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Delivered via U.S. Mail and email to appeals-southern-regional-office@fs.fed.us

USDA, Forest Service
ATTN: Appeal Deciding Officer
1720 Peachtree Road N.W., Suite 811N
Atlanta, GA 30309-9102

RE: Notice of Appeal- Upper Tellico OHV Area DN/FONSI/Final EA

Dear Appeal Deciding Officer:

Please accept this Notice of Appeal under 36 C.F.R. Part 215 from the Decision Notice (“DN”) and Finding of No Significant Impacts (“FONSI”) and Final Environmental Assessment (“Final EA”) for the Transportation System and Related Recreation Management Actions for the Upper Tellico Off-Highway Vehicle System (collectively, the “Decision”), dated October 14, 2009. In addition, we appeal and/or seek clarification of the “Trail 1” DN/FONSI, which was issued independently of the Transportation System DN/FONSI. This appeal is presented on behalf of our clients the Southern Four Wheel Drive Association, United Four Wheel Drive Associations, and the BlueRibbon Coalition. Individual and/or organizational members of any of these organizations may submit their own appeal(s) from the Decision. This appeal and any such appeals must be independently evaluated and the agency must comply with applicable review procedures for all such appeals. Any communications regarding this appeal should be directed to Paul A. Turcke at the contact information listed above and at pat@msbtlaw.com.

I. INTRODUCTION

The Recreational Groups urge the Forest to actively and effectively manage the Upper Tellico OHV Area. Neither the Recreational Groups nor the Forest should be limited by past management deficiencies. Instead, we should be working toward a collaborative solution that advances the simultaneous goals of sustainable, yet enjoyable use of the Area. The EA, and certainly any “emergency” closure order, are premised on an incorrect and unsupportable notion that the existing condition violates applicable law and cannot be improved. To the contrary, designated uses are being supported, state water quality standards are being met, and water

quality can be even further improved through a cooperative and logical management solution that will bring common sense to planning and management of the OHV System at the Area. Sadly, the Decision reflects none of these goals and violates applicable law. As advocates of responsible and effectively-managed vehicle-based recreation, we perceive little option but to ask for withdrawal of the Decision.

II. IDENTITY AND INTERESTS OF APPELLANTS

Southern Four Wheel Drive Association (“Southern”) is a nonprofit organization formed in 1987 and dedicated to promoting four-wheel drive recreation, responsible land usage, conservation and education. Southern is an association of member clubs located in the southeastern U.S. including Alabama, Georgia, Kentucky, North Carolina, South Carolina and Tennessee. Southern members have long visited the Forest and the Area, have assisted to the extent allowed by the Forest Service in active management of vehicle travel, and have definite and concrete plans to access the Forest and the Area via motorized vehicles in the future, to the extent authorized by the Forest Service.

United Four Wheel Drive Associations (“UFWDA”) consists of more than 10,000 individuals, clubs, and associations who share a common interest in recreational off-road activities, including the use of four-wheel-drive vehicles. UFWDA has members in each of the 50 states and in several foreign countries. UFWDA members access federal public lands throughout the United States, including lands within the Nantahala National Forest and the Upper Tellico OHV Area, to the extent authorized by the Forest Service.

The Blue Ribbon Coalition, Inc. (“BlueRibbon”) is an Idaho nonprofit corporation representing over 1,100 businesses and organizations with approximately 600,000 members nationwide. BlueRibbon members use motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access Forest Service and other public lands throughout the United States, including such lands in North Carolina. BlueRibbon has a long-standing interest in the protection of our Nation’s public land values and natural resources, and regularly works with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors. BlueRibbon members have visited the Area in various types of off-highway vehicles (“OHV”) and intend to do so in the future to the extent authorized by the Forest.

Collectively, we refer to these organizations and their members as “the Recreational Groups.”

III. FACTUAL AND PROCEDURAL BACKGROUND

The Nantahala Forest includes the Area within its Tusquitee Ranger District. The Area, like much of the Forest, contains a variety of vegetation types punctuated by streams and relatively deep gorges. Much of this terrain was heavily logged during or before the 1960’s and later purchased by the Forest Service. The Area consists of approximately 8,000 acres and now includes twelve (12) formally designated trails that encompass a total of about 38 miles. These trails involve a variety of terrain and challenges ranging from relatively easy routes to extremely

challenging routes requiring advanced equipment and operator skill/experience. As a result of these unique opportunities, the Area is a destination for “jeep” and “four wheel drive” OHV enthusiasts from throughout the country and is an unparalleled site in the eastern United States for the four-wheel drive community.

OHVs are a traditional and increasingly-popular means of visiting National Forest System lands. This access occurs as a means to other activities, such as sightseeing, picnicking, camping, photography, hunting, fishing, wildlife study and similar outdoor pursuits. In addition, some enthusiasts derive enjoyment and satisfaction from the act of traveling through the Forest in their vehicle and the associated navigational, operational and mechanical challenges associated with such travel.

In addition to its supporters and enthusiasts, OHV travel has its detractors. Opponents to OHV access on the Forest have more closely targeted riding in the Upper Tellico OHV Area in recent years, applying their energies and resources to a campaign including political, administrative, legal and public relations strategies ultimately designed to eliminate meaningful OHV access to the Area.

Mindful of the potential issues and controversy surrounding OHV use in general and on the Forest, the Recreational Groups have long attempted to educate their members, forge effective and collaborative relationships with land managers and other interest groups, and proactively address resource concerns potentially associated with vehicle use. Plaintiff organizations and their members conduct trail maintenance work in the area several times each year in conjunction with Forest Service oversight. Typical trail maintenance activities have included movement of rock for trail stabilization, adding signage, planting seed and fertilizing new plantings. During the months of May, June, and July, 2007 trail work included hauling over 250 tons of surge stone for trail stabilization; repairing, cleaning, and installing over 150 water bars and silt traps; repair of Fain’s Ford Crossing; repairing and replacing 2 culverts; closing 6 illegal trails/bypasses; donating 698.5 volunteer hours and donating 1,003.5 hours of heavy machine time. At the “Tellico Cleanup Day” on March 10, 2007, Defendant’s reported volunteer pickup and removal of 213 bags of trash and 2,400 pounds of trash removed in North Carolina by 212 participants. The Recreational Groups’ members constituted 116 of the 212 participants, while Trout Unlimited members constituted 23 of the 212 participants.

Following these efforts the Southern Environmental Law Center sent a letter to the Forest dated June 28, 2007 on behalf of several organizations styled as a “notice of intent to sue” under the Clean Water Act for alleged violations of that and related statutes arising from continuing OHV use of the Area (the “NOI”). The NOI specifically requested “at a minimum, remedial measures for the Tellico ORV trail system must include year-round closure of the trails known to be degrading water quality and seasonal closure of the entire system during the wettest months of the year”. NOI at 5. The NOI further requested immediate action to address alleged Clean Water Act violations including unpermitted discharge of pollutants (NOI at 5), unpermitted discharge of dredged and fill material (NOI at 6); violations of state water quality laws and standards in both North Carolina (NOI at 7) and Tennessee (NOI at 10); violations of National Environmental Policy Act, the National Forest Management Act and Forest Service regulations (NOI at 11).

In apparent response to the NOI, the Forest leapt to action, at least by comparison to its prior passive management of the Area. The Forest held a number of meetings. At least one meeting was open to the public and included representatives from numerous interest-group perspectives. Other meetings were not open to the public and involved only the Forest and hand-picked representatives of the preservationist special interests opposed to ongoing vehicle access in the Area.

The Forest sent out a “scoping notice” dated September 17, 2007 soliciting public comment on two proposed “Forest Supervisor’s Orders” in the Area. One proposed order would prohibit motorized vehicles on Lower Trail 2, Trail 7, and Trail 9, duration of order not to exceed one year or until a reasonable plan is in place to prevent adverse impacts to the aquatic resource. The other proposed order would prohibit winter-time motorized vehicle use on the Upper Tellico OHV Trail System from January 1 to March 31 each year. This would include all trails in the system except Trail 1 and the upper section of Trail 2 which would remain open as system roads used by vehicles types normally found on public roads. During this same time in September, 2007 the Forest initiated an “engineering survey and assessment” to evaluate a variety of issues articulated or implicated by the NOI.

On November 19, 2007 Forest representatives held a meeting with Plaintiff organizations’ representatives which the Forest indicated was to be an “informational” meeting in which to report on the progress of the “survey and assessment” and to discuss various short- and long-term strategies to manage OHV travel in the Area and to appropriately avoid or mitigate any adverse effects associated with such travel.

Approximately one month after this meeting the Forest issued a decision on December 20, 2007 which “put into effect two Forest Supervisor’s Orders” restricting OHV use in the Area. The first action consists of “a one-year closure” of Lower Trail 2, Trail 7, a portion of Trail 8 and Trail 9 which prohibits operation of motor vehicles during the closure period. The second action is an Area-wide “seasonal closure” which prohibits operation of motor vehicles between January 1 and March 31 each year. The decision indicated its actions “are categorically excluded from documentation in an environmental impact statement or an environmental assessment.” The Decision further states that its actions “are not subject to legal notice and opportunity to comment” and that the Decision “is not subject to [administrative] appeal.”

On May 22, 2008, the Recreational Groups filed suit in the U.S. Western District of North Carolina, asserting a variety of challenges to the December 20, 2007, closure orders. In June, 2008, the Forest released a proposal “for long-term management of the System” and received about 1,500 comments on the proposal. The suit was voluntarily dismissed on October 30, 2008, pursuant to a stipulation which was entered, at least in part, “in light of the Forest Service’s stated intention to complete a public planning process and announce a new decision in the near future which will likely substantially impact or change the interim orders referenced in the complaint....” Stipulation of Dismissal (Doc. No. 40) at 1-2.

Before, during and after the lawsuit the Recreational Groups’ contacts have endeavored to maintain a constructive with both the Forest and USDA-USFS leadership. Consistent with those discussions and at meaningful expense, the Recreational Groups obtained a Recommended

Trail System Repair & Maintenance Plan from Caliber Engineering Consultants, LLC, of Greenville, South Carolina. That 56-page report concludes:

Streams are healthy and have excellent water quality per North Carolina standards and are capable of sustaining viable, reproducing native trout populations. Degradation of water quality and aquatic habitat in Upper Tellico is non-existent....Historic clear-cutting of land in Upper Tellico has contributed more to the off-site sediment transport than the trail system.

The current deteriorated trail conditions are largely the result of too many years of neglected maintenance by the USFS due to budget constraints. However, the trails and site obstacles are repairable and very much maintainable/sustainable after repair.

Caliber Report, Executive Summary at 6. The report is dated January 23, 2009, and the complete report was provided to the Forest in February, 2009.

On February 27, 2009, the Forest released an Environmental Assessment (“EA”) analyzing six alternatives for management of the Area. Alternative B represented the “proposed action” that was outlined in the June, 2008, proposal. On the same day, Forest Supervisor Marisue Hilliard issued a letter. The letter generally announced release of the EA, provided background and information about submitting comments. In addition, the letter took the unusual step of announcing that “my preferred alternative is Alternative C, which closes the OHV System.” The letter thus proposes another “temporary closure” of the OHV System “for resource protection, effective April 1, 2009.” The letter clarifies that “the impacts to water quality are so significant that I cannot recommend keeping the System open at this time.” The letter further states “[t]he Agency is in violation of North Carolina state water quality standards because of the conditions on the Upper Tellico OHV System.” Following these staggering, untrue, and unwise announcements, the letter offers the hollow assurance “that a final decision has not yet been made.”

Consistent with the letter, and the day following close of 30-day comment period on the EA, the Forest Supervisor issued the Order/DM on March 31, 2009. The agency reviewed the comments received to its predecisional EA, and released the Decision, including responses to public comments, on October 14, 2009. Unfortunately, the Decision reflects and further continues the commitment to a “manage through elimination” strategy demanded by preservationist special interests.

IV. GENERAL LEGAL STANDARD

For any or all of the following reasons, we respectfully request that the Decision be withdrawn and the Forest directed to undertake a more-rigorous environmental impact statement (“EIS”) to more fully address the relevant issues considered in, and omitted from, the EA. As a preliminary matter, we wish to outline the applicable standard of judicial review, as this standard is effectively the one which agency decisionmakers must consider during the administrative review process. Executive-branch agency decisions are ultimately reviewable by the judiciary,

which is empowered to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or found to be “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A) & (D), see also, *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004) (“we review the full agency record to determine whether substantial evidence supports the agency’s decision....”).

The arbitrary and capricious standard is deferential and does not allow a reviewing court to substitute its judgment for that of the agency:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, 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....Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass’n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added). Arbitrary and capricious review is the mechanism through which the courts can require basic fairness and reasonableness of agency behavior, for “unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on discretion.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (quotation omitted).

Even where an agency can arguably point to substantial evidence supporting its decision, the presence of contradictory evidence might render the decision arbitrary and capricious. Thus, “even though an agency decision may have been supported by substantial evidence, where other evidence in the record detracts from that relied upon by the agency we may properly find that the agency rule was arbitrary and capricious.” *American Tunaboat Ass’n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984) (citing *Bowman Transport, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974) (agency decision supported by substantial evidence may still be arbitrary and capricious)); see *Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (where agency modifies or overrides precedents or policies, it has the “duty to explain its departure from prior norms”).

Even substantial evidence cannot properly support a decision if the information was not considered by the decision-maker at the proper stage of the process. Information cannot be presented as a post-hoc rationalization to justify a decision previously made. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). For the reasons identified below, a decision supported by this EA, particularly to close the entire Area, will violate these basic principles.

V. APPEAL ISSUES

The EA is seriously flawed and should be revisited through a more thorough environmental impact statement (EIS) analysis. Our comments below will primarily address these flaws in a legal context. We note and incorporate by reference herein the comments of the Recreational Groups members and/or agents, specifically including the comments submitted by Calliber Engineering Consultants LLC in consultation with biologist Mike Eagan. Unfortunately, the EA can support neither a closure agenda nor rational management of the OHV Area, and fundamental aspects of the EA must be further addressed to create a logical and sustainable management strategy.

A. Mixed Use Should be Allowed on Trail 1.

At the outset, we appeal and/or seek clarification of the DN/FONSI addressing the paving of Trail 1. The Trail 1 DN/FONSI indicates that it will “remove[] non-highway-legal OHVs from Trail 1.” DN/FONSI at 1. While we understand and accept the decision to pave Trail 1, it is important that the Forest consider the importance of that route as a connection to campgrounds and other destinations in the area. Facilitation of existing and historical traffic that has occurred via Trail 1 must be analyzed and provided for by the Forest to support appropriate recreational uses.

B. The Decision Reflects a Pre-Ordained Decision to Close.

The Decision and the process leading to it are tainted by the Forest’s now-obvious preoccupation with closing the Area to OHV use. We acknowledge the agency’s broad discretion in formulating management strategies, but a legitimate exercise of discretion must reflect reasoned analysis, not an arbitrary and capricious post-hoc rationalization to justify a decision previously made. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). Similar strictures govern procedural compliance, for mere “*pro forma* compliance with NEPA procedures, nor *post hoc* rationalizations as to why and how the agency complied with NEPA” will not suffice. *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 340 F.Supp.2d 1249, 1263 (D.Wyo. 2004) (italics in original); *see also Davis v. Mineta*, 302 F.3d 1104, 1112-1113 (10th Cir. 2002). In the unique circumstances here, the Forest’s decision to “close first and then analyze” should place the agency under heightened scrutiny.

While this inexorable march to justify closure in itself violates NEPA, it independently precluded meaningful public involvement in the agency analysis. For instance, the Final EA contains additional information and analysis that was not made available for public comment. Perhaps most importantly, some of this additional material reflects new underlying data and technical analysis that was not available for public review, most notably the NCDWQ survey of aquatic macroninvertebrates. *Compare* Responses to Comments at 76 (3-76) (“[r]esults of that survey are not available”) to *id.* at 72-73 (“[w]hile the NCDWQ study resulted in a bioclassification of “excellent,” **NCDWQ found there was clearly more sand, embeddedness, and in some cases silt in the streams adjacent to the OHV system...**” (emphasis in original)). This information was released to, and relied upon by, the Forest after the close of the public

comment period. This does not reflect the open, public decisionmaking process required by NEPA.

The illegal pre-ordained closure here is epitomized by the selective, at times inconsistent, interpretation of critical factual elements of the Decision. For instance, on numerous issues the Forest cursorily dismisses the Caliber Report's stream assessment, saying that "proper protocols were not followed for the Caliber report, making the results unusable." Responses to Comments at 1. However, the Forest admits in responding to other comments that the Caliber "reported bioclassification results were similar to those reported by NCDWQ." Responses to Comments at 112 (3-139). The same response contains an odd, first-person concluding paragraph, presumably added by a technical specialist, saying that "macroinvertebrates do not track low to moderate sedimentation all that well..." and that population-level effects might only be seen after "the sedimentation gets to the point of large-scale burial of substrates or significantly higher rates of embeddedness downstream relative to upstream [when] the inverts will demonstrate impacts." *Id.* (see also, *id.* at 109 (3-131) (noting that macroinvertebrates "are not good indicators of ecosystem stress" but selectively applying this fact to reject as "spurious" the proposition (attributed to Caliber) that macroinvertebrate richness is a proxy for "good water quality"). Similarly, the Forest alleges the Tellico River has less viable trout populations than other North Carolina water bodies, relying entirely on Besler, 2007, "A Summary of Wild Trout Population Monitoring in the Tellico River Watershed, 1994-2006." However, that study plainly states that it is a preliminary effort and recommends that responsible agencies "[d]esign and implement a study to determine cause-and-effect relationships..." which could be "fully integrated to include measurements of sediment loading (source, rates, and timing) and other water quality parameters." Besler (2007) at 6. The Forest is doggedly presenting the data it has to justify the closure of the Area, but disregards the limitations of that data.

In summary, the Forest does not have and the Decision does not reflect actual data showing biological impacts attributable to existing or historical use of the OHV Area, but rather a theory or hypothesis about impacts that is not supported by the data at hand. The agency should withdraw the Decision, allow use to continue at the Area, and conduct the further analysis that logically flows from and/or is specifically called for by the existing analysis.

C. The Decision Constitutes Illegal Action Concerning the Ongoing Planning Process.

Related to the preceding point, the Forest took illegal action which prevented proper review and completion of an ongoing management plan amendment for route and area designation. While involved in a public planning process and in the critical stage of receiving public comment on the alternatives, including a proposed action that would allow for continuing use, the Forest has threatened to institute an "emergency" closure of the Area. NEPA's implementing regulations prohibit an agency from taking any action "concerning the proposal...which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a).

Additionally, NEPA and its implementing regulations require early and meaningful involvement of the public in planning for any major federal action which may significantly affect

the human environment. 42 U.S.C. § 4332. In adopting and implementing NEPA procedures, the Forest “must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1. The Forest Supervisor cannot predetermine the outcome of a NEPA process by making a decision on the proposal without, or prior to, involving the public. NEPA requires that federal agencies evaluate the potential impacts of proposed actions while those actions are still proposed.

NEPA has twin aims. First, it “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.” Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.

Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97 (1983) (citations omitted). These requirements, among others, require the Forest to take a “hard look” at the impacts to the environment even potentially associated with a proposed action. *Marsh v. ONRC*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Proper analysis must evaluate the effects of a proposal upon “the human environment,” which the regulations clarify “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment....” 40 C.F.R. § 1508.14.

Here the Forest acted first by closing the Area via an “interim” or “emergency” order. The Forest then undertook a travel planning and NEPA process, which took years to complete. During this analysis the Area remained closed, under a continuing series of “interim” orders. These orders were issued despite decades of prior, and more excessive, vehicle use in the Area. This “close and then study” method violates the letter and spirit of NEPA and applicable law.

D. An EIS is Required.

An EA is not sufficient to evaluate and implement the planning strategy outlined by the Forest. What is truly required by the Travel Management Rule and applicable law (not to mention common sense) is an active management strategy that will reduce impacts to the physical environment, enhance visitor experiences, and establish a system that is sustainable in both an environmental and financial sense.

The National Environmental Policy Act (“NEPA”) requires a federal agency to prepare an EIS for all major federal actions that “may significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The term “human environment” refers not only to the physical environment but “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14. “[A]n EIS *must* be prepared if ‘substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor. . . . To trigger this requirement a plaintiff need not show that significant effects *will in fact occur*, [but] raising substantial questions whether a project may have a significant effect is sufficient.” *Ocean Advocates v. U.S. Army Corps of Eng’rs.*, 402 F.3d 846, 864–65 (9th Cir. 2005) (quotations omitted, emphasis in original). If an agency decides not to prepare an EIS, it must supply a “convincing statement of reasons” to explain why a project’s impacts are insignificant. *Blue*

Mountain Biodiversity Project v. Blackwood, 161 F.3d at 1212. An agency “cannot simply assert that its decision will have an insignificant effect on the environment” *Marble Mountain Audubon Soc’y v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990).

Whether there may be a significant effect on the environment requires consideration of two broad factors: “context and intensity.” See 40 C.F.R. § 1508.27; 42 U.S.C. § 4332(2)(C). Context refers to the setting in which the proposed action takes place. 40 C.F.R. § 1508.27(a). Intensity means “the severity of the impact.” *Id.* at § 1508.27(b). The regulations include ten “intensity,” factors that courts may consider, any one of which is sufficient to trigger an EIS. *Ocean Advocates v. U.S. Army Corps of Eng’rs.*, 402 F.3d at 865. The DN/FONSI includes a conclusory run through this checklist, but that effort does not pass muster. See DN/FONSI at 13-15. Rather, the Forest simply characterizes each inquiry and offers a conclusion to each supporting “non-significance.” As such, the DN/FONSI is a catalogue of agency conclusions rather than a window into the agency’s analytical process. Applicable caselaw condemns this approach. An agency “cannot simply offer conclusions” but “must identify and discuss the impacts that will be caused by each successive [project], including how the combination of those various impacts is expected to affect the environment...” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 974 (9th Cir. 2006) (quoting *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 1001 (9th Cir. 2004)); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027-1028 (9th Cir. 2007); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 811 (9th Cir. 1999) (rejecting “very broad and general statements devoid of specific, reasoned conclusions” or statements that “fall short of a ‘useful analysis’”).

Important and apparently overlooked here is the fact that the degree of impact is independent from whether the impact is beneficial or adverse - rather, “[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1). The Forest is caught in a procedural dilemma of its own design. NEPA requires an EIS if it is possible that a proposal will trigger significant effects. Whether any effects are significant is unrelated to whether the effects are adverse or beneficial. If fundamental changes to the OHV Area travel network can be deemed “non-significant” such a finding can only flow from the conclusion that only “non-significant” effects might be associated with such changes. However, the Decision is fundamentally based upon the premise that there are continuing and widespread harms to the Tellico River and its designated uses (ie fishery) caused by operation of the OHV trail system. Implicit in the rationale behind the Decision is the reasoning that elimination of these harms and rehabilitation of the system will eliminate the harms and have a corresponding benefit to the water quality, fishery and other aspects of the human environment. The agency cannot have it both ways- either there are “non-significant” problems and therefore “non-significant” effects, or there are “significant” problems justifying action. In the latter scenario, any action, even one magically resolving all problems, will by definition have a “significant” effect and require an EIS and significant plan amendment.

Finally, it is notable that the vast majority of travel planning projects conducted by other Forests occur via the EIS process.

The Forest improperly relied upon an EA here. The Forest should declare the possibility of significant effects associated with the proposed action, the DN/FONSI should be withdrawn, and further analysis should be conducted via an EIS.

E. The Decision is Premised on a Flawed Purpose and Need Statement.

The EA was presented in a confusing context, and, given the Forest Supervisor's accompanying letter and purpose/need statement, must be viewed as a "closure" decision. This background inappropriately taints analysis through the omission of any "positive" aspects of providing for motorized recreational access.

A proper range of alternatives cannot flow from an illegally narrow purpose and need. The reasonableness of the agency's choices in defining its range of alternatives is determined by the "underlying purpose and need" for the agency's action. *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815-816 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1989). The entire range of alternatives presented to the public must "encompass those to be considered by the ultimate agency decisionmaker." 40 C.F.R. § 1502.2(e). The agency is entitled to "identify *some* parameters and criteria—related to Plan standards—for generating alternatives...." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1522 (9th Cir. 1992) (italics in original). However, in defining the project limits the agency must evaluate "alternative means to accomplish the general goal of an action" and cannot "rig" the purpose and need section of a NEPA process to limit the range of alternatives. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997) (emphasis added).

The purpose/need statement in the EA is simply inaccurate or unduly limiting. Item 1 asserts that Forest Plan standards are being violated, citing a "prevent visible sediment from reaching streams" standard. EA at 2. Taken at face value, as the Forest does here, this standard will preclude any meaningful use of the Forest. It is the construction and continued existence, not use of roads/trails that is the primary factor in sediment delivery. *See, generally*, Robert C. Davies Testimony (December 8, 2004) *The Lands Council v. Stringer*; Case No. CV-03-344-N-MHW; at 20 ("it's basically just the existence of roads" that is most significant factor influencing sedimentation); at 26 ("just the existence of the roads out there is the problem, that sheerly just by opening-- or just by closing these roads, you're not alleviating the problem") (transcript attached hereto).

Item 2 states that BMPs are "currently failing" and item 3 says BMPs are not sustainable. These statements are simply erroneous and are flatly contradicted by the Trails Unlimited and Caliber reports. The Forest is attempting to use the result of minimal management to justify total closure.

Items 4 and 5 are similarly flawed. Applicable state standards for water quality are not being violated. Turbidity measurements are not taken during stochastic events such as peak storm runoff. Again, the Forest should be more thoughtful before invoking such a standard, as there are probably very few sites or activities that could survive scrutiny under this standard. The EA ignores the guidance of the state water quality regulations, which provide, in part:

Natural waters may on occasion, or temporarily, have characteristics outside of the normal range established by the standards. The adopted water quality standards relate to the condition of waters as affected by the discharge of sewage, industrial wastes or other wastes including those from nonpoint sources and other sources of water pollution. Water quality standards will not be considered violated when values outside the normal range are caused by natural conditions.

North Carolina Administrative Code 15A NCAC 02B .0205 (emphasis added); *see also* 15A NCAC 02B .0211(3)(k) (“if turbidity exceeds these levels due to natural background conditions, the existing turbidity level shall not be increased...”). Regardless, this discussion is largely academic since applicable waters are deemed to be supporting designated uses and are therefore meeting the state’s antidegradation policy. Similarly, with regard to claims of impending doom for brook trout populations, the EA conspicuously omits any reference to population or trend data, speaking again only to narrow or temporary instances of non-compliance against what is a larger backdrop of a functioning and trumpeted aquatic ecosystem.

The EA improperly fixates on elimination in the face of a legal mandate to provide for and properly manage access. At the most basic level, the Travel Management Rule requires the agency to apply “general criteria” when designating roads, trails and areas for vehicle use, which include effects on natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of National Forest System lands, the need for maintenance and administration of roads, trails and areas, and the availability of resources for maintenance and administration. 36 C.F.R. § 212.55(a). The agency recognizes that “motorized use is a legitimate use of the National Forests.” Travel Management Rule Final Communication Plan, November 2, 2005, p.5. Following withdrawal of the Decision, the agency should broaden the purpose and need statement to include recognition of the need to provide appropriate and diverse mechanized access opportunities through a designated system of roads, trails and areas.

F. The EA Presents an Illegally Limited Range of Alternatives.

The Forest has been provided, yet stubbornly refuses to consider, the management solution. Visitor enjoyment and sustainability need not be placed in conflict, but can be simultaneously advanced by the proper management approach. Unfortunately, the range of existing alternatives refuses to include such an option.

Federal agencies have a mandatory duty to consider a reasonable range of alternatives to proposed actions or preferred alternatives analyzed during a NEPA process. 40 C.F.R. § 1502.14; 40 C.F.R. § 1508.9. “[A]gencies shall rigorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14. The alternatives section is considered the “heart” of the NEPA document. 40 C.F.R. § 1502.14 (discussing requirement in EIS context). The legal duty to consider a reasonable range of alternatives applies to both EIS and EA processes. *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1325 (S.D. Cal. 1998) (citing *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) (“Alternatives analysis is both independent of, and broader than, the EIS requirement.”)).

A NEPA analysis must “explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14 (EIS); *Id.* at § 1508.9 (EA); *Bob Marshall Alliance*, 852 F.2d at 1225 (applying reasonable range of alternatives requirement to EA). A NEPA analysis is invalidated by “[t]he existence of a viable but unexamined alternative.” *Resources, Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993). Indeed, the range of alternatives requirement is to be interpreted broadly, for the CEQ Regulations direct the agency to fully analyze even those “reasonable alternatives not within the jurisdiction of the lead agency.” 40 C.F.R. 1502.14(c).

The agency was presented with a number of additional alternatives, but refused to fully analyze them or make them available to public review and comment. *See* Final EA at 16-19 (listing alternatives “considered but not analyzed in detail”). These conclusions are legally erroneous and one or more of these alternatives should have been fully analyzed.

The Forest apparently relied heavily, both in formulating the project purpose and need as well as the range of alternatives, on the conclusion that active and effective management of the Area for continuing OHV use was economically infeasible. First, there is no meaningful analysis to support this conclusion. Additionally, review of available records, including those provided in response to the Recreational Groups under the Freedom of Information Act, reveal that the Forest has consistently failed to spend the monies available to it for management of the Area. For instance, in 2007 there were \$100,000 in RTP funds granted to the Forest, but expense records only account for expenditures of \$48,183 of those monies. The Forest seems poorly positioned to cry poverty over trail management challenges given its inability to utilize available resources and history of passive management.

The Decision should be withdrawn and a more robust analysis undertaken, including an EIS that will consider additional action alternatives, including but not limited to, one or more taken from the alternatives considered but not analyzed in detail.

G. The EA Relies Upon Inadequate Technical Analysis.

The Forest is accorded wide latitude in analyzing technical issues. Such analysis lies at the core of the Decision’s substantive conclusions, for in the end it is largely, if not exclusively, the desire to address concerns over water quality attributed to the OHV System that motivates and justifies the Decision. Unfortunately, the Decision reflects independent deficiencies in this analysis. First, the methodology relied upon and the procedure by which the results were communicated with the public violate NEPA. Further, the substantive conclusions advanced by the Decision do not satisfy even arbitrary and capricious review.

1. Procedural Deficiencies.

When federal agencies evaluate technical issues or apply specialized expertise, NEPA requires them to rely on valid sources and to disclose methodology, present hard data, cite by footnote or other specific method to technical references, and otherwise disclose and document any bases for expert opinion. 40 C.F.R. § 1502.24; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). When applying NEPA, agencies must:

utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment....

42 U.S.C. § 4332(A); 40 C.F.R. § 1502.6. NEPA does not envision undocumented narrative exposition, instead requiring:

Agencies shall insure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

40 C.F.R. § 1502.24. Where information is not provided in the NEPA document itself, but is only cross-referenced:

“The propriety of such incorporation is dependent upon meeting three standards: 1) the material is reasonably available; 2) the statement is understandable without undue cross reference; and 3) the incorporation by reference meets a general standard of reasonableness.”

...[T]here is no evidence in the record concerning the public availability of other incorporated materials. In addition, although it appears that the EA is dependent on these documents to support its finding of no significant impact, [] the EA does not appear to specifically cite to which documents or portions of these documents support which conclusions. This requires undue cross-referencing. It appears that the incorporation of these materials fails the general reasonableness test. Defendants have failed to point out where these materials are specifically cited to in the materials to support their conclusions.

Siskiyou Regional Education Project v. Rose, 87 F.Supp.2d 1074, 1098 (D.Or. 1999) (quoting *NRDC v. Duvall*, 777 F.Supp. 1533, 1539 (E.D.Cal. 1991)) (internal citations omitted). Allowing an agency to couch technical analysis in vague citations to other material violates NEPA and the Council on Environmental Quality Regulations.

Despite a full range of resource topics implicating technical analysis, the EA offers only a handful of citations or professional references. Much relevant information seems omitted. For example, monitoring data from 1994 to 2006 is cited, but not provided. Final EA at 187-192 (predecisional EA at 65). This information is not made available in the documents. Even if the material is available upon request, the underlying hard data is not. Finally, as noted previously, the critical NCDWQ “benthic macroinvertebrate special study” is relied upon at length in the Decision but was not available during the public comment period.

These procedural defects condemn the Decision's technical analysis. Further review should occur through an EIS, and any technical materials, including underlying data, should be made fully available for public review and comment.

2. Substantive Deficiencies.

In addition to the above-noted procedural deficiencies, many of the important substantive conclusions in the Decision violate the applicable review standard. These include, but are not necessarily limited to, the following:

a. Reference Watersheds.

The Decision ultimately relies upon the conclusion that the Tellico River has high, indeed illegal, turbidity levels which are attributable to the OHV System. This conclusion is based upon comparison of the "storm runoff" turbidity readings in the Tellico River compared to "reference sites" which were located in Citico and Sycamore Creeks. *See, e.g.*, Final EA at 41-42 (and tables) (comparing sites). Thus, the selection of reference sites is a critical element in this approach. However, the EA contains only cursory and conclusory discussion of this process. *Id.* at 24 (single paragraph comparing acreage of drainage, asserting the areas have "similar geology" and "forested landcover" and other attributes).

The Forest has not adequately described the critical selection of the reference sites. A far more detailed analysis is required. This deficiency is obvious upon tracking the EA analysis, which jumps from the conclusory comparison of sites into minutely-detailed differences based on riffle pebble counts, pool filling and other attributes used to justify the Decision. *See, e.g., id.* at 43-47.

b. Sedimentation.

The sedimentation analysis is central to the closure rationale but is at best confusing, if not irrational. Perhaps most importantly, the sedimentation (and all water quality) analysis must be considered within the broader, undisputed, conclusion that the applicable waters are deemed "fully supporting" applicable uses as monitored by recognized state authorities. Final EA at 26. Intent on advancing its thesis, the Forest nonetheless determines that the Tellico River is unacceptably deficient in numerous regards, including turbidity readings, sedimentation, siltation, embeddedness and other factors. These conclusions are questionable for numerous reasons. Many of the conclusions are attributed to the "new" NCDWQ study. *See, e.g.* Responses to Comments at 112 (3-139) (attributing conclusions regarding sand, silt and embeddedness to the 2009 study). This study is not discussed in either the predecisional or final EA. It is only referred to in the responses to comments released contemporaneously with the DN/FONSI. This pivotal study was obviously not available for public review, but it is impossible to determine if it was even reviewed internally by NCDWQ, peer reviewed, or meaningfully discussed by the Forest's full interdisciplinary team.

Additionally, there seem to be explanations or interpretations not fully considered or discussed in the documents. For instance, one distinction between Tellico River and the

reference streams used to support the decision is the conclusion that there is greater “pool filling” in the Tellico River. Final EA at 45. However, the EA also indicates that the Tellico River apparently has relatively fewer pools. Final EA at 67 (“[i]t has fewer pools per kilometer than the mean number or median number across the Forest....”). Thus, it might be logical to conclude that if the same amount of sediment is delivered to a water body with more pools (reference stream) and a water body with fewer pools (Tellico River), and that sediment is deposited similarly based upon relevant factors (eg gradient, depth, water speed, sinuosity, etc.) that the depth of sediment would be less in the more numerous pools of the reference stream than in the fewer pools of the Tellico River. Simplistically, the EA fails to discuss, or perhaps consider, a “null hypothesis” that “fewer pools=deeper sediment/pool; more pools=shallower sediment/pool.”

The Decision fails to address the intuitive proposition that most of the streams in the locale display high levels of sediment following storms. Typical of its selective focus the Final EA includes a photo showing a “sediment plume” apparently intended to bolster the general assertion that areas adjacent to the OHV System display such a condition while those outside the System do not. Final EA at 33 (Figure 3.1.1.6). This is simply untrue. Submitted herewith and attached hereto are four (4) photos from representative sites within the Tellico River watershed but outside the OHV Area. Photo 1 is taken along a drainage ditch in the vicinity of the Green Cove Motel. Photo 2 is taken near the Fish Hatchery. Photo 3 is taken near Holly Flats. All of these areas are outside of, but downstream from, the OHV Area. They illustrate water heavily laden with sediment following storm events. They reflect similar, if not more troubling, “sediment plumes” than that depicted in the EA. Finally, Photo 4 is taken on the reference stream, Sycamore Creek, showing its water to be running brown following a storm event. This information is consistent with Figure 3.1.1.7 (Final EA at 41), which shows virtually all of the sites considered to be in excess of 10 NTU when measured after storm events. The Decision fails to discuss or differentiate such information.

c. Fish Populations.

The Decision is additionally based on the conclusion that trout populations in the Tellico River compare poorly with similar sites. This conclusion is based almost entirely on the above-mentioned Besler (2007) document. Again, the Forest calls that analysis into a duty for which it is ill-suited and was not intended. As noted above, the recommendation of the study is not that it be used as the authoritative reference on the subject, but rather that it assist in conducting further research. *Id.* at 6. This recommendation seems appropriate given the limitations apparent from even a cursory reading of the document. The electrofishing results for the Tellico River yield such variable results as to question their validity and preclude meaningful arithmetic or statistical analysis. *Id.* at Tables 1-4. As for the reference streams in the sedimentation analysis, there is no attempt to compare the Tellico sites to the reference sites in terms of habitat suitability or other obviously relevant criteria. Where a comparison is attempted it reveals an obvious shortcoming related to the fact that the Tellico and reference data were not even collected during the same time period. *Id.* at Figure 3 (sampling occurred during earlier time period 1989-1996 compared to Tellico data collected at varying dates between 1994 and 2006). None of these points are intended to disparage the authors, who presumably conducted precisely the analysis

they set out to conduct: an initial assessment of the subject intended to facilitate more detailed analysis. The problem is that the Forest has not facilitated or analyzed such further analysis.

Additionally, there is no attempt to evaluate Tellico River trout (or other) populations over time. Such trend data is critically important in addressing the myriad other variable that might affect the results. For instance, it is possible that Tellico River trout use the portion adjacent to the OHV Area selectively, that there are other habitat factors which play a larger causal role in trout population dynamics, and similar issues. Such trend analysis seems particularly important given the long history of intensive use of what is now the Area. In short, the Area may be functioning as effectively as one could reasonably expect as trout habitat.

d. Macroinvertebrate Populations.

As noted above, the analysis is similarly confusing regarding macroinvertebrate populations as a proxy for water quality or biological functioning. As with other indicators, there is no objective deficiency, even the new NCDWQ study concluded the “bioclassification” at all sites was “excellent.” Response to Comments at 112 (3-139). The Forest downplays these results in noting that “aquatic insects are generally poor indicators of ecosystem stress due to sedimentation.” Final EA at 72. Of course the Forest analyzed these issues, apparently with bated breath in the instance of the NCDWQ analysis, perhaps based on the related but downplayed belief that sedimentation disparities resulting in “large-scale burial” would be reflected in macroinvertebrate population surveys. Of course, the premise that the OHV Area has caused dramatically elevated sediment loading for decades cannot be reconciled with the macroinvertebrate data, but this interpretation is not discussed. The Decision reflects great interest in a macroinvertebrate population that is objectively in “excellent” condition, but the analysis fails to demonstrate that use of the OHV System has caused or is causing the problem that does not exist.

H. The Decision Violates the Clean Water Act.

The Decision is largely, and incorrectly, premised upon the Forest’s apparent determination that management of the Area represents violation of the Clean Water Act. To the contrary, the Forest’s determinations presented in the EA contradict the findings of the North Carolina Division of Water Quality.

The Clean Water Act was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA makes the states primarily responsible for achieving the Act’s goals. *Id.* at (b). Section 303 directs states such as North Carolina to adopt water quality standards, which are then reviewed by the EPA. *Id.* at §1313(a)-(c); 40 C.F.R. § 131.4(a). State water quality standards are developed for each water body and generally contain three elements: (1) designated uses (33 U.S.C. § 1313(c)(2)(A)); (2) criteria for allowable limits of specified pollutants (*id.*); and (3) an antidegradation policy to protect existing uses (*Id.* at § 1313(d)(4)(B)).

In North Carolina, such standards are partly contained in the North Carolina Administrative Code (the “NCAC”). As noted above, and contrary to the EA, applicable state

standards are being met for those waters arising in the Area. The applicable waters are within the Little Tennessee River and Hiwassee River Basins. The only pollutant standard meaningfully discussed in the EA is turbidity, and the EA asserts that sediment load readings within the Area at peak storm runoff exceed the applicable 10 Nephelometric Turbidity Unit standard. Final EA at 39-42. However, these statements fail to recognize that the standards do not attempt to regulate, are not deemed violated by, “natural conditions.” 15A NCAC 02B .0205. Similarly, the standard for turbidity is not deemed violated if “background levels” are above the standard or if BMPs are in place. 15A NCAC 02B .0211(3)(k). The Decision misconstrues or misrepresents many of these regulatory provisions.

Perhaps most importantly, the EA presents the flawed conclusion that existing conditions do not comply with state requirements or the Act. Instead, as noted above, relevant waters are deemed “fully supporting” by state regulators. Final EA at 26. Instead, the Decision reflects an unsupported Forest-driven methodology of comparing sites following storm events, and concluding that Tellico River sites more greatly exceed the 10 NTU standard than do the reference sites. *See*, Final EA 41-42, Figures 3.1.1.7 and 3.1.1.8 (showing nearly all sites exceeding 10 NTU level). This approach does not comply with the applicable legal standards.

Prior to the Decision the Forest revealed little or no effort to determine “natural conditions” on any of the relevant water bodies. In its response to comments, the Forest makes mention of this factor, but in a manner that does not support the Decision. Specifically, the Forest admits “[t]he Upper Tellico River has been degraded by private timber operations and by OHV use for so long that its high turbidity levels have become associated with its natural conditions.” Response to Comments at 111 (3-137). More important than reflecting the agency’s motivation to close the OHV Area, this response recognizes the necessity of determining “natural conditions” and the fact that such an inquiry implicates differentiating historical or background conditions from those attributable to (1) existence; and (2) use of not only the current trail system, but variations of that system including those incorporating BMPs.

As detailed above, Photos 1-4 submitted herewith also question why the Forest is fixated on water quality and turbidity issues adjacent to the OHV Area when such concerns would be equally justified in other portions of the Forest. The Act (and other law) does not contemplate or allow such selective application.

The Decision hinges on a mistaken interpretation and analysis under the Clean Water Act. A proper analysis must be conducted in further analysis under an EIS.

I. The EA Presents a Flawed Analysis of Socioeconomic Impacts

The Decision fails to address, or improperly minimizes, the significant adverse effects to the “human environment” that will follow closure of the Area.

The Forest Service Handbook requires that the agency consider and “integrate considerations of biological, physical, social, and economic factors and environmental design criteria in Travel Management.” FSH 1909.1213.13f.3. The EA fails to properly analyze both adverse of economic impacts, as well as impacts to desired visitor experience. As is detailed in

the Caliber report, there are no comparable sites reasonably available in the region. This status has produced a unique market for Murphy and other communities in the locale, which will be lost if the Area is closed or its access significantly restricted. Again, to the extent these issues are considered there are only conclusions, not analysis, offered by the agency.

On remand, socioeconomic impacts should be included among those more fully analyzed in an EIS.

J. The Forest Illegally Failed to Consider a Plan Amendment.

Among the legal reasons justifying the analysis and Decision is the need to comply with the Forest Plan's "no visible sediment" standard. Final EA at 2. The Decision's logic, that the Forest faced little option but to close the System, is problematic. The "no visible sediment" standard seems of questionable wisdom in an environment like the Forest. Virtually any activity could likely be connected in some way to a violation of the "no visible sediment" standard. *See, generally*, Photos 1-4 submitted herewith. The Forest must explain why it is selectively applying this standard to eliminate existing uses at the OHV Area when turning a blind eye to the same standard for other uses on other sites.

The dilemma created by the "no visible sediment" standard is easily resolved. As the Forest notes, "[a]mending Forest Plans is a common occurrence. The Nantahala Forest Plan has been amended over 20 times." Response to Comments at 126 (3-173). In this statement the Forest is correct, for applicable guidance indicates that projects "must be consistent with the applicable [Forest] plan" but that where a project is not consistent, the official may select among several options, including "amend[ing] the plan contemporaneously with the approval of the project or activity so that it will be consistent with the plan as amended." 36 C.F.R. 219.8 (e). Put differently, the Forest was not faced with the inflexible requirement to close the Area because visible sediment is allegedly entering the Tellico River. The agency had the option of amending the nonsensical Forest Plan standard and approving a project that would actively manage OHV use to meet a more reasonable plan standard.

Unfortunately, the Forest failed to consider such an option and failed to even acknowledge its authority to amend the Plan to address any unique conflict at the OHV Area with the "no visible sediment" standard. This failure is "arbitrary and capricious" and "short of statutory right" in violation of section 706(2) of the APA.

K. The Forest Illegally Concluded the Decision Constitutes a "Nonsignificant" Plan Amendment.

To the extent the Forest evaluated plan amendment issues, it did so only in continuing its pre-ordained path to the Decision by declaring the Decision a "nonsignificant" amendment eliminating the OHV System. DN/FONSI at 15. In making this conclusion, the agency was required to undertake analysis and issue conclusions comparable to the determining whether a project has "significant" effects under NEPA. In addition to the NEPA analysis deficiencies, the Forest failed to adequately disclose this analysis or document its conclusions. In fact, the

justification of the finding that the outright closure of the OHV System constituted a “nonsignificant” plan amendment contains less than a full page of the Decision. *Id.*

The finding that the Decision involved only a nonsignificant amendment should be set aside on appeal. Through further analysis a significant plan amendment should be considered, including continuation of some vehicle use of the OHV area in conjunction with modification of the “no visible sediment” standard.

L. The Decision Violates Equal Protection Guarantees.

Requiring the Recreational Groups to comply with the “no visible sediment” standard which is not required of other uses, user groups or individuals violates the Equal Protection Clause. Under the Equal Protection Clause, statutory or regulatory classifications which do not involve suspect classes are subject to rational basis scrutiny.

While the due process and equal protection clauses of the fourteenth amendment are applicable only to the states, the due process clause of the fifth amendment imposes on the federal government the same obligations that the fourteenth amendment imposes on the states. *Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. Cal. 1986) (internal citations omitted).

While the rational basis test is deferential, it is not toothless:

[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature . . . marks the limits of our own authority . . . [and] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Romer v. Evans, 517 U.S. 620 at 632-33, 116 S. Ct. 1620 (1996). Under this test, the laws must be rationally related to a legitimate state interest. *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1105 (S.D. Cal. 1999). “Under the rational basis test, the ‘fit’ required between legislative objectives and methods used to meet those objectives is a loose one . . . [but] the fit must be reasonable. There must be some congruity between the means employed and the stated end.” *Id.* at 1106.

The Forest must explain why, through the Decision, it applies the “no visible sediment” requirement as a primary basis for closure of the entire OHV Area, when other uses and areas in the Forest are not subjected to the same requirement. As Photos 1-4 illustrate, virtually any activity conducted near even an intermittent stream will result in delivery of visible sediment to that stream during peak runoff.

A recent Ninth Circuit case, *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) is instructive. Plaintiff Merrifield was in the pest control business specializing in non-pesticide solutions—for example, using physical barriers to thwart raccoons (not unlike Ursack which is also used for raccoon resistance). The State Structural Pest Control Board prohibited Merrifield from submitting a bid to bird proof San Francisco’s Trans Bay Terminal because he did not have the required pest control license. The pest control statute exempted controllers of vertebrate animals such as “bats, raccoons, skunks, and squirrels,” but did not exempt controllers of “mice, rats or pigeons.” *Id.* at 989. In short, Merrifield would have had the right to bid on the bird proofing job if the target pest had been bats, but not pigeons. In reversing Judge Chesney’s grant of summary judgment, the Ninth Circuit held that the license exemption scheme did not rest on a rational basis. Singling out pest controllers like Merrifield “in connection with a rationale so weak that it undercuts the principle of non-contradiction fails to meet the relatively easy standard of rational basis review.” *Id.* at 991. The Equal Protection Clause requires “that similarly situated persons must be treated equally.” *Id.* at 992.

The Decision singles out OHV use in the Area for unique and unjustified application of the “no visible sediment” standard. The Forest has not discussed, let alone justified, this dissimilar application in the Decision. The Decision violates Equal Protection guarantees under even rational basis review, and must be withdrawn.

M. The Decision Fails to Sufficiently Disclose or Analyze Ground-Disturbing “Rehabilitation” Actions.

The act of decommissioning is a site-specific action which itself requires commensurate site-specific analysis. This is important in this context for several reasons. First, as indicated in the Robert Davies testimony submitted with our comments, it is typically the existence of a road system more so than its continuing use that potentially causes sediment-loading to nearby water bodies. Additionally, physical “rehabilitation” efforts can include recontouring, grading, movement of large boulders, trees or other objects, and similar efforts with the potential for profound effects on the physical environment. To amplify and support the legal and practical need for this analysis, we attach as Exhibit 5 hereto an administrative appeal decision dated January 27, 2000, issued by the Intermountain Regional Office.

Site-specific analysis of “rehabilitation” has not occurred here. All that is attempted is a brief, conclusory assertion that any such effects would be “short-term” and would be “mimimized.” Final EA at 60. This analysis is deficient- it fails to identify the specific methods that would be used, and fails to present or defend the rationale used in reaching the agency’s conclusions about the possible effects of rehabilitation.

Depending on the details, it is at least possible that rehabilitation efforts could have profound impacts on the physical environment. At a minimum a separate analysis of this aspect of the Decision is required by applicable law but was not attempted here. Again, the Decision should be withdrawn so that this analysis can occur in an EIS.

RELIEF REQUESTED

In light of the foregoing, the Recreational Groups respectfully request the Appeal Deciding Officer expeditiously grant any and all of the following relief from the Decision:

- (1) Withdraw the Decision;
- (2) Remand the Decision for further analysis; and
- (3) Withdraw existing “interim” closures of the OHV System so that use can resume in appropriate with lawfully-established terms and conditions.

We specifically request the opportunity for information disposition, oral presentation, and or any procedural opportunities provided for or consistent with the applicable regulations.

Sincerely,

MOORE, SMITH, BUXTON & TURCKE, CHTD

/s/ Paul A. Turcke

Paul A. Turcke

/PAT: cam