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November 9, 2010

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Via electronic and U.S. mail

RE: Comments Regarding the Giant Sequoia National Monument Management Plan and Draft Environmental Impact Statement, August 2010

Dear Ms. Terrell:

This letter contains the comments of the Attorney General of the State of California regarding the United States Forest Service's Draft Environmental Impact Statement ("DEIS") and Draft Management Plan ("Draft Plan") for the Giant Sequoia National Monument.

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, § 13; Cal. Gov. Code §§ 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 presented by the Forest Service's DEIS and Draft Plan, and is not an exhaustive discussion of all issues.

Unfortunately, while this DEIS and Draft Plan are improved compared to the previous effort, they remain in violation of the terms of the 2000 Presidential Proclamation, the District Court's 2006 Order, the 1990 Mediated Settlement Agreement, and National Environmental Quality Act, and the National Forest Management Act. In particular, neither the DEIS or Draft Plan acknowledges the constraints that those documents and laws place on the management actions possible in the Monument. The Forest Service must comply with these requirements if the Monument is to be protected and managed in the manner expected by the public and directed by the law.

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INTRODUCTION

Interest of the Attorney General's Office

Because the Giant Sequoias are among the most precious of resources to the people of California, the Attorney General's Office has been involved in Sequoia National Forest land management planning issues since we commented on the first comprehensive management plan proposed for the forest in 1986. One of our most pressing concerns over the last twenty years has been ensuring that the forest's Giant Sequoia Groves and the old forest ecosystem that sustains them are fully protected.

We actively participated in the extensive mediation process over the 1988 Land and Resource Management Plan (LRMP), and were a party to the 1990 Mediated Settlement Agreement (MSA) that rewrote LRMP. One of the most significant accomplishments of the MSA was to set specific protections for the Giant Sequoia Groves within the boundaries of the national forest, protections that set the stage for President Clinton's issuance of the Antiquities Act Proclamation that established the Giant Sequoia National Monument.^{1/} We intervened to help defend the creation of the Monument when that the legality of the Proclamation was challenged.

In 2003, we filed extensive comments on the Forest Service's first proposed management plan for the Monument, and ultimately filed suit challenging that plan when our comments were not addressed. In October of 2006, the U.S. District Court found that the 2003 plan was adopted in violation of the National Environmental Policy Act (NEPA) and failed to comply with the requirements of the Proclamation or the MSA. As we requested, the court permanently enjoined the Forest Service from implementing the plan, and ordered that "until the Forest Service issues a new Management Plan, the Monument shall be managed consistent with the Monument Proclamation of April 15, 2000, and in accordance with direction from the 1988 Sequoia National Forest Land and Resource Management Plan, as amended by the 1990 Mediated Settlement Agreement and the 2001 Sierra Nevada Forest Plan Amendment." October 11, 2006 *Judgment in People of the State of California v. U.S. Dept. of Agriculture, et al.*, Case No. C05-00898 CRB, at p. 3.

¹ The Monument Proclamation was preceded by the Giant Sequoia Proclamation issued by President George H.W. Bush in 1992 that protected the Giant Sequoia Groves as defined in the MSA and precluded commercial logging and mining in the groves.

The Forest Service has now released the revised management plan in the form of the Draft Plan and DEIS. Although generally an improvement over the 2003 plan, the Draft Plan and DEIS continue to suffer from some of the same problems the court found fatal to the prior effort. In particular, the documents allow discretionary tree removal in violation of the Proclamation, which requires specific determinations of need; lacks scientific guidance as required by the Proclamation; and relies almost exclusively on “treatment” for fuels and fire to restore the Monument ecosystem without consideration of other options, including those used by the National Park Service. Accordingly, the Attorney General’s Office submits the following detailed comments in the interest of ensuring that the management standards adopted for the Monument comply with all applicable legal requirements.

APPLICABLE LEGAL STANDARDS

2000 Proclamation. The Presidential Proclamation that created the Monument serves as its fundamental legal charter. As stated in the Proclamation, the Monument has one dominant purpose: to protect the unique and irreplaceable natural, scientific, and historical objects of interest contained within its boundaries (which include the Giant Sequoia Groves and their ecosystems and surrounding landscape, rare and endemic plants, a diverse array of rare animal species, and paleontological, geological and cultural resources). 65 Fed. Reg. 24095-98 (DEIS, Vol. 2 at p. 549-55). Where other activities are mentioned in the Proclamation as appropriate for the Monument, they are made explicitly subordinate to protection of the Monument’s objects, and any activity in the Monument must further that purpose. *Id.* at 24097-98. The Proclamation “set[s] apart and reserve[s]” the federal lands within the Monument’s borders, distinct from the national forest land it is derived from and provides that management of the reserved land must implement the protective purpose. *Id.* Consistent with this protective purpose, the Proclamation places strong emphasis on the need for ecological restoration of Monument lands. *See, e.g.*, 65 Fed. Reg. 24095 (“[t]hese forests need restoration to counteract the effects of a century of fire suppression and logging”); *id.* (the Monument presents opportunities to study the consequences of different approaches to forest restoration); *id.* at 24097 (trees may be removed only for “ecological restoration and maintenance”).

