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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

CASCADIA WILDLANDS, GREATER
SOUTHEAST ALASKA CONSERVATION
COMMUNITY, GREENPEACE, CENTER FOR
BIOLOGICAL DIVERSITY, and THE BOAT
COMPANY,

Plaintiffs,

v.

FORREST COLE, in his official capacity as Tongass
National Forest Supervisor; BETH PENDLETON, in
her official capacity as Alaska Regional Forester;
THOMAS L. TIDWELL, in his official capacity as
Chief of the United States Forest Service; and the
UNITED STATES FOREST SERVICE, an agency of
the United States Department of Agriculture,

Defendants,

STATE OF ALASKA, et al.,

Intervenor-Defendants.

Civ. Case No. 1:14-cv-0015-RRB

PLAINTIFFS' REPLY BRIEF

**(Violation of National Environmental
Policy Act, National Forest Management
Act, and Administrative Procedure Act)**

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INTRODUCTION

Plaintiffs hereby submit their Reply to Federal Defendants' and Intervenor-Defendants' response briefs (Dkts. 68 ("FD Br.") and 69 ("ID Br.")), pursuant to Local Rule 16.3(c)(3).

In their response briefs, Federal Defendants and Intervenor-Defendants raise a number of collateral issues that fail to address the gravitas of Plaintiffs' claims. Where the Forest Service has adopted a peer-reviewed threshold for managing a sustainable wolf population—one that already reflects the nuances of the deer-wolf-human community—the agency must candidly explain how it can authorize more logging that drops deer habitat capability deeper below that threshold at every management scale. This duty, relevant to site-specific projects, derives from the 2008 TLMP, which sets a threshold for maintaining sustainable wolf populations.

Federal Defendants instead accuse Plaintiffs of conflating this duty with the obligation to provide for viable wolf populations, a statutory requirement that applies to the forest plan. But it is Federal Defendants who confuse the issue. The crux of this case is that the agency did not explain how it could approve the Big Thorne project consistent with its project level duty to provide for sustainable wolf populations. The Forest Service argues that the 2008 TLMP¹ allows the agency to approve the project and to degrade old-growth habitat in this manner, and Plaintiffs also challenge the forest plan and its old-growth conservation strategy as inadequate under NFMA to provide for viable wolf populations on the Tongass National Forest.

ARGUMENT

I. Reply on Claim 1: The Forest Service failed to explain rationally how the project provides enough deer habitat to maintain a sustainable wolf population.

The 2008 TLMP directs the Forest Service to manage for sustainable wolf populations in planning site-specific projects:

Provide, where possible, sufficient deer habitat capability to first maintain sustainable wolf populations, and then to consider meeting estimated human deer harvest demands. This is generally considered to equate to the habitat capability to support 18 deer per square mile (using habitat capability model outputs) in biogeographic provinces where deer are the primary prey of wolves.

Ex. 11, at 35 (WILD1.XIV.A.2) (emphasis added). While related to the agency's duty at the

¹ The acronyms and citation formatting in this brief are the same as in Plaintiffs' opening brief. See Op. Br. at 2 n.1. A table of exhibits is appended to this brief.

level of the forest plan to ensure a “viable” population of wolves on the Tongass, *see* 36 C.F.R. § 219.19, WILD1.XIV.A.2 is an independent, project-level requirement. As the Forest Service explained in the 2008 TLMP FEIS, “[t]he 1997 Forest Plan established a comprehensive, science-based old-growth conservation strategy to address wildlife sustainability and viability.” Ex. 9, at 88 (emphasis added).

That the Forest Service pursued an approach to wolf management premised on sustainability is unsurprising, given the best available science (a revision of earlier science) when the agency adopted the first iteration of WILD1.XIV.A.2. In the 1996 Wolf Conservation Assessment—the foundation of the agency’s entire wolf conservation strategy—the authors explained, “[w]e cannot suggest a minimum deer population because we do not know what would constitute a minimum viable wolf population either demographically or genetically.” Ex. 2, at 35. Instead, the authors substituted a sustainability metric that accounted for the dynamics of the wolf-deer-human community. *See id.* at 37; Ex. 4, at 8 (explaining that sufficient deer habitat capability to support 18 deer/mi² is the appropriate metric). The agency adopted this peer-reviewed numeric criterion to “maintain[] sufficient deer habitat capability to sustain wolf populations” in order to “preclude further declines in deer habitat capability that would adversely effect [sic] the equilibrium.” Ex. 52, at 8. With the 2008 TLMP amendment, the Forest Service added narrative language, directing “biologists to consider local knowledge of habitat conditions, spatial location of habitat and other factors rather than solely relying upon model results.” Ex. 10, at 16. This addition clarified “the use of the deer habitat capability model and standardized this to a habitat capability of 18 deer/square mile.” *Id.*

A. The Forest Service has not explained how it can authorize 6,000 acres of old-growth logging in areas already below the 18 deer/mi² threshold, while meeting its 2008 TLMP duty to ensure a sustainable wolf population.

The Forest Service assesses deer habitat capability “at the scale of a WAA or number of WAAs.” Ex. 9, at 100. With its 6,000 acres of low-elevation, old-growth logging, the Big Thorne project reduces deer habitat capability further below 18 deer/mi² at every management scale, including the four project-area WAAs and the biogeographic province. *See Op. Br.* at 3–4. At stem exclusion, deer habitat capability across all ownerships will fall below 10 deer/mi² in three of four project-area WAAs, and down to 71% of pre-1954 conditions at the biogeographic

province scale (14 deer/mi²). *See id.*

Intervenor-Defendants’ argument that Plaintiffs are insisting on 18 deer/mi² on “every acre” of the forest demonstrates a very fundamental misunderstanding of wolf management on the Tongass. ID Br. at 9–10. Deer carrying capacity is a modeled average over a large land area (a WAA, or multiple WAAs comprising a province); the Forest Service does not run the model on an acre-by-acre scale.

Because there is no dispute in this case that the Big Thorne project decreases deer habitat capability below 18 deer/mi² at every management scale, the Forest Service carries a heavy burden in articulating a different basis for finding the project consistent with WILD1.XIV.A.2. *See Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 729–30 (1998) (explaining that before proceeding with a site-specific project, the agency must ensure that the proposed project is consistent with the forest plan); *Greenpeace v. Cole*, 445 Fed. Appx. 925, 926 (9th Cir. 2011). The Forest Service has not attempted to apply the “where possible” language of WILD1.XIV.A.2 to this project, nor does it endeavor to demonstrate consistency by applying WILD1.XIV.A.2’s narrative language.

Federal Defendants instead argue that WILD1.XIV.A.2 is not enforceable and does not set a “hard floor,” relying on this Court’s recent decision in *Greenpeace v. Cole*, No. 3:08-cv-00162-RRB, 2014 U.S. Dist. LEXIS 136026 (D. Alaska Sept. 26, 2014). FD Br. at 3 n.4. This argument makes much over little, because the 2008 TLMP standards and guidelines apply to site-specific projects. *See* 16 U.S.C. § 1604(i). Whether labeled a “standard” or a “guideline,” a “threshold” or a “goal,” the Forest Service must demonstrate consistency with the provision. *See Greenpeace*, 445 Fed. Appx. at 926; *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005) (explaining that it is not the job of a reviewing court to determine which forest plan requirements are relevant and meaningful, nor is it appropriate for the agency to discount the significance of a duly-enacted forest plan provision in environmental compliance documents). The Ninth Circuit’s holding in *Greenpeace*, 445 Fed. Appx. at 926, is controlling, and the Forest Service has not articulated how this Court could depart from that precedent.

After the Ninth Circuit’s opinion, in its order on the remand proceedings in *Greenpeace*, this Court again reinforced that “all subsequent agency actions must comply with NFMA and the governing forest plan.” 2014 U.S. Dist. LEXIS 136026, at *2. And in no way did this Court

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interpret the requirements of the 2008 TLMP. The Court simply noted that the language of the 1997 and 2008 TLMPs is different, and it then held that the Forest Service “wrongly relied on the 2008 forest plan * * *.” *Id.* at *20. This Court certainly did not conclude that the language of WILD1.XIV.A.2 that was added in 2008 relieved the Forest Service of its statutory duty to explain how the project is consistent with the requirements of the forest plan. *Contra* FD Br. at 5. Both the Ninth Circuit’s opinion and the remand order in *Greenpeace* dispose of the Forest Service’s argument here as to the legal force of Standard and Guideline WILD1.XIV.A.2.

