

NOTICE OF APPEAL  
and  
STATEMENT OF REASONS

SIERRA NEVADA FORESTS MANAGEMENT INDICATOR SPECIES AMENDMENT  
USDA FOREST SERVICE PACIFIC SOUTHWEST REGION

BETH G. PENDLETON, DEPUTY REGIONAL FORESTER, DECIDING OFFICER  
GAIL KIMBELL, CHIEF OF THE FOREST SERVICE, APPEAL DECIDING OFFICER

February 4, 2008

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**Notice of Appeal and Statement of Reasons  
Sierra Nevada Forests Management Indicator Species Amendment  
February 4, 2008**

Appellants Sierra Forest Legacy, Sierra Club, Defenders of Wildlife, Forest Issues Group, Sierra Foothills Audubon Society, and Center for Biological Diversity (collectively “Legacy”) hereby appeal the Record of Decision (“ROD”) and Final Environmental Impact Statement (“FEIS”) approving the Sierra Nevada Forests Management Indicator Species Amendment, signed by Deputy Regional Forester Beth G. Pendleton on December 14, 2007, pursuant to 36 C.F.R. Part 217. Public notice appeared in the Sacramento Bee on December 21, 2007, and this appeal is timely filed. Legacy previously filed scoping comments and comments on the draft EIS and we hereby incorporate those comments by reference.

**I. INTRODUCTION**

Legacy appeals the Forest Service’s decision to adopt the Sierra Nevada Forests Management Indicator Species Amendment. The decision will dramatically reduce the number of management indicator species (“MIS”) that will be monitored on national forests in the Sierra Nevada, thereby increasing the risk that management activities will adversely affect these species and their habitat. The decision lacks any details regarding how MIS will be monitored, and fails to establish management objectives and mitigation measures for the MIS, contrary to requirements set forth in the agency’s planning regulations. Legacy requests that the decision be overturned and reconsidered consistent with all legal requirements.

Current requirements for monitoring MIS are set forth in the individual forest plans, as amended by the 2001 and 2004 Frameworks. The original forest plans established MIS lists and monitoring plans that vary for each national forest. *See* Britting 2008, Appendix A. The 2001 Framework amended each of the forest plans and established a comprehensive regional monitoring plan for MIS and related species, set forth in Appendix E. *See* USDA Forest Service 2001, Vol. 4, App. E. The Framework’s “monitoring strategy [was] designed to supplement existing forest plan and project level monitoring obligations” by adding “Sierra Nevada wide broad scale monitoring to assess ecosystem trends at multiple scales.” *Id.*, Vol. 5, at 2-5. “The 2004 Supplement incorporates the 2001 Framework’s population monitoring requirements.” *Earth Island Inst. v. United States Forest Serv.*, (“*Earth Island*”), 442 F.3d 1147, 1173 (9<sup>th</sup> Cir. 2006).

Appendix E, as incorporated into the 2004 Framework, requires gathering of population monitoring data, rather than simply habitat monitoring, for the majority of MIS. *Id.* at 1173, 1175 (holding that Framework “allows for a very limited degree of habitat monitoring in lieu of actual population monitoring” and that “population monitoring” in the form of “distribution data” is required for all species for which Appendix E requires “population monitoring”); *see* App. E, Tables E-9, E-10, E-11 (noting where population monitoring is required). The courts have held that, in the absence of required population monitoring data, site-specific projects such as timber sales are contrary to law and may not proceed. *See, e.g., Earth Island; Sierra Nevada Forest Protection Campaign v. Tippin*, 2006 WL 2583036 (E.D. Cal. 2006); *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070 (E.D. Cal. 2004).

The ROD would substantially weaken the existing MIS requirements. First, 44 of the existing MIS would be removed from the list. FEIS at 58. As a result, important species and habitat types would no longer be adequately monitored. *See* Beedy 2008. Second, the decision eliminates the requirement in Appendix E, as confirmed by the courts, that population monitoring data must be obtained for MIS prior to plan implementation. ROD at 5 (eliminating Appendix E monitoring requirements); ROD at 16 (“fulfillment of the plan-level monitoring ... is not a precondition to project approval and implementation”). Third, the decision fails to establish any specific monitoring requirements for the new MIS, such as the frequency, duration, or location of planned monitoring. Instead, the ROD defers decisions on these critical issues until development of a “monitoring implementation package” that will not be “legally enforceable,” ROD at 14, and that will apparently be developed outside of the forest plan amendment or National Environmental Policy Act (“NEPA”) context.

