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**Via E-mail and U.S. Mail**

RE: Comments on Draft Environmental Impact Statement for the Kings River Project

This letter contains the comments of the Attorney General of the State of California that the United States Forest Service's Draft Environmental Impact Statement (DEIS) for the Kings River Project fails to comply with the National Environmental Policy Act (NEPA).

The Attorney General submits these comments pursuant to his independent authority under the California Constitution, common law, and statutes to represent the public interest. Along with other State agencies, the Attorney General has the power to protect the natural resources of the State from pollution, impairment, or destruction *See* Cal. Const. Art. V, sec. 13; Cal. Gov. Code secs. 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office.

This letter focuses on some major concepts and concerns and is not an exhaustive discussion of all issues raised by the Kings River Project DEIS.

## **INTRODUCTION**

It is hard to overstate the importance of the national forests of the Sierra Nevada Mountain Range to the People of California. National forests cover millions of acres in this state, including some of the most spectacular and sensitive areas of the Sierra Nevada region.<sup>1/</sup> Because of the importance of forest resources, the California Attorney General has participated

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1. As stated in a May 1999 *Los Angeles Times* editorial supporting the 2001 Framework: "This is an issue of importance to every Californian. More than two-thirds of the state's residents live within a few hours drive of the Sierra. As California becomes increasingly crowded and developed, the [Sierra Nevada Mountain] range becomes ever more vital as a place for recreation, solace, renewal and rejoicing in life."

in the land management planning process for national forests in the Sierras for almost twenty years. In the mid- to late- 1980's and early 1990's, this Office submitted extensive comments on a number of proposed forest plans (including Plumas, Sequoia, Tahoe, Modoc, Shasta-Trinity, and Lassen), appealed and intervened in several plans after the plans were approved by the Forest Supervisor, and participated in a seventeen-month mediation process for the Sequoia National Forest land management plan. In addition, we worked with the Forest Service on the 2001 Sierra Nevada Framework Plan during the decade-long scientific study and public review process that preceded its adoption, and we participated in the defense of the 2001 Framework in both the administrative process and in litigation.

Most recently, the Attorney General has objected to the massive, radical alterations to the 2001 Framework that were adopted in 2004, on the basis that the 2004 changes reduced protections for wildlife, habitat, and riparian resources, and increased timber harvesting by 300 and 400 percent, allowing fragmentation of wildlife corridors that were the centerpiece of the 2001 Framework. Our litigation challenging the 2004 Framework as violating the Administrative Procedures Act and the National Environmental Policy Act (NEPA) is currently pending in the U.S. District Court.

Without proper review of environmental impacts, the Kings River Project allows an even more intensive level of logging in the southern Sierra than is allowed under the 2004 Framework, potentially exacerbating the threat to the sensitive resources of the Sierra Nevada. The KRP, at full implementation, is a massive project, encompassing 131,500 acres over a period of 30 years. The Forest Service proposes to allow the harvesting of even larger trees – up to 35 inches in diameter – and to permit reductions in canopy cover significantly greater than that allowed in the 2004 Framework. The KRP requires that only 50% of the fisher habitat in the Southern Sierra Fisher Conservation Area (SSFCA) in the project area be in canopy cover of 50% or greater.<sup>2/</sup> DEIS at 54. The further weakening of tree size and canopy standards in the southern Sierra poses a particular threat to the imperiled Pacific fisher, a habitat-specific mammal dependent the large trees and dense canopy cover of the “old forest.” As the U.S. Fish and Wildlife Service found when it designated the Pacific fisher a “candidate” species for federal listing under the Endangered Species Act, the southern Sierra population of the Pacific fisher is one of only two “extant native populations of the fisher remaining” in the Pacific coast states and appears to be “at substantial risk because of several factors, including . . . ongoing habitat loss.” 68 Fed. Reg. 41174 (July 10, 2003). In addition, by the Forest Service’s own finding in this DEIS, the KRP so jeopardizes the viability of the Yosemite toad – also a candidate species – that