Federal Defendants also broadly suggest that the agency should be accorded deference for its interpretation of the forest plan. The problem is that the Forest Service never set forth an interpretation of the term “sustainable” as used in WILD1.XIV.A.2, so there is no interpretation to which to the Court may defer. *See Or. Nat. Desert Ass’n (“ONDA”) v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010) (“We cannot defer to a void.”). Forest planning documents and the scientific literature relied upon by the agency make clear, however, that an unsustainable wolf population is one in which total annual mortality exceeds recruitment, estimated between 30% to 38% yearly mortality for POW wolves. *See* Ex. 12, at 8; Ex. 22, at 14; Ex. 9, at 105; Ex. 2, at 35.

The record is clear that wolf mortality is already unsustainable within the Project area. *See* Op. Br. at 7. The Forest Service did not explain how it could further exacerbate these conditions by lowering deer habitat capability at every spatial scale while meeting its duty to provide for a sustainable wolf population.²

Rather than address this fatal flaw with the agency’s decision, Federal Defendants argue that deer habitat capability will not be reduced too much. *See* FD Br. at 68. That argument misses the point, and is severely misleading. *Cf. Or. Nat. Res. Council v. Goodman*, 505 F.3d 884, 895 (9th Cir. 2004) (no *de minimis* exceptions to compliance with forest plans). Federal Defendants appear to suggest that the agency can meet its duties by simply acknowledging that the project will have “some incremental effect on WAAs that are already below the 18 deer/mi² value,” FD Br. at 6, without demonstrating the project will provide for a sustainable wolf

² Indeed, Federal Defendants actually concede that the Big Thorne project will result in sustainability concerns. *See* FD Br. at 4 (localized areas of population vulnerabilities equate to sustainability concerns).

population. But an “incremental” reduction is not the same thing as consistency with the forest plan. As explained in Plaintiffs’ Opening Brief, “the agency has not demonstrated how approving the Big Thorne project that will lower deer habitat capability that is already below the 18 deer/mi² threshold across four WAAs, and the entire north-central POW biogeographic province, in light of alarming evidence of wolf population declines, is a ‘reasonable’ interpretation of the duty to provide for a sustainable wolf population.” Op. Br. at 21 n.17.³

Nor can the speculative future efforts of another agency save the Forest Service’s current approval of the project. *See* FD Br. at 9, 28. Whatever the merits of future harvest regulations, which are “unlikely to have much effect on rates of illegal harvest,” Ex. 12, at 9, promises of future management actions to be undertaken by other agencies cannot be a substitute for the Forest Service’s current management obligations. *Cf. Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936–37 (9th Cir. 2008) (“[W]e are not persuaded that even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, absent specific and binding plans.”); *Dine Citizens Against Ruining Our Env’t v. Klein*, 747 F. Supp. 2d 1234, 1259 (D. Colo. 2010) (agency’s reliance on a hypothetical future mitigation plan was arbitrary and capricious).

The bottom line is that while the Forest Service touts the “inherent flexibility” of WILD1.XIV.A.2., it cites no authority for the proposition that it can simply apply the standard and guideline on an ad hoc basis such that the agency may continue lowering deer habitat capability without explaining how it is providing for wolf sustainability. Plaintiffs are not suggesting that WILD1.XIV.A.2’s 18 deer/mi² is a hard floor. Rather, the Forest Service’s

³ Federal Defendants’ “tiering” argument on this point is misplaced. FD Br. at 7. Federal Defendants attempt to import a procedural standard from NEPA, 40 C.F.R. § 1508.20—regarding the disclosure of environmental impacts—to satisfy the NFMA duty to ensure consistency with the TLMP. Under NEPA, agencies may “tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review.” *Id.* But “a programmatic EIS will often be insufficient as it relates to site-specific actions.” *Sierra Club v. Block*, 576 F. Supp. 959, 964 (D. Or. 1983); *see also League of Wilderness Defenders/Blue Mts. Biodiversity Proj. v. U.S. Forest Serv.*, 883 F. Supp. 2d 979, 1009 n.36 (D. Or. 2012). Likewise, the 2008 TLMP FEIS’s general viability projections cannot be used as a surrogate for demonstrating site-specific compliance with the forest plan’s sustainability requirement, based on the evidence in the record. *See* 16 U.S.C. § 1604(i); *Earth Island Inst. v. Carlton*, 626 F.3d 462, 470 (9th Cir. 2010).

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NFMA violation occurs here where the agency has failed to comply with the numeric sustainability threshold and failed to offer any other explanation for how it is providing enough old-growth deer habitat to support a sustainable wolf population.

B. The Forest Service approved the Big Thorne project without addressing recent data indicating a POW wolf population crash.

In the FEIS and ROD, the Forest Service did not account for evidence of a crashing wolf population in the project area and on POW. This failure was fatal to the agency's decision because the Forest Service may not simply ignore hard data reflecting population declines far below sustainable levels, while concluding that the project is consistent with the agency's duty to provide for a sustainable wolf population. *Mtr. Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (quotation omitted). Federal Defendants fault Plaintiffs for relying on actual data, and point instead to the opinions of ADF&G. In doing so, Federal Defendants create a false frame because only Dr. Person's opinion is based on empirical evidence. At no point did the Forest Service address that record evidence and explain its decision—the Forest Service simply ignored it.

In their Opening Brief, Plaintiffs provided a timeline of wolf population estimates and data—based on field research—demonstrating that the population within the project area has declined dramatically in recent years. *See Op. Br.* at 22.⁴ These estimates of population declines are further substantiated by recent evidence on unsustainable wolf mortality rates. A 2008 study of wolf mortality showed a 46% annual mortality rate. *Ex. 12*, at 8. A 2013 progress report on wolf population research disclosed an 80% mortality rate. *Ex. 29*, at 2.⁵ These figures are well

⁴ Again, this is not simply Dr. Person's "opinion," as Federal Defendants suggest. *FD Br.* at 9. This is based on the body of scientific evidence and data that was before the agency when it approved the Project. *See Ex. 12*, at 1; *Ex. 29*, at 2; *Ex. 30*, at ¶ 15–19.

⁵ Federal Defendants craft a post-hoc rationalization in an attempt to minimize the import of the 80% finding. *FD Br.* at 28–29. Untethered to any rationale offered by the agency in the administrative record, this argument must be dismissed. *See ONDA v. BLM*, 625 F.3d at 1120 ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action"). But even if taken at face value, the unsupported argument is unconvincing and misleading because it neglects to mention that the 80% figure is derived from a study conducted in the Big Thorne

above the 30% to 38% total annual mortality sustainability threshold, discussed *supra* page 4.

Although the Forest Service relied heavily on anecdotal evidence—which itself suggests population declines in GMU 2 of about 50% from the last, scientifically validated and peer reviewed population estimate—the agency merely noted that “the population on Prince of Wales Island may be lower than in previous years * * *.” Ex. 25, at 157. It was arbitrary for the agency to conclude that it could authorize more old-growth logging and more road building consistent with WILD1.XIV.A.2., without accounting for evidence of steep population declines. *Cf. Seattle Audubon Society v. Epsy*, 998 F.2d 699, 703–04 (9th Cir. 1993) (holding that the Forest Service violated NEPA where it relied on stale scientific evidence without addressing more recent, contradictory population data).⁶

Federal Defendants tout the opinion of ADF&G, implicitly suggesting that its opinion trumps hard data. However, in 2012, ADF&G “believed” that the wolf population was not “threatened with extinction,” a belief unsupported by any data. (And, moreover, a belief attached to a different standard than sustainability).⁷ Indeed, ADF&G in its comments on the DEIS expressly noted a “paucity of quantitative data with which to assess actual population levels.” *See* FD Br. at 10 n.14 (citing State’s DEIS comments at AR 736_3150).

Dr. Person, on the other hand, relied on evidence in the record signaling a population crash in the project area, including post-2012 fieldwork using DNA hair trapping and radio collaring methods. *See* Op. Br. at 22. Dr. Person’s conclusions have been echoed by the USFWS, which has specifically noted that “wolf mortality has been excessive across the project area and other areas of [POW].” Ex. 21, at 3 (emphasis added); *see also* Ex. 40 at 1 (noting evidence that where over 40% of a wolf pack’s home range is logged or roaded, mortality will

project area. *See* Ex. 30, at ¶ 16 (“Our study area was essentially coterminous with the Big Thorne project area.”). Accordingly, the report amplifies the project-specific sustainability concerns.

⁶ *See also* Ex. 9, at 94 (“Either a significant current or predicted downward trend in population numbers or density, or a significant current or predicted downward trend in habitat capability that would reduce a species’ existing distribution indicates a viability concern.”).

⁷ At any rate, ADF&G’s opinion does not appear to be shared by its own biologists. *See, e.g.*, Ex. 54, at 3 (Area Biologist’s 2010 testimony to the Board of Game explaining that the take home message regarding the wolf population is that “we’ve had drastic declines”); Ex. 55 (email correspondence between Dr. Person—while he was with ADF&G—and Forest Service coordinator, noting that “density of [wolf] sign is extremely low compared to previous years”).

