not, however, 'unbridled.' *Id.* We also warned that '[t]he regulations implementing NFMA provide a minimum level of protection by mandating that the Forest Service manage fish and wildlife habitats to insure viable populations of species in planning areas. In addition, the statute

requires the Forest Service to ‘provide for diversity of plant and animal communities.’ *Id.* (citations omitted). Consequently, this court has already determined that the NFMA and its associated regulations require the Forest Service to comply with the law on-the-ground rather than merely issuing standards and guidelines as part of its LRMPs.”

Sierra Club v. Peterson, 185 F.3d 349, 372-73 (5th Cir. 1999), *overruled en banc*, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

Just as in *Sierra Club v. Martin*, this EA admits in numerous places that MIS species have the potential to occur within the project sites and acknowledges that any such individuals would be destroyed by the proposed project. The statutes, implementing regulations, and case law mandates the Forest Service to monitor and maintain population data on MIS. The District has not performed site-specific surveys for or obtained current population trends or inventory data on all the MIS in these planning areas.

The BE and EA show that the District did not conduct full, complete and scientifically-defensible population surveys for all MIS species that could occur in the project area. The population data must cover the project area and the district as a whole. This is necessary to make sure that you are complying with your NFMA requirements to ensure the viability of these species on your district. See *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999). Further, all PETS species should have been surveyed for to meet requirements in the Management Plan.

Most disturbing, the EA admits that there is inadequate data for the MIS species Eastern Meadowlark. EA at 115. Even under the District’s illegal interpretation that you do not have to have MIS data at a site-specific level but only at the Plan level, you admit that you have no data at all for two of the MIS species that could occur on the project sites. Thus, even assuming MIS data only has to be at the Plan level, the EA shows violations of that requirement.

The EA attempts to gloss over this total failure to comply with MIS requirements by saying that another species can substitute for the MIS, proposing to use White-eyed Vireo for the Meadowlark. EA at 116. Courts have rejected attempts to substitute one species for an MIS species unless the Plan is amended to replace one MIS with another one. In the Manti-La Sal National Forest, the Forest Service tried to do the same thing there by substituting the Northern Goshawk in its analysis for the MIS Blue Grouse. As held in *Utah Environmental Congress v. Zieroth*, 190 F. Supp. 2d 1265, 1270 (D. Utah 2002):

“Since 1992, the Forest Service has allegedly tried to track the northern goshawk, which it has deemed a better MIS for the area. Plaintiffs argue that in order to change the MIS the Forest Service would need to formally revise the Forest Plan and such a change was never done. Therefore, the data on the northern goshawk is irrelevant and this court must determine only whether the Forest Service adequately analyzed the effects of the Project on the blue grouse population.”

The data the District uses for the substitute species is irrelevant. If you do not want to do the work of getting data (even Plan-level data) on MIS, then you should amend the Plan to provide for other species and then do projects like this after the data on the new MIS is collected. But to just pass the buck and say “we don’t have to monitor certain MIS species because we found other species we like better” is clearly illegal.

The EA admits that no site-specific surveys were done for MIS birds. As the EA states:

“With the information provided by using this level of monitoring, it is not necessary to obtain stand specific data on songbird populations in order to insure viability. In a few years, monitoring points will give us much better data on trends by National Forest. Currently we rely on regional summaries of bird survey data to indicate potential viability problems. These sources have been used in our regional strategy to identify 47 regional priority bird species. This list serves as a starting point for assessing effects of management activities on bird population viability.”

EA at 140. As this statement shows, trend data will not be available for use until “a few years” from now. We fail to see how this meets requirements under the NFMA regulations to have trend data NOW for use in making this project decision.

Further, this statement shows that you are not complying with 36 C.F.R. § 219.19 which requires that MIS be used “in order to estimate the effects of each alternative on fish and wildlife populations...” You have selected as MIS species that are so common that the impacts of the various alternatives do not vary in their effects on the species. Thus, you cannot estimate the effects of each alternative, because the commonness of the MIS you use is so great as to mask all effects and make the alternatives analysis meaningless. The species you selected are so common that never touching the forest and clearcutting every inch of it have the same effects on viability. Thus, you are clearly failing to comply with your NFMA duties and have made the entire MIS process a sham.