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2. In contrast, the 2004 Framework manages for 50% of the forested area within the SSFCA in canopy cover of 60% or greater and limits removal of trees greater than 30 inches dbh. Total canopy reduction of greater than 30% is prohibited. 2004 Framework ROD at p. 41

The 2001 Framework was considerably more protective of old forest characteristics. The 2001 plan imposed 12 inch and 20 inch diameter limits in westside forests, and 12 inch, 20 inch and 24 inch limits in eastside forests, and limited canopy reduction so that 60% of each watershed was required to contain 60 % canopy cover. 2001 Framework ROD at p. 45.

the project, if adopted, will result in a “trend to federal listing” of this species. DEIS at p. iv. The Forest Service proposes this massive project without considering a single alternative and without comparing the environmental impacts of the project in relation to other approaches.

The purpose of NEPA is to ensure that the significant environmental impacts of a proposed project and its alternatives are fully explained and analyzed prior to final agency action. Properly done, an EIS serves to ensure that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of its potential environmental consequences, as well as to provide the public and other government agencies with full information and an opportunity to meaningfully participate in the decision-making process. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519-20 (9<sup>th</sup> Cir. 1992) (quoting 40 C.F.R. § 1502.14); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9<sup>th</sup> Cir. 1988). Because EISs are central to NEPA’s purposes, these documents must contain “a reasonable, good faith, objective presentation” of the issues. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1439 (9<sup>th</sup> Cir. 1988) (internal quotation omitted). “[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 (9<sup>th</sup> Cir. 2000).

For the reasons set forth below, the Kings River Project DEIS fails to comply with the requirements of NEPA. Most significantly, the DEIS neither proposes nor analyzes a single substantive alternative to the Forest Service’s proposed course of action, and it is therefore invalid for this reason alone. The DEIS also fails to properly describe and analyze the direct, indirect and cumulative environmental impacts of the KRP on sensitive forest resources, including two species that qualify for listing as endangered. Finally, the Forest Service has violated the National Forest Management Act (NMFA), 16 U.S.C. §§ 1600 *et seq.* by failing to follow the requirements of the Forest Service Manual that prohibit actions that trend toward federal listing of sensitive species.

## COMMENTS

### **I. The Forest Service Has Violated NEPA By Failing to Evaluate a Reasonable Range of Alternatives to the Proposed Kings River Project**

NEPA requires that federal agencies prepare a detailed statement disclosing the environmental impact of a proposed action and presenting alternatives to a proposed action. 42 U.S.C. § 4332(c). The impacts of alternatives must be analyzed in “comparative form” to “sharply define[e] the issue,” and are considered the “heart” of the EIS. *See* 40 C.F.R. § 1502.14.; *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9<sup>th</sup> Cir. 1992). One of the main purposes of the alternatives section on an EIS is to make clear the resource conflicts that are inherent in the decision and how each alternative proposes to resolve those conflicts. 42 U.S.C. § 4332(2)(E); *See Bob Marshall Alliance*, 852 F.2d at 1219 (holding that any proposed federal action involving unresolved conflicts as to the proper use of resources triggers NEPA’s consideration of alternatives requirement).

An adequate alternatives analysis is so important that an EIS is rendered inadequate by the existence of a viable but unexamined alternative. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (9<sup>th</sup> Cir. 1999); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9<sup>th</sup> Cir. 1992) (“an agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposed action”).

A. The Forest Service has Failed to Consider Reasonable Alternatives to the KRP

The most glaring deficiency of the KRP DEIS is its failure to evaluate an adequate range of alternatives to the Forest Service’s proposed action. The DEIS does not analyze a single alternative that would apply a different approach to meeting the Forest Service’s purpose and need for this project.