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exceed reproduction); Ex. 37, at 22 (map showing majority of Big Thorne project area, and high percentage of POW, over 40% logged/roaded). Data reflecting a population crash is not irrelevant; rather, it directly undercuts the Forest Service's decision and must be addressed by the agency. *State Farm*, 463 U.S. at 43.

C. The Forest Service did not account for the predator-prey system's non-linear responses when habitat capability falls below 18 deer/mi².

The Forest Service compounded its failure to account for empirical evidence of the declining wolf population by failing to address the non-linear responses a predator-prey dynamic will exhibit when habitat capability drops below a minimum ecological threshold. Here, that threshold is 18 deer/mi.² See Ex. 30, at ¶ 34o.

Federal Defendants implicitly acknowledge the agency's failure because they can point to no citation from the Big Thorne record where the agency considered this scientifically validated feature of predator-prey dynamics. They instead attempt to sweep this critical omission under the rug by asserting that the threshold for a non-linear response remains "undefined." FD Br. at 11. That argument flatly conflicts with the record and is simply not true.⁸ See Ex. 30, at ¶ 34o ("If a timber sale project results in deer habitat capability below 18 deer/mi², the likelihood is that predator-prey dynamics will become more erratic and the resilience of deer to predation, hunting, and winter weather is reduced,"); Ex. 37, at ¶ 4 ("Our work to develop the deer habitat capability level (18 deer/mi²) was peer-reviewed (Person et al. 1996). The deer habitat capability value of 18 deer/mi² was accepted by the U.S. Forest Service and [ADF&G], as well as expert panels assessing the viability of wolves during the 1997 revision of the TLMP as a minimum level below which there was greatly increased risk of predator-prey instability, loss of resilience of both wolf and deer populations, and insufficient deer to sustain human subsistence harvesting") (emphasis added); Ex 4, at 8 ("[H]abitat capability of at least 18 deer/mi² is required to meet our criteria for the minimum density of deer").

While Federal Defendants obfuscate the issue, the fact remains that the Forest Service did not disclose and consider the impacts of logging in areas already below 18 deer/mi² carrying capacity for deer. Indeed, project area WAAs across all ownerships will on average fall about 50% below 18 deer/mi² at stem exclusion, while the north-central POW biogeographic province

⁸ Also, the agency did not take this position during the administrative proceedings.

will drop 23% below the threshold. *See* Op. Br. at 4. Thus, Federal Defendants’ overtures about “incremental” habitat loss ring profoundly hollow.⁹

D. The agency’s “source population” theory is entirely speculative, and the Forest Service ignores record evidence on actual habitat conditions.

Federal Defendants’ final effort to revive the agency’s flawed consistency analysis rests on an entirely speculative source population theory that undercuts the very foundations of the old-growth conservation strategy and conflicts with record evidence of on-the-ground conditions. As Plaintiffs noted, this is an arbitrary rationale, given the dual-pronged old-growth conservation strategy and record evidence showing poor habitat conditions and unstable wolf populations in the very areas the agency assumed could provide a “source” for wolves once hunters decimate them in the project area. *See* Op. Br. at 25 (citing *State Farm*, 463 U.S. at 43).

The maintenance of deer habitat in old growth reserves cannot provide for maintenance of deer habitat in the matrix. *Contra* FD Br. at 7–8. The old-growth conservation strategy “includes two major components: (1) a forest-wide network of [reserves], and (2) a series of standards and guidelines applicable to lands where timber harvest is permitted.” Ex. 25, at 92 (emphasis added). “Within the matrix (areas outside of reserves), components of the old-growth ecosystem are maintained through standards and guidelines designed to provide for important ecological functions * * *.” *Id.*¹⁰ The 18 deer/mi² standard and guideline applies collectively to reserves and the matrix lands, where deer are the primary prey of wolves.¹¹ The dual-pronged old-growth conservation strategy crumbles if the agency can sacrifice the quality of old-growth habitat in the matrix. *See* Ex. 53, at 6 (“[A] number of species-specific standards and guidelines provide additional protection to old growth within the matrix.”) (emphasis added). Relying on reserves to meet a sustainability requirement applicable to matrix lands turns the entire old-

⁹ Federal Defendants relegate to a footnote an argument that the duly adopted 18 deer/mi² standard and guideline somehow underestimates deer habitat capability, but the scientists who developed the threshold long ago laid that position to rest. Ex. 4, at 4–6.

¹⁰ *See also* Ex. 9, at 88 (“In [the matrix], the standards and guidelines sustain key components of the landscape that the available scientific information indicates is important for wildlife.”).

¹¹ There is no dispute that deer are the primary prey of wolves on POW. Ex. 2, at 16.

growth conservation strategy on its head. *See* Op. Br. at 26–27.¹²

Nor may the Forest Service ignore actual habitat conditions in relying on its “source” population theory. If the agency is relying on other areas to support a sustainable wolf population in the Project area, the agency must consider record evidence on habitat conditions and species’ abundance, rather than blindly point to administrative land use designations. *State Farm*, 463 U.S. at 43; *cf. Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 933–34, 936 (9th Cir. 2010) (agency cannot meet its duties under NFMA where providing sufficient habitat has no relationship to actual population trends). The agency categorically failed to reconcile its source population theory with record evidence on the quality of habitat and the status of wolf populations in other WAAs, based on local knowledge of habitat conditions and spatial location of habitat, that shows low-quality habitat¹³ and at-risk wolf packs.¹⁴ *See* Op. Br. at 25–27.¹⁵

Where the agency concludes that nearby WAAs and reserves would “assure” wolf sustainability, *see* Ex. 25, at 161, it must adequately support its decision. The Forest Service’s failure to do so here rendered its decision arbitrary and capricious. *See Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (en banc) (“The Forest Service must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.”); *Buffalo River Watershed Alliance v. Dep’t of Agriculture*, No. 4:13-cv-450-DPM, 2014 U.S. Dist. LEXIS 168750, at *11 (E.D. Ark. Dec. 2, 2014)

¹² And Federal Defendants themselves note that wolves are dependent on matrix management because their habitat requirements extend beyond most old-growth reserves. FD Br. at 8.

¹³ For example, WAA 1332, one of the WAAs upon which the agency relied to support its source pack theory, has a current deer habitat capability of 12.44 deer/mi². Op. Br. at 25.

¹⁴ For example, the two breeding females in one of the packs the agency allegedly considers a population “source” were killed in 2012. Ex. 30, at ¶ 18.

¹⁵ The USFWS’s opinion further undercuts the Forest Service’s theory. *See* Op. Br. at 28–29. This opinion is based on the Wolf Conservation Assessment’s conclusions about wolf immigration. Ex. 2, at 18 (“Wolves occupying islands (or other insular areas) in southeast Alaska will likely be more vulnerable to overexploitation because mortality cannot be readily compensated for by immigration from adjoining areas.”)

Plaintiffs do not suggest that the Forest Service cannot rely on the opinions of its own experts in light of conflicting views; rather, the point is that where the Forest Service’s conclusions contradict its own Forest Plan, are unsupported (indeed, contradicted) by record evidence, and are called into question by the expert wildlife agency, the Forest Service’s decision should not be accorded deference. *Contra* FD Br. at 14.

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("[C]onclusions can't take the place of reasons.").

II. Reply on Claim 2: The Forest Service failed to disclose and consider information on the direct, indirect, and cumulative impacts of the Big Thorne project on the wolf.

NEPA requires the agency to "make every effort to disclose and discuss at appropriate points in the [DEIS] all major points of view on the environmental impacts of the alternatives including the proposed action," and to "discuss at appropriate points in the [FEIS] any responsible opposing view which was not adequately discussed in the [DEIS] and shall indicate the agency's response to the issues raised." 40 C.F.R. § 1502.9(a), (b) (emphasis added); *see also Greenpeace*, 445 Fed. Appx. at 928 (stating that the Forest Service must discuss in the final statement "any responsible opposing views"). Before publication of the FEIS, Dr. Person and the USFWS raised specific concerns about project-level and POW-wide impacts to wolves and deer, and the Forest Service was legally obligated to disclose and respond to those views in the Final EIS. *Id.*

A. The Forest Service failed to disclose the dissenting scientific opinions of Dr. Person and the USFWS.

Dr. Person and the USFWS provided critical scientific opinions on the following topics:

- **Baseline conditions**, *e.g.*, Ex. 21, at 3 ("FWS is concerned that wolf mortality has been excessive across the project area and other areas of [POW].");
- **The magnitude of impacts from harvest of low-elevation old-growth stands**, *e.g.*, Ex. 17, at 2 ("I doubt that a resilient and persistent wolf-bear-deer-human predator-prey system will be possible within the watersheds affected after the project is completed * * * ."); *id.* at 1 ("The Big Thorne sale goes further to remove the most important winter habitat for migratory deer in the watershed."); *id.* at 2 ("Cumulative loss of productive forest habitat [in project area watersheds] causes me to question the viability of those watersheds to maintain ecological functions and support a healthy predator-prey community.");
- **The magnitude of impacts associated with added road densities**, *e.g.*, Ex. 21, at 4 (disagreeing with statements in the DEIS that 1.5 mi/mi² may be a suitable road density target);
- **The efficacy of mitigation**, *e.g.*, Ex. 17, at 1 ("There are simply no methods of mitigation that will compensate for that much loss of winter habitat."); and
- **The "source population" theory**, *e.g.*, Ex. 21, at 6 (disagreeing that the project area's failure to meet 18 deer/mi² may be mitigated by factors such as immigration of wolves dispersing from adjacent source populations).