Biological Evaluations (“BEs”) are a basis for the EAs and subsequent FONSI. Thus, to the extent that a BE is defective for failure to be based on the population inventories required of them under the LRMPs, the resulting EA and FONSI are defective, i.e., arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law.

The United States Department of Agriculture’s Office of Inspector General (“OIG”) assessed the adequacy of the Forest Service’s Environmental Assessments in light of the PETS population inventory requirements of the LRMPs. USDA Office of the Inspector General Report, *Forest Service Timber Sale Environmental Analysis Requirements*, January, 1999 (“OIG Report”).

The OIG found that “the lack of these surveys could jeopardize threatened, endangered

and sensitive species or their habitats.” (OIG Report p. 18). The OIG found that “the Forest Service should conduct and document field surveys in those situations when adequate information about possible effects to threatened, endangered and sensitive species is not available or when suitable habitat for such species is present in the project area.” (OIG Report p. 19).

The OIG found several of the Forest Service EA that it reviewed were inadequate due to a lack of sensitive species population inventories -- including specifically in Mississippi.

The OIG Report notwithstanding, the Forest Service continues to publish EAs, Decision Notices and FONSI for timber sales like this one without the required population surveys and inventories.

The Forest Service’s MIS and PETS analysis also serves as a basis for the EAs and subsequent FONSI. Thus, to the extent that MIS data and analysis are defective in not meeting the requirements of 36 C.F.R. §§ 219.19 and 219.26, this EA is defective, i.e., arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law.

Cumulative Impacts and Need for an EIS

We have further concerns that past EAs from this District have not given proper consideration to cumulative impacts. Many of them have had a near total lack of cumulative impacts/effects analysis. Private lands cuts, which are numerous in the area, were not fully addressed and their impacts considered. There must be a full analysis of other past, present and reasonably foreseeable Forest Service projects in area.

It is disingenuous to dismiss these concerns as simply ... “There was a concern that actions proposed in this project would be cumulative because a number of other projects were also being scoped and evaluated for needs. Together, these projects seem to present the appearance of large numbers of regeneration and thinning acres, widely distributed across the District and compressed into a short time frame. The “Proposed Action” for Analysis Unit 24, along with proposed or estimated vegetative management activities on other Homochitto National Forest lands within three years of anticipated implementation, is summarized in Table 3.9. The number of projects may be somewhat higher than the long-term average because litigation delays have resulted in some projects being delayed, while other scheduled units are being inventoried and evaluated. The three-year period was chosen because the Final EIS for the Forest Plan confirmed that, with mitigation, the potential for soil and water impacts diminished rapidly over the first year after implementation and returned to normal base levels by the end of the third year.” EA at 89.

“Because of their short rotation management, there is no cumulative relationship with respect to late seral habitats, red-cockaded woodpecker habitat, and other special habitats. Private lands generally do not provide these habitats, and the National Forests stand alone in meeting these needs. The Homochitto National Forest represents a limited resource in southwest

Mississippi. Part of the associated obligation is planning for replacement of natural losses and avoiding catastrophic loss that might place species of special concern at risk. When viewed in perspective, there has been a cumulative reduction in interior pine/late seral habitat, but the loss is on a scale of 80 to 90 million acres. Regenerating the 279 acres proposed will not meet the benchmark of causing "fundamental changes in system behavior or structure" (CEQ, Cumulative Effects under the NEPA). Not harvesting will not restore past losses at a measurable level. Forest structure on National Forest lands will change over time as a result of natural losses and events, whether or not planned harvests are implemented. Planned harvest can meet the obligation of sustained management of the remaining late seral and interior pine forest habitats." EA at 93.