As set forth in greater detail below, Legacy challenges the decision on the following grounds:

(1) The ROD is based on the assumption that the decision will have “no ecological effects.” ROD at 9, 10. Based on this assumption, the EIS includes essentially no analysis of the decision’s environmental impacts. FEIS at 47-49. In fact, the decision is likely to have significant environmental impacts, both by allowing numerous site-specific projects to proceed and by eliminating existing population monitoring and related requirements for many existing MIS, which provide a vital safety net that serves to reduce the possibility of adverse impacts to these species. The Forest Service’s failure to analyze these impacts in the FEIS violated NEPA.

(2) Other than revising the existing MIS lists for national forests in the Sierra Nevada, the decision fails to address how the MIS will be monitored or how these species will be managed. Thus, for example, the ROD fails to specify the frequency, extent, duration, or reliability of monitoring, as required by law. 36 C.F.R. § 219.12(k). Similarly, the ROD fails to “establish objectives for the maintenance and improvement of habitat” for the selected MIS or to prescribe “measures to mitigate adverse effects” to these species, as required by the agency’s regulations. 36 C.F.R. § 219.19(a)(1). By failing adequately to describe these elements of the proposed action, the Forest Service has also precluded meaningful public comment on the decision, contrary to NEPA.

(3) The Forest Service has failed to select MIS that adequately represent important habitat types, and has rejected other species that would better serve as MIS without sufficient justification, contrary to the National Forest Management Act (“NFMA”) and the Administrative Procedure Act (“APA”).

(4) The Forest Service has impermissibly proposed to apply aspects of the new decision retroactively to decisions that have already been approved, which will effectively remove all MIS monitoring requirements for these decisions, contrary to NFMA.

For these reasons, Legacy requests that the decision to approve the MIS amendment be overturned and that the Regional Forester be directed to reconsider the decision consistent with NEPA, NFMA, and other applicable laws.

## II. THE PROPOSAL WILL HAVE SIGNIFICANT IMPACTS THAT ARE NOT DISCLOSED IN THE EIS

The Forest Service asserts that the proposed action will have “no ecological effects.” FEIS at iv, 49. This assertion is inconsistent with the agency’s decision to prepare an EIS on the proposed action. Under NEPA, an EIS is only required if an action may have significant impacts. *See Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1066-67 (9th Cir. 2002). If an action will have “no significant impact,” there is no reason to prepare an EIS. 40 C.F.R. § 1501.4. The decision to prepare an EIS – which implies that a proposal may have significant environmental consequences – is at odds with the claim that the proposal will have “no ecological effects.” Beyond this basic problem, it is apparent that the proposal to substantially reduce the existing monitoring requirements may, in fact, have substantial adverse environmental consequences that have not been addressed in the EIS, contrary to NEPA.

### A. The Proposed Action Will Allow Logging and Other Projects to Proceed, but the Impacts of These Projects are Not Analyzed in the EIS.

The Forest Service acknowledges that the Ninth Circuit’s decision in *Earth Island* “was a significant impetus for this amendment,” FEIS at 5, and that complying with the court’s decision “would likely result in the long-term delay of many” Forest Service projects, FEIS at 6. Thus, a significant and intended effect of the proposed action is to allow these projects to go forward. The environmental impacts of this decision are not identified, much less analyzed, in the FEIS, contrary to NEPA.

As described above, a series of recent court cases have emphasized the importance of the existing MIS monitoring requirements and have held that site-specific projects such as timber sales may not proceed until the Forest Service complies with its monitoring duties. The effect of these decisions has been to halt or delay numerous timber sales as well as other large projects such as the Cottonwood herbicide spraying proposal on the Tahoe National Forest and the Larson herbicide project on the Stanislaus National Forest.<sup>1</sup> Under the new decision, compliance with MIS monitoring requirements would no longer be “a precondition to project approval and implementation.” ROD at 16. Moreover, for numerous projects for which legal notices relating to NEPA have been published prior to the effective date of the ROD, *all* existing monitoring requirements would be “superseded,” and the new monitoring requirements established by the ROD also would not apply. ROD at 14-15. Thus, the effect of the ROD would be to allow all of these so-called “exempted” projects, which could not proceed under current forest plans, to be implemented, yet the FEIS lacks any disclosure of the resulting environmental impacts.<sup>2</sup>

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<sup>1</sup> *See Californians for Alternatives to Toxics v. U.S. Forest Service*, Order Enjoining Cottonwood Project, Civil No. 2:05-CV-01502-LKK-JFM (E.D. Cal. June 16, 2006); *California Oak Foundation v. U.S. Forest Service*, Order Granting Preliminary Injunction, CV-F-05-1395 OWW SMS (E.D. Cal. Aug. 22, 2006).

