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APPEAL TO REGIONAL FORESTER BERNIE WEINGARDT
(APPEAL DECIDING OFFICER)
OF THE UNITED STATES FOREST SERVICE

**In the Matter of the Decision of Sierra National
Forest Supervisor Edward C. Cole (Deciding
Officer) to Approve the Kings River Project and
Final Environmental Impact Statement**

PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
EDMUND G. BROWN JR., ATTORNEY GENERAL

Notice of Appeal and
Statement of Reasons

Submitted February 5, 2007
via e-mail and U.S. mail

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NOTICE OF APPEAL

This appeal is filed by the People of the State of California, ex rel. Edmund G. Brown Jr., Attorney General (“Attorney General”). The Attorney General appeals (1) the December 20, 2006, Record of Decision (“ROD”), signed by Sierra National Forest Supervisor Edward C. Cole, justifying the decision to implement the Kings River Project; and (2) the document purporting to support that decision, the Kings River Project Final Environmental Impact Statement (“FEIS”), dated October 2006. The Attorney General files this appeal pursuant to 36 C.F.R. part 215. This appeal is timely filed and the appellant has standing to appeal under 36 C.F.R. § 215.13(a).¹ In addition, this appeal makes reference to portions of the March 28, 2006, comments on the DEIS. The March 28th letter therefore is also attached and incorporated by reference as identified herein.

STATEMENT OF REASONS

The Attorney General submits this statement of reasons pursuant to his independent authority under the California Constitution, common law and statutes to represent the public interest. Along with other State agencies, the Attorney General has the power to protect the natural resources of California from pollution, impairment or destruction. *See* Cal. Const. art. V, § 13; Cal. Gov. Code §§ 12511, 12600-12; *D’Amico v. Board of Medical Examiners*, 11 Cal. 3d

¹On March 28, 2006, the Attorney General’s office submitted timely substantive comments that the Draft Environmental Impact Statement for the Kings River Project did not comply with the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). The Forest Service responded by issuing a Final Environmental Impact Statement that crafted a new alternative and included some additional analysis, but did not address key legal deficiencies identified in the Attorney General’s comments. On November 20, 2006, the Attorney General’s office submitted comments pointing out the significant defects that remained in the Final Environmental Impact Statement for the Kings River Project. Unfortunately, in his Record of Decision, the Forest Supervisor failed to address the significant legal and procedural issues raised. Thus, the defects remain in the final decision and final EIS. This Statement of Reasons, as a result, tracks the Attorney General’s November 20th comment letter in significant part. A copy of that letter is attached and incorporated into this appeal by reference.

1, 14-15 (1974). This appeal and statement of reasons is submitted on behalf of the Attorney General in his independent capacity as the representative of the People and not on behalf of any other California agency or office.

I. INTRODUCTION

Because of the importance of forest resources to the people of the State, the California Attorney General has a long-standing interest in the Forest Service's management of the forests of the Sierra Nevada. In particular, the Attorney General is currently challenging the decision to jettison the 2001 Framework for a different plan adopted in 2004, on the basis that the 2004 plan was adopted without compliance with the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). The 2004 plan reduces protections for wildlife, habitat, and riparian resources and allows fragmentation of wildlife corridors that were the centerpiece of the 2001 Framework. In both the EIS supporting the 2004 Framework, and this Kings River Project FEIS, the Forest Service has failed to properly analyze and disclose how the less-protective canopy cover and diameter limits for tree removal authorized will affect forest resources. In particular, the Forest Service has failed to take the requisite hard look at short-term impacts on the imperiled Pacific fisher, a habitat-specific mammal dependent the large trees and dense canopy cover of the "old forest" and a "candidate" species for federal listing under the Endangered Species Act. 68 Fed. Reg. 41174 (July 10, 2003). Similarly, the Forest Service has failed to analyze the credible scientific alternatives to address fire hazards in the southern Sierra in a manner that also protects important old forest habitat and conditions.