The Forest Service has undertaken the KRP in order to “restore historical pre-1850 forest conditions across a large landscape and provide opportunities for research.” DEIS at iii; *see also id.* at p. 5. The Forest Service describes the project as one designed to gain knowledge of the forest’s response to a “uneven aged” silvicultural management system, to restore forest health, and to reduce fuel build-up in the forest. DEIS at p. iii. To reach these goals, the Forest Service proposes in the KRP to apply a specific “inverse J-curve” tree size distribution model, with results to be achieved over a 30 year time period of “retaining the trees that would potentially makeup the oldest third of the age classes in the stand” in order to “provide growing space for larger trees.” DEIS at pp. 6-7. Based on application of this particular mathematical model, “the oldest third of the age classes” are the “trees 35”dbh and larger;” these trees are to be “maintained equal to one-third of the potential basal area.” *Id.* at p. 7. Therefore, under the KRP, any tree smaller than 35 inches is proposed for harvest.

The DEIS fails to evaluate a single alternative to implementation of this model. Rather, the DEIS analyzes and considers the Forest Service’s proposed action in comparison only to the “no action” alternative. In a classic example of circular logic, the DEIS dismisses, without detailed analysis, all potential alternatives that would result in protecting any tree less than 35 inches for the reason that those alternatives would not conform to the chosen mathematical model. For example, the DEIS states that retaining any large or medium trees smaller than 35 inches in diameter results in “allocation of more than 1/3 of the growing space to large trees” (i.e. area where no treatment occurs) (DEIS at p.58-59) and therefore “would not be a reasonable trial of the KRP uneven-aged silvicultural system” (DEIS at p. 56, *see also id.* at 58-59). The DEIS provides no explanation why other options to restore old forest conditions that do not depend on this particular model are not reasonable. All it contains are inadequate conclusory statements such as “in the opinion of silviculturalists and ecologists involved in the development of the KRP uneven-aged silvicultural system” other options “would not be sufficient.” DEIS at p. 56.

Any number of other alternatives exist that could accomplish the purpose of restoring the forest to historical (pre-1850) conditions without the severe short-term environmental impacts

caused by logging large trees and reducing tree canopy, as proposed in the KRP.<sup>3/</sup> In addition to rejecting out of hand the option to protect trees less than 35 inches in diameter as discussed above, the Forest Service fails to consider any of the following:

- Models that would establish an old growth forest through natural thinning, rather than preemptive logging.
- Options that would apply the inverse J-curve tree distribution at the landscape scale, rather than the scale of each individual stand of trees. This could allow larger, denser stands of large trees to remain for the purposes of protecting habitat, but would still result in the desired tree size distribution overall.
- Implementation of the 2001 Framework standards and guidelines for the KRP study area.
- Development of a study design that experiments with different models at a smaller scale in order to strengthen inferences of cause and effect and minimize risk of habitat destruction resulting from the experiment.

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. All of the relevant legal authority contradicts the Forest Service's apparent position that NEPA's requirement to evaluate a reasonable range of alternatives can be satisfied by analysis of only the proposed project and the no action alternative. *See, e.g., Blue Mountains Biodiversity Project v. U.S. Forest Service*, 229 F.Supp.2d 1140, 1147 (D. Or. 2002); *Oregon Natural Desert Association v. Singleton*, 47 F.Supp.2d 1182, 1195 (D.Or. 1998) (holding BLM did not take a "hard look" at its Owyhee River Plan where it evaluated only alternatives at odds with the Wild and Scenic Rivers Act policy objects, its preferred alternative, and a "no action" alternative); *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).<sup>4/</sup>

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3. Through these comments, the California Attorney General is alerting the agency to the existence of viable, yet unexamined alternatives. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1021-22 (9<sup>th</sup> Cir. 1986).

4. The recent case of *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1245 (9<sup>th</sup> Cir. 2005) – involving the preparation of an Environmental Assessment instead of an Environmental Impact Statement – does not support the Forest Service action here. *See id.* at 1246 ("an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS"). Under NEPA, the EA and the EIS are governed by completely different statutory standards. *Compare* 40 C.F.R. § 1508.9(a), (b) (an EA is "concise" requiring only a "brief discussion" of alternatives) *with* 40 C.F.R. § 1502.14 (alternatives must be analyzed in

B. The Forest Service Improperly Dismisses Viable Alternatives Because it Adopts an Impermissibly Narrow Definition of the Purposes of the KRP

While an agency is not required to analyze alternatives that do not meet its proposed goal, an agency is not allowed to narrowly define 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); *see also City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9<sup>th</sup> Cir. 1997).