While some of the management directives are written in general terms,² the Proclamation specifically and explicitly prohibits commercial timber harvest. 65 Fed. Reg. 24097 (“[n]o portion of the monument shall be considered to be suited for timber production”). In addition, the Proclamation limits tree removal from the Monument only to situations where there is strong concrete evidence that removal is justified and effective alternatives are absent: “*Removal of trees, except for personal use fuel wood, from within the monument area may take place only if*

² For example, the management plan is directed to “encourage public and recreational access” and to include a transportation plan that “provides for visitor enjoyment and understanding about the scientific and historic objects in the monument,” as long as the objects of interest are protected. 65 Fed. Reg. 24097-98.

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clearly needed for ecological restoration and maintenance or public safety.” 65 Fed. Reg. 24097.

1990 Mediated Settlement Agreement. In 1990, to resolve multiple administrative appeals of the proposed 1988 LRMP, the Forest Service agreed to implement specific provisions effectively rewriting the 1998 LRMP until it could be amended in a NEPA-compliant process. Further, pursuant to the terms of the MSA, the Forest Service agreed that the LRMP “shall be amended to reflect” the provisions of the MSA.³ MSA at p. 154, Sec. Y.1. Nevertheless, the Forest Service did not undertake to amend the LRMP until the adoption of the Sierra Nevada Framework Plan in 2001 (2001 Framework). Although the 2001 Framework incorporated some of the MSA requirements, significant key provisions were not incorporated – including the protections for the Giant Sequoia Groves, such as grove-specific fuel reduction plans and restrictions on mechanical entry into groves, set forth on pages six through 28 of the MSA. (*See* Letter dated March 8, 2002 from Forest Supervisor to Mediated Settlement Agreement Partners.) In 2002, the Forest Service stated its intent to incorporate those requirements into the management plan for the Monument. *Id.* As the District Court found, the Forest Service’s obligations under the MSA with respect to those provisions remain in effect. *California v. U.S. Forest Service*, 465 F.Supp.2d 942, 954 (N.D.Cal. 2006) (the term of the MSA “has not yet lapsed”).

National Environmental Policy Act. NEPA is “a procedural statute intended to ensure environmentally informed decision-making by federal agencies.” *Tillamook County v. U.S. Army Corps of Eng’rs*, 288 F.3d 1140, 1142 (9th Cir. 2002). NEPA requires that federal agencies prepare a detailed statement disclosing the environmental impacts of a proposed action and, of particular importance, presenting alternatives to the proposal. 42 U.S.C. § 4332(c). A DEIS must permit those who do not participate in its preparation to understand and consider meaningfully the reasoning, premises, and data relied upon, and to permit a reasoned choice among different courses of action. *Friends of the River v. FERC*, 720 F.2d 93, 120 (D.C. Cir. 1983).

Alternatives to the agency’s preferred action must be analyzed in “comparative form” to “sharply define[e] the issue;” evaluation of alternatives is 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 (9th 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.

³ Although the parties recognized that NEPA compliance for any amendment may result a language that “does not conform to the [MSA] verbatim,” the parties intended that the Forest Service complete amendments incorporating the MSA within a two year period. MSA at p. 154, Sec. Y.1.

National Forest Management Act. The Draft Plan has been prepared under the authority of NFMA, which prescribes how land and resource management planning is to be conducted on national forest system lands. The Forest Service has determined that the plan is to be developed using the planning regulations and rules adopted by the agency in 1982 (1982 Rule). The 1982 Rule sets forth mandatory content for the Draft Plan, including “goal and objectives that include a description of the desired future condition of the forest” as well as “prescriptions and associated standards and guidelines for each management area” covered by the plan. 36 C.F.R. § 219.11 (1982). A “goal” is defined as a “statement that describes a desired condition to be achieved” and goals “form the principle basis from which objectives are to be developed.” 36 C.F.R. § 219.3 (1982). Under the 1982 Rule, the goals, objectives, standards and guidelines developed for the forest-wide plan serve to provide integrated management direction to guide and constrain the Forest Service’s discretion in the approval and implementation of specific management actions.

COMMENTS

In invalidating the 2003 plan, Judge Breyer noted that the Forest Service’s decision to rely on an “overlay” of management direction from prior plans, including the 1998 LRMP and the 2001 Framework, created a plan that lacked coherent management direction and as a result did not effectively constrain the Forest Service’s discretion. *California v. U.S. Forest Service*, 465 F.Supp.2d at 948-49. In response, the Forest Service has prepared the Draft Plan with more explanation of land allocations and the standards and guidelines that would apply in the Monument, and has prepared a plan document that is separate from the DEIS. While these changes in format and explanation are welcome and represent an improvement, the Draft Plan continues to suffer from the lack of clarity and specificity that plagued the prior plan.