As set forth in this appeal, the Kings River Project cannot be adopted based on the FEIS without violating the requirements of NEPA. Most significantly, the FEIS fails to analyze a sufficient range of substantive alternatives to the Forest Service's proposed course of action; it remains invalid for this reason alone. In addition, the Forest Service has violated NEPA by not circulating a supplemental draft of its EIS, and, as a result, there was insufficient time to evaluate

the substance of the new analysis contained in the FEIS. However, even the new analysis in the FEIS neglects an adequate discussion of the short-term impacts on the fisher and other sensitive forest resources, and fails to properly assess the direct, indirect and cumulative environmental impacts of the Kings River Project. The Forest Supervisor's ROD that directs a vague and amorphous "staged approach" to logging conducted in management units with "high quality fisher habitat" does not substitute for legally adequate NEPA analysis of the readily foreseeable short-term impacts of the project as adopted.

For the reasons set forth below, we urge the Regional Forester to reverse the Forest Supervisor's arbitrary, capricious and illegal decision to adopt the Kings River Project and direct the Forest Supervisor to prepare a supplemental EIS and reconsider the decision. Alternatively, we request that the Forest Supervisor withdraw his decision.

II. ARGUMENT

A. The FEIS Violates NEPA By Failing to Evaluate a Reasonable

Range of Alternatives to the Proposed Kings River Project The FEIS purports to consider a second action alternative (Alternative 3) in addition to the proposed action (Alternative 1) outlined in the DEIS and the no-action alternative (Alternative 2). However, with respect to the intensity of logging, the new alternative simply applies the same approach to meeting the Forest Service's stated purpose and need, with only minor tree size harvest limits and canopy retention modifications. Alternative 3 falls far short of addressing comments requesting that the Forest Service look at alternatives to its "inverse J-curve" tree size distribution model, and alternatives that would result in a significantly less-intensive level of logging. As the FEIS concedes, Alternatives 1 and 3 are the "same" in most respects. FEIS, Table 2-20 at pp. 2-51 – 2-58; FEIS at p. 3-123 ("[t]here is minimal difference between the two action alternatives for wildlife species").

Although the FEIS acknowledges the existence of other models describing pre-1850 tree

size distributions, it provides no explanation why other options to restore old forest conditions that do not depend on this particular model are not reasonable. *See, e.g.*, FEIS, Table 3-7 at p. 3-29. All it contains are inadequate conclusory statements, for example, that “thinning more in the smaller size diameter classes ... and treating surface fuels . . .do not meet the Purpose and Need [sic] . . . to gain knowledge of uneven aged silvicultural systems and prescribed fire.” FEIS, Appendix G at p. 8.²

As with the 2004 Framework decision, the Kings River Project ROD attempts to justify the potentially severe short term impacts to the fisher and other sensitive forest resources by focusing on the need to reduce fire risk. The Attorney General fully supports efforts to respond to the threat that catastrophic wildfire poses, both to communities and to sensitive forest resources. The intensive logging approach adopted for the Kings River Project, however, is not supported by the substantial body of scientific evidence, ignored in the FEIS, that the Forest Service’s fire and fuel reduction goals can be met while at the same time maintaining the higher canopy cover and greater number of medium and large size trees necessary to support old forest habitat conditions. *See, e.g.*, U.S. General Accounting Office, GAO/RCED-99-65, April 1999.³ For example, as the Forest Service itself has acknowledged, the 2001 Framework – with its less intensive logging – was specifically intended to provide “a coordinated strategy for addressing the risk of catastrophic wildfire that resulted from decades of fire suppression and the resulting build-up of hazardous fuels” (2001 Framework FEIS, vol. 1, ch. 1, pt. 1.3.3 at 28), and, as written, was fully consistent with the National Fire Plan (Decision on Appeal of the 2001 Framework ROD [Nov. 16, 2001] at p. A-12).

² As discussed below in this appeal, even the proposed action does not appear to satisfy the Forest Service’s stated purpose and need for the KRP.

³ Further evidence is found throughout the record; some of it is summarized in the Sierra Nevada Forest Protection Campaign’s supplemental comments on the FEIS for the Kings River Project, at pp. 19-29.