<sup>2</sup> The ROD includes a partial list that names 9 of the exempted projects. ROD at 15. However, there are many more projects for which NEPA notices have been published that would also meet the criteria for “exempted” projects. A list of such projects could be derived by reviewing the schedules of proposed actions (“SOPAs”) for each national forest. The EIS fails to include a complete list of such projects, much less to provide any information regarding their environmental impacts, contrary to NEPA.

The U.S. Environmental Protection Agency, in its comments on the draft EIS, specifically objected to exempting existing projects from monitoring requirements because these projects will have significant environmental impacts. As stated by EPA:

Many existing projects pose significant impacts to MIS species. The current MIS monitoring system was developed as one element to address the National Forest Management Act requirements related to maintaining the diversity of plant and animal communities. Elimination of MIS monitoring for existing actions, without replacement with a comparable or more robust monitoring system, could place MIS species and overall diversity goals at increased risk.

FEIS at 245.

Because the ROD would have the effect of allowing existing projects – which are currently either enjoined by court orders or are on hold because they fail to comply with recent judicial opinions – to proceed, NEPA requires that the EIS analyze the environmental impacts of allowing such projects to go forward. The FEIS fails to provide any discussion or analysis of these impacts, contrary to NEPA.

B. The Existing Monitoring Requirements Were Designed To Prevent Significant Environmental Impacts Which Are More Likely To Occur If Monitoring Is Weakened or Eliminated.

The existing monitoring requirements for MIS and related species are an essential part of the land management plans and provide a valuable safety net to reduce the likelihood of plan implementation having significant adverse environmental impacts. *See, e.g., Utah Environmental Congress v. Richmond*, 2006 WL 325375 at \*4 (D. Utah 2006) (“MIS monitoring was adopted as a means to gauge the effect of management activities and to ensure compliance with NFMA’s mandate that forests ‘provide for diversity of plant and animal communities’”) (emphasis added). Therefore, as biologists Edward C. Beedy, Ph.D. (Beedy 2008) and Susan Britting, Ph.D. (Britting 2008) conclude in their attached reports, eliminating these monitoring requirements is likely to have negative ecological consequences. NEPA requires that these consequences be disclosed in the EIS.

The monitoring requirements for MIS and related species are set forth in the individual LRMPs and in the 2001 and 2004 Frameworks, which amended the LRMPs. Appendix E of the 2001 Framework established a comprehensive monitoring strategy for MIS and related species. The 2004 Framework subsequently readopted the requirements of Appendix E. The monitoring requirements for MIS and related species are an integral part of the Forest Service’s conservation strategy for these species; therefore, weakening these requirements could have significant, adverse environmental consequences. In adopting the 2004 Framework, the Forest Service significantly increased both the amount and intensity of planned logging, thereby increasing the risk to the viability of numerous species, particularly species associated with old forests. Sierra Nevada Forest Protection Campaign et al. 2004. Similarly, the 2004 Framework weakened the

2001 Framework's protection for watersheds, streams, meadows, and riparian areas, increasing the risk to the viability of species associated with aquatic habitats.

To address the "uncertainty" caused by weakening protection for MIS and related species in the 2004 Framework, the Regional Forester emphasized the importance of using an "adaptive management" approach that would allow the agency to change course if the plan resulted in adverse consequences to species. USDA Forest Service 2004a at 12. Similarly, in reviewing the plan, the Chief of the Forest Service found that "managing habitat to maintain viable populations of the California spotted owl, the Pacific fisher, and American marten can only be assured by using subsequent site-specific evaluations and the adaptive management and monitoring strategy.... The importance of species persistence along with the associated risks requires ... a clear articulation of the [adaptive management and monitoring] strategy." Bosworth 2004 at 74-75.

The monitoring program that the Forest Service is proposing to change is an integral part of adaptive management, and therefore a central component of the Forest Service's conservation strategy for MIS and related species. As the Forest Service has stated, the monitoring program set forth in Appendix E and incorporated as part of the 2004 Framework "addresses key uncertainties related to the effects of management on ecosystem elements and processes." USDA Forest Service 2004b, Vol. 2, at 5. Appendix E makes clear that "the success of adaptive management is dependent upon a well-designed, adequately funded, and carefully implemented monitoring and research program." USDA Forest Service 2001 at E-5. More specifically, the monitoring requirements set forth in Appendix E

will provide managers with information about the status and change in populations and habitats of species at risk. This information will be useful in determining potential impacts of projects on sensitive species and will provide an early warning system for species known to be at risk, yielding information that may aid in preventing listing.