As discussed above, the Forest Service attempts to dismiss other options – such as preserving more trees under 35 inches – by claiming that these alternatives are not feasible because they fail to conform to the inverse J-curve model. In doing so, the Forest Service impermissibly attempts to narrow the purpose of its project from the legitimate goal of achieving old forest conditions and restoring forest health to a narrower, improperly circumscribed goal of retaining precisely the ratio of “large trees” and the amount of “growing space” in each stand of trees that would result from application of the inverse J-curve model.<sup>5f</sup> *See, e.g.*, DEIS at p. 56-59, emphasis added (the option to retain any large or medium trees smaller than 35 inches in diameter results in “allocation of more than 1/3 of the growing space to large trees” and therefore “would not be a reasonable trial of the *KRP uneven-aged silvicultural system*”). For the purposes of the KRP, even the definition of what constitutes a “large tree” is determined by the application of the KRP model itself.

Thus, in discussing the viability of reasonable alternatives, the DEIS seems to re-define the project purpose from one 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. *Border Power Plant Working Group* 260 F.Supp.2d at 1030.

C. The DEIS Violates NEPA Because it Impermissibly Commits Resources to the KRP Study Design Before Evaluating Reasonable Alternatives

The KRP DEIS makes a “trend toward federal listing” finding for the Yosemite toad, a candidate species that is warranted for listing, but precluded by higher priorities under the

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“comparative form” to “sharply define[e] the issue[s]” and are considered the “heart” of an EIS).

5. Similarly, to the extent that the Forest Service seeks to meet its goal of reducing fire risk, the evidence does not support that logging trees larger than 20 inches is necessary to achieve this purpose.

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federal Endangered Species Act. 67 Fed. Reg. 75834 (December 10, 2002). As a result, the impacts of the KRP – just considering the first phase alone – result in a finding of an “irreversible and irretrievable commitment of resources” under NEPA. DEIS at p. 207-08.

As the DEIS acknowledges, modifications to the KRP design would be required to change the Forest Service’s finding that the Yosemite toad, as a result of the KRP, is trending toward federal listing to a finding that the KRP is not likely to lead to listing or loss of viability. DEIS at p. v. Specifically, under the Forest Service’s own admission, an alternative that includes a 500 foot buffer zone surrounding occupied meadows – rather than the 100 foot zone specified in the KRP – would be needed to mitigate this serious impact.<sup>6/</sup> *Id.*

Apparently, because of the Forest Service’s commitment of financial and scientific resources to the existing KRP study design, the agency is reluctant now to change the buffer zone to mitigate impacts on the Yosemite toad. NEPA, however, requires that information on environmental impacts be developed *prior* to decision-making, in order to inform the decision process. Specifically, under 40 C.F.R. §1502.2 (f), a federal agency is prohibited from committing resources so that selection of alternatives is prejudiced before a final decision is made. Accordingly, the Forest Service has improperly committed to the KRP prior to evaluating its impacts or alternatives that will reduce the impacts, in violation of NEPA.

## **II. The DEIS Violates NEPA Because it Fails to Adequately Analyze the Direct, Indirect, and Cumulative Impacts of the KRP on Sensitive Forest Resources**

The DEIS purports to analyze the impacts of the first phase of the KRP: “treatment” of 13,847 acres of the Sierra National Forest with approximately 600 acres of group selection clear cuts (DEIS at p. 30) and approximately 6,000 acres of defensible fuel profile zone (DFPZ) creation (DEIS at p. 28). This will result in the harvest of approximately 7600 acres of non-commercial harvest and 6200 acres of commercial logging. DEIS at p. 27. The total scope of the Kings River Project, however, extends well beyond this first phase, which comprises just the first eight of the total 69 management units contained in the project area. One management unit is already being treated; the remaining 60 units are proposed to be treated in five subsequent “planning cycles” through the year 2033. DEIS at pp. 17, 71-72. According to the DEIS, the Forest Service plans to propose that the other 60 management units receive an intensity of