Federal Defendants do not argue (nor could they) that the opposing scientific viewpoints of Dr. Person and the USFWS are not "responsible." Nor do Federal Defendants contest that these

dissenting opinions were presented to the agency before publication of the FEIS.¹⁶ Finally, Federal Defendants do not cite any specific pages in the FEIS where these dissenting opinions were disclosed and have for all practical purposes conceded the issue. *See Pac. Coast Fed'n of Fishermens's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1253 (W.D. Wash. 2007).

While Federal Defendants include a string cite to pages in the FEIS, FD Br. at 16, they are careful not to argue that the FEIS actually discloses Dr. Person's dissenting scientific opinions. Indeed, the Forest Service can only go so far as to argue that it "considered" and "addressed" concerns generally about the impacts to the wolf. *Id.* at 14–16. Federal Defendants have conceded the issue by failing to argue in their legal brief that the FEIS discloses the opposing views of Dr. Person and the USFWS on the impacts of this project—"evidence and opinions directly challeng[ing] the scientific basis upon which the Final EIS rests and which is central to it." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003). And Federal Defendants' "project-specific" versus "island-wide" distinction, FD Br. at 14–15, is irrelevant for purposes of NEPA disclosure. Up-front and fair disclosure of project-specific impacts is exactly the purpose of NEPA's procedural requirements. *See* 40 C.F.R. § 1502.1(b) (EIS must "provide a full and fair discussion of significant environmental impacts"). Opposing views about the scope and magnitude of impacts of the Big Thorne timber sale were provided to the agency prior to publication of the FEIS; by failing to disclose and respond directly to these views, the agency violated NEPA's procedural requirements. *See* 40 C.F.R. § 1502.9; *see also Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1172 (9th Cir. 2006) (EIS "must respond explicitly and directly to conflicting views in order to satisfy NEPA's procedural requirements") *abrogated in part on other grounds, Winter v. Nat. Res. Def. Council*,

¹⁶ Intervenor-Defendants suggest that the State followed an appropriate procedure when delivering comments to the Forest Service. *See* ID Br. at 16–17. Whatever the merits of the State's "One Voice" policy, there is no dispute that it does not comport with the public disclosure requirements of NEPA. While the State may prefer to streamline its comments, that does not excuse the suppression of relevant information and scientific opinion on the Big Thorne project's impacts. In any event, Plaintiffs provided Dr. Person's dissenting opinions in their comments on the DEIS—there can be no argument here that the Forest Service was somehow in the dark. *See* 40 C.F.R. § 1502.9(b) (agency must respond to any responsible opposing view).

555 U.S. 7 (2008).¹⁷

B. The Forest Service did not disclose the cascading consequences of logging below 18 deer/mi², an important aspect of the problem.

An agency takes the required “hard look” at a project when it conducts a full and fair discussion of environmental impacts. *W. Watersheds Proj. v. Abbey*, 719 F.3d 1035, 1047 (9th Cir. 2013) (citing 40 C.F.R. § 1502.1). This involves the dissemination of high quality information, 40 C.F.R. § 1500.1(b), and a demonstration of scientific integrity. *Id.* § 1502.24. On the other hand, “[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Kraayenbrink*, 632 F.3d at 491.

As discussed above, *see supra* Part I.C., the scientific literature consistently has flagged the cascading consequences of logging further below the 18 deer/mi² threshold because the predator-prey dynamic responds in a non-linear fashion to incremental reductions. *See, e.g.*, Ex. 28, at 20 (“As the capacities of logged landscapes to support deer diminish, nonlinear predator-prey dynamics will dramatically alter those conditions such that populations of wolves, black bears, and deer likely will decline substantially.”).

Rather than fully and fairly address these consequences, the Forest Service generally described reductions in deer habitat capability and “localized” population declines. Federal Defendants acknowledge the agency’s conclusion that the project will “reduce deer habitat capability in the North Central Prince of Wales Biogeographic Province slightly.” FD Br. at 18–19.¹⁸ This general statement does not disclose the risk to actual populations of deer and wolves,

¹⁷ It is interesting to observe the very little credence Federal Defendants are willing to lend the opinion of its federal “sister” agency, the USFWS, *see, e.g.*, FD Br. at 22, while at the same time blindly adopting the opinion of a state agency, the ADF&G. *See, e.g., id.* at 10 n.14 (adopting State’s opinions on the wolf population); *id.* at 8 n.11 (citing ADF&G white paper as a substitute for Forest Service’s interpretation about the scope of standards and guidelines). While the Forest Service is not required to “adopt” the views of a sister agency, it is not permitted to simply ignore them in the FEIS as it did here. *See W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011) (“Instead of a serious response to FWS’s concerns and an analysis and consideration of the various delays and impediments in the [agency’s management], as required by NEPA, the Final EIS downplays the environmental impacts of the [proposal].”)

¹⁸ Federal Defendants go one step further, claiming that the “minor reduction in deer habitat capability associated with the Project would not trigger such non-linear responses.” FD

and it failed to provide the public with available high quality information, *see* 40 C.F.R. § 1500.1(b), and failed to ensure the requisite level of scientific integrity by disclosing available information on predator-prey dynamics. *Id.* § 1502.24.

Plaintiffs are not “insisting” that the agency undertake to model the non-linear consequences of logging below 18 deer/mi². FD Br. at 18–19. This is a red herring argument. Plaintiffs are insisting that to comply with NEPA, the Forest Service was required to at least disclose and acknowledge in the Big Thorne FEIS the risk of cascading effects of logging further below that threshold. And, contrary to Federal Defendants’ suggestion, the science behind the destabilizing effect of logging under 18 deer/mi² has been known to the agency for as long as that minimum threshold itself. *See, e.g.*, Ex. 2, at 28 (“The implication * * * is that equilibrium, and therefore stability, would be difficult to achieve and tenuous at best if carrying-capacity for deer declines.”); *see also* Ex. 5 at 96–97 (“Our predictions indicate that deer will decline disproportionately to the decay of [carrying capacity]. Thus a small change in [carrying capacity] may precipitate a large change in deer numbers * * *.”).

III. Reply on Claim 3: The Forest Service was required to prepare a Supplemental EIS.

A. Use of a SIR was procedurally incorrect because the information was not “truly new.”

Federal Defendants concede that a SIR may not be used to correct a deficiency in an EIS, and may only be used to consider information that is truly new. FD Br. at 20. Thus, if the Court holds that the FEIS failed to disclose the dissenting scientific opinions of Dr. Person and the USFWS, Federal Defendants must revise and supplement the EIS to comply with NEPA’s action forcing procedures and may not rely on the SIR that was prepared after the EIS was completed. *See* Op. Br. at 32, 34–35 (by only obliquely citing Dr. Person’s prior scientific research, the FEIS did not disclose dissenting scientific opinions about project-specific impacts).

Br. at 19. This was not a position taken by the agency in the FEIS (or ROD), and courts are not permitted to accept agency counsel’s post-hoc rationalizations. *See ONDA*, 625 F.3d at 1120 (holding that a position first articulated in a brief—and not in the EIS itself—was a post hoc rationalization advanced to defend agency action against attack). Perhaps more importantly, this belated explanation is flatly inconsistent with the entire premise of non-linearity, *i.e.*, even minor reductions can have severe consequences. *See* Ex. 37, at ¶ 6 (“[A] small change in carrying capacity for deer (deer habitat capability) may result in a big change in actual deer numbers resulting from predation.”).