*Id.* at E-63.

The critical role of MIS monitoring in reducing the risk of unforeseen environmental impacts to species and habitats has been widely recognized by leading experts, including the Committee of Scientists convened by the Forest Service to review the agency's planning regulations (Committee of Scientists 1999) and by Forest Service scientists who developed the monitoring program for the Northwest Forest Plan (Mulder et al. 1999). Thus, for example, Mulder et al. explained that MIS monitoring provides "an early warning of adverse changes to an ecosystem before unacceptable loss has occurred." *Id.* at 22. More specifically, such monitoring "is mandated on National Forest lands to ascertain the degree of compliance with the population viability requirement of National Forest Management Act (NFMA) and with minimum water quality standards of the Clean Water Act." *Id.* at 23. "In addition to assessing compliance, environmental monitoring programs have great value as early warning systems. By providing measures, in the early stages of decline, of those attributes indicative of ecological change, monitoring can result in prompt intervention before unacceptable environmental losses occur." *Id.* at 24.

The Committee of Scientists reached similar conclusions. According to the Committee, “[e]ffective monitoring is a critical aspect of achieving ecological sustainability. Monitoring ... provides a better understanding of how to sustain ecosystems and serves as an ‘early warning system’ to detect declines in ecosystem integrity and species viability before irreversible loss has occurred.” Committee of Scientists 1999 at 152; *see also id.* at xxxv (“[m]onitoring is crucial ... as an ‘early-warning system’ against the risks involved in management activities”).

In short, the ROD is likely to result in significant environmental impacts by eliminating this “early warning system” for numerous existing MIS.

C. The Proposal Will Eliminate Specific Environmental Protections in Existing LRMPs

The FEIS contends that the decision will have no environmental impacts because “[n]one of the current habitat and wildlife management strategies are contingent upon current MIS lists and associated monitoring strategies” and “none of the current monitoring provides an essential component necessary for the protection of any particular species or habitat.” FEIS at 48. This assertion is simply not true, as demonstrated in the attached reports by biologists Edward C. Beedy, Ph.D. (Beedy 2008) and Susan Britting, Ph.D. (Britting 2008).

As Dr. Britting shows, the existing LRMPs include numerous provisions that establish triggers requiring reconsideration of current management direction depending upon the results of MIS monitoring for species that will now be dropped from the MIS list. The thresholds established in the existing plans require that management be reconsidered based upon a variety of factors, such as population declines, declines in habitat quality, and reduction in nesting success. Britting 2008, Tables 1 and 2. Thus, contrary to the claim in the FEIS, it is apparent that MIS monitoring in existing forest plans is closely linked to management strategies designed to protect these species and their habitat, and that “[i]n the absence of the monitoring and evaluation previously provided for these species as MIS, negative impacts on these species will not be detected and their viability may be threatened by Forest Service management.” Britting 2008 at 8.

Some of the monitoring requirements in the existing LRMPs require that certain actions be taken to mitigate potentially significant environmental impacts depending upon the results of monitoring. The Stanislaus forest plan identifies “variability from standard[s] indicating further action”; as just one example of many, for the northern goshawk a 20 percent decline in reproduction for two successive years requires that the Forest Service take action to reduce potentially significant negative impacts to the goshawk, such as modifying on-the-ground activities, modifying the LRMP’s standards and guidelines, or taking other steps. Stanislaus National Forest 1991 at V-3 to V-4, V-7. In the Stanislaus LRMP, there are similar numerical standards triggering management changes for other MIS as well. *Id.* at V-7 to V-12. By eliminating the MIS requirements for these species, the proposed action is also eliminating the related requirements that actions be taken to mitigate environmental impacts. These implications are neither identified nor analyzed in the FEIS.

Similarly, Dr. Beedy describes how the elimination of monitoring requirements for the peregrine falcon, band-tailed pigeon, and great grey owl means that activities that adversely affect these species are less likely to be detected. Beedy 2008 at 2-3. Notably, the Forest Service identified all three species as “species at risk” in the 2001 Framework, USDA Forest Service 2001 at E-64, and the agency has similarly identified the band-tailed pigeon and great gray owl as “bird species of particular concern and ... a high priority for monitoring efforts in the Sierra Nevada bioregion,” USDA Forest Service 2004 at 172-73. As further discussed by Dr. Beedy, the Forest Service proposes to remove the pileated woodpecker from the MIS list and replacing it with the hairy woodpecker, a species that is less associated with large snags. “By replacing Pileated Woodpecker with Hairy Woodpecker, adverse impacts to large snags – which are ecologically more important than smaller snags -- may go undetected.” Beedy 2008 at 4. None of these impacts are considered in the FEIS.