Some of the problem can be solved by more careful explanation and clearer drafting. Comment III below provides some examples of places where the documents are particularly confusing and unclear. Even were these corrected, however, more fundamental problems remain. First and foremost, it appears that this plan has been prepared with the overarching goal of preserving as much management “flexibility” as possible. A desire for maximum discretion, however, cannot be reconciled with the Proclamation’s clear and explicit mandate that the Monument is to be reserved for the purposes of protection and managed for ecological restoration, and that tree removal is restricted to very limited circumstances. The Monument is not like, and cannot be managed like, any other national forest in the system.

In addition, further revisions are required for the DEIS to comply with the requirements of NEPA and serve as a document that fully informs the public regarding federal agency action and that results in fully informed decision-making. The plan as drafted also fails to comply with NFMA planning regulations, the MSA, and the science review requirements of the Proclamation.

I. The Draft Plan and DEIS Fail to Fulfill the Proclamation's Fundamental Management Directives in Violation of the Proclamation and NEPA

It is without dispute that the Presidential Proclamation establishing the Giant Sequoia National Monument provides the dominant management direction applicable in the Monument, and the Draft Plan and DEIS properly recognize this. *See, e.g.*, DEIS, Vol. 1 at p. 42. In addition, the Forest Service acknowledges that the Proclamation requires the Monument to be managed with the primary focus on achieving ecological restoration and protecting the objects of interest. *Id.* While these mandates are acknowledged, the management direction as it is developed and applied in the Draft Plan does not articulate or support clear criteria for achieving restoration and protection. These comments focus on two areas where there is the largest disconnect between the Proclamation's requirements and the management prescriptions -- the emphasis on fire and fuels treatments, and the reliance on the management prescriptions in the 2001 and 2004 Framework plans.

A. Emphasis on Fire and Fuels Rather than Restoration

We understand and share the Forest Service's interest in reducing the risk of intense and large wildfires that are outside the historical fire regimes of the Monument. Fuels reduction work in the Monument, however, must comply with the management requirements in the Proclamation's restoration and protection mandate; it is not clear that the Draft Plan does this.

The Draft Plan and DEIS appear to assume, absent supporting scientific analysis, that ecological restoration is best accomplished by "treatment" to remove trees to reduce unwanted fire risk and create openings. In some cases, prescriptions for fire and fuels treatments are the only actions identified in the DEIS as available tools to achieve restoration. For example, in Table 25, titled "Strategies for Ecological Restoration by Alternative," three of the four strategies set forth are focused on accomplishing ecological restoration through the reduction of fuels and fuels treatment. Although the table contains a footnote that makes passing reference to "additional strategies for ecological restoration in other resource areas, such as hydrological resources," the focus here, as it is throughout the document, is on the notion that reducing fuels equates with ecological restoration. DEIS, Vol. 1 at p. 111; *see also, e.g.*, DEIS, Vol. 1 at p. 65 ("[e]cological restoration in the Monument is likely to be related to, or dependent upon, fuel treatments in the WUIs"), Vol. 1. at p. 430 ("[e]cological restoration may be accomplished or partially accomplished through the reduction of fuels, and in some cases restoration or resiliency treatments may be equal to the fuels treatment"). Further, the Draft Plan and DEIS seem to simplistically suggest that ecological restoration as required by the Proclamation will be accomplished equally well under each one of the alternatives – whether the alternative limits fuels treatments to 4,600 acres or authorizes 56 times that much (257,400 acres) (DEIS, Vol. 1 at p. 16), and regardless of the upper limit on the size of tree allowed to be removed (compare

tables for fuels management direction for each alternative on pages 82-100; each alternative “complies with the Clinton proclamation”).

This focus makes the Draft Plan read more like a fire and fuels management plan than an integrated plan to restore the complex Giant Sequoia ecosystem. As noted in the Forest Service’s own Science Consistency Review (SCR) Report, “habitat provision for sensitive species can be at odds” with fuels reduction objectives and therefore restoration of the Monument requires “balanc[ing] the needs for fuels reduction, ecosystem restoration, and provision of wildlife habitat.” SCR at p. II-3. Rather than addressing the complexities of balancing these competing goals, both the DEIS and the underlying Silviculture Report are improperly focused on the “single mission” of fuels reduction.

The DEIS recognizes, as it must, that “most of the reduction in fire severity is achieved” by “thinning smaller ladder-fuel trees . . . from 10 to 16 inches in diameter” . . . [i]f trees larger than [10 to 16 inches] are thinned, it is important to provide reasons other than for ladder-fuel treatment.” DEIS, Vol. 1 at p. 184. However, these reasons are not identified in the alternatives that allow cutting of larger trees or that have no diameter limits at all.⁴ Nor is there an explanation of how thinning greater than that necessary for fuels reduction would accomplish the restoration required by the Proclamation.⁵ As noted by one of the reviewing scientists, by allowing wide latitude to thin trees up to 20 inches and beyond, the Draft Plan “gives forest managers discretion in applying treatments without clarifying what science they will use to make decisions on thinning intensity.” SCR at p. II-2. While Forest Service managers may desire to have the most flexibility possible, in order for the plan to be legally adequate, it must contain constraints to ensure that management furthers the purpose of protecting and restoring the resources of the Monument as required by the Proclamation.