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As discussed at length, *see* Op. Br. at 34–36, the SIR goes well beyond considering truly new information. The Forest Service was fully aware that the State was suppressing Dr. Person’s views from its official “One Voice” comments long before the EIS was completed—Plaintiffs provided all of that information to the agency in conjunction with their comments on the Draft EIS. Op. Br. at 12–13. The fact that Dr. Person’s appeal statement was dated after the ROD is not dispositive. Far from being a “belated” statement, ID Br. at 18, 20, the record reflects unequivocally that Dr. Person’s and the USFWS’s dissenting scientific opinions were provided to the Forest Service well before the EIS was finalized and released to the public, and well before Dr. Person’s appeal statement. Op. Br. at 12–13 (citing Exs. 17, 18, 20, 21, 30).

B. The Forest Service failed to apply CEQ’s significance criteria, instead applying incompatible standards of its own invention.

There is also no dispute that CEQ’s “NEPA regulations define what may be considered ‘significant’ within the meaning of 40 C.F.R. § 1502.9(c)(1)(ii).” FD Br. at 23; *see also* 40 C.F.R. § 1508.27. Even if Dr. Person’s scientific opinions were truly new (and they were not) the SIR still must fail because the Forest Service failed to apply the correct legal criteria in assessing whether that information “may be” significant. This is not a matter of the agency simply failing to cite to a regulation. The Forest Service ignored the CEQ criteria at the time of its decision, and now Federal Defendants abandon the very rationale set forth in the SIR and attempt to construct an entirely new explanation for the decision not to supplement the EIS.

As Plaintiffs discussed in their opening brief, the Forest Service and Forest Supervisor Cole applied explicitly the following standard in deciding whether to prepare a supplemental NEPA analysis: “If I do not implement the Big Thorne project, would this solve the issue of wolf mortality on Prince of Wales Island?” Ex. 42 at 7; Op. Br. at 36–37. Federal Defendants make no effort in their response brief to defend the use of this standard and simply ignore Plaintiffs’ argument that the Forest Service applied the wrong criteria at the time of its decision. *See* FD Br. at 22–26. Federal Defendants thus concede that the standard utilized by the agency on the record is inconsistent with the CEQ regulations as they do not defend it.

Instead of defending the agency’s original rationale, Federal Defendants now conjure an entirely new explanation for why the information in Dr. Person’s appeal statement does not meet the CEQ criteria of significance. This is a classic example of a post-hoc rationalization by

agency counsel because nowhere in the SIR itself did the Forest Service apply the CEQ criteria to the factual information in the record. *See ONDA v. BLM*, 625 F.3d at 1120.

Even if this Court were to entertain the agency's untimely rationale offered for the first time in its response brief, that explanation is far from convincing. At its core, Federal Defendants are asking for the Court to allow the Wolf Task Force and SIR process to take the place of the mandatory procedural requirement to supplement the EIS to address new information on the impacts of a project. FD Br. at 24–26.¹⁹ Dr. Person expressed serious scientific concerns that the viability of the wolf on POW is threatened, and Federal Defendants respond that the Wolf Task Force “vetted” and “addressed” those concerns, FD Br. at 25–26, even though the members of the Wolf Task Force were split down the middle as to the validity of Dr. Person's scientific opinions, and magnitude of projected consequences. *See, e.g.*, Ex. 39, at 7 (USFWS and Logan concluding that it is “unknown whether a substantial risk of island-wide predator/prey collapse or loss of sustainable populations of deer and wolves will result”).²⁰ NEPA flatly prohibits a federal agency from resolving these types of scientific disputes without following the action-forcing procedures of proper public disclosure, comments, and response to comments in a supplemental EIS. 40 C.F.R. § 1508.27(b).

Unless an agency follows the correct procedure, a federal court is not in a position to evaluate the agency's choice among competing scientific opinions. Op. Br. at 36–37.

It is not up to the court to evaluate or to discount the opinions of responsible experts in a scientific field. It is the duty of the [agency] to identify, evaluate and address the new information, allow public comments, and formulate its plan accordingly. The only credible conclusion to be reached in this controversy, regardless of which ‘responsible experts’ the court chooses to believe, is that NEPA requires the public to be involved, and the [agency] has not followed procedures to allow the public to be involved.

Portland Audubon Soc’y v. Lujan, 795 F. Supp. 1489, 1501–03 (D. Or. 1992) (holding that agency failed to prepare a supplemental EIS to address new information on impacts of old-

¹⁹ And Intervenor-Defendants' suggestion that the Wolf Task Force comprised a team of “wolf biologists,” *see* I-D. Br. at 12, is plainly erroneous. *Cf.* Ex. 37, at ¶ 28.

²⁰ *See also id.* at 10 (USFWS and Logan noting that “much of the best remaining winter habitat would be removed from the project area, which could have much greater influence on deer and wolf populations following a series of extreme winters than indicated by the percentage loss of habitat capability”).

growth logging). A Wolf Task Force and SIR are plainly not the correct procedures to address Dr. Person’s concerns that the Big Thorne project may threaten the viability of the wolf on POW. The Forest Service may eventually choose to disagree with his opinions (after supplementing the EIS), but it is far from convincing for the agency to argue now, in a post-hoc legal brief, that the impacts of the project are not “highly controversial” or “uncertain” where the agency’s own task force and even its own two biologists could not reach agreement on Dr. Person’s opinions— informed by decades of his own research and dozens of peer-reviewed publications.²¹

C. The SIR’s reliance on hunting and trapping regulations is arbitrary.

As a final matter, Federal Defendants misrepresent Plaintiffs’ argument in an effort to defeat it. Plaintiffs have never stated wolf harvest management “is a creation of the SIR.” FD Br. at 27. Plaintiffs instead argued that the TLMP has always relied both on protecting deer habitat, and, to a lesser extent, limiting the killing of wolves to manage for a viable population. Op. Br. at 39 (citing Ex. 2, at 5 and Ex. 9, at 106). The SIR is arbitrary because the Forest Service now presumes, for the first time, and without a scientific basis, that it can provide for wolves solely through another agency’s harvest management—even though deer habitat would be degraded far below the levels necessary to provide for the needs of wolves and subsistence hunters and road density would be increased. The agency never once took this position in developing the forest plan, and its decision here is arbitrary because it has failed to explain why its position differs now when addressing the views of Dr. Person that the Big Thorne project threatens the viability of the wolf. *Ramapraksh v. FAA*, 346 F.3d 1121, 1124–25 (D.C. Cir. 2003) (“[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation. Agencies are free to change course * * * but when they do so they must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”) (citations omitted).

The agency’s change in its position is all the more troubling because the record demonstrates: 1) that the Forest Service does not have any concrete population estimates that can

²¹ Federal Defendants also attempt to downplay the importance of possible violations of NFMA as a consideration in whether the new information “may be” significant. FD Br. at 24 n.30. But possible violations of governing land management plans are precisely the types of issues to be discussed in environmental review documents under NEPA. *See Native Ecosystems Council v. U.S. Forest Serv.*, 866 F. Supp. 2d 1209, 1231 (D. Idaho 2012).

be used to set effective limits on wolf harvest, Ex. 37, at ¶¶ 18–20; and 2) illegal killing of wolves already accounts for a substantial portion of annual mortality. Op. Br. at 40–41. Federal Defendants’ only response to the peer-reviewed studies on wolf mortality is to argue that those studies are from a “study area much smaller than Prince of Wales Island * * *.” FD Br. at 28. As Plaintiffs pointed out, however, those studies in fact are from the very location of this specific timber sale. Op. Br. at 40–41. The Forest Service never reconciled this data with its decision to change course from the TLMP and to rely on harvest management in the matrix to compensate for degradation of old-growth deer habitat. Nor did it confront evidence directly undercutting its assumptions about efficacy of harvest restrictions in landscapes that can no longer support abundant and resilient deer populations. See Ex. 28, at 21; see also Ex. 30, at ¶ 23 (“My experience indicates that regulations designed to sustainably manage wolf populations will be ineffective, because of unreported and illegal take of wolves (Person and Russell 2008).”); Ex. 2, at 31 (“Substantial human-caused mortality can occur even when wolves are completely protected from legal hunting and trapping.”).

IV. Reply on Claim 4: The 2008 Tongass Land Management Plan fails to comply with the species viability requirement of the National Forest Management Act.

It is notable that, in response to Plaintiffs’ fourth claim that the 2008 TLMP is unlawful and contrary to the requirements of NFMA, Federal Defendants do not contest this claim is ripe even if the underlying project is invalid. Op. Br. at 42. Nor do Federal Defendants argue that Plaintiffs lack standing or that this claim suffers from any other procedural infirmity. Thus, it is appropriate for this Court to reach the merits to decide whether the 2008 TLMP’s substantive provisions “provide for diversity of plant and animal communities.” 16 U.S.C. § 1604(g)(3)(B).