In sum, as the Forest Service has acknowledged, existing forest plan MIS monitoring provides checks that “[s]afeguards to maintain diversity of plant and animal species” are working. FEIS at 265 (Response A4). By eliminating these “checks” for numerous MIS, the ROD would weaken the existing safeguards that serve to reduce the likelihood of adverse environmental impacts. By failing to acknowledge or analyze these impacts, the Forest Service violated NEPA.

### **III. THE FEIS AND ROD FAIL TO DEFINE ESSENTIAL ASPECTS OF THE PROPOSED ACTION AND ALTERNATIVES, CONTARY TO LAW**

The Forest Service has failed to define the essential elements of the MIS monitoring plan, to establish required management objectives and mitigation measures for the selected MIS, or adequately to define the proposed action and alternatives. As a result, the decision fails to comply with requirements set forth in the agency’s regulations or to satisfy NEPA’s public participation requirements.

#### **A. The ROD Fails to Define Basic Elements of the Monitoring Plan or to Establish Forest Plan Objectives for the MIS.**

The ROD and FEIS lack any details regarding the proposed monitoring plan for MIS. With respect to the proposed action, the FEIS only states the names of the species that will be monitored and whether such monitoring will be “habitat trend monitoring” or “habitat trend and distribution population monitoring at the Sierra Nevada scale.” FEIS at 28 (Table 6a). *See also* FEIS at 40-41 (“The specific sampling design for habitat trend monitoring [and] population distribution monitoring ... will be developed after the decision is made, as part of the monitoring implementation program.”). The ROD fails to establish the basic elements of the proposed monitoring plan for the MIS. How often will the monitoring occur? How many monitoring sites will be established? What kind of monitoring protocols will be utilized? What assumptions and methodologies will be used to assess habitat trend? Will the intensity of monitoring be sufficient to derive statistically significant results? None of these issues is discussed, much less resolved, in the EIS. Without this kind of basic information, the proposed action is impermissibly vague.

The applicable regulations require that the Forest Service provide more details about the proposed monitoring and its relationship to the forest plan. Thus, for example, the regulations

require that “[m]onitoring requirements identified in the forest plan shall provide for ... a description of the following monitoring activities: (i) The actions, effects, or resources to be measured, and the frequency of measurements; (ii) Expected precision and reliability of the monitoring process; and (iii) The time when evaluation will be reported.” 36 C.F.R. § 219.12(k)(4). Other than specifying the names of the MIS that will be monitored, the ROD fails to identify any of the other required elements. Instead, the ROD impermissibly defers development of the monitoring plan to an ill-defined future process, outside of the NEPA and plan amendment process, which will result in a “monitoring implementation package” that is not “legally enforceable.” ROD at 14. Because the regulations direct that the monitoring plan be established in the forest plan, deferring decisions regarding the monitoring plan to this ill-defined process is contrary to law.

Similarly, the regulations direct that forest plans and forest plan alternatives “shall establish objectives for the maintenance and improvement of habitat” for selected MIS, that “measures to mitigate adverse effects” to these species shall be prescribed where appropriate, and that “[p]lanning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends” of the MIS. 36 C.F.R. § 219.19(a). Unlike existing forest plans,<sup>3</sup> the ROD lacks any objectives for maintaining or improving habitat for the MIS or any mitigation measures for these MIS, and the FEIS fails to evaluate the impacts of the forest plans on MIS habitat or population trends. Thus, the ROD does not comply with the basic requirements set forth in the agency’s regulations.

The Regional Guide, which interpreted the 1982 planning regulations and applied them to national forest plans in the Sierra Nevada, also made clear that each forest plan must include a “monitoring system” that “will identify the activity or practice to be measured, objective of this measurement, monitoring technique, expected precision and reliability, monitoring, frequency, standard of comparison (yardstick), responsible staff, expected range of output or effect, and average annual monitoring cost.” USDA Forest Service 1982 at 1-51. Even more specifically, the Regional Guide directs that each of the forest plans must contain a monitoring framework that addresses the following categories:

- Activity, Practice or Effect to be Measured
- Monitoring Objective
- Monitoring Technique
- Expected Precision and Validity
- Minimum Monitoring Frequency
- Reporting Period
- Standard of Comparison
- Variability From Standard Indicating Further Action
- Average Annual Cost

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<sup>3</sup> See for example the monitoring description provided in the Stanislaus Land and Resource Management Plan, which establishes the relationship between monitoring and the annual review of the forest plan, notes the monitoring technique and its expected precision and reliability, establishes the monitoring frequency and standard of comparison, and establishes the “variability from standard indicating further action.” Stanislaus National Forest 1991, Section V.