In the FEIS “errata” released just prior to the end of the FEIS comment period, the Forest Service attempts to provide further explanation as to why a less-intensive logging alternative, in particular an alternative based upon the fuel treatment scheme set out in the 2001 Framework, was “eliminated from detailed study.” FEIS revised pp. 2-49 – 2-51. The Forest Service’s explanation is inadequate under NEPA for a number of reasons. First, it relies on an inaccurate characterization of the 2001 Framework. The statement that the 2001 Framework “specifies an upper thinning limit of 20” dbh and some places 6 inches or less” is a gross oversimplification. *Id.* Even were this description accurate however, the erratum contains nothing but the Forest Service’s conclusory perceptions of the 2001 Framework’s supposed shortcomings. The further “explanation” for out-of-hand dismissal of a 2001 Framework-style alternative does nothing to cure the NEPA defects. Kings River Project ROD at p. 11. Indeed, the Forest Service itself admits that its analysis of a less-intensive logging approach was “cursory.” *Id.*

What NEPA requires is that the agency take a *hard look* at reasonable alternative ways of meeting agency goals that have less impact on the environment. It is precisely for the purpose of examining the short versus long-term environmental tradeoffs inherent in different options for achieving desired agency goals that NEPA places such emphasis on rigorous evaluation of alternatives. *League of Wilderness Defenders v. Marquis-Brong*, 259 F.Supp.2d 1115,1124 (D. Or 2003) (agency unreasonably excluded consideration of any alternative that provided for restoration of the burned area without salvage logging).

With respect to its treatment of alternatives, the Kings River Project ROD and FEIS are strikingly similar to the recently invalidated FEIS for the Creeks Forest Health Recovery Project. *Sierra Nevada Forest Protection Campaign, et al. v. Tippin, et al.*, No. Civ. S 06-00351 FCD DAD, U.S. District Court, Eastern District, Amended Memorandum and Order, September 6, 2006. There the Forest Service looked only at one action alternative to its proposal that differed only in minor respects, and dismissed other alternatives without reasonable explanation because

they ostensibly did not meet the project purpose. *Id.* at pp. 13-17. As the Court found, it is impermissible to “narrowly define [the] purpose and need so as to winnow down the alternatives until only the desired one survives.” *Id.* at p. 13, citing *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 814 n.7 (9th Cir. 1999). Likewise, in dismissing alternatives to the proposed Kings River project, the Forest Service here narrowly circumscribes the project purpose of restoring old growth forest to one of meeting the particular tree size distribution of its chosen mathematical model. This is not permitted under NEPA. “[T]he comprehensive ‘hard look’ mandated by Congress and required by [NEPA] . . . must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

For these reasons, the addition and adoption of Alternative 3 in the FEIS and ROD do nothing to address the concerns that the Forest Service has failed to consider an adequate range of alternatives and has acted contrary to law by improperly narrowing the purpose of its proposed action in order to exclude reasonable alternatives. *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997, 1030 (S.D.Cal. 2003) (DOE improperly confined scope of its action and thus failed to consider reasonable alternatives that considered actual nature of project). The environmental analysis of the Kings River project is therefore rendered inadequate by the existence of viable but unexamined alternatives. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) (“an agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposed action”).

B. The FEIS Violates NEPA Because it Fails to Adequately Analyze the Direct Indirect, and Cumulative Impacts of the KRP on Sensitive Forest Resources

An EIS is required to include analysis of all environmental impacts that are "essential to an informed agency decision." *Oregon Natural Resources Council v. Marsh*, 52 F.3d 1485, 1491 (9th Cir. 1995). The KRP FEIS fails to do so. Notably, as discussed above, the FEIS fails to

conduct any analysis of the impacts of the proposed project in relation to the impacts of a reasonable range of alternatives, including those that may be less environmentally-damaging in the short-term. For this reason alone, the Forest Service has failed to include adequate information of environmental impacts to enable an informed agency decision. In addition, the Forest Service has failed to take the required hard look at both the short-term direct and cumulative impacts of the project as proposed.