Most of the alternatives place over half of the Monument (58%) into wildland urban intermix (WUI) defense or threat zones, where more aggressive thinning is allowed even when it

⁴ Although the Silviculture Report repeatedly emphasizes the desirability for “maximum flexibility,” it provides little information about the scientific justification of such an approach, and virtually no discussion of the resource protection trade offs associated with aggressive thinning. The preferred alternative appears to impose diameter limits of 20 inches as a matter of course, however, exceptions are allowed without meaningful criteria to govern when that limit may be exceeded. According to the science review report, there is “little scientific support for removing [trees greater than 20 inches] in the interest of restoration or maintaining resiliency.” SCR at p. II-47.

⁵ In discussing Alternative C, the DEIS recognizes that even practices that limit tree cutting to 8 inches are effective for fire reduction, “In practice, cutting trees up to and including 8” in diameter has proven effective in fuels reduction in the [Sequoia-Kings Canyon National Park]”. *Id.*, Vol. 1 at p. 90. Yet, the preferred alternative allows cutting trees up to 20” (and beyond under an undefined “exception”) and Alternative F includes no diameter limits at all.

affects sensitive resources.⁶ Further, most of the alternatives include a large Tribal Fuels Emphasis Treatment Area (TFETA) of 56,643 acres (including inventoried roadless areas) adjacent to the boundary of the Tule River Reservation where more aggressive thinning is allowed.⁷ Again, however, the Draft Plan lacks both explanation and scientific justification as to why these zones contain so much of the land area of the Monument, why the treatment prescriptions in them should take precedence over other land allocations designed to protect resources such as old forest emphasis areas, spotted owl home range core areas, or Southern Sierra Fisher conservation areas. See chart on p. 61 of volume 1 of the DEIS. To be legally valid, the Forest Service must demonstrate that these decisions are based on the determination – following the best available science – that these management directives are needed to accomplish ecological restoration of the Monument resources and to protect the objects of interest in the Monument. It is not sufficient for the DEIS to simply rely on whatever WUI zones were developed for the 2001 Framework.

The Forest Service’s Draft Plan and DEIS provide little more than conclusory statements, without explanation or analysis, that each of the alternatives proposed is “in compliance” with the Proclamation’s directive to achieve ecosystem restoration. See, e.g., DEIS, Vol. 1, at p. 83 (“[r]estoring more natural conditions, such as fire return intervals, and protecting the objects of interest and communities fulfill the needs identified in the Clinton Proclamation”). Under NEPA, however, conclusory statements of compliance are improper. *Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1065 (9th Cir. 2005) (an EIS must do an analysis, not just “treat[] the prediction that treatment will benefit old-growth dependent species as a fact”).

B. Reliance on 2001 and 2004 Framework Standards

The Record of Decision adopting the 2001 Framework clearly stated that it was not developed to address the requirements of the Proclamation and that any changes needed to comply with the Proclamation would be made when the Monument Plan itself was developed. SNFPA ROD, January 2001, p. 18 (“Lands within the [Giant Sequoia National Monument] are

⁶ The WUI zones are defined as they were in the 2001 Framework, with the defense zone being “generally” 1/4 mile, and the threat zone being one and 1/4 mile from “structures and communities intermixed with national forest lands.” DEIS, Vol. 1 at p. 458. As the DEIS acknowledges, however, these distances are general guidelines. As depicted on the maps accompanying the DEIS, the WUIs appear to extend in some cases significantly beyond a mile and 1/2 from communities, according to the scales provided on those maps. (See Map C with a 5 mile scale line.) There does not appear to be a detailed explanation or any scientific justification as to how these zones were delineated, other than that they are based on the 2001 Framework. There is no discussion of how setting these WUI zones accomplishes ecological restoration as required by the Proclamation.

⁷ Unlike the WUIs, the TFETA is set from the geographical boundary of the reservation lands, rather from any communities or structures on those lands.

subject to the decisions made through this ROD. However, the monument management plan . . . may modify this direction to protect the values for which the monument was created.”) The Forest Service, therefore, cannot rely on management prescriptions set out in the 2001 Framework without further analysis that justifies and supports why those management directives meet the requirements of the Proclamation. This is equally true for the management prescriptions set forth in the 2004 Framework, which expressly did not apply to Monument lands. SNFPA ROD, January 2004, p. 15.⁸

