



June 3, 2015

Randy Moore, Regional Forester  
USDA Forest Service, Pacific Southwest Region  
1323 Club Drive  
Vallejo, CA 9459

**Via electronic mail**

**Re: Ch. 70 wilderness evaluation for Sierra, Sequoia, and Inyo National Forests**

Dear Regional Forester and Forest Supervisors:

This letter addresses our major concerns with the recent release of the areas the Sierra, Sequoia, and Inyo National Forests intend to carry forward for analysis as potential recommended wilderness in the upcoming draft environmental impact statement (DEIS). Those 10 areas total only about 121,000 acres, or just over 8% of the acreage identified in the forests' final 1.4-million-acre wilderness inventory. In a May 19 conversation, Director of Ecosystem Planning Al Olson confirmed that the forests are crafting alternatives that include only those ten areas. Presumably then, the amount of recommended wilderness analyzed in the DEIS alternatives will range from 0 to 8% of the inventoried acreage.

This approach is contrary to the letter and spirit of the Chapter 70 directives and almost certainly guarantees that the DEIS range of alternatives will violate NEPA. To correct these deficiencies and avoid future litigation, the agency must: (1) permit meaningful public input on the methodology and results of its wilderness evaluation *prior to* formulating its DEIS alternatives, and (2) reconsider which areas to carry forward for analysis in the DEIS to ensure a range of reasonable alternatives. These requirements and recommendations are explained in more detail below.

**I. Chapter 70 requires the Forest Service to provide an opportunity for public input on the evaluation methodology and results *prior to* a determination of which areas to carry forward for NEPA analysis.<sup>1</sup>**

Chapter 70 of the Forest Service Handbook 1909.12 sets out a four-step process for the agency to satisfy its obligation to “[i]dentify and evaluate lands that may be suitable for inclusion in the National Wilderness Preservation System [NWPS] and determine whether to recommend any such lands for wilderness designation” through a plan revision.<sup>2</sup> The agency must: (1) inventory all lands that may be suitable for inclusion in the NWPS; (2) evaluate the wilderness characteristics of each inventoried area using the criteria in section 2(c) of the Wilderness Act of 1964; (3) analyze some or all of the evaluated areas in the applicable NEPA document; and (4) decide which areas to recommend for inclusion in the NWPS. Chapter 70 requires the agency to provide opportunities for public engagement at *each* of the four steps:

*Early and during each step of the process* identified in this chapter, the Responsible Official:

1. *Shall provide opportunities for public participation* and collaboration . . . . Through such opportunities, engage the public . . . early and throughout the process to provide feedback on the inventory, evaluation, analysis, and recommendation steps identified in this chapter.
2. May provide additional participation opportunities specifically on this topic as necessary.

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<sup>1</sup> We articulated these same concerns about the lack of public involvement and transparency in the wilderness evaluation in an October 30, 2014 letter (attached).

<sup>2</sup> 36 C.F.R. § 219.7(c)(2)(v).

*Maps, analysis, and other documentation developed through each step of the process must be made available timely to the public to increase transparency and enable feedback and input.*<sup>3</sup>

With respect to the evaluation step in particular, section 72 of the directives reiterates the requirement to “provide opportunities for public . . . participation” and “communicate the evaluation process to the public.”<sup>4</sup> The agency must “ensure that the process for inventory and evaluation is transparent and accessible to the public for input and feedback” and make documentation of the evaluation “available for participation opportunities.”<sup>5</sup> Once the evaluation phase (including public participation) is complete, Chapter 70 then requires the responsible official to identify which areas to carry forward for analysis in the NEPA process “[b]ased on the evaluation and input from the public participation opportunities.”<sup>6</sup>

The Sierra, Sequoia, and Inyo National Forests have thus far failed to make available to the public their wilderness evaluation methodology or results, and there has been limited opportunity for public involvement at the evaluation stage<sup>7</sup>. Yet the forests have already determined which areas to carry forward for analysis in the NEPA process. By completing the third step in the Chapter 70 process prior to providing a meaningful opportunity for public participation on the evaluation methodology or results, the agency has circumvented the letter and intent of the Chapter 70 directives. Absent public input on the evaluation methodology and results *prior to* alternative development and determination of which areas to carry forward for analysis, the agency has foreclosed any opportunity for meaningful public involvement, including the chance to identify problems with the evaluation before they are carried over into the NEPA process.<sup>8</sup> Under this approach, it is not possible for the responsible official to identify which areas to carry forward for NEPA analysis “based on the evaluation and input from the public participation opportunities,” as required by Chapter 70.<sup>9</sup> More generally, releasing those areas that will be carried forward for analysis prior to disclosing information about the evaluation methodology or results is contrary to the directive to “ensure that the process . . . is transparent and accessible to the public for input and feedback.”<sup>10</sup>

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<sup>3</sup> FSH 1909.12, ch. 70, § 70.61 (emphasis added).

<sup>4</sup> *Id.* § 72.