1. Failure to Analyze Short Term Impacts

Although the FEIS has added additional analysis on the impacts of the project, this additional information fails to correct the inadequacies outlined in comments on the DEIS. The FEIS provides little information to enable either the public or the agency decision makers to understand the significance or the scope of the impacts of KRP on old forest wildlife in general, and in particular, on the viability of the imperiled Pacific fisher. Instead, the FEIS is remarkable in that it highlights what is not known about the impacts of the project on the fisher, rather than containing a clear analysis of what is reasonably likely to happen to the fisher once the project is implemented. The FEIS readily acknowledges, as it must, that: (1) fisher resting and denning habitat that is the most limiting to fisher populations (FEIS at p. 3-140); (2) rest and den sites in the Sierra Nevada average greater than 70% to greater than 90% canopy cover (FEIS at p. 3-141); and, (3) the project will decrease high-quality CWHR habitat types that the fisher “preferentially selects” by over 30% (FEIS at p. 3-142). The FEIS then admits that the Forest Service has no idea what effect retaining only a maximum of 50-60% canopy cover as a result of the KRP will have on the fisher. *See, e.g.*, FEIS at p. 3-141 (“because rest and den sites in the Sierra Nevada average >70% to >90% canopy cover,” the effect of the project’s 50-60% canopy cover goals on the fisher’s resting and den uses of its habitat “cannot be evaluated”); FEIS p. 3-142 (effect of reducing high-quality habitat types “cannot be predicted with certainty”). Like the DEIS, the FEIS provides only sketchy this mention of short-term negative impacts to

endangered wildlife from the KRP; even this recognition is minimized by numerous general conclusory statements about the project's long-term benefits to the species. *See, e.g.* FEIS at p. 3-145.

In the face of this uncertainty and lack of analysis, the FEIS repeats the DEIS' unsubstantiated optimism – a conclusion that seems more wishful than factual – that implementing the KRP will result in improved forest conditions 20 or 30 years from now. The uncertainty of the predictive value of long-term modeling and forecasting is well-known to the Forest Service, even if not thoroughly explained in the FEIS. *See, e.g.*, M.A. Bergman, et al., *Risk Assessment in Conservation Biology*, 3-4 (1993) (discussing need for short-term evaluations and concerns about long-term projections); *see also* 2004 Framework FEIS. Yet the KRP FEIS assumes, based only on this limited long-term modeling, that whatever short-term damage is done to fisher habitat, for example, during the first phase of the KRP is necessary and reasonable in order to accomplish the project goals. FEIS at p. 3-151. However, as noted in Judge Breyer's recent ruling granting a preliminary injunction prohibiting the Forest Service from proceeding with the Saddle timber sale in the Sequoia National Forest, there is evidence "that losses of individual fishers could have devastating consequences." *Sierra Club v. Bosworth*, No. C 05-00397 CRB, Mem. and Order Granting Motion for Prelim. Injunction at 17:20 (N. Dist. Cal., September 9, 2005). The cumulative effects of the loss of even one fisher is particularly serious given the evidence that fishers occupy large home ranges over their life spans and that the southern Sierra fisher population is biologically distinct and remains only in a thin band along the western slope of the Sierra Nevada. *Id.* at 16:3-5, 7:4-9. Under these circumstances in particular, NEPA requires that the short and long-term trade-offs associated with the KRP be fully analyzed and understood. *See Seattle Audubon Soc'y v. Moseley*, 798 F.Supp. 1473, 1482 (W.D. Wash. 1992). Agency decision-makers and the public are entitled to know, before this project goes ahead, whether the long-term benefits of treatment, if any, will be moot with respect

to the fisher and other sensitive species.