Despite the express limitations of the 2001 and 2004 decisions as applied to the Monument, the standards and guidelines adopted by those prior plans are used repeatedly to supply the standards and guidelines to be applied in the Monument, without any explanation or analysis as to why these prescriptions are appropriate for the Monument, or how they will serve to protect the objects of interest and accomplish ecosystem restoration as required by the Proclamation. (See tables beginning on page 120 of volume 2 of DEIS which include numerous references to 2004 and 2001 Framework standards and guidelines.) Reliance on the 2004 Framework standards and guidelines – including those for riparian conservation objectives, soil conservation, canopy cover, great gray owl and willow flycatcher protections -- is particularly problematic for the Monument lands, in light of the directives of the Proclamation.⁹ The 2004 Framework was adopted to remove some of the more restrictive and protective provisions of the 2001 Framework, in order to give the Forest Service more management flexibility. Specifically, changes to the standards and guidelines affecting aquatic, riparian and meadow ecosystems were adopted in 2004 for the express purpose “to allow more economic benefits to be retained” from grazing allotments, and the changes to fire and fuels prescriptions were adopted to “[i]ncrease the economic value of fuel treatment byproducts.” (SNFPA, Final Supplemental Environmental Impact Statement, Vol. 1 at pp. 3-4.) These justifications are impossible to reconcile with the protective purposes of the Proclamation.

Use of the 2001 and 2004 Framework standards without further analysis would relegate management of the Monument to the same status as any other multi-use national forest in the Sierra Nevada. This approach, however, contravenes the express direction in the Proclamation that sets Monument land aside for preservation and protection.

⁸ In addition, although the Draft Plan cites the 2007 Management Indicator Species Amendment as a source of current management direction in the Monument, the legal basis for that determination is not explained.

⁹ The legality of the 2004 Framework has been challenged by the State of California and others. Because the case has not yet been resolved, any reliance on its standards and guidelines is legally questionable. The U.S. District Court has ruled that the 2004 Framework Plan was adopted in violation of NEPA; appeal of that decision is pending in the Ninth Circuit Court of Appeals. *People of the State of California v. U.S. Dept. of Agriculture*, 2008 WL 3863479 (E.D.Cal. August 19, 2008).

II. The DEIS and Draft Plan Fail to Establish Criteria for Tree Removal that Comply with the Proclamation

A related defect is the failure of the Draft Plan and DEIS to articulate a clear standard for tree removal in the Monument. As noted, the Proclamation contains a very specific restriction on tree removal, limiting tree cutting only when “clearly needed for ecological restoration and maintenance or public safety.” 65 Fed.Reg. 24097. The DEIS and Draft Plan, however, lack a generalized rubric, decision tree, or any other analytical or scientific methodology or meaningful criteria to determine whether tree removal satisfies the “clearly needed” standard. Instead, the plan assumes that any tree cutting proposal that is labeled a “treatment” is de facto and by fiat “clearly needed for ecological restoration.” While the Forest Service may desire to retain maximum discretion to make tree removal decisions on a case-by-case basis, the specificity of the Proclamation’s directive requires much more guidance.

In place of any binding criteria to govern when the Proclamation standard is satisfied, the Draft Plan offers only a “strategy” that includes six very general criteria, relating to whether keeping the tree on site would “deplete moisture,” “adversely affect growth . . . [or] diversity,” “cause unacceptable fuels accumulation,” “provide a vector . . . beyond endemic levels,” or “create a public safety hazard.” DEIS, Vol. 1 at p. 104. What would satisfy any of these conditions, however – such as what would be considered “unacceptable fuels accumulation”¹⁰ or “a public safety hazard” -- is left undefined and thus up to the discretion of the individual Forest Service personnel. The “enforceable” standard and guideline designed to implement the strategy calls only for an in field “evaluation” based on some unstated criteria.¹¹ *Id.*

In addition, although the Forest Service is prohibited from making planning decisions in the Monument based on any commercial harvest considerations, the cutting of large trees or removing biomass to fund other restoration seems to improperly inform the management

¹⁰ In places, the DEIS grafts this “criterion” onto the clearly needed language to state that tree removal is allowed “when clearly needed for ecological restoration and public safety and when unacceptable fuel accumulations occur.” *See, e.g.*, DEIS, Vol. 1 at p. 460 (emphasis added). This standard does not conform to the Proclamation.

¹¹ The narrative of the DEIS contains the following language relating to field evaluation of trees: “In order to establish the clear need for removing trees, as set out by the Clinton proclamation, each individual forest stand or forest ecosystem should be evaluated in the field considering the major objectives for the project. For all projects within the Monument, there will be a determination to establish if the treatment is “clearly needed for ecological restoration and maintenance or public safety.” DEIS, Vol. 1 at p. 438. This “guidance” is so general as to be meaningless.

direction at various points in the plan. For example, the chart explaining treatment rationale states that alternatives A, B, C, E, and F, “allow and promote the use of unwanted forest carbon” and that “removal of [unwanted forest carbon] would reduce associated costs in vegetation and fuels management either as cost offsets or reduced amount of subsequent work needed.” DEIS, Vol. 1 at p. 427-28; see also Silviculture Report at p. 27-28. Curiously, despite the clear intent of the Proclamation that the Monument management steer completely clear of concepts such as flow of sustained yield of wood products that inform ordinary multiple-use forest planning, the Silviculture Report prepared for the Draft Plan discusses management for “timber partnerships,” “value of sale,” “wood product offsets,” and the use of “wood products to support” treatment operations. Silviculture Specialists Report at pp. 53-54. This type of analysis, coupled with management guidance that essentially equates all “treatment” with “restoration,” gives the public very little assurance that the Monument will be protected as a unique “reservation,” separate and apart from how every other forest in the system is managed.