*Id.* at 1-82. Other than listing the MIS that will be monitored, the decision fails to include any of the other required elements of a monitoring plan. *See* Britting 2008 at 3-6.

NFMA requires that the Forest Service develop “one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents . . . all of the features required by this section.” 16 U.S.C. § 1604(f)(1). By deferring critical decisions regarding planned MIS monitoring until after the plan is amended, and providing that the monitoring plan will not be legally enforceable, the Forest Service has failed to develop an “integrated plan” as required by NFMA.

These requirements are not only mandated by law, but are also consistent with the best available science regarding monitoring of MIS. Thus, according to leading Forest Service experts: “Identifying quantifiable questions, measurable indicators, and the subsequent monitoring design and field protocols, along with an appropriate supporting infrastructure, are key to designing an implementable monitoring program that meets agency information needs.” Mulder et al. 1999 at 5.

*At a minimum, a defensible monitoring program should do the following:*

1. Clearly state management goals and objectives, emphasizing how periodic information about the status of the resources is needed for informed management decisions....
5. Outline the sampling design and methods of measurement to estimate the value of the indicator variable. This element includes, but should not be limited to, the sampling and measurement protocols.
6. Ensure statistical precision of the measurement protocols. For example, the sampling design must address the necessary precision of indicator estimation to detect a given magnitude of change, and the likelihood of detecting this change should it occur....
7. Include those procedures that connect the monitoring results to the decision process. For example, determine what magnitude of change in a given indicator should trigger a management response, and what the response or responses should be.

*Id.* at 26-27 (emphasis added).

The Committee of Scientists reached similar conclusions. According to the Committee, forest plans must include “the procedures and timing of monitoring and review processes,” including “the monitoring methodologies that will be implemented.” Committee of Scientists 1999 at xxviii-xxix. “An adequate plan contains the methods and proposed measurements for monitoring at the bioregional, strategic, and operational levels.” *Id.* at 108.

The monitoring program must select indicators of ecosystem integrity and species viability, develop methods for measuring such indicators, designate critical indicator values that would trigger changes in management practices, obtain data to determine whether such critical values are being approached, and interpret those data in relation to past and potential management decisions. If analysis and assessment concludes that some critical values are being approached, then the appropriate plan must be reevaluated to determine whether amendments are necessary to comply with the provisions of this section.

*Id.* at 152. The ROD fails to address any of these critical elements of monitoring, contrary to law and the best available science.

B. The FEIS Fails Adequately to Define the Proposed Action and Alternatives, Including the “No Action” Alternative.

1. The Proposed Action is Poorly Defined, Contrary to NEPA.

In order for the public to comment meaningfully on an EIS, the key aspects of the proposed action and alternatives must be clearly defined. The MIS EIS fails to pass this basic test. “The primary purpose of an [EIS] is to allow for informed public participation and informed decision making.” *Earth Island*, 442 F.3d at 1160. In particular, “[a]gencies shall make sure the proposal which is the subject of the environmental impact statement is properly defined.” 40 C.F.R. § 1502.4(a). See *People ex rel. Lockyer v. U.S. Forest Service*, 465 F. Supp. 2d 942, 949 (N.D. Cal. 2006) (holding that Forest Service EIS for the Giant Sequoia National Monument plan was contrary to NEPA because it failed to “clearly define” the “proposal”). By failing to identify the essential aspects of the MIS monitoring plan, as required by agency regulations and the best available science, the EIS also fails to comply with NEPA.

Because the proposed monitoring is so poorly defined, reviewers of the DEIS were unable to comment meaningfully on the proposal. In fact, the Forest Service’s own staff from national forests in the Sierra Nevada complained about the failure to define the monitoring plan. Thus, for example, the Sequoia National Forest in its comment letter stated:

While some broad brush statements regarding how species may be monitored are provided, little specific information is available for the Forest or the general public to comment on.... For instance, no time frame is given for how often Regional monitoring would occur (e.g., every year, every 5 years), nor for how baselines will be established.... *In the end, it is difficult to make effective, comprehensive comments on the DEIS without the specifics of monitoring and implementation.*

FEIS at 344 (emphasis added). Similarly, the Plumas National Forest stated that the EIS “should describe how habitat monitoring will be accomplished,” FEIS at 312, and the Lassen National Forest stated that “more detail is needed for each new terrestrial species,” and specifically requested with respect to one MIS that the FEIS specify “how, where, and under what habitat conditions macroinvertebrates will be monitored.” Despite these comments from agency personnel, none of the requested information is included in the FEIS or ROD.