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6. It appears that an even larger buffer zone of 0.6 miles surrounding occupied meadows may be warranted, based on the known dispersal distance of the toad. *See* Memorandum from Holly Sanders, Forest Service District Aquatic Biologist, to Kings River Project file, dated May 7, 2004.

treatment similar to the first phase. DEIS at p. 68 ("the expectation [is that] the remaining 60 units will be treated similar to the initial eight management units between 2011 and 2033").

Notwithstanding the intensity of this proposed timber harvesting, and the large scale and long duration of the entire project, the DEIS contains only limited and very general discussions of the potential adverse environmental impacts of the proposed action, compared only to the no action alternative. The DEIS fails to compare the impacts of the project with any other alternatives that may be less environmentally damaging in the short term.

A. The DEIS' Discussion of the Affected Environment and the Environmental Consequences Fails to Provide the Required "Hard Look" at Direct and Indirect Impacts.

If the heart of the environmental impact statement is the section describing alternatives, the section describing the environmental consequences is its lifeblood. The environmental consequences section "forms the scientific and analytic basis for the comparisons" in the alternatives section. 40 C.F.R. § 1502.16. This discussion must address the direct and indirect environmental impacts of the alternatives, including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. 40 C.F.R. § 1502.16. The EIS include all environmental impacts that are "essential to an informed agency decision." *Oregon Natural Resources Council v. Marsh*, 52 F.3d 1485, 1491 (9<sup>th</sup> Cir. 1995).

The Forest Service has combined the discussion of environmental consequences of the KRP with a description of the affected environment in Chapter 3 of the DEIS. Under 40 C.F.R. § 1502.15, the affected environment section of an EIS is required to "succinctly describe the environment of the area(s) to be affected" in a manner that makes it possible to "understand the effects of the alternatives." *Id.*

The KRP DEIS fails to meet these requirements. Most notable, as discussed above, is the failure of the DEIS to conduct any analysis of the impacts of the proposed project in relation to the impacts of reasonable alternatives to it. For this reason alone, the Forest Service has failed to include adequate information of environmental impacts to enable an informed agency decision.

Other deficiencies are illustrated most pointedly in the DEIS' discussion of impacts to wildlife. The project proposes to subject a large area of national forest in the southern Sierra known to provide habitat for eight sensitive species, including the imperiled the Pacific fisher, to more intense logging than is permitted generally in other forests of the Sierra Nevada. Yet, the DEIS provides little information to enable either the public or the agency decision makers to understand either the significance or the scope of the impacts of KRP on these species in general, and on the fisher in particular. The entire affected environment section consists of only two paragraphs listing all the species that may be effected by activities in the first eight management

units, including the fisher, and then a list of the management units in which certain species are known to exist, including whether fishers have been “sighted” in that unit. DEIS at p. 183-84. Conspicuously missing, however, is any description of how the fisher is using the existing forest; for example, there is no discussion regarding the location and use of nesting and resting sites.<sup>7</sup> As a result, it is not possible for the public or decision makers to understand how the changes in landscape brought by the KRP “treatment” will affect fisher use of the forest.

The direct and indirect impact analysis of the project on the fisher is similarly lacking. DEIS at pp. 192-96. While the DEIS acknowledges several times that the fisher is dependent on “large trees” with “dense cover and a multi-layered canopy” (*id.* at p. 193), the “analysis” of the project impacts states only the following:

[T]he proposed action focuses on two [of the three necessary habitat elements], the need to increase the number of large trees and the . . . [creation and/or maintenance] of multi-storied stands. . . These improvements or benefits to fisher habitat come at the expense of a reduction in canopy cover in the initial eight units but it is almost entirely in 11 to 24 inch trees.