While Federal Defendants refuse to acknowledge the applicable law in response to Plaintiffs’ TLMP claim, Federal Defendants concede in the *SEACC* litigation that the wildlife viability provisions of the 1982 NFMA regulations have been incorporated into the 2008 TLMP and thus govern the determination of whether the Forest Service has complied with its statutory obligation. See *SEACC* FD Br. at 9 (stating that the “Forest Service also included a requirement to maintain viable populations in the 2008 Forest Plan’s standards and guidelines”). And while the Forest Service does not even cite or refer to that language a single time in its argument on the TLMP claim in this case, the Court’s analysis should start with the governing law. Wildlife

habitat “shall be managed to maintain viable populations of” management indicator species. 36 C.F.R. § 219.19; Ex. 11, at 29 (WILD1.II.B.). And a “viable population” is one that has “the estimated number and distribution of individuals to insure its continued existence is well distributed in the” planning area. *Id.* (emphasis added).

A. Standard and Guideline WILD1.XIV.A.2 on deer habitat capability, as interpreted by the Forest Service, is vague and unenforceable and thus does not “insure” anything at all about the population of the wolf.

As the Forest Service has now made clear, it interprets the 2008 TLMP to allow for the degradation of old-growth habitat well below the level necessary to provide for a sustainable population of the wolf and to meet the needs of subsistence hunters. Op. Br. at 29. As the chart at page four of Plaintiffs’ opening brief demonstrates, deer carrying capacity will be far below 18 deer/mi² across wide swaths of POW—at every scale of analysis. *Id.* at 4. Thus, if the Big Thorne project is allowable under the 2008 TLMP, there is simply no enforceable standard at all in the 2008 TLMP that protects old-growth habitat in the matrix. This is precisely the position taken by the Forest Service in its brief. FD Br. at 29. As a direct result of this shortcoming in the forest plan, the Big Thorne timber sale will further degrade habitat to the detriment of the wolf on POW, to the tune of another 6,000+ acres of old-growth logging.

Instead of arguing that the forest plan provides an enforceable standard for protection of old-growth habitat, the Forest Service claims that only 5 deer/mi² are necessary to “support viable populations of wolves alone * * *.” FD Br. at 30. The apparent theory of the Forest Service is that if there are no subsistence hunters of deer, then 5 deer/mi² would be adequate to support a viable population of wolves. *Id.*; *see also* SEACC TLMP FD Br. at 7–8.

It is remarkable that the Forest Service now promotes 5 deer/mi² as a threshold for wolf viability. First, of course, the 2008 standards and guidelines say nothing whatsoever about this criterion. As this Court recently found, the Forest Service originally adopted the deer habitat capability standard in the 1997 TLMP in order to meet its statutory obligation to “maintain viable populations of existing native” species. *Greenpeace*, 2014 U.S. Dist. LEXIS 136026 at *5. Thus, the 1997 Plan directed the Forest Service to “accomplish this by [p]rovid[ing] sufficient deer habitat capability to first maintain sustainable wolf populations, and then to consider meeting estimated human deer harvest demands.” *Id.* And this Court also explained

that “the Forest Service later adopted an 18 deer per square mile guideline as the minimum to support hunting and wolves.” *Id.* Since 1997, the TLMP has directed the Forest Service to manage for viable populations of wolves by supporting the needs of both wolves and subsistence hunters. This is the same principle that underlies the 2008 TLMP, and the 18 deer/mi² figure was adopted verbatim into the 2008 forest plan.

The Forest Service attempts to roll back the clock and re-write the forest plan by now arguing it can manage for 5 deer/mi². The agency cherry picks a citation from the EIS on the 1997 TLMP and a citation to a draft 1993 report. FD Br. at 30 (citing 1997 forest plan FEIS, App. N at N-31; Kirchhoff (1993)).²² The Forest Service fails to disclose the very next sentence of that passage in the 1997 FEIS:

Kirchhoff (1993) recommended that a long-term carrying capacity of 5 deer/mi² was necessary to sustain a deer/wolf equilibrium in GMU2. This estimate was revised by Person et al. (1996), who suggested that an average long-term carrying capacity of 13 deer/mi² would reduce long-term risks to wolf viability, sustain wolves, and maintain current levels of deer harvest by humans.

Ex. 52, at 11 (emphasis added). In other words, the 1996 Wolf Conservation Assessment, which the Forest Service admits is the foundation for the TLMP conservation strategy, rejected the 5 deer/mi² habitat value:

Maintaining a minimum average density of deer equal to 5 deer per square kilometer (13 deer/mi²) in wildlife analysis areas that currently support deer numbers greater than or equal to 5 deer per square kilometer and where deer are the principal prey for wolves would reduce long-term risk to wolf viability.

Ex. 2, at 37.²³

The Forest Service also fails to mention that Mr. Kirchhoff co-authored the subsequent 1996 Wolf Conservation Assessment that recommended 13 deer/mi². And, Mr. Kirchhoff and Dr. Person further responded directly to this very argument when they recommended a carrying capacity of 18 deer/mi² as being necessary to manage for average densities of 13 deer/mi²:

The fourth point (item “d”) suggests that deer harvest rates may decline and thus

²² Intervenor-Defendants endeavor to attribute the 5 deer/mi² density metric to Dr. Person, *see* ID Br. at 26 n.17, but Dr. Person had nothing to do with that figure.

²³ Even prior to the Wolf Conservation Assessment, the Forest Service’s own independent research team explained that the deer density should be “at least double” the 5 deer/mi² value to support wolves. Ex. 51, at 6.

fewer deer are needed to support wolves. As we stated in the wolf conservation assessment, human populations are increasingly rapidly. In the vicinity of Prince of Wales Island, the human population has grown 13% since 1990. It is reasonable to assume that the demand for deer will grow as well.

Ex. 4, at 5. This is the figure—18 deer/mi²—the Forest Service adopted into the 2008 TLMP based on the scientific work of Dr. Person and Mr. Kirchhoff in 1996 and 1997. The Forest Service itself, in adopting this figure into the forest plan, rejected the idea that it could maintain viable populations of wolves by logging so much old-growth that severe restrictions on subsistence hunters would be required in order to maintain enough prey. In 1997, the agency had no current science in support of that highly suspect theory, and it still does not.²⁴

Because the Forest Service concluded that it could not ignore the needs of subsistence hunters in managing for viable populations of wolves, it never determined what deer habitat capability would be necessary to support an average density of 5 deer/mi². The Forest Service implies in its brief that 5 deer/mi² refers to carrying capacity. FD Br. at 4, 30. That is incorrect, Ex. 50, at 11, and the Forest Service offers no measure of carrying capacity that corresponds to an average density of 5 deer/mi². The agency has never calculated this figure because it has no scientifically valid reason to apply that metric in managing the Tongass.

The Forest Service's reliance on 5 deer/mi² is also remarkable for a second and even more fundamental reason. At that level, to support a viable population of wolves, demand from subsistence hunting of deer would have to be eliminated—*i.e.*, 5 deer/mi² is “necessary to support viable populations of wolves alone.” FD Br. at 29–30 (emphasis added). The Forest Service, however, is charged in the Multiple Use Sustained Yield Act (“MUSYA”) with administering its lands for “multiple uses and sustained yield of the several products and services obtained therefrom.” 16 U.S.C. § 529. Wolves are protected under the diversity mandate of the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B). Subsistence hunting is also protected under the Alaska National Interest Lands Conservation Act (“ANILCA”), 16 U.S.C. § 3120(a)(3)(A).

Federal Defendants appear to take the position now that the agency can log so much old-

²⁴ See Ex. 28, at 21 (“It is not enough to maintain deer abundance sufficient for wolves because subsistence hunters rely on those deer as well, and they will kill wolves legally and illegally to protect that resource.”).

growth that the landscape can support enough deer to provide only for wolves or for subsistence hunters but not both. The Forest Service never once took that position on the record when it prepared the 2008 TLMP, and that theory is not reflected at all in the plain language of the 2008 TLMP. Moreover, if the Forest Service had attempted to implement such a management scheme, it would be contrary to the requirements of MUSYA, NFMA and ANILCA. *Cf. Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 850 (9th Cir. 2013) (“Forest Plans aim to balance environmental and economic concerns, while furthering NFMA’s purpose to ‘provide for diversity of plant and animal communities’ in national forests.”) (citations omitted). The only criteria in the 2008 TLMP for maintaining viable wolf populations is WILD1.XIV.A.2 directing the Forest Service to provide enough deer habitat for both wolves and subsistence hunters. Federal Defendants now argue that this requirement is unenforceable and that it can manage only for wolves to the exclusion of subsistence hunters. The agency has thus abandoned the entire scientific foundation of the conservation strategy reflected in the 2008 TLMP, and there is no remaining mechanism in the plain language of the plan to “insure” the continued existence of the wolf, well-distributed, in the Tongass.