III. The Draft Plan and DEIS Contain Unclear Management Standards in Violation of NEPA

The Forest Service’s most basic NEPA obligation is to ensure that it prepares a plan that is intelligible to the public. While the format of the Draft Plan is an improvement over the 2003 plan, the management directives in the Draft Plan continue to contain some confusing contradictions and inconsistencies that undermine its clarity and value.

For example, in the key chart setting forth the management priorities for standards and guidelines in overlapping land allocations (called “trumping order” in the Draft Plan), the Forest Service refers to a version of the management standards contained as an appendix to the 2001 Framework decision. Draft Plan at p. 39 (Figure 2). Yet, in the DEIS and Draft Plan, the standards and guidelines are not always based on the 2001 Framework, leaving the reader guessing as to the management direction for any particular land allocation. In addition, it is not clear whether this “trumping order” from the 2001 Framework is or is not being applied in the new Draft Plan. If it is intended to apply, then additional analysis as to how it meets the requirements of the Proclamation would be required, for the reasons stated in Comment I above. If it is not intended to apply, then the Draft Plan does not give guidance as to what kind of a “trumping order” would stand in its place.

In addition, the Draft Plan contains separate tables of “Strategies” and “Standards and Guidelines,” directed primarily at resource type (e.g. vegetation, hydrology, fire and fuels, etc.). Draft Plan at p. 57-70 and 118-47. These tables, however, are neither linked together nor linked to any of the land allocations (which are described as either static, overlapping, or dynamic) or any of the other special or defined management areas. And, the standards and guidelines themselves are not numbered or associated with management actions or areas. As a result, it continues to be difficult, if not impossible, to identify what standards apply to any given geographic area of the Monument.

Appendix A to the DEIS (Volume 2) purports to contain a comprehensive list of all the standards and guidelines that would apply under each alternative. Again, there is nothing linking these standards to specific land allocations or management areas. It is unclear whether the various tables of standards and guidelines are additive for each alternative, or whether the reader must piece together the standards from the several tables to find the total list of standards for a given alternative. Also, it is unclear why prior management direction that is clearly prohibited by the Proclamation (relating to timber harvest, removal of very large trees, and creation of very large openings, for example) remains in the standard and guideline tables at all. This serves no purpose except to create confusion. Finally, the separate Draft Plan document does not appear to be a “stand alone” plan, but instead, continues to rely on other planning documents, including the DEIS, further adding to the lack of clarity.

IV. Failure to Convene a Scientific Advisory Board Violates the Proclamation

The Proclamation requires the Forest Service to “appoint a Scientific Advisory Board to provide scientific guidance during the development of the initial management plan” 65 Fed.Reg. 24098 (DEIS, Vol.2 at p. 556). The membership of the board is expressly required to be representative of the scientific disciplines necessary to accomplish protection of the Monument’s scientific and historic objects. Because the Proclamation mandates that the Scientific Advisory Board provide advice “during” development of the initial plan, and because there is still no valid Monument plan, the requirement for a board remains in effect. Advisories created in connection with the invalid 2003 plan do not fulfill the requirement that a science board provide guidance during development of an initial plan. The Proclamation cannot reasonably be read to mandate advice from scientists only after issues for which that advice is relevant have been decided. Therefore, failure of the Forest Service to convene a Science Advisory Board for the Draft Plan violates the requirements of the Proclamation.

Even if use of the previous seven-year-old advisories were determined to be adequate compliance with the Proclamation for the new Draft Plan, the Forest Service has not identified which ones it relied upon in developing this plan, and how it relied upon them or how they informed the preparation of the plan. DEIS, Vol. 1 at p.70 (stating only that “a number of the existing scientific advisories are still relevant”). Although the Forest Service did conduct a Science Consistency Review, the panel had a limited task to review certain aspects of the science after the plan was already prepared, not during its preparation. Further, the SCR was instructed to review only one alternative (Alternative F) that ultimately was not selected as the preferred alternative. This contravenes the directive of the Proclamation to base the plan on the best available science.

V. The DEIS Fails to Conduct a Through Environmental Analysis of the Proposed Plan’s Effects Under NEPA

The DEIS as drafted fails to comply with several other of NEPA’s mandates for evaluating environmental impacts. First and foremost, the effects analysis declares that this plan

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has no direct impacts because it does not authorize ground disturbing activity, and therefore no direct effects are identified or analyzed. This is a misstatement of the requirements of the law. As the courts have repeatedly determined, programmatic plans subject to NEPA make large scale decisions with effects that must be analyzed at the programmatic scale. *See, e.g., City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990); *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1096-97 (9th Cir. 2006); *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1091 (9th Cir. 2003).