*Id.* at p. 194. Then, with absolutely no quantification or analysis of the significance or severity of the habitat trade-off caused by reduced canopy cover, the DEIS concludes that the trade-off is “reasonable.” *Id.* at p. 195. In fact, the only discussion of short-term impacts to the fisher from the disturbance caused by mechanical treatments is to recognize “noise disturbance” and then to describe an incident where a fisher “ran away” during an underburning project. *Id.* Even this sketchy mention of short-term negative impacts is then minimized with the statement that the “long term effects are a benefit to the species” – again with no quantification or analysis. *Id.* The rest of the impacts discussion primarily addresses the results of long-term modeling. *Id.* at pp. 195-96. This lack of meaningful analysis is repeated throughout the document with respect to other impacts – evidencing the Forest Service’s failure to undertake the “hard look” required by NEPA.

B. The DEIS Fails to Adequately Analyze Cumulative Impacts on Sensitive Species

Under NEPA, a federal agency is required to evaluate whether a project’s impacts, though individually limited, are cumulatively significant. 40 C.F.R. § 1502.16; *City of Carmel-by-the-Sea v. DOT*, 123 F.3d 11452, 1160- (9<sup>th</sup> Cir. 1997). A cumulative impact is the impact on the environment that results from the incremental impact of the action when added to past, present and reasonably foreseeable future actions, regardless of what agency or person undertakes the other actions. 40 C.F.R. § 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7. “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(7).

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7. The description of fisher habitat in Biological Assessment and Biological Evaluation also fails to provide this type of information. *See, e.g.*, pages 21 through 22 of that document.

Again, review of the DEIS' discussion of cumulative impacts to the fisher provides a typical example of the Forest Service's failure to meet the most basic cumulative impact analysis requirements. As an initial matter, the DEIS acknowledges that the Forest Service has in fact done considerable planning to outline the anticipated scope of treatment activities beyond the first phase of the KRP. *See, e.g.*, DEIS at p. 68 (the remaining 60 units will be treated "similar" to the first 8); *id.* at pp. 71-72 (listing subsequent treatment units); *see also* DEIS, Appendix C at p. 41 (map of tree removal intensity plotted out for the entire KRP area), Appendix E at first fold out map (depicting the timing of treatment for each specific unit); *see also* Intra-agency Agreement for the Kings River Project (stating that the desired research outcomes cannot be realized in the near term, but instead depend on a 15 to 30 year timeline).

Consistent with the Forest Service's intent to undertake a long-term project, the DEIS purports in several places to consider the cumulative impacts of the entire KRP project; for example, the cumulative impacts assessment area is actually larger than the 131,500 acres (DEIS at p. 196), and the DEIS identifies all of the past, present and future projects within the entire 131,500 acre area as relevant to the cumulative effects analysis (DEIS at p. 67-75). The DEIS' analysis of cumulative impacts of the project, however, falls far short of NEPA requirements.

For example, with respect to impacts on the fisher, the DEIS claims to have "considered" the list of projects conducted or planned for the 131,500 KRP area, and then concludes: "There are no other past or present activities that have affected the fisher so together with the activities in the initial eight management units, there is no cumulative effect to fisher." DEIS at p. 196. Although the precise meaning of this statement is not clear, it appears that the Forest Service is concluding that no cumulative impact will result from the identified past, present and future projects because none of them is located geographically within the project area of the first phase. There is no analysis to support a conclusion of that there will be no cumulative impact from these other projects, and given the large home range occupied by the fisher, this conclusion seems wishful rather than factual.

Further, with respect to the units of the KRP planned to be treated in the future, the DEIS states that because the next units to be treated are not adjacent, and because no adjacent units are planned to be treated within at least a five year period, there is no cumulative impact on the fisher. *Id.* at p. 197. Again, the DEIS contains no explanation for or analysis of this conclusion or the biological basis for it. At the most, what is included in the DEIS is a recognition of the incremental effects of the various project phases on the fisher – but what is required by NEPA is an analysis of how all of this proposed treatment will impact the fisher considering all of the projects together, even if each one is incrementally insignificant. 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. 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*, 123 F.3d at 1160.<sup>8/</sup>

C. The Adaptive Management Concept Cannot Cure the Defects in the DEIS’ Cumulative Impacts Analysis

The KRP depends upon an “adaptive management” program to complete the later phases of the project. For the reasons set forth below, the adaptive management program contained in the KRP does not serve to cure the defects in the DEIS.