B. Standard and Guideline WILD1.XIV.A.1.c on road density is unenforceable.

The final nail in the coffin for the 2008 TLMP is the lack of any enforceable road density standard. The science is undisputed that elevated road densities provide for access for hunters and trappers, thus resulting in unsustainable levels of wolf mortality. *Op. Br.* at 45–46.

Federal Defendants fall back on two excuses. First, they argue that once road densities are above a certain threshold, “higher road densities [are] unlikely to increase wolf harvest substantially.” *FD Br.* at 39. On its face, this argument is inconsistent with the language of WILD1.XIV.A.1.c, which instructs the agency to manage roaded landscapes where wolf mortality from human harvest is an identified concern; there is no dispute that this is the case in the Big Thorne project area. To the extent that the TLMP allows increased road density and old-growth logging where road density already is above identified thresholds and where wolf mortality is a concern, the TLMP is flatly inconsistent with the best available science. That science documents that further harvest of old-growth deer habitat will cause hunters to utilize roads to increasingly target wolves both legally and illegally because they view wolves as

competition for dwindling deer numbers. *See* Ex. 2, at 34; Ex. 30, at ¶ 23.²⁵ Thus, elevated road densities are inextricably linked to the impacts on wolves from additional old-growth logging.

Second, Federal Defendants again point to future plans for wolf harvest restrictions and a future wolf management plan. For all the reasons discussed earlier, those justifications are also arbitrary. *See supra* Part III.C.; Op. Br. at 39. In 2008, the Forest Service stated in the FEIS for the TLMP that it must both maintain low road density and maintain wolf harvest within sustainable limits. Ex. 9, at 106. The agency never explained how it could sacrifice road density limitations and deer habitat capability in the matrix to rely wholly on wolf harvest restrictions. There is simply no basis in the record to support the agency’s argument made in its brief that this approach is adequate to “insure” a viable wolf population, and indeed, unsustainable wolf mortality, facilitated by too many roads, is currently causing a crash in the wolf population in GMU 2. *See* Op. Br. at 22–23.

RELIEF

I. Defendants have not rebutted the presumption in favor of vacatur.

To depart from the normal APA remedy of vacatur, courts must consider (1) the seriousness of the agency’s error and (2) “the disruptive consequences of an interim change that may itself be changed.” *Cal. Cmty’s. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Federal Defendants make no argument that the agency’s procedural and substantive errors under NEPA and NFMA were not serious. Nor can they seriously allege disruptive consequences that will flow from reinstating the status quo. *Contra Cal. Cmty’s. Against Toxics*, 688 F.3d at 993–94 (remand without vacatur where setting aside the agency’s decision could result in devastating consequences to an entire region’s power supply).²⁶

Instead, Federal Defendants string together a few citations to other cases where courts

²⁵ In any event, Federal Defendants’ argument is based on a specious interpretation of the scientific literature that expressly found that “the TLMP guideline entails considerable risk of facilitating chronic unsustainable mortality.” Ex. 12, at 9.

²⁶ Intervenor-Defendants recite a parade of horrors that will necessarily flow from vacatur or a permanent injunction. But they cannot escape the fact that Viking Lumber assumed the risk when was awarded the Big Thorne project contract during the pendency of litigation. *See* Dkt. 1 (Complaint, Aug. 26, 2014); Ex. 56 (Contract Award Letter, Sept. 30, 2014).

have remanded without vacatur, in an apparent effort to show that this is a normal remedy. But as the principal case upon which they rely candidly acknowledges, the Ninth Circuit “only order[s] remand without vacatur in limited circumstances.” *Cal. Cmty’s. Against Toxics*, 688 F.3d at 994; *see also Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (“In rare circumstances, when we deem it advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating the agency’s decision”). Departure from the normal remedy of vacatur is unwarranted here, where the agency’s errors threaten the already precarious predator-prey balance on POW, and where any disruptions to any “planning efforts” stem from the agency’s failure to comply with the law. *Cf. Swan View Coalition v. Weber*, CV 13-129-M-DWM, 2014 U.S. Dist. LEXIS 173957, at *4 (D. Mont. Dec. 8, 2014) (“Had the Forest Service conducted the requisite analysis prior to taking agency action * * * the agency would not be in its current predicament”).

II. An injunction should issue until the Forest Service complies with applicable law.

Even if this Court determines that vacatur is unwarranted, the Court should enter an injunction prohibiting the Forest Service from implementing the Big Thorne project until it complies with applicable law. In their Opening Brief, Plaintiffs cited dispositive case law articulating longstanding principles supporting the position that (1) irreparable injury necessarily flows from logging over 6,000 acres of old-growth forest; (2) monetary damages cannot remedy this significant environmental injury; (3) the balance of harms tips in favor of an injunction to protect the environment, and (4) the public interest supports protection of irreplaceable resources. Op. Br. at 48–49.

Federal Defendants offer no argument to the contrary, and instead request additional briefing. No additional briefing is necessary regarding implementation of the Big Thorne project; a permanent injunction is required given the irreparable loss of 700-year-old trees, inflation of road density, and resultant impacts on old-growth bellwether species. Intervenor-Defendants, on the other hand, go to great lengths in their remedy section to re-litigate the merits of this case, while trumpeting the undeniably hollow “environmental restoration” portions of the

stewardship contract,²⁷ and citing speculative economic harms. In essence, Intervenor-Defendants, would have this Court sign off on a novel procedure whereby federal agencies could violate the law, but if a contract is awarded before a court order issued, the parties may proceed as if there was no legal violation. There is simply no support for such an unprecedented erosion of the rule of law.

III. This Court should reinstate the 1997 Tongass Land Management Plan provisions that relate to management of habitat for the wolf and deer.

The Court should reject Federal Defendants' invitation to remand the 2008 TLMP to the agency without deciding what substantive standards and guidelines should apply to the agency's management of the Tongass National Forest in the interim. Federal Defendants concede that the effect of invalidating a forest plan issued under NFMA is to reinstate the prior version. FD Br. at 37 (citing *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)). Federal Defendants, however, rely on a district court case involving national NFMA planning rules, which had gone through a series of very confusing amendments, in 2000, 2002, 2005 and 2008. *Citizens v. Better Forestry v. U.S. Dep't of Agric.*, 632 F. Supp. 2d 968, 969–73 (N.D. Cal. 2009). In that specific factual scenario, the Northern District of California allowed the agency not an open-ended remand, but rather, a choice between the 1982 Rule and the 2000 Rule. *Id.* at 982–83.

Here, consistent with *Paulsen*, the prior version of the plan must be reinstated. The Forest Service has no choice as the 2008 TLMP amended the 1997 version and, according to the agency, weakened the deer and wolf requirements, which the Ninth Circuit earlier enforced in *Greenpeace*, 445 Fed. Appx. at 925. There is no legal basis for a vague, open-ended remand, and there are no other versions of the forest plan from which the Forest Service could choose.

CONCLUSION

For all of the foregoing reasons, and those stated in their opening brief, Plaintiffs respectfully request this Court to hold unlawful and set aside the Big Thorne project. Plaintiffs also request this Court to vacate the standards and guidelines that apply to wolf management in the 2008 TLMP and reinstate the 1997 forest plan.

²⁷ Intervenor-Defendants argue unconvincingly that some nominal trail maintenance projects rise to the same level of significance as logging 6,000 acres of old-growth forest.

Respectfully submitted this 20th day of January, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2015, a copy of the foregoing Plaintiffs' Principal Brief was served electronically on the Federal Defendants.