<sup>5</sup> *Id.* § 72.2.

<sup>6</sup> *Id.* § 73 (emphasis added).

<sup>7</sup> The Inyo National Forest (INF) has scheduled an open house on June 9<sup>th</sup> to brief the public on the potential wilderness areas it is carrying forward in the planning process.

<sup>8</sup> For example, the limited information available on the agency’s wilderness inventory and evaluation webpage shows that the Forest Service applied an improper initial evaluation screen to exclude from detailed evaluation approximately 19% of inventoried areas that contain motorized uses on authorized trails. Chapter 70 requires the agency to “comprehensively evaluate . . . the wilderness characteristics of *each* area identified during the inventory process” using the criteria in section 2(c) of the Wilderness Act. *Id.* § 72 (emphasis added). As we explained in more detail in our October 30, 2014 letter, the presence of authorized motorized activity in an area does not necessarily impede its wilderness character, and the evaluation process is designed, in part, to assess how those existing uses may affect the areas’ wilderness characteristics.

<sup>9</sup> *Id.* § 73.

<sup>10</sup> *Id.* § 72.2.

To correct these deficiencies and satisfy Chapter 70, the Sierra, Sequoia, and Inyo National Forests must make publicly available their wilderness evaluation methodology and results and provide a meaningful opportunity for public input on that information. The forests should address any problems with the evaluation identified by the public, and then reconsider which areas to carry forward for analysis in the DEIS based on the final evaluation and public input.

**II. NEPA requires the Forest Service to analyze a range of reasonable alternatives, which must consider more than 0-8% of the acreage identified in the final wilderness inventory for potential wilderness recommendation.**

The analysis of alternatives under NEPA is the “heart” of an EIS.<sup>11</sup> An agency must “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action.<sup>12</sup> Consistent with NEPA’s basic policy objective to protect the environment, this includes more environmentally protective alternatives.<sup>13</sup> “The existence of a viable but unexamined alternative renders an [EIS] inadequate.”<sup>14</sup> The “touchstone” of the inquiry is “whether an EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation.”<sup>15</sup>

The Sierra, Sequoia, and Inyo National Forests’ determination to carry forward for analysis only 10 areas totaling approximately 121,000 acres (only about 8% of the acreage identified in the forests’ final wilderness inventory) almost certainly guarantees an unreasonably narrow range of alternatives. Presumably, the DEIS alternatives will analyze between 0 and 8% of the inventoried acreage, and the remaining 92% of those roadless lands will be off the table as potential recommended wilderness.<sup>16</sup> Under binding Ninth Circuit precedent, such a narrow range of options – each of which leads to the end result that only an exceedingly small proportion of inventoried lands will be recommended for wilderness designation – violates NEPA.

In *California v. Block*, the Ninth Circuit invalidated the Forest Service’s EIS for a decision-making process to allocate RARE II inventoried roadless areas into three management categories (recommended wilderness, non-wilderness, or further planning) for purposes of first-generation forest plans. “None of the eight alternatives seriously considered by the Forest Service designate[d] more than thirty-three

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<sup>11</sup> 40 C.F.R. § 1502.14.

<sup>12</sup> *Id.* § 1502.14(a). See also 42 U.S.C. § 4332(2)(E) (agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”).

<sup>13</sup> 40 C.F.R. § 1500.2(e) (agencies must “[u]se the NEPA process to identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment”). See also, e.g., *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1121-22 (9th Cir. 2002) (citing cases), *abrogated on other grounds by The Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178-80 (9th Cir. 2011) (en banc).

<sup>14</sup> *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988, 1004 (9th Cir. 2013) (quotations and citation omitted).

<sup>15</sup> *Id.* at 1005 (quotations and citation omitted).

<sup>16</sup> The forests may have determined in the evaluation that some proportion of that remaining 92% lack the requisite wilderness characteristics, as defined by section 2(c) of the Wilderness Act. But without the methodology or results of the evaluation, the public has no way of knowing what that proportion is and if the determination that those areas lack wilderness character is reasonable.

percent of the roadless acreage to Wilderness, and none designate[d] less than thirty-seven percent of that acreage to Nonwilderness.”<sup>17</sup> The Court held that such a narrow range of alternatives violated NEPA because it “uncritically assume[d] that a substantial portion of the RARE II areas should be developed and consider[ed] only those alternatives with that end result.”<sup>18</sup> The same will be true of the alternatives analyzed in the DEIS for the Sierra, Sequoia, and Inyo, should those forests proceed with analyzing a maximum of 8% of the inventoried acreage for potential wilderness recommendation. Notably, the Ninth Circuit in *Block* invalidated as unduly narrow a range of alternatives that would have considered a maximum of over *four times* the proportion of potential recommended wilderness that the Sierra, Sequoia, and Inyo National Forests intend to analyze in the DEIS (33% vs. 8%).<sup>19</sup>