Second, the DEIS, with its focus on fuels treatments, contains scant analysis of the effects of the trade-offs between the competing management goals of fuels reduction and habitat protection. In fact, the trade offs are barely recognized in the document. This statement in the Silviculture Report is typical, but illucidating: "Alternative F treats stands . . . more than any other alternative. While it will have the most favorable impact in the long run, it may have some immediate short term impacts on certain species that require dense canopy." Silviculture Report at p. 34. This statement is repeated on page 433 of the DEIS (volume 1) with no additional analysis. There can be no dispute that managing the Monument is a complex endeavor that involves striking a balance between competing goals. For example, fire is needed for restoration and regeneration of Sequoia, but mechanical treatment may be preferred to reduce fuels when the risk of uncontrolled fire is too high. And, fire treatments can reduce old forest habitat. How are those competing needs balanced? What are the tradeoffs? What will be the magnitude of the short term habitat losses? What are the impacts of the different management options? The Draft Plan and DEIS do not address any of these questions in a meaningful way. Rather, the effects section mostly consists of description of the various alternatives coupled with conclusory statements that each of the alternatives complies with the Proclamation.

The science consistency review comments highlight the fact that the DEIS gives short shrift to the importance of protecting wildlife habitat in achieving ecological restoration. The reviewing scientists documented numerous failures of the analysis to identify and apply the most current wildlife biology and fire science, and to adequately support assertions of impacts with adequate scientific justification. SCR, § II. Further, the DEIS contains only minimal analysis of impacts to wildlife species other than the Pacific fisher and American marten and fails to include any analysis of the potential effects of the alternative management schemes on habitat fragmentation – a key component of wildlife viability. SCR at p. II-55. The Forest Service's response to this scientific criticism fails to acknowledge the commenter's key point – that the DEIS does not recognize the threat posed by habitat fragmentation at the larger programmatic scale.¹²

¹² The response to other scientific comments is similarly inadequate. For example, in response to the comments that the DEIS fails to identify criteria and science used to make tree thinning decisions especially for larger trees (SCR at pp. II-3 and II-4), the Forest Service's "Responses to Science Review Panel Comments" consists of narratives that have been cut and pasted from the pre-existing Silviculture Report (*see, e.g., pp. 31-35*). These answers offer no additional

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The DEIS also contains little or no discussion of past management of the Monument, including past timber harvesting that resulted in loss of large trees, degraded ecosystems and even-age stands. Without this information, there is inadequate environmental baseline information and it is impossible to put the current management proposals into context. Further, the cumulative impacts analysis in the DEIS is also deficient because it fails to analyze the impacts of this proposal in the context of the significant changes in the forest that have occurred over the last 50 years. As noted by a scientist reviewer, an appropriate cumulative effects analysis would “acknowledge how tree diameter frequency distributions had changed over the last 50-100 years . . . and how each of the alternatives would affect the recovery of the large tree component.” SCR at pp. II-52 and II-53. A cumulative analysis that looks only at “existing conditions,” in the manner of this DEIS fails to fully evaluate the proposed action with adequate consideration of the aggregate effects of past degradation, in violation of NEPA.

Finally, there is little meaningful discussion of climate change impacts and how those are likely to affect management of the Monument in upcoming decades, a critical discussion for any programmatic forest plan. NEPA compliance requires a meaningful evaluation of the carbon accounting of the various alternatives, an assessment of the vulnerability of ecosystems and resources (including sensitive species) to a changing climate, an identification of adaptation strategies, and an analysis of how climate considerations can be incorporated into programmatic management direction. *See, e.g., Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 368-70 (E.D.Cal. 2007).

VI. The DEIS Fails to Adequately Analyze A Reasonable Range of Alternatives Under NEPA

The analysis of alternatives suffers from several key deficiencies. Purportedly, the DEIS develops five action alternatives. In reality, however, there is very little meaningful difference. Desired conditions and objectives, in general, do not vary by alternative (DEIS, Vol. 1, p. 102), and the land allocations are largely the same in nearly all alternatives (DEIS, Vol. 1 p. 16, Table 1). Further, as the DEIS states, “Most of the standards and guidelines are the same for all of the action alternatives.” DEIS, Vol. 2 p. 169. For the alternatives that do contain some land allocation variations, two of them (Alternative C and Alternative E) are constructed with features that directly conflict with the Proclamation so that they could not reasonably or legally be chosen as the preferred alternative. There is only one action alternative other than the preferred action that could legally be implemented (Alternative F), and it differs very little from the preferred action (Alternative B).

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information beyond what was in the Silviculture Report, which presumably had already been reviewed and found lacking by the SCR.

Alternative C, in particular, purports to propose a management scheme similar to how the National Park Service manages Giant Sequoia National Park, a concept that has historically been favored by the environmental community. The management of the national park is widely recognized as focusing on restoration and as having created a resilient ecosystem, yet the management principles used there are not analyzed or described in detail in the DEIS. As a reviewing scientist notes, the DEIS fails to provide the most basic information about how the Park's management principles have fared in accomplishing ecological restoration, protection of species, or prevention of catastrophic fire – i.e., the goals for Monument management. *See* SCR at p. II-50. Instead, Alternative C includes recreation provisions that directly conflict with the Proclamation, as well as a fuels treatment area (the TFETA) that allows treatments that are not currently included in management of the National Park. Further, Alternative C fails to include any special management areas that would work to protect aquatic ecosystems, sensitive species, or other objects of interest in the Monument. This alternative does not appear to have been seriously developed as a viable option for meeting the restoration goals of the Proclamation.