It is not reasonable for the Forest Service to conclude that the KRP “in combination with other protection measures will limit the effects on fisher.” FEIS at p. 3-142. A key “protection measure” identified by the Biological Assessment and Biological Evaluation is the requirement to “monitor[] fishers in treatment and control units.” BA/BE at p. 44. Any potential protection provided by this measure, however, is illusory; a careful reading of the FEIS and ROD shows that the appropriate research project to study the effects of treatments on fisher population and behavior has yet to be developed. FEIS at p. 2-62, p. 2-20; FEIS, Appendix B at p.3. Even if a scientifically valid study ultimately can be designed, the FEIS provides no plan or criteria for determining how the results of a monitoring program will be translated into changes in treatment proposed for successive management units. As a result, there is no basis for determining that an adaptive management program will succeed to mitigate any short-term impacts from the KRP.

Where an environmental document “gives no reason for [the agency’s] optimism” that mitigation will protect species and habitat, the “agency’s decision to proceed with a project is based on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation measures” and “the decision may be set aside as ‘arbitrary and capricious.’” *Stein v. Barton*, 740 F.Supp. 743, 754 (D.Alaska 1990) (holding that the Forest Service’s EIS gave “no reasons for the Service’s optimism” that monitoring and enforcement would protect salmon); *see also Seattle Audubon Soc’y v. Moseley*, 798 F.Supp. 1473, 1482 (W.D. Wash. 1992) (noting that while Forest Service’s expert recommended proceeding with agency’s proposed course of action and monitoring effects on owls, expert “did not make clear how the situation could be rectified if the critics are correct”).

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2. Failure to Analyze Cumulative Impacts

With respect to assessment of cumulative impacts, the FEIS is flawed for a

number of reasons, three of which we summarize here. First, although the BA/BE indicates that biological evaluations were reviewed for 70 projects in the Sierra and Sequoia National Forests, the BA/BE fails to report or analyze any data about the number of acres treated, the types of treatments, or the impacts of those treatments. An EIS must do more than just “catalogue” the relevant projects, it must also include a “useful analysis of the cumulative impacts of past, present and future projects” or it is deficient under NEPA. *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142,1160 (9th Cir. 1997).

Second, the cumulative impacts analysis in the FEIS fails to assess the need for higher quality fisher denning and resting habitat based on the most current research that greater than 70% to greater than 90% canopy cover is required by the fisher for these activities. An agency’s method of analysis, while subject to some discretion, must have a reasoned basis to comply with the requirements of NEPA. *Idaho Sporting Congress v. Rittenhouse, Inc.*, 305 F.3d 957, 973 (9th Cir. 2002).

Third, the cumulative impacts discussion fails to adequately analyze all of the impacts resulting from the project as a whole. Our March 28, 2006 comments noted that the cumulative impacts analysis in the DEIS was inadequate – partly because the DEIS contained insufficient analysis to assess the impacts on sensitive species that would be created by the overall project to treat 131,500 acres, as the project was described in the DEIS. Comments of the California Attorney General at pp. 7-11. Other commenters raised similar concerns. FEIS, Appendix G at p.5. In apparent recognition that the level of analysis was inadequate for a project of such a large scope, the Forest Service now claims in the FEIS that the scope of the project is limited to only to the first stage (2006 through 2008) which includes the initial eight management units totaling approximately 13,700 acres. *Id.* at pp. 5-6. The FEIS’ description of the proposed action now pointedly omits reference to the expectation of treatment in the remaining 60 units and 177,000 plus acres over the next 30 years. *Cf.* FEIS at p. 2-2 *with* DEIS at p. 17.

This apparent attempt to cure the deficiencies in the cumulative impact is unavailing. The Forest Service cannot disavow its true intent for this project by omitting mention of it. Every indication is that the Service has always planned and continues to anticipate treatment activities for the KRP well beyond the first eight units. *See, e.g.*, FEIS at p. 2-2, emphasis added (“[t]he proposed action will *begin* implementation of a *landscape level* program of uneven-aged silviculture”). Therefore, NEPA requires that the Forest Service adequately analyze the full range of impacts, including cumulative impacts, of the whole of the project, for the reasons set forth in our March 28, 2006 letter. The FEIS does not do so.⁴