The analysis of cumulative effects in this EA reveals a misunderstanding of the legal requirements under NEPA. First of all, you presumably intended to discuss cumulative *impacts* since that is the phrase in the law. You failed to appreciate that the analysis required is of government actions that will have environmental impacts. "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR 1508.7

Thus, there can be no "impact" from taking "no action" as you suggest. EA at 108. ("The greatest potential for cumulative effects can be expected under 'No Action.'")

Further, the law requires that to determine the scope of analysis in an EIS:

"... agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

"(a) Actions (other than unconnected single actions) which may be:

"(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement ...

"(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement ...

"(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative."

40 C.F.R. § 1508.25

Federal courts have further elaborated on this requirement.

“Given the CEQ regulations, it seems to us that a meaningful cumulative-effects study must identify: (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions -- past, proposed, and reasonably foreseeable -- that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate. *See Cabinet Mountains Wilderness/ Scotman's Peak Grizzly Bears v. Peterson*, 222 U.S. App. D.C. 228, 685 F.2d 678, 683-84 (D.C. Cir. 1982).” *Fritiofson v. Alexander*, 772 F.2d 1225, 1245 (U.S. App., 1985)

As a prime example, the District is doing other large projects at the very same time they were preparing this project. Here are the Forest's other proposed actions for the next two months:
http://www.southernregion.fs.fed.us/mississippi/homochitto/projects/homochitto_3rd_quarter_2004.pdf

We expect the environmental analysis of this project to include a full and data-supported discussion of the cumulative impacts of this project along with the other projects in the Homochitto.

We are also concerned that the EAs issued by your office are exceptionally thick and heavy with information. As you know, a large EA is a strong indication that a project will have significant impacts such that an EIS must be performed. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of 40 C.F.R. § 1508.9 and where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed. The Council on Environmental Quality (CEQ), which administers and interprets NEPA, has noted that “in most cases, ... a lengthy EA indicates that an EIS is needed.” 46 *Fed. Reg.* 18026, 18037 (1981). See *Curry v. United States Forest Service*, 988 F. Supp. 541 (W.D. Pa. 1997). During your analysis, we suggest that you give strong consideration to the direct, indirect and cumulative impacts from this proposal and consider doing a full EIS on it and any related or similar projects in the District.

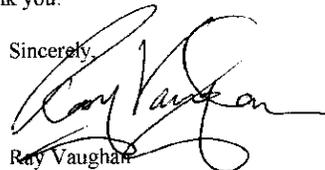
Further, since the Homochitto is doing Longleaf Pine ecosystem restoration, that is a large-scale project, a program not contemplated by the current Mississippi National Forests LRMP and its EIS. Thus, unless the LRMP is amended or a separate Longleaf Restoration EIS is prepared for individual projects to be tiered to, the Homochitto is actually in violation of the Plan by proposing this project and in violation of NEPA in that it is conducting a significant and extensive program that has **never** had NEPA analysis done for it.

The Conecuh National Forest in Alabama prepared an EIS on a five-year program to restore Longleaf Pine over some 4,222 acres. The Bankhead, Shoal Creek/Talladega and Oakmulgee are all also doing EISs on what is valid restoration for those districts. It would give

the Homochitto's Longleaf and other restoration work better direction and real validity if you would reverse this project and all others like it until such time as the District did a full EIS on Longleaf restoration in the Homochitto and examined all these projects and any other related ones together in one comprehensive and more-thorough analysis. The significant impacts that come from Longleaf Pine restoration (and such work does have significant impacts, many of them beneficial, which makes no difference to the NEPA requirement for an EIS) is why the Conecuh did an EIS on that program and why the Homochitto should also.

Thank you for the opportunity to comment on this EA. Please make these comments and all enclosed materials part of the official record for this project. Also, please send me at the above address all future notices, announcements, draft and final EAs, decision notices and bid announcements, and contracts for this project. Thank you.

Sincerely,



Ray Vaughan
Attorney for Wild South and FMPL