First, the DEIS contains only conclusory statements 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 this DEIS. *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 DEIS assumes, without analysis, that whatever short-term damage is done to fisher habitat, for example, during the first phase of the KRP will represent a “reasonable tradeoff.” DEIS at p. 195. The Forest Service, however, fails to provide any basis for this conclusion. To the contrary, the DEIS itself acknowledges that the proposed action “may affect individual” fisher. As discussed above, given the perilous condition of the fisher in the southern Sierra, even one lost individual can be cumulatively significant to the viability of the population.<sup>9/</sup> Nothing in the DEIS suggests that “adaptive management” will cure this deficiency.

In addition, as acknowledged by the Forest Service in its Biological Assessment and Biological Evaluation, the appropriate design of a research project intended to address the effects of treatments on fisher population and behavior has yet to be developed, despite some unsuccessful attempts. BA/BE at p. 19. Even if a scientifically valid study ultimately can be designed, however, the DEIS 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 first phase of the KRP.

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8. The Biological Assessment and Biological Evaluation again does not supply the missing analysis, as it is expressly limited to the effects of the initial eight management units. See page 3 of that document.

9. Because the KRP may threaten the viability of the southern Sierra Pacific fisher population and, as discussed below, does threaten the viability of the Yosemite toad, the KRP raises issues of compliance with the federal Endangered Species Act and the National Forest Management Act.

Where the 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”).

### **III. The DEIS Violates NFMA By Failing to Comply with the Forest Service Manual Prohibition Against Actions that Trend Toward Federal Listing of Species**

As noted above, the Forest Service has made a finding in the DEIS that implementation of the KRP as proposed “is likely to result in a trend toward federal listing or loss of viability” of the Yosemite toad, a sensitive species that already has been identified by the U.S. Fish and Wildlife Service as warranted for federal listing, but precluded by higher listing priorities. 67 Fed. Reg. 75834 (December 10, 2002).

The Forest Service has published a series of Forest Service Manuals (FSM) that codify the agency's policy, practice, and procedure and that serve as the primary basis for the internal management and control of all programs and as the primary source of administrative direction to Forest Service employees. *See* <http://www.fs.fed.us/im/directives/>. Under FSM 2672.4, the agency is required to “[r]eview all Forest Service planned, funded, executed, or permitted programs and activities for possible effects on endangered, threatened, proposed, or sensitive species” through the preparation of a biological evaluation. FSM 2762.4. In undertaking a biological evaluation, the Forest Service is prohibited from taking actions that “contribute to the loss of viability of any native or desired non-native plant or contribute to animal species or trends toward Federal listing of any species.” FSM 2672.41. *See* <http://www.fs.fed.us/im/directives/fsm/2600/2672.24b-2676.17e.txt>.

Thus, adoption of the KRP – a project that will result in a trend toward federal listing of a sensitive species – would violate the Forest Service’s own policies and procedures, and therefore violates the NFMA, and constitutes arbitrary and capricious action under the Administrative Procedures Act. *See Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

### **CONCLUSION**

For the reasons stated above, the KRP DEIS fails to comply with the fundamental requirements of NEPA to properly analyze environmental impacts, to consider an appropriate

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range of alternatives, and to withhold pre-commitment to a project prior to environmental analysis. Under 40 C.F.R. § 1502.9(a) where a draft EIS is “so inadequate as to preclude meaningful analysis,” the agency is required to prepare and circulate a revised draft. The environmental documentation, particularly in light of the apparent impacts on the fisher and Yosemite toad, is so deficient that the the Forest Service must revise and recirculate the DEIS for the Kings River Project.

Thank you for the opportunity to present our comments.

Respectfully Submitted,

/s/

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For BILL LOCKYER  
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