3. A “Staged” Approach to Implementation Does Not Substitute for Analysis

The Forest Service’s decision to “stage” implementation of logging in the initial eight units is not a substitute for legally adequate direct and cumulative impacts analyses of the impacts of this project. (ROD at p. 2.) Rather than providing any analysis, the ROD simply sets forth the unsupported conclusion that a staged approach is “cautious” and will “minimize the potential effects to fisher habitat while maximizing the opportunity to learn from in-progress studies and research before treating higher quality habitat” (ROD at p. 2). However, of the two units scheduled for implementation in 2007, one is proposed *inside* fisher habitat, directly contradicting the agency’s conclusion that impacts to the fisher will be “minimized.” In addition, the Forest Service has prepared no analysis of how the expected study and research results will be used to inform or modify future logging prescriptions in the remaining units. More importantly, the agency provides no facts or analysis in support of the assumption that sufficient useful data will be obtained in a timely way to avoid short-term impacts to the fisher.

C. The FEIS and ROD Violate NEPA Because the Project Proposal is Improperly and Inconsistently Defined

⁴ For example, the new Biological Assessment and Biological Evaluation, dated 10/19/2006, is limited on its face to the impacts of the initial eight management units.

The Forest Service claims to be proposing the Kings River project in order to gain “knowledge about the response of forests to a management strategy consisting of a specific uneven-aged silvicultural strategy and prescribed fire program designed to restore forests to historical pre-1850 conditions across a large landscape.” FEIS at p. 1-4. Consistent with this goal, in the DEIS, the agency claimed to be analyzing the effects of treatment of eight management units and ten units with no treatment controls, with the “expectation that the remaining 60 units [in the entire 131,500 acre Kings River Study area] will be treated similar to the initial eight management units between 2011 and 2033.” DEIS at p. 17. In the FEIS, however, the Forest Service now claims that the scope of the project is limited to “only to the first stage (2006 through 2008) that includes application of the KRP uneven-aged silvicultural system and prescribed fire upon the initial eight management units totaling approximately 13,700 acres” together with an analysis of the cumulative effects of the 10 units of no-treatment controls and the treatment of the already approved South of Shaver unit. FEIS, Appendix G at pp. 5-6. The FEIS’ description of the proposed action now omits reference to the expectation of treatment in the remaining 60 units over the next 30 years. *Cf.* FEIS at p. 2-2 *with* DEIS at p. 17.

This discrepancy in the project description fails to comply with the requirement of NEPA that “the proposal which is the subject of the environmental impact statement [be] properly defined.” 40 C.F.R. § 1502.4(a). Even while claiming that the purpose of the project is to gain knowledge of uneven-aged silvicultural management over a large landscape (and expressly rejecting alternatives because they don’t meet this purpose as described above), the Forest Service admits in the FEIS that its own proposal will never meet this goal. Specifically, in response to public comment, the agency states:

An uneven-aged management study has been conceived but will only be implemented to the extent of establishing ten management units as treatment-controls. . . . These controls are intended for use in future uneven-aged management study and may also be used for other study and monitoring purposes. *The uneven-aged management study can not be reasonably implemented utilizing the initial eight management units because two are*

involved in the KREW study and several others have significant area in the defense zone of the WUI. These focused activities preclude applying the uneven-aged management strategy to the extent necessary for this study.

FEIS at p.2-23; *see also* Appendix G at p. 3 (emphasis added). The decision in the ROD to undertake a “staged approach” and initially treat only two units of the initial eight units in 2007 (ROD at p. 2) serves only to further exacerbate this disconnect between project scope and stated project purpose.

The Forest Service has not only failed to clearly define its proposal and the purposes of its proposal, it also has created confusion and produced a plan that is internally contradictory and therefore incomprehensible, in violation of NEPA. *People of the State of California v. United States Forest Service*, --- F.Supp.2d --- 2006 WL 2771663 at *4, *6 (N.D. Cal. August 25, 2006), citing *Or. Env'tl. Council v. Kunzman*, 817 F.2d 484, 494 (9th Cir. 1987).