The Forest Service acknowledges that “monitoring for MIS requires a strategy that produces statistically robust population trend information and concurrent information on the relationship to habitat change.” FEIS at 326 (Response K). Yet the ROD fails to include any information regarding how the monitoring will be conducted to produce “statistically robust” results. In sum, the decision fails to specify the nature, amount, and intensity of proposed monitoring, other than in extremely vague terms, making it impossible to comment meaningfully on the proposal. *See* Beedy 2008 at 1.

In other respects, the EIS and ROD are confusing and unintelligible. NEPA requires that an EIS be “organized and written so as to be readily understandable by governmental decisionmakers and by interested non-professional laypersons likely to be affected by actions taken under the [EIS].” *Earth Island*, 442 F.3d at 1160. The MIS FEIS fails to pass this test. As discussed by Dr. Britting, the impacts of the proposed decision on monitoring requirements for the northern goshawk are confusing and unclear, making it impossible to comment meaningfully on the proposal. Britting 2008 at 3. More generally, the EIS fails to explain clearly how the decision will affect existing monitoring requirements and related elements of forest plans, including Appendix E, as explained in Legacy’s comments on the draft EIS.

## 2. The FEIS Fails Adequately to Describe the “No Action” Alternative

NEPA requires that the Forest Service “rigorously explore and objectively evaluate all reasonable alternatives,” including the “no action” alternative. 40 C.F.R. § 1502.14(a), (d). Here, the FEIS fails adequately to describe the “no action” alternative, and as a result fails to adequately to assess the extent to which the proposed action will modify the status quo.

In describing the “no action” alternative, the FEIS merely summarizes the species that are listed as MIS and the habitat types that these species represent. FEIS at 27-31. In fact, as Dr. Britting summarizes in her analysis, the existing forest plans include numerous requirements relating to MIS, including management objectives, monitoring protocols, and specific thresholds that will trigger reconsideration of management direction. The monitoring requirements in the original forest plans are set forth in Britting 2008, Appendix A. The FEIS includes no discussion or analysis of any of these existing forest plan requirements, despite the fact that the proposed action will essentially eliminate requirements for species that will no longer be MIS, since the Forest Service will no longer be required to obtain population monitoring data for these species. Instead, the FEIS simply ignores these requirements, contrary to NEPA’s full disclosure mandate.

By failing adequately to describe the existing forest plan requirements that will be eliminated if the new plan is implemented, the Forest Service violated NEPA.

## **IV. THE NEW MIS LIST IS NOT CONSISTENT WITH THE BEST AVAILABLE SCIENCE**

As described above, the ROD would substantially reduce the number of MIS for Sierra Nevada national forests, likely resulting in significant adverse impacts to species and habitats that will no

longer be effectively monitored. The decision to eliminate numerous MIS was not based on the best available science and does not comport with regulatory requirements that species be selected whose “population changes are believed to indicate the effects of management activities on ... major biological communities or on water quality.” 36 C.F.R. § 219.19(a)(1). In his attached report, Dr. Beedy describes in some detail how the selected MIS fail adequately to represent the full range of important habitats affected by Forest Service management and why additional MIS need to be selected to allow the agency to assess the impacts of its management on these habitats. Beedy 2008 at 5-7. We incorporate Dr. Beedy’s critique by reference and ask that it be considered as part of this appeal.

In particular, dropping the pileated woodpecker as an MIS does not appear to be based upon the best available science. The Forest Service’s Pacific Southwest Research Station questioned the elimination of the pileated woodpecker as an MIS, describing it as a “high quality indicator [that is] widely distributed if not found across all forest types.” FEIS at 318. As explained by Dr. Beedy, pileated woodpecker is a better indicator of large snags than the hairy woodpecker, and eliminating the pileated woodpecker as an MIS is likely to result in impacts to large snags that are not detected. Beedy 2008 at 4, 7. Similarly, Sierra Forest Legacy in its comments on the DEIS cited research indicating that pileated woodpecker is a better MIS for large snags. FEIS at 364-65.

The Forest Service agrees in the FEIS that the pileated woodpecker meets all of the agency’s criteria for MIS. FEIS at 127-28. However, the Forest Service rejected the pileated woodpecker as an MIS based on the assertion that “information from our landbird partner, Partners in Flight, indicated that, based on past monitoring experience in the Sierra Nevada, pileated woodpecker was difficult to monitor.” FEIS at 351. Because the Forest Service fails to cite any research or data to support this claim, appellants cannot respond specifically. However, NEPA requires that the Forest Service provide the underlying data, rather than relying on unsubstantiated conclusions. Therefore, the Forest Service has failed adequately to explain its rejection of the pileated woodpecker as an MIS as required by law.