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TABLE OF EXHIBITS / DOCKET # CROSS-WALK

*** Re-filed exhibits denoted in **bold** ***

Ex. #	AR #	Dkt. #	Year	Author/Title
1	736_3588	29-1 29-2	1995	McNay, R. Scott and Voller, Joan M., <i>Mortality Causes and Survival Estimates for Adult Female Columbian Black-Tailed Deer.</i>
2	736_0302	29-3 71-1	1996	Person, David K. et al., <i>The Alexander Wolf: A Conservation Assessment.</i>
3	736_4077	29-4 29-5 29-6	1997	Person, David K., and Bowyer, R. Terry, <i>Population Viability Analysis of Wolves on Prince of Wales and Kosciusko Islands, Alaska.</i>
4	736_0367	29-7	1997	Person, David K., et al., <i>Letter to Beth Pendleton re: Proper Use of Wolf Conservation Assessment.</i>
5	736_3361	29-8	2001	Person, David K., <i>Alexander Archipelago Wolves: Ecology and Population Viability in a Disturbed, Insular Landscape.</i>
6	736_3522p	29-9	2006	TLMP Conservation Strategy Review, <i>Wolves and Predator-Prey Interactions.</i>
7	736_3575	29-10	2006	Tongass CSR Workshop (Ketchikan April 2006) Wolf Panel, presented by David Person.
8	736_0320	29-11	2007	Schoen, J. and Person, D., <i>Alexander Archipelago Wolf (Canis Lupus Lugoni).</i>
9	603_1591	29-12	2008	U.S. Forest Service, <i>Tongass Land and Resource Management Plan: Final Environmental Impact Statement.</i>
10	603_1592	29-13	2008	U.S. Forest Service, <i>Tongass Land and Resource Management Plan: Final Environmental Impact Statement – Appendices (excerpts).</i>
11	603_1593	29-14	2008	U.S. Forest Service, <i>Tongass Land and Resource Management Plan (excerpts).</i>
12	736_0300	29-15 71-2	2008	Person, David K. and Russell, Amy L., <i>Correlates of Mortality in an Exploited Wolf Population.</i>
13	736_3165	29-16	2009	Brinkman, Todd, J., <i>Resilience of a Deer Hunting System in Southeast Alaska: Integrating Social, Ecological, and Genetic Dimensions.</i>
14	736_3348	29-17	2009	Franklin, Jerry, F. and Lindenmayer, David B., <i>Importance of matrix habitats in maintaining biological diversity.</i>
15	736_0481	29-18 71-3	2011	Brinkman, Todd, J. et al, <i>Estimating Abundance of Sitka Black-Tailed Deer Using DNA From Fecal Pellets.</i>

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Ex. #	AR #	Dkt. #	Year	Author/Title
16	736_0339	30-1	2011	U.S. Forest Service, <i>2011 Direction for Project-level Deer, Wolf, and Subsistence Analysis</i> .
17	736_4310	30-2	2011	Person, David K. et al., <i>Internal ADF&G correspondence about the Big Thorne timber project 2011 – February and March</i> .
18	736_0053	30-3	2011	Tongass Conservation Society and Greenpeace, <i>Big Thorne Project Scoping Comments</i> .
19	736_0228	30-4	2011	Center for Biological Diversity and Greenpeace, <i>Petition to List the Alexander Archipelago Wolf As Threatened or Endangered Under the Endangered Species Act</i> .
20	736_3112	30-5	2012	Cascadia Wildlands, Center for Biological Diversity, Greenpeace, Greater Southeast Alaska Conservation Community, Tongass Conservation Society, <i>Comments on Big Thorne Project</i> .
21	736_3156	30-6	2012	U.S. Dep't of the Interior, <i>Comments on the Big Thorne Timber Sale, Draft Environmental Impact Statement</i> .
22	736_4523	30-7 71-4	2012	Person, David K. and Logan, Brian D., <i>A spatial analysis of wolf harvest risk on Prince of Wales and associated islands, Southeast Alaska</i> .
23	736_0385	30-8	2013	U.S. Forest Service, <i>Deer Model Results for Big Thorne Project (Updated)</i> .
24	736_0419	30-9	2013	Tetra Tech EC, Inc., <i>Big Thorne Project: Wildlife and Subsistence Report</i> .
25	736_2244	30-10 30-11 30-12	2013	U.S. Forest Service, <i>Big Thorne Project: Final Environmental Impact Statement</i> (excerpts).
26	736_2248	30-13	2013	Cole, Forrest, U.S. Forest Service, <i>Big Thorne Project: Record of Decision</i> (excerpts).
27	736_3707	30-14	2013	Cascadia Wildlands, Center for Biological Diversity, Greenpeace, Greater Southeast Conservation Community, Tongass Conservation Society, <i>Appeal on Big Thorne Project</i> .
28	736_3712	30-15	2013	Person, David K. and Brinkman, Todd J., <i>Succession Debt and Roads: Short- and Long-Term Effects of Timber Harvest on a Large Mammal Predator-Prey Community in Southeast Alaska</i> in <i>North Pacific Temperate Rainforests: Ecology & Conservation</i> (Orians, Gordon H. and Schoen, John W., eds.).
29	736_3718	30-16	2013	Person, David and Larson, Kristian, <i>Developing a Method to Estimate Abundance of Wolves in Southeast Alaska: Progress Report: 1 January 2013–31 May 2013</i> .

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Ex. #	AR #	Dkt. #	Year	Author/Title
30	736_4529 736_3728	30-17	2013	Person, David, K., <i>Statement of David K. Person Regarding the Big Thorne Project, Prince of Wales Island.</i>
31	736_4007	31-1 31-2 31-3 31-4	2013	Monahan, Ruth, U.S. Forest Service, <i>Big Thorne Appeal Recommendation.</i>
32	736_4009	31-5	2013	Pendleton, Beth G., <i>Decision on Administrative Appeal.</i>
33	736_4207	31-6	2014	U.S. Dep't of the Interior, Fish and Wildlife Service, <i>90-Day Finding on a Petition to List the Alexander Archipelago Wolf as Threatened or Endangered</i> (79 Fed. Reg. 61 (Mar. 31, 2014)).
34	736_4227	31-7	2014	U.S. Dep't of the Interior, Fish and Wildlife Service, <i>90-Day Finding on a Petition to List the Alexander Archipelago Wolf as Threatened or Endangered – Appendix.</i>
35	736_4300	31-8	2014	Cascadia Wildlands, Center for Biological Diversity, Greenpeace, Greater Southeast Alaska Conservation Community, The Boat Company, <i>Comments on Draft Supplemental Information Report on the Big Thorne Final Environmental Impact Statement and Record of Decision.</i>
36	736_4299	31-9	2014	Lor, Socheata, U.S. Dep't of the Interior, Fish and Wildlife Service, <i>Comments on Draft Big Thorne Supplemental Information Report.</i>
37	736_4304	31-10 31-11	2014	Person, David, K., <i>Statement on Big Thorne Project Draft Supplemental Information Report.</i>
38	736_4308	31-12	2014	Interagency Wolf Task Force, <i>Narrative in Response to Four Broad Conclusions in Person Statement (edited draft).</i>
39	736_4244	31-13	2014	Interagency Wolf Task Force, <i>Big Thorne Project SIR Appendix A: Interagency Wolf Task Force Report.</i>
40	736_4315	31-14	2014	Brockmann, Steve et al., U.S. Fish and Wildlife Service, <i>Email Correspondence—USFWS Comments on WTF Narrative.</i>
41	736_4539	31-15	2014	Logan, Brian D. et al., <i>Email Correspondence re: Developing a Method to Estimate Abundance of Wolves in Southeast Alaska.</i>
42	736_4559	31-16	2014	Cole, Forrest, U.S. Forest Service, <i>Big Thorne Project: Final Supplemental Information Report – Documentation of Interagency/Interdisciplinary Review.</i>

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Ex. #	AR #	Dkt. #	Year	Author/Title
43	736_4570	31-17	2014	Pendleton, Beth, G., U.S. Forest Service, <i>Concurrence on Big Thorne Project: Final Supplemental Information Report Findings.</i>
44	-	31-18	2014	Declaration of Don Hernandez.
45	-	31-19	2014	Declaration of Joel Hanson.
46	-	31-20	2014	Declaration of Natalie Dawson.
47	-	31-21	2014	Declaration of Peter Smith.
48	-	31-22	2014	Declaration of Rebecca Knight.
49	-	31-23	2014	Declaration of Sylvia Garaghty.
50	736_0333	72-1	1993	Suring, Lowell H., et al., <i>A Proposed Strategy for Maintaining Well-Distributed, Viable Populations of Wildlife Associated with Old-Growth Forests in Southeast Alaska</i> , Report of An Interagency Committee—Review Draft (excerpts).
51	736_3365	72-2	1994	Kiester, Ross A., and Eckhardt, Carol—Pacific Northwest Research Station, <i>Review of Wildlife Management and Conservation Biology on the Tongass National Forest: A Synthesis with Recommendations</i> (excerpts).
52	10_00072	72-3	1997	U.S. Forest Service, <i>Tongass National Forest Land Management Plan Revision: Final Environmental Impact Statement.</i>
53	603_1592	72-4	2008	U.S. Forest Service, <i>Tongass Land and Resource Management Plan: Final Environmental Impact Statement – Appendices</i> (additional excerpts).
54	736_4366	72-5	2010	Bethune, Steve, <i>Unit 2 Overview – Presentation to the Board of Game</i> (transcript).
55	736_3227	72-6	2010	Person, David K., et al., <i>Email Correspondence Re: Wolf Population Estimate.</i>
56	736_4610	72-7	2014	U.S. Forest Service, <i>Letter to Viking Lumber Re: Big Thorne Project Integrated Resource Timber Contract, Number 063639.</i>

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