D. The Forest Service has Violated NEPA by Failing to Recirculate a Supplemental Draft EIS for the Kings River Project.

As discussed above, the Forest Service has failed to conduct legally adequate analyses of the short-term impacts of the project on forest resources. Nevertheless, the FEIS contains, by the Forest Services’ own acknowledgement, a “considerable amount of additional analysis” beyond the information that was presented in the DEIS. *See, e.g.*, FEIS, Appendix G, Public Comment Response, at pp. 5 -6. Added to the FEIS are over 150 pages of summary of the new and revised discussion of topics such as “past and present projects on the High Sierra District,” “watershed effects from the action alternatives,” “some sensitive species (spotted owl, fisher, and goshawk),” “Management Indicator Species (MIS),” “cumulative effects . . . for sensitive plant species,” “habitat and populations of spotted owls and fisher,” and “fire behavior.” *See, e.g.*, FEIS, Appendix G, Public Comment Response, at pp. 5 -6, 17. In addition, the FEIS contains new adaptive management details, a revised biological assessment and evaluation, and new technical advice and proposed conservation measures from the Fish & Wildlife Service on the

fisher and the Yosemite toad, and also incorporates by reference new detailed and lengthy specialist reports. *Id.* at p. 16.

While NEPA demands detailed analysis of a project such as the KRP, this is the type of work that must be included in a *draft* EIS in the first instance, not dropped into a *final* document for the first time. NEPA explicitly requires that a supplemental draft EIS be prepared and recirculated when significant new information is presented. Specifically, an agency “shall prepare *supplements* to either draft or final environmental impact statements if:

- a The agency makes *substantial changes in the proposed action* that are relevant to environmental concerns; or
- b There are *significant new circumstances or information* relevant to environmental concerns and bearing on the proposed action or its impacts.”

40 C.F.R. § 1509.9(c)(1) (emphasis added).

The agency’s failure to prepare a supplemental draft EIS for the Kings River project has two important consequences. First, the Forest Service provides less time for the public to review and comment on the new document. Thirty days is simply not enough time to determine whether such a large volume of at times highly technical scientific information is thorough enough to provide the requisite NEPA “hard look.”⁵ See 40 C.F.R. § 1502.9(c)(4) (requiring that a supplemental draft EIS be prepared, circulated, and filed in the same manner as a draft EIS). Second, by not recirculating a new draft, the Forest Service avoids its commitment to actually consider and respond to any comments made by the public. *Cf.* 40 C.F.R. § 1503.4 (“An agency preparing a final environmental impact statement *shall* assess and consider comments both individually and collectively, and *shall* respond by one or more of the means listed below, stating its response in the final statement”); *with* 40 C.F.R. § 1503.1(b) (“An agency *may* request comments on a final environmental impact statement before the decision is finally made”).

By refusing to circulate a supplemental draft, the Forest Service has failed to satisfy the

⁵ The substantive “errata” received by commenters on November 13, 2006 only compounded this problem.

fundamental purpose of NEPA: To allow the public an opportunity to meaningfully participate in the decision-making process. *See, e.g., California v. Block*, 690 F.2d 753, 769-72 (9th Cir. 1982) (holding that the Forest Service denied meaningful public participation where a proposed action differed significantly from alternatives in the draft EIS).

III. CONCLUSION

The Forest Service has failed to comply with the National Environmental Policy Act in adopting the Kings River Project. The FEIS and ROD incomprehensibly describe the project and its goals, improperly circumscribe the project purpose so as to exclude consideration of an adequate range of reasonable alternatives, and inadequately analyze the short-term effects on sensitive forest resources. Therefore, we request that the Appeal Deciding Officer direct the Forest Supervisor to prepare a supplemental EIS and reconsider the decision. Alternatively, we request that the Forest Supervisor withdraw his decision.

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Respectfully submitted,

EDMUND G. BROWN JR., Attorney General
of the State of California
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Dated: February 5, 2007

By: _____
SALLY MAGNANI KNOX
Supervising Deputy Attorney General

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