## **V. THE ROD ILLEGALLY EXEMPTS MANY PROJECTS FROM ANY MIS MONITORING REQUIREMENTS**

The ROD purports to apply only to “covered projects” and to exempt numerous projects from any MIS monitoring requirements. ROD at 14-15.

There is a strong presumption against retroactive application of laws and regulations. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The Ninth Circuit has recognized that there is an “absolute bar against an agency’s retroactive rulemaking absent statutory authority.” *Newman v. Apfel*, 223 F.3d 937, 942 (9th Cir. 2000). “Nothing in NFMA suggests an intent to allow the Forest Service to retroactively revise its regulations.” *Forest Conservation Council v. Jacobs*, 374 F. Supp. 2d 1187, 1202 n.10 (N.D. Ga. 2005); *see also Defenders of Wildlife v. Johanns*, 2005 WL 2620564, \*7 (N.D. Cal. 2005). For this reason, the Ninth Circuit has held that the version of plans and regulations that was in effect at the time of decision continues to apply. *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 800 n. 3 (9th Cir. 2005).

The monitoring requirements are an essential part of the adaptive management strategy for the 2004 Framework. Therefore, weakening the monitoring requirements would weaken one of the key legs upon which the Framework (and projects implementing the Framework) stands. Any site-specific projects approved to date were approved based upon the premise that the projects comply with existing laws and management plans. Any change to these plans, such as a weakening of the monitoring requirements, would constitute significant new information and changed circumstances that require supplemental environmental documentation under the National Environmental Policy Act.

In addition, the applicable regulations, as interpreted by the courts, require that the Forest Service obtain population monitoring data for MIS. 36 C.F.R. § 219.19(a)(6) (“[p]opulation trends of the management indicator species will be monitored”). The new decision eliminates any requirement that MIS be monitored for the exempted projects, but instead only requires that “impacts the project may have on MIS habitat or populations” be considered. ROD at 15. Thus, this retroactivity provision is inconsistent with the agency’s planning regulations.

For these reasons, any changes to the monitoring requirements should apply prospectively only, and at a minimum cannot lawfully be applied to projects that have already been approved.

## **VII. CONCLUSION**

For the foregoing reasons, Legacy requests that the decision to approve the MIS amendment be overturned and that the Regional Forester be directed to reconsider the decision consistent with NEPA, NFMA, and other applicable laws.

Respectfully submitted,



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## REFERENCES<sup>4</sup>

Beedy, E.C. 2008. Comments on the Sierra Nevada Forests Management Indicator Species Amendment FEIS. January 28, 2008. **Attached hereto and incorporated by reference.**

Bosworth, D.N. 2004. 2004 Sierra Nevada forest plan amendment appeal decision. November 18, 2004.

Britting, S. 2008. A review of ten national forest plans in the Sierra Nevada and the management indicator species amendment. February 4, 2008. **Attached hereto and incorporated by reference.**

Committee of Scientists 1999. Sustaining the people's lands: recommendations for stewardship of the national forests and grasslands into the next century. U.S. Department of Agriculture, Washington, D.C. March 15, 1999.

Mulder, B.S.; Noon, B.R.; Spies, T.A.; Raphael, M.G.; Palmer, C.J.; Olsen, A.R.; Reeves, G.H.; Welsh, H.H. 1999. The strategy and design of the effectiveness monitoring program for the Northwest Forest Plan. USDA Forest Service, Pacific Northwest Research Station. Gen. Tech. Rep. PNW-GTR-437.

Sierra Nevada Forest Protection Campaign et al. 2004. Notice of Appeal of the Record of Decision and Final Supplemental Environmental Impact Statement for the Sierra Nevada Forest Plan Amendment. April 29, 2004.

Stanislaus National Forest 1991. Land and resource management plan.

UDSDA Forest Service 1982. Land Management Planning Direction. Pacific Southwest Region.

USDA Forest Service 2001. Sierra Nevada Forest Plan Amendment. Final Environmental Impact Statement. Pacific Southwest Region. January 2001.

USDA Forest Service 2004a. Sierra Nevada Forest Plan Amendment. Record of Decision. Pacific Southwest Region. January 2004.

USDA Forest Service 2004b. Sierra Nevada Forest Plan Amendment, Final Supplemental Environmental Impact Statement. January 2004.

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<sup>4</sup> Each of these references is hereby incorporated by reference into this appeal. Please contact us if you need copies of any of the references.