The anticipated range of alternatives for the upcoming DEIS is particularly concerning given the apparent determination – without any public involvement or transparency – to exclude from NEPA analysis significant acreage with important wilderness values and characteristics. For example, the DEIS apparently will not consider the Devil’s Gulch area bordering Yosemite National Park in the Sierra National Forest, or the Bright Star area in the Sequoia National Forest. Both of these areas were included in Senator Boxer’s state-wide wilderness bills and garnered significant local support.<sup>20</sup> Devil’s Gulch, which includes the steep slopes that rise up from the banks of the Wild South Fork Merced Wild & Scenic River, also represents a critical opportunity to preserve and protect an under-represented, low-elevation ecosystem in a region where most protected landscapes are high-elevation, alpine or sub-alpine.<sup>21</sup>

Failure to consider one or more alternatives that would include these and other areas with wilderness characteristics will render the Sierra, Sequoia, and Inyo National Forests’ EIS invalid.<sup>22</sup> As the Ninth Circuit in *Block* explained, “[w]hile nothing in NEPA prohibits the Forest Service from ultimately implementing a proposal that allocates [relatively few areas to recommended wilderness], it is troubling that the Forest Service saw fit to consider from the outset only those alternatives leading to that end result.”<sup>23</sup> A range of alternatives that would analyze a maximum of only 8% of the inventoried acreage

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<sup>17</sup> 690 F.2d 753, 765 (9th Cir. 1982).

<sup>18</sup> *Id.* at 767.

<sup>19</sup> See also, e.g., Council on Environmental Quality, *NEPA’s Forty Most Asked Questions*, 46 Fed. Reg. 18,026 (Mar. 23, 1981) (“When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness.”); *Mont. Wilderness Ass’n*, 725 F.3d at 1004-05 (range of alternatives for national monument plan that would have opened between 0 and 10 (the total number existing) backcountry airstrips, including several mid-range alternatives, was reasonable).

<sup>20</sup> See, e.g., California Wild Heritage Act of 2002, S. 2535, § 101(a)(43) & (44), 107th Cong. 2d Sess. (May 21, 2002) (“South Fork Merced Wilderness Area” is the Devil’s Gulch area).

<sup>21</sup> See Jeff Novak & Christina Boston, *Sierra National Forest Inventory Areas, Summary of The Wilderness Society’s Data on Under-represented Ecosystems in the National Wilderness Preservation System*, at 9, Unit 772 (Nov. 2014) (Forest Service narrative recognizing that over 90% of the Devil’s Gulch area is comprised of under-represented ecological types) (attached).

<sup>22</sup> See *Mont. Wilderness Ass’n*, 725 F.3d at 1004 (“The existence of a viable but unexamined alternative renders an [EIS] inadequate.” (quotations and citation omitted)).

<sup>23</sup> 690 F.2d at 768.

frustrates informed decision-making and public participation. Thus, to avoid a NEPA violation, the Forest Service must reconsider which areas to carry forward for NEPA analysis to ensure a range of reasonable alternatives.

### III. Conclusion

The Forest Service must take immediate action to correct course and remedy the public participation, transparency, and NEPA violations identified in this letter. First the agency must make publicly available the methodology for and results of its wilderness evaluation and provide a meaningful opportunity for public comment on that information. Second, the agency must correct any deficiencies identified in the evaluation methodology or results. Finally, the agency must reconsider which areas to carry forward for analysis in the DEIS “based on the evaluation and input from the public participation opportunities” and to ensure a range of reasonable alternatives. With the DEIS slated to be released in October, it is critical that the agency take these actions immediately to correct the identified deficiencies and avoid future litigation.

We look forward to discussing these issues further and working with the Forest Service to correct course and ensure that its wilderness evaluation and range of alternatives complies with Chapter 70 and NEPA.

Sincerely,



Alison Flint  
Counsel and Planning Specialist  
The Wilderness Society



Stan Van Velsor  
Senior Regional Representative  
The Wilderness Society



Ryan Henson  
Senior Policy Director  
CalWild (California Wilderness Coalition)



Frances A. Hunt  
Eastern Sierra Organizer  
Sierra Club



Susan Britting, Ph.D.  
Executive Director  
Sierra Forest Legacy



Pamela Flick  
California Program Coordinator  
Defenders of Wildlife

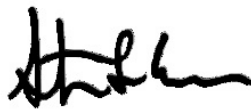


Alan Carlton  
Sierra Nevada Team Leader  
Sierra Club  
San Francisco, CA

Trudy Tucker  
National Forest Chair  
Tehipite Chapter, Sierra Club



Malcolm Clark  
Range of Light Group (Toiyabe Chapter), Sierra Club



Steve Evans  
Wild & Scenic River Consultant  
Friends of the River

*Karen Schambach*

Karen Schambach  
President  
Center for Sierra Nevada Conservation

*Donald I Rivenes*

Don Rivenes  
Executive Director  
Forest Issues Group

*Dan Stewart*

Dan Stewart  
President  
Sierra Foothills Audubon Society

Patricia Puterbaugh  
Lassen Forest Preservation Group