Similarly, Alternative E purports to implement the grove protections of the MSA. As developed, however, it could never be given serious consideration because it is laden with outdated provisions that clearly conflict with the superceding Proclamation, including authorizing removal of up to 36 inch Sequoias and authorizing logging in groves. DEIS, Vol. 1 at p. 464. These unacceptable and illegal provisions mask the utility of adopting other provisions such as fuel load reduction plans and other grove protections that are still relevant. Further, none of the protected activity centers, home range core areas, riparian conservation areas, or other allocations designed to protect resources are included, even though they do not conflict with the MSA.

Notably, the DEIS does not contain an alternative that strikes a different balance with respect to the tradeoffs between fuels treatment and habitat or other resource protections, as discussed above. One of the primary purposes of NEPA is to sharply define and highlight the differences between alternative decisions so that the ultimate decision can be fully informed. The DEIS fails in this regard.¹³

Finally, the analysis in the DEIS appears to be, at least in part, improperly informed by the consideration of “cost offsets” to be generated by the “use of forest carbon.” Even assuming that these types of cost considerations are valid under the Proclamation, the DEIS fails to comply with NEPA because the Forest Service did not look at any alternatives to selling “biomass” to raise the funds needed in order to “treat” the desired number of acres, such as obtaining a greater

¹³ As a related point, the Silviculture Report, which is presumably the basis for the Fire and Fuels analysis, does not read like an objective analysis of the differences between the alternatives but instead makes conclusory statements, with little or no citation to scientific support, that Alternative F is the best alternative because it allows maximum flexibility.

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appropriation or transferring funds from other sources. This is actually the NEPA deficiency that the court found present in the 2004 Framework SFEIS. The alternatives that the Forest Service failed to evaluate in the 2004 Framework plan should also have been evaluated in this DEIS. *People of the State of California v. U.S. Department of Agriculture*, 2008 WL 3863479 at *28 (E.D.Cal. Aug. 19, 2008).

VII. The Draft Plan Fails to Comply with the NFMA 1982 Planning Rule

The DEIS claims that underpinnings of the Monument plan -- the “desired conditions” for the Monument -- are “aspirational” and therefore expressly disavows that they represent “commitments” or “final decisions.” *See, e.g.*, DEIS, Vol. 1, p. 16, 58. This is at odds, however, with the requirements of the 1982 Planning Rule. As noted above, under the 1982 Rule, it is mandatory that a plan contain “goals,” which include a description of “desired conditions” that are required “to be achieved.” 36 C.F.R. § 219.3 (1982). While the Forest Service may desire the flexibility that would flow from implementing an “aspirational” plan, its own regulations require that it make final decisions regarding goals to be achieved in the Monument lands, and that it adopt and implement specific management directives to accomplish those goals. As drafted the DEIS and Draft Plan do not do this.

VIII. The Forest Service Has Not Complied with the MSA

By its own terms, the 1990 Mediated Settlement Agreement expires when a new management plan is in place for the Sequoia National Forest. Under the MSA, however, the Forest Service is contractually bound (subject to NEPA) to adopt the specific provisions of the MSA designed to protect the Giant Sequoia Groves, where those provisions do not conflict with the 2000 Proclamation.

As did the 2003 plan, this Draft Plan and DEIS continue to minimize the legal significance of the MSA, referring to its legally binding provisions as mere “recommendations.”¹⁴ Further, both documents seems to be based on a misunderstanding of the Forest Service’s obligation under the MSA in that they propose to either adopt all of the MSA (ostensibly Alternative E) -- even where it conflicts with the Proclamation -- or to adopt none of the MSA (the preferred alternative). As found by the district court, however, the Forest Service has a legal obligation to conduct a good-faith analysis of the environmental impacts of the specific provisions of the MSA that are still in force and to incorporate those into the Monument

¹⁴ The Forest Service appears to have improperly made a unilateral determination that full implementation of the grove inventory required by the MSA is “prohibitive in terms of both time and money.” DEIS, Vol. 1 at p. 76.

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Plan where they do not conflict with the Proclamation.¹⁵ *California v. U.S. Forest Service*, 465 F.Supp.2d at 954.

CONCLUSION

Because of the deficiencies and problems discussed above, we request that the Forest Service withdraw this DEIS and Draft Plan and prepare planning documents for the Giant Sequoia National Monument that comply with the applicable legal requirements.

Sincerely,

/s/

SALLY MAGNANI
Supervising Deputy Attorney General
Environment Section

For EDMUND G. BROWN JR.
Attorney General

¹⁵ Some of the still relevant provisions are identified on page 459 of volume 1 of the DEIS. In addition, the MSA required that the Forest Service recommend the Moses Roadless Area as wilderness.