COMMENTS ON DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR CLARIFICATION OF LANGUAGE IN THE 1994 RECORD OF DECISION FOR THE NORTHWEST FOREST PLAN

Submitted by Earthjustice on behalf of:
Pacific Coast Federation of Fishermen’s Associations,
Institute for Fisheries Resources,
Oregon Natural Resources Council,
Umpqua Watersheds,
Klamath Forest Alliance,
Sierra Club, and
Environmental Protection Information Center

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INTRODUCTION

Earthjustice (then called Sierra Club Legal Defense Fund) represented the environmental organizations, including Oregon Natural Resources Council and Klamath Forest Alliance, that compelled the Forest Service and the Bureau of Land Management (“BLM”) to stop violating an array of environmental laws relating to management of Northwest forests. Those lawsuits led to the development of the Northwest Forest Plan. Earthjustice represented commercial fishing and conservation organizations (Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, Oregon Natural Resources Council, Umpqua Watersheds, Coast Range Association, and Headwaters) in a series of cases captioned Pacific Coast Federation of Fishermen’s Associations v. National Marine Fisheries Service (PCFFA v. NMFS) challenging the agencies’ failure to ensure full compliance with the Plan’s Aquatic Conservation Strategy (“ACS”) and protection of salmon and steelhead that are listed under the Endangered Species Act (“ESA”). Earthjustice submits these comments to provide an accurate depiction of the litigation that is the focus of the proposed changes to the ACS and of the impact the changes would have on protection of salmon and their habitat.

The Draft Supplemental Environmental Impact Statement (“DSEIS”) identifies the purpose and need of amendments to the ACS as to clarify the ACS and override what it calls a “misapplication” of certain passages of the ACS. The misapplication is said to have occurred by the courts in the PCFFA litigation. Specifically, the DSEIS asserts:
The ACS has been interpreted to mean that every project must achieve all ACS objectives at all spatial and temporal scales. This interpretation suggests that land managers must demonstrate that a project will maintain existing conditions (or lead to improved conditions) at every spatial and temporal scale. Any project that may result in site-level disturbance to aquatic or riparian habitat, no matter how localized or short-term, could be precluded under this interpretation. This interpretation establishes a nearly impossible expectation for demonstrating that projects follow the ACS.

DSEIS at 6. The DSEIS goes on to claim that both watershed restoration and logging projects have been stopped by this misapplication of the ACS, even though it concedes that none of the PCFFA cases targeted restoration activities. DSEIS at 6-8.

This characterization of the PCFFA cases pervades the entire DSEIS. It is the premise on which the DSEIS purpose and need, construction of alternatives, and environmental analysis depend. To adhere to this premise, the DSEIS presents a skewed, biased, and unsupported summary of the PCFFA cases and the environmental impacts of the logging activities at issue. The DSEIS attaches only one of the many PCFFA decisions. Indeed, the decision it attaches is the district court’s decision in PCFFA II, but the Ninth Circuit decision affirming the district court in PCFFA II is the final word in that case.

To correct the record, these comments provide a full description of the PCFFA litigation that highlights the short-cuts and types of degrading logging practices the Forest Service and BLM insisted on pursuing despite the clear conflict between the harmful logging and the ACS, as originally conceived in the Northwest Forest Plan (“NFP”). These comments critique the proposed weakening of the ACS and identify the types of environmental impacts that must be, but have not been, addressed. Finally, these comments relate the industry demands and negotiations uncovered under the Freedom of Information Act that precipitated the proposed weakening of the NFP and that call into question the extent to which the Administration has conducted an independent, objective analysis of the rollback of forest protections that it agreed to adopt in secret negotiations with the timber industry.

I. THE PCFFA LITIGATION TO PROTECT SALMON UNDER THE NORTHWEST FOREST PLAN

A. The Northwest Forest Plan’s Aquatic Conservation Strategy and NMFS’ Consultation on That Strategy

The Northwest Forest Plan sought to resolve the controversy over management of the northern spotted owl and old-growth forest habitat in the Pacific Northwest. See Seattle Audubon Society v. Evans, 771 F. Supp. 1081, 1089-90 (W.D. Wash.), aff’d, 952 F.2d 297 (9th Cir. 1991); Record of Decision for Amendments to Forest Service & Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (April 1994) (“ROD”).

Recognizing the declining health of salmonid populations in these forests, the Northwest Forest Plan contains an Aquatic Conservation Strategy (“ACS”). The ACS has four components:
(1) riparian buffers, where management must focus on aquatic conservation and commercial logging generally should not occur; (2) watershed analysis, which creates a scientific record to guide and inform logging, restoration, and other management activities; (3) key watersheds embodying fish strongholds or high priority restoration areas; and (4) a comprehensive watershed restoration program to speed ecosystem recovery. ROD at B-12.

In 1994, the federal district court in Seattle held that the Northwest Forest Plan passed muster under certain federal environmental laws. This holding was apart from the ESA, because Pacific salmon in the impacted area had not yet been listed. The decision cautioned that “[t]he effectiveness of the ACS is still subject to debate among scientists. If the plan as implemented is to remain lawful, the monitoring, watershed analysis, and mitigating steps called for by the ROD will have to be faithfully carried out, and adjustments made if necessary.” Seattle Audubon Soc’y v. Lyons, 871 F. Supp. 1291, 1322 (W.D. Wash. 1994), aff’d, 80 F.3d 1401 (9th Cir. 1996); see also id. at 1300 (“any more logging sales than the plan contemplates would probably violate the laws. Whether the plan and its implementation will remain legal will depend on future events and conditions”); id. at 1324 (“As written it is legally sufficient. It remains, of course, to be carried out.”); id. at 1325 (a failure to monitor adequately “would call for reconsideration of the plan”).

B. Endangered Species Act Consultation on the Plan’s Aquatic Protections

At that time, NMFS did not consult on the Northwest Forest Plan under the ESA because no salmonids in the Plan area had yet been listed under the Act. The 1996 endangered species listing of Umpqua cutthroat trout put the ACS to its first significant ESA test. 61 Fed. Reg. 41,514 (1996). In March 1997, NMFS issued a programmatic biological opinion and conference report on the impacts of the ACS on the listed Umpqua cutthroat trout as well as the proposed Oregon coast or southern Oregon/northern California coho salmon, Oregon coast or Klamath Mountains Province steelhead, or candidate chinook salmon, chum salmon, or coastal cutthroat trout. (“Plan Bop” available at http://www.nwr.noaa.gov/1publcat/bo/1997/osb1997-0711.pdf). As other salmonids, such as Oregon coastal coho and lower Columbia River steelhead, have been listed under the ESA, NMFS has extended the biological opinion to cover them.

In the 1997 programmatic biological opinion, NMFS started with the proposition that salmonids need properly functioning aquatic habitat conditions to survive and determined that these requirements were not being met:

Their status is such that there must be a significant improvement in the environmental conditions of their habitat over those currently available under the environmental baseline …. Any further degradation of these conditions is expected to have a significant impact due to the level of risk that listed, proposed, and candidate salmonids presently face under the environmental baseline. (Plan BiOp at 15)

The Northwest Forest Plan acknowledges as much in the nine ACS objectives, which call for maintaining and restoring properly functioning components of aquatic habitat, such as riparian reserves, sediment regime, water quality, drainage networks, and in-stream flows. ROD at B-9 to B-10. NMFS “recognizes that agency decision makers retain enough discretion when
implementing management direction in the [forest plans incorporating the ACS] that application of the standards and guidelines alone may not always guarantee that all management decisions will be fully consistent with ACS objectives.”  Plan BiOp at 26. It therefore determined that to avoid jeopardizing salmon survival, each project must be fully consistent with these objectives. Plan BiOp at 12, 21, 23-24, 26, 39, 63, 66-67; Attachment 2 at 8, 12, 14. To ensure that this would occur, the Plan BiOp identified three criteria for determining whether proposed actions would jeopardize the continued existence of salmonids, specifically:

(1) essential components of the LRMPs and RMPs [forest plans], including ACS objectives, watershed analysis, restoration, land allocations, and standards and guidelines, will be fully applied at the four spatial scales of implementation (region, province, watershed, and site or project); (2) management actions will comply with all applicable land allocations and standards and guidelines; and (3) management actions will promote attainment of the ACS objectives.... A pivotal issue in applying these criteria is determining whether the proposed actions are properly designed and mitigated to ensure full attainment of the ACS objectives.

Plan BiOp at 38; accord id. at 23-24. The Plan BiOp further stated that “the NFP ROD establishes clear direction to the land management agencies regarding the design and review of actions to meet ACS objectives” and quoted verbatim from the language on pages B-9 and B-10 that the agencies now propose to eliminate. Id. at 38-39. The Plan BiOp’s no-jeopardy conclusion is conditioned upon the design and review of all timber sales and other actions to ensure that they meet the ACS objectives. Id. at 38-39.

In PCFFA v. NMFS (“PCFFA I”), No. C97-775R, Amended Order on Summary Judgment (W.D. Wash., May 29, 1998) (Exhibit 1), the district court upheld the Plan BiOp. In particular, the court concluded that NMFS had failed to follow through on its promise that individual projects would promote attainment of the ACS objectives. Id. at 23-24. Any failure to fulfill this promise would become an issue in site-specific consultations, not in the plan consultation. Id. at 24.

C. Invalidation of the First Round of Biological Opinions on Timber Sales Proceeding Under the Northwest Forest Plan

In PCFFA I, the district court then turned to the first two biological opinions issued for timber sales proceeding under the Northwest Forest Plan and found them deficient because NMFS had failed to follow through on its promise that individual projects would promote attainment of the ACS objectives. Id. at 26-30.

NMFS had issued two biological opinions, each five pages in length and covering more than a dozen timber sales that clearcut mature and old-growth forests within degraded watersheds. The biological opinions contain a chart listing the names of the particular timber sales, but have no discussion of the sales’ aquatic impacts. Instead, they incorporate a document that describes generically the types of impacts various logging activities have on aquatic habitat. This document, entitled “Potential Effects of Timber Harvest and Associated Activities on Salmonid Habitat” dated June 19, 1997, is attached as Exhibit 2.
Of relevance to the timber sales at issue and the proposed changes to the NFP, NMFS made the following findings:

(1) clearcutting results in higher rates of surface erosion that can result in sediment and turbidity problems even when the activities occur outside the NFP riparian reserves, Id. at 4-5;

(2) clearcutting affects flow and hydrology because less rain and snow is intercepted by vegetation when tree cover is removed and less evapotranspiration of water by trees occurs; quicker runoff can increase the volume and frequency of peak flows, Id. at 6-8; and

(3) these hydrologic impacts may occur when less than 20% of a watershed is clearcut; no more than 15% of a watershed in young stands (defined as stands less than 30 years old) should confer a low risk of hydrologic effects on streams from the cumulative effects of logging. Id. at 9 (the measure described by NMFS is called Equivalent Clearcut Area (“ECA”)).

In this generic assessment, NMFS assumed that “all timber sales will be designed and mitigated in accordance with the NFP ACS objectives” and therefore their impacts “are expected to be generally minor in magnitude and short-lived in duration.” Id. at 2; see also id. at 14. In addition, NMFS explicitly required as a condition to minimize incidental take of listed salmon that the land management agencies would “[a]pply the review criteria described on pages B-9 and B-10 of the NFP ROD to ensure that proposed timber sales are fully consistent with applicable standards and guidelines and ACS objectives. These criteria stress the importance of ‘meeting’ and of ‘not retarding or preventing attainment of’ ACS objectives.” Id. at 13.

The timber sales at issue in PCFFA I had been identified by agency biologists as “major problem,” jeopardy sales, or “languishing” sales because they would further degrade aquatic habitat in watersheds that “have been extensively cut over” and “are already degraded and in need of immediate restoration.” AR 80 at 1 (Exhibit 3) (the cited excerpts from the Administrative Record (“AR”) in PCFFA I are attached. The June 18, 1997 BiOp is available at: http://www.nwr.noaa.gov/1pubcat/bo/1997/osb1997-0774.pdf. The July 22, 1997 BiOp is available here; http://www.nwr.noaa.gov/1pubcat/bo/1997/osb1997-0776.pdf). These timber sales would cause “cumulative watershed effects,” described as changes in runoff patterns, volumes, and timing from the removal of large blocks of tree cover in the affected subwatershed. Agency scientists recommended dropping the clearcut logging in these sales to reduce these adverse watershed effects, but agency supervisors objected to reducing timber volumes when the sales appeared to comply with NFP standards and guidelines. AR 80 and 82 (Exhibits 3 and 4).

For example, the Cobble Creek sale was located in the Rock Creek Watershed – the most important subbasin of the North Umpqua River for Umpqua Cutthroat Trout. The agency scientists documented poorly functioning aquatic habitat in the area impacted by the sale. Because the sale would increase the area in equivalent clearcut condition from 43.7% to 45.3% in this already degraded area, the agency scientists recommended that it not go forward.
Similarly, the High Noon sale was a 229-acre clearcut in a Tier 1 key watershed. The agency scientists documented degraded conditions that would be made worse by the sale’s clearcut logging and roadbuilding. One scientist’s notes indicate: “we didn’t agree that the proposed mitigation is adequate.” AR 122s (Exhibit 5). A fisheries biologist from the BLM recommended “drop[ping] the harvest units and the proposed new roads in the Fate Creek subbasin and defer[ring] timber harvest in the subbasin for at least twenty years.” AR 79s (Exhibit 6). This scientist added: “I believe the fish are already in jeopardy in the Fate Creek subbasin due to the environmental baseline conditions. Therefore, it is hard to rationalize subjecting them to an incremental increase in jeopardy.” AR 80 (Exhibit 3).

To resolve this dispute, the regional executives convened scientists who had served on the aquatic team of the Forest Ecosystem Management Assessment Team (“FEMAT”) that formed the scientific underpinnings of the ACS. AR 83 (Exhibit 7). The FEMAT scientists confirmed that cumulative watershed effects from logging, which increase peak flows, change runoff timing, and produce other hydrologic impacts, must be evaluated and mitigated to meet the ACS objectives. AR 88 at 5 (Exhibit 8). The FEMAT scientists also concluded that clearcutting may need to be constrained even in matrix lands designated in the NFP as suitable for timber production if necessary to mitigate cumulative watershed effects and meet the ACS objectives. Id. at 6-8. See AR 79, 84, 85, and 87 (Exhibits 9-12).

In keeping with the FEMAT scientists’ recommendations, the regional executives directed the agency scientists to identify the cumulative watershed effects at the project, watershed, and basin scales and to develop necessary mitigation measures, including deferring or canceling clearcut logging until hydrologic conditions in the subwatershed have recovered and converting clearcut logging into thinning that retains sufficient tree canopy to minimize hydrologic effects. AR 88 (Exhibit 8). The agencies collected data that confirmed the already degraded conditions in the affected subwatersheds and the adverse impacts the clearcutting would have, but imposed no mitigation to minimize the impacts of the logging. The biological opinions never acknowledged the impacts, let alone required any mitigation for the logging. In contrast, the Plan BiOp had established some binding standards for roadbuilding mitigation, which were incorporated into the sales.

In PCFFA I, the federal district court in Seattle invalidated two NMFS site-specific biological opinions on timber sales because: “[o]n the programmatic level, NMFS has assumed ACS compliance, but on the project level it has failed to ensure or verify compliance.” Id. at 30 (Exhibit 1). Although the agencies “recognize the need for a limit on the amount of cutting in a watershed when there has already been an excessive amount of cutting . . . [the agencies] did not add mitigation for the logging” in heavily degraded watersheds. Id. at 27-28. In the court’s view, “NMFS could not have rationally concluded, based on the evidence of adverse effects and lack of evidence of significant mitigation before it, that the proposed actions were consistent with the ACS’s mandate that agencies maintain and restore aquatic systems within the range of the northern spotted owl.” Id. at 30.

The court declared the site-specific biological opinions invalid, which revoked the incidental take statements that insulated the Forest Service and the BLM from liability under the
ESA for taking listed fish. Stripped of this immunity, the Forest Service and BLM stopped all logging of sales covered by the biological opinions.

D. Judicial Invalidation of the Next Round of Timber Sale Biological Opinions in PCFFA II

Following this decision, NMFS, the Forest Service, and BLM adopted a new approach to consultation that identifies aquatic impacts from the timber sales but then ignores those project-level impacts in determining ACS consistency and jeopardy. Instead of reviewing the full extent, duration, and consequences of the project-level impacts, NMFS made its ACS consistency and jeopardy determinations at the fifth field watershed scale, which generally spans 20-200 square miles. At this scale, few, if any, individual timber sales would produce measurable impacts. For example, a reduction of tree canopy that would undoubtedly affect runoff patterns in a subwatershed would constitute such a small percentage of the tree cover throughout the entire watershed that it would seem too small to have an impact. In addition, the agencies determined ACS consistency based on anticipated conditions in 10-20 years, ignoring the sales’ near-term impacts on fish survival and recovery. Moreover, while the agencies often drew information about baseline conditions from the watershed analysis, they did not adhere to watershed analysis recommendations nor did they ascertain whether logging would lead to the desired future conditions for the watershed as identified in the watershed analysis. NMFS applied the new direction in all of its consultations on timber sales proceeding under the NFP.

PCFFA II challenged four biological opinions on nearly two dozen timber sales, many of which had previously been at issue in PCFFA I. The new consultations generated reams of paper, but led to no changes in the underlying logging activities that would better protect salmon and their habitat. The sales consisted primarily of large-scale clearcut logging operations with no mitigation for the impacts of the logging, apart from riparian reserves along the streams. Although the biological opinions documented degraded conditions in the subwatersheds and drainages in which the sales are located, NMFS concluded that “only those actions with adverse effects which are significant at the watershed scale over a long period,” i.e., 10-100 years, would be inconsistent with the ACS objectives. See, e.g., Aug. 24, 1999 Biological Opinion at 19 available at http://www.nwr.noaa.gov/1publcat/bo/1999/osb1999-0222.pdf. NMFS reached this conclusion for sales that log in and outside key watersheds adjacent to, or miles away from, fish-bearing streams in heavily degraded drainages that violate water quality standards, or in relatively pristine drainages.

By way of example, the Christopher Folley sale would clearcut 215 acres of old growth forest in the Canton Creek watershed, designated a Tier 1 key watershed under the NFP because it is a priority for fish habitat and restoration. The watershed analysis describes the watershed as a “key refuge” for anadromous fish stocks in the region. Portions of the sale are adjacent to fish

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1 Since Oregon coastal coho had by then been listed under the ESA, the consultations focused on both Umpqua cutthroat trout and Oregon coho. NMFS subsequently delisted Umpqua cutthroat trout. However, because NMFS used properly functioning habitat as the sole measure of the species survival, without differentiating among different salmonid species, it engaged in a single analysis and reached one conclusion applicable to both species.
bearing streams, and other parts are adjacent to streams identified as important sources of cool water and gravel. Past logging has left a legacy of high road densities (as high as 7.2 miles per square mile) and sparse timber cover. Several sale units are located in areas with a high incidence of management-related landslides. In the subwatershed where the timber sale takes place, hydrologic recovery (or the percentage of the watershed with minimally functional tree cover) is estimated at 57%. In individual drainages, the figure is as low as 21%. The biological opinion assessed the sale’s impacts by measuring hydrologic recovery on the federal lands in the fifth field watershed, which is 78%.

Similarly, the Diamondback sale is located on BLM lands that have checkerboard ownership patterns with only 34% federal ownership. Much of the private land has been clearcut; only the federal lands contain significant old-growth stands. The other side of the mountain was clearcut in the mid-1990s in the Yellow Jacket timber sale and a landslide runs down the middle of the clearcut area. The Diamondback sale would clearcut 97-acres of the last remaining old-growth in this area in the Upper Umpqua watershed. The logging would increase the area in clearcut condition by approximately 1% so that only 75% of the federal watershed would be hydrologically recovered. Over the entire watershed, including both federal and nonfederal lands, the figure drops to about 60%.

The Christopher Folley and Diamondback sales illustrate the difference it makes when the analysis is conducted over an entire watershed versus in the drainage immediately affected by the logging. The focus on the broad landscape diluted the impact of clearcutting in the drainages where the impacts will be felt by the fish and other aquatic species that need these affected streams reaches for essential life functions.

On September 30, 1999, the district court granted PCFFA’s motion for summary judgment, holding that the biological opinions ran counter to the evidence of aquatic degradation before NMFS and failed to employ the best available scientific information as required by the ESA. 71 F. Supp.2d 1063 (W.D. Wash. 1999) (Exhibit 13). The court rejected the notion that NMFS could make jeopardy determinations solely at the larger watershed-scale because such a broad landscape perspective masks the effects of the individual sales. Id. at 1069. In the court’s view, “[b]y employing a long term/watershed approach in making jeopardy determinations, NMFS has virtually guaranteed that no timber sale will ever be found to jeopardize the continued existence of the Oregon coastal coho or Umpqua River cutthroat trout.” Id. at 1073. In keeping with the scientific evidence and the Plan BiOp, “not only must the ACS objectives be met at the watershed scale (as NMFS argues), each project must also be consistent with ACS objectives, i.e., it must maintain the existing condition or move it within the range of natural variability.” Id. at 1069 (emphasis in original). NMFS’ “failure to evaluate ACS compliance at the project or site level, therefore, was arbitrary and capricious.” Id. at 1073.

Next, the court held that “NMFS has failed to adequately assess the short term impacts of the timber sales and . . . has failed to adequately explain its assumption that passive restoration will adequately mitigate the adverse impacts of logging. The problem with NMFS’ approach, as plaintiffs point out, is that NMFS is analyzing the sales’ effects based on predicted conditions ten years after the sale.... [T]o fully ensure the action agencies’ compliance with the ACS, NMFS would have to assess the condition immediately after the sale....” Id. at 1070. According to the
court, “NMFS could not rationally conclude, based on the evidence before it, that evaluating only long-term impacts of agency activities satisfied its mandate to ensure ACS compliance. Its failure, therefore, to evaluate the short-term impacts, (i.e., impacts that would manifest in less than a ten-year period) was also arbitrary and capricious.” Id. at 1073.

The court also held that NMFS failed to use the pertinent watershed analysis to determine whether conditions in the impacted watersheds are within the acceptable range of variability. Id. at 1072. The Little River Watershed Analysis, for example, identified the Upper Little River as a high priority for restoration and protection, yet the Little River DEMO sale would log in the riparian reserves in the Upper Little River drainage. Id. at 1071. NMFS’ biological opinion makes no mention of the watershed analysis recommendations.

The court cited two other examples where NMFS ignored watershed analysis recommendations. First, the Upper South Myrtle sales would clearcut 15.4 mmbf across several hundred acres in the Myrtle Creek watershed. The watershed analysis (at 48-49) lists ten subwatersheds as “most important” for fisheries, and states that “only limited activities should be considered for these areas (i.e., commercial thinning, pre-commercial thinning, road maintenance, culvert replacements, or road improvements/upgrading).” The watershed analysis goes on to list ten other subwatersheds “in which to consider regeneration harvesting....” Id. at 49. Despite this recommendation, the Upper South Myrtle Sales would clearcut in the first two drainages listed in the “most important to maintain and/or restore” category, as well as in two drainages identified in the watershed analysis as having a “high probability of mass movement.” Id. at 14.

Second, the E-Mile sale would log in the Lower E-Mile and Middle Little River drainages. The Little River Watershed Analysis (at Recommendations 14) targets Lower E-Mile Creek as a high priority for restoration of upslope processes and sediment regimes. The analysis further identifies both drainages as “at high risk of debris avalanches or debris flow sediment delivery to stream channels” because of their steep, dissected terrain where activities that alter slope stability should be avoided. Id. Recommendations-19-20. The biological opinion never mentions these recommendations, despite a hydrologist report and a letter from a member of the watershed analysis team noting the inconsistencies.

The watershed analyses contain information critical to whether the sales will attain desired future conditions for the watershed. Because the biological opinions never mentioned the watershed analysis recommendations, “the court finds that NMFS has not fully or sufficiently incorporated watershed recommendations into its ACS analysis.” 71 F. Supp. 2d at 1072.

In May 2001, the Ninth Circuit affirmed, holding that NMFS is not “free to ignore site degradations because they are too small to affect the accomplishment of that goal [to maintain and restore aquatic functions] at the watershed scale”:

Its disregard of projects with a relatively small area of impact but that carried a high risk of degradation when multiplied by many projects and continued over a long time period is the major flaw in NMFS study. Without aggregation, the large spatial scale appears to be calculated to ignore the effects of individual sites and
If the effects of individual projects are diluted to insignificance and not aggregated, then Pacific Coast is correct in asserting that NMFS’s assessment of ACS consistency at the watershed level is tantamount to assuming that no project will ever lead to jeopardy of a listed species.

PCFFA v. NMFS, 265 F.3d 1028, 1035-36 (9th Cir. 2001) (Exhibit 14) (NMFS cannot ignore “the cumulative effects of individual projects on small tributaries within watersheds”). Accordingly, “NMFS’s assuming away site-specific degradations that could lead to a jeopardy finding contradicts the purpose of the ESA and is arbitrary. Any effect on a particularly important spawning area should show up as a degrade rating for the entire watershed.” Id. at 1037.

Nor can NMFS consider “only degradations that persist more than a decade.... This generous time frame ignores the life cycle and migration cycle of anadromous fish. In ten years, a badly degraded habitat will likely result in the total extinction of the subspecies that formerly returned to a particular creek for spawning.” Id. at 1037. The Ninth Circuit explained:

The NMFS predicts that more trees will grow within the watershed during the ensuing decade than are cut in the proposed project and, therefore, concludes that the “short-term” and “localized” effects of the logging will be naturally mitigated by regrowth. This optimism may be justified for the purpose of counting trees, but for the purpose of counting anadromous fish, it is wholly unrealistic.

Id.; see also id. at 1038 (finding no scientific evidence in the record to support NMFS’ approach or to “ensure that fish that never hatched could return to the recovered spawning habitat”). The Ninth Circuit further stated that “NMFS does not and cannot explain adequately its disregard of short-term effects.... Given the importance of the near-term period on listed species survival it is difficult to justify NMFS’s choice not to assess degradation over a time frame that takes into account the actual behavior of the species in danger.” Id. at 1038.

E. The PCFFA III Litigation

1. NMFS Refused to Rescind the Biological Opinions Pending the Outcome of the Ninth Circuit Appeal in PCFFA II

NMFS used the same template in conducting consultations on NFP timber sales throughout Washington, Oregon, and northern California. In addition to the biological opinions at issue in PCFFA II, NMFS issued at least 19 other biological opinions covering over 100 timber sales using this flawed consultation approach.

These biological opinions generally lumped together all timber sales for a particular district over a specified time frame. Some of the sales involved large-scale clearcut logging. Others involved less-degrading commercial thinning. And some included restoration or road work as part of the sales. The biological opinions also covered projects that involved no logging activities.
In every instance, NMFS concluded that the timber sales were not likely to jeopardize the continued existence of listed salmonids. However, NMFS reached this no-jeopardy conclusion without assessing degradation from the sales that could not be measured across the entire watershed or degradation from the sales over the next ten years. Moreover, NMFS never distinguished between those activities that cause extensive degradation of aquatic habitat from those that have lesser impacts.

In the spring of 2000, PCFFA formally asked NMFS to withdraw these biological opinions because they suffer from the same defects as the biological opinions invalidated by the district court in PCFFA II. NMFS refused and instead kept the biological opinions in place. Logging proceeded on numerous sales, precipitating the third lawsuit known as PCFFA III.

2. The Preliminary Injunction Directing NMFS to Rescind the Biological Opinions

In an order dated December 7, 2000, the district court issued an injunction invalidating the 20 NMFS’ biological opinions pending the outcome of the Ninth Circuit appeal in PCFFA II, No. 00-1757R, Order Granting Plaintiffs’ Motion for Preliminary Injunction and Denying Defendant’s Request for Stay (Dec. 7, 2000) (Exhibit 15). The court stated, in pertinent part: “There is no dispute that, in the instant opinions, NMFS has again (1) failed to measure impacts at the site specific scale, instead of reviewing for compliance with ACS guidelines on a watershed level; [and] (2) ignored short term effects that would not be measurable ten or more years after the action.... These actions were held to violate the APA and ESA in PCFFA II. NMFS has made no showing that the court’s prior ruling is in error, or that these opinions are somehow not governed by the ruling in PCFFA II. The court therefore finds that PCFFA’s likelihood of success on the merits of the instant case is exceedingly strong.” Id. at 7.

The court addressed the harm to salmon, concluding: “There is a discrete and immediate harm to listed species [of salmon] by logging and timber sale activities undertaken pursuant to the biological opinions that fail to properly assess the potential environmental harm associated with such forestry actions…. In sum, the court finds that the possibility of irreparable harm exists on the facts of this case. Moreover, the balance of hardships, and certainly the public interest, tip sharply in favor of the PCFFA in its attempt to enforce the provisions of the NFP and the ESA.” Id. at 9.

The court enjoined NMFS from taking any action on the challenged opinions and provided that “[t]he injunction shall remain in place until such time as NMFS is in compliance with the Ninth Circuit’s decision.” Id. at 10. In response to the order, NMFS suspended the challenged biological opinions and incidental take statements.

NMFS incorrectly construed the court’s order to stop restoration projects in addition to logging. PCFFA immediately asked the court to clarify that only logging, and not beneficial restoration projects, were enjoined. In an order entered on December 20, 2000, the court clarified that its order and NMFS’ suspension extended to the biological opinions only as they pertain to timber sales and not to other non-timber sale projects covered by the biological opinions (Exhibit 16).
A subsequent order entered on December 22, 2000, clarified that the court’s order does not apply to yarding, hauling, and removal of downed timber on certain named timber sales (Exhibit 17). As clarified, the court’s preliminary injunction directs NMFS to suspend 20 biological opinions as they pertain to logging of timber sales until the Ninth Circuit issues the mandate in PCFFA II and NMFS is in compliance with that mandate.

3. Settlement of PCFFA III: the fishing and conservation groups sift through the projects and identify some that can go forward

After the Ninth Circuit issued its ruling in May 2001, the Forest Service and BLM took no actions to modify the affected timber sales to eliminate or mitigate the degradation of salmon habitat. NMFS has issued no new biological opinions on the timber sales at issue, and the Forest Service and BLM made no attempt to modify the sales. The federal agencies seemed to invite gridlock in order to justify changing the ACS.

In contrast, the PCFFA plaintiffs never interpreted the court rulings as an absolute barrier to logging, provided that the logging would not prevent attainment of the ACS objectives. Frustrated with the federal agencies’ inaction, the PCFFA plaintiffs began to identify timber sales that could go forward with further analysis or modifications.

In September 2001, the PCFFA plaintiffs asked the federal agencies to examine three commercial thinning sales on the Siuslaw National Forest that were under consideration as a trade to prevent clearcut logging of two other classic old-growth sales. The sales – Peach, Fiddle, and Eichler – involved thinning of young stands to promote development of old-growth forest conditions. The PCFFA plaintiffs believed the sales could comply with the ACS because they involve thinning of relatively young stands and have substantial restoration components, such as fixing or removing culverts that block fish passage, road decommissioning, riparian planting, and a credible monitoring plan. Based on this overture, the parties entered into a stipulation removing these three timber sales from the PCFFA III injunction (Exhibit 18).

In October 2002, the PCFFA plaintiffs made a similar offer regarding the Five Rivers Project, another sale that would thin overstocked young stands. While waiting for a response to their letter regarding this particular sale, the PCFFA plaintiffs undertook a review of the available information regarding the sales covered by the Biological Opinions at issue in PCFFA III. Based on this review, the PCFFA plaintiffs filed a motion to convert the December 2000 preliminary injunction into a permanent injunction and to exempt certain timber sales that would have minimal adverse aquatic impacts either in their original form or with proposed modifications. In March 2003, the court approved a settlement of the case in which NMFS rescinded the biological opinions as to timber sales except as to specified actions suggested by the plaintiffs, which allowed 18 timber sales to go forward (Exhibit 19).

Ironically, it was the PCFFA plaintiffs, rather than the federal agencies, that identified timber sales that could be modified to have only minimal adverse effects on salmon habitat. The PCFFA plaintiffs had no trouble distinguishing restoration and thinning activities that had only short-term, localized effects, from clearcut logging that had far more pervasive and sustained impacts on salmon habitat. While the PCFFA plaintiffs were essentially doing the federal
agencies’ job, the agencies were painting a picture of the PCFFA litigation as creating impossible expectations and necessitating a wholesale revamping of the ACS.

*     *     *

By characterizing the PCFFA decisions as a misapplication of the ACS, the DSEIS fails to acknowledge the fundamental changes that the agencies are proposing. The timber sales at issue in the PCFFA litigation illustrate the types of harmful logging practices that the agencies had authorized under a flawed application of the ACS. They likewise illustrate the type of logging that would be permitted under the proposed amendment. It is not until the last three pages that the DSEIS even acknowledges that the logging could have any adverse effects on aquatic and riparian habitat. Its entire discussion of those impacts is embodied in a listing: “risk of increased sedimentation from disturbance from road work and logging operations, risk of effects to peak flows from canopy removal; and risk of loss or degradation of wildlife habitat.” DSEIS at 42. Nowhere does the DSEIS assess these impacts.

Elsewhere, the DSEIS gives a very selective and incomplete portrayal of logging at issue in the PCFFA cases and fails to disclose that logging can seriously harm salmon and their habitat. The DSEIS asserts that the timber sales at issue in the litigation had minimized roadbuilding, employed yarding mitigation, and had only short-term, localized sediment impacts usually due to road removal or maintenance activities that have long-term benefits. It further asserts that the current wording of the ACS has been interpreted to preclude sales that have only minimal aquatic impacts. DSEIS at 8. As discussed above, PCFFA II actually challenged large clearcuts that denuded the landscape, exacerbating peak flows, intensifying runoff, and increasing sedimentation. The agencies identified these impacts at the site scale, but found them never to be problematic because they did not aggregate the impacts from past activities and other sales. Instead, they looked across an entire fifth field watershed, ten or more years into the future, and predicted that the number of acres of trees removed would not have a measurable effect at the watershed scale. As the Ninth Circuit held, this approach ignored very real cumulative effects and the harm to several generations of salmon that would occur before the time frame assessed by the agencies. The DSEIS similarly skirts over the very real effects of the logging at issue.

The DSEIS’ one-sided and misleading description of the PCFFA litigation leads to another flaw as well. The DSEIS presents two alternatives: the agencies’ proposed action and the alleged gridlock caused by the allegedly misguided PCFFA rulings. In the scoping process, Pacific Rivers Council, joined by Pacific Coast Federation of Fishermen’s Associations and Oregon Natural Resources Council, urged the agencies to include an alternative in the SEIS that provides for faithful compliance with the ACS and the court rulings. Such faithful compliance could build upon the approach presented in the Declaration submitted by Dr. Gordon Reeves in PCFFA II, which is discussed below, or the agencies could develop an alternative approach that would prevent harmful clearcut logging but allow restoration and thinning to proceed subject to appropriate mitigation measures. The agencies have made no good faith effort to comply with the PCFFA II and III rulings. Instead, they have presented a skewed view of the litigation as prohibiting far more than the holdings support.
II. THE FEDERAL GOVERNMENT’S RELIANCE ON AN ERRONEOUS AND MISLEADING DEPICTION OF PCFFA I AND II TO JUSTIFY WEAKENING THE NORTHWEST FOREST PLAN’S AQUATIC PROTECTIONS

Rather than bring their actions into compliance with the Ninth Circuit’s decision, the federal agencies are proposing to weaken the Northwest Forest Plan’s salmon protections. On November 25, 2002, the Forest Service and BLM issued a scoping notice, followed by release of the DSEIS in March 2003. This DSEIS represents the agencies’ third attempt to “fix” the problem by doing paperwork instead of modifying the timber sales that harm salmon. The proposed plan amendment would strip the ACS of all but the few standards and guidelines that delineate riparian reserves and other narrow aquatic protections. Under the amendment, the agencies would no longer need to ensure that each timber sale complies with the ACS objectives. Other comments address the scientific pitfalls in such an approach and how it deviates from the FEMAT scientific underpinnings of the ACS. These comments address four issues related to the PCFFA litigation.

A. The Proposed Amendment Eliminates Any Mechanism to Ensure Cumulative Watershed Effects Will Be Addressed and the ACS Objectives Will Be Met.

Under the ACS as it is currently written, the federal agencies must determine whether projects will meet, or at least not prevent attainment of, the ACS objectives. This facially obvious reading of the ACS is confirmed by the federal agencies, the Regional Ecosystem Office memorandum attached to the DSEIS, the NMFS Plan Biological Opinion, and the courts in the PCFFA litigation.

As an initial matter, the agencies must design projects to comply with the specific standards and guidelines spelled out in Section C. However, Section C contains far less than what the FEMAT scientists believed would be necessary to ensure properly functioning aquatic habitat. For logging, the ACS standards and guidelines impose restrictions on activities that can occur in the designated riparian reserves. The FEMAT scientists recognized that aquatic habitat is significantly impacted not only by what occurs in streamside corridors but also by the activities that occur in upland areas. Moreover, the quality of aquatic habitat is substantially impacted by the cumulative impacts of activities that occur throughout the watershed.

Because compliance with the standards and guidelines in Section C will not, alone, protect aquatic habitat, the NFP establishes nine ACS objectives that also must be met. As currently written, the NFP requires that land managers make a determination whether each project will meet or not prevent attainment of the ACS objectives. This decision is the mechanism for ensuring that land management activities will keep aquatic conditions on the trajectory toward attainment of the ACS objectives and recovery.

NMFS “recognizes that agency decision makers retain enough discretion when implementing management direction in the [forest plans incorporating the ACS] that application of the standards and guidelines alone may not always guarantee that all management decisions will be fully consistent with ACS objectives.” Plan BiOp at 26. It therefore determined that to avoid jeopardizing salmon survival, each project must be fully consistent with these objectives. Plan BiOp at 12, 21, 23-24, 26, 39, 63, 66-67; Attachment 2 at 8, 12, 14. The DSEIS abandons
the ACS’s cautious approach of ensuring that individual projects are consistent with the ACS even before we have meaningful monitoring results to tell us whether the Standards and Guidelines are working.

During the course of the litigation, NMFS submitted the declaration of Gordon Reeves, Ph.D., a co-leader of the FEMAT Aquatic Team (Exhibit 20). Dr. Reeves endorsed determining jeopardy by reference to whether a timber sale maintains or moves conditions toward the natural range of variability at the watershed level. To do so, watershed analysis must, in Dr. Reeves opinion, be used to determine the natural range of variability, which he defines as “the distribution of conditions of smaller subwatersheds that support acceptable populations of anadromous salmonids and other aquatic and riparian organisms. It may be expressed as the frequency of distribution of productive and non-productive sites and subwatersheds in a subwatershed or watershed.” Reeves Decl. ¶ 15. Not only does the watershed analysis define the natural range of variability, but it also establishes the criteria for determining consistency with the ACS at the watershed scale. Id. ¶ 16.

More specifically, both jeopardy and consistency with the Aquatic Conservation Strategy would be determined in relation to the natural range of variability:

If the current distribution of conditions was determined to be within the acceptable range of variability for the watershed or subwatershed, then presumably sites are in compliance with the ACS. If the distribution of conditions was outside the acceptable range of variability then the watershed or subwatershed is out of compliance. Management actions that would degrade a site or small subwatershed were not expected to proceed under such circumstances unless it was established that the actions would bring the system back within the acceptable level of variability in the long-term and this outweighed any short-term negative impacts. Management activities are focused on restoration in such cases.

Reeves Decl. ¶ 16.

The proposed amendment in the DSEIS would eliminate this mechanism for ensuring that projects are on the right track. There would no longer be any inquiry into whether the project is consistent with the ACS objectives. The sole question would be whether the project complies with the few Section C standards and guidelines. The DSEIS explains that ACS objectives will be met solely through compliance with standards and guidelines: “No additional site-scale determinations regarding attainment of the ACS objectives would be required.” DSEIS at 13.

Without the additional inquiry that focuses on meeting the ACS objectives, there appears to be no mechanism to assess and prevent adverse cumulative watershed effects of logging and roadbuilding. The DSEIS is silent with respect to these effects or any alternative mechanism for identifying and curtailing them. It is the individual projects proceeding under the NFP that cause on-the-ground harm. By eliminating the mechanism for assessing the full impacts of those projects, the proposed amendment would allow the harm to go unchecked.
While the DSEIS asserts that progress toward meeting the ACS objectives will be assessed at watershed and broader scales, DSEIS at 3, it offers no viable mechanism for doing so. The fallback mechanism in the DSEIS would become effectiveness monitoring. While implementation monitoring has been underway for several years, effectiveness monitoring is still in its infancy. The DSEIS states that such monitoring “will provide information at the province scale in a decade or more.” DSEIS at 32. It also candidly admits: “The monitoring time period has been too short for agencies to demonstrate how well the ACS has worked to improve aquatic habitats.” Id. at 33. It stresses that it may take decades to assess the results.

If future effectiveness monitoring indicates that the ACS objectives are not being met, the solution would be to use that information to amend the NFP. In other words, with the proposed amendment, there would no longer be any way to use that information to change projects. Harmful logging would be able to continue unabated as long as it complies with the Section C standards and guidelines. To impose any new constraints to ensure that the ACS objectives would be met, the NFP would need to be amended to add new Section C standards and guidelines. The safeguard currently afforded by requiring that each project also lead to, or not prevent, attainment of the ACS objectives would no longer exist.

B. Neither the ACS Nor the PCFFA Litigation Required That Each Project Meet All ACS Objectives By Itself.

In describing the purpose and need for the ACS amendment, the DSEIS points to what it calls a misapplication of the ACS. It describes this misapplication as:

The ACS has been interpreted to mean that every project must meet all ACS objectives at all spatial and temporal scales. This interpretation suggests that land managers must demonstrate that a project will maintain existing conditions (or lead to improved conditions) at every spatial and temporal scale.

DSEIS at 6. It offers no citation for this proposition from any of the PCFFA decisions. The only decision it describes is a district court decision affirmed by the Ninth Circuit. The court of appeals faults NMFS for masking the site-specific impacts of timber sales and describes a flexible approach to determine compliance with ACS objectives – provided relevant impacts of scales are considered:

Given that overall protection of forest and water resources is the concern of both NFP and ACS, it does not follow that NMFS is free to ignore site degradations because they are too small to affect the accomplishment of that goal at the watershed scale. For some purposes, the watershed scale may be correct, but the NFP does not provide support for limiting NMFS review. The purpose of the ACS is to maintain and restore ecosystem health at watershed and landscape scales to protect habitat for fish and other riparian-dependent species and resources and restore currently degraded habitats. This general mission statement in NFP does not prevent project site degradation and does nothing to restore habitat over broad landscapes if it ignores the cumulative effect of individual projects on small tributaries within watersheds.
265 F.3d at 1035-36.

The problem uncovered in PCFFA II and III was that the agencies skirted over the degradation from timber sales that could individually or cumulatively impair watershed health. As the Ninth Circuit further explained: “it is unclear whether NMFS performed an analysis of the cumulative effect of small degradations over a whole watershed.... We find nothing to show that it did. Appropriate analysis of ACS compliance is undertaken at both the watershed and project levels.” Id. at 1036. Rather than insist that the ACS consistency determination be made at the project scale, the Ninth Circuit held that NMFS must assess the cumulative effect of site-specific degradation in making jeopardy determinations “at the regional watershed scale.” Accordingly, a project that degrades habitat at the project level must be included in any realistic study at the watershed scale. Its disregard of projects with a relatively small area of impact but that carried a high risk of degradation when multiplied by many projects and continued over a long time period is the major flaw in NMFS study. Without aggregation, the large spatial scale appears to be calculated to ignore the effects of individual sites and projects. Id. at 1036.

Nothing in the Ninth Circuit decision precludes assessment of whether each ACS objective is met at the scale that is relevant to that objective. An objective directed at watershed or landscape scale features might be assessed at a watershed and landscape scale, while an objective targeting water quality, sedimentation, bank stability, and flows might be assessed at all scales that are appropriate for that objective. At whatever scale an ACS objective is assessed, the agencies must account for the individual and cumulative effects of projects that affect attainment of the objective. That is what the Ninth Circuit held and what common sense requires. It is disingenuous to claim that PCFFA II requires that decisionmakers must “find that site-scale projects, in themselves, will fully attain all ACS objectives.” DSEIS at 9. This assertion, which forms the core underpinnings of the proposed amendment, is created out of whole cloth.

C. Neither the ACS Nor the PCFFA Litigation Prohibited Actions, Like Restoration Projects, That Have Short-Term, Localized Adverse Impacts, but Long-Term Benefits.

The DSEIS complains that the PCFFA litigation would prohibit any actions that have short-term impacts, even if they have long-term benefits. This is the basis for the assertion that the “misapplication” has blocked restoration projects. In the DSEIS’ words:

Any project that may result in site-level disturbance to aquatic or riparian habitat, no matter how localized or short-term, could be precluded under this interpretation.

DSEIS at 6.

In the PCFFA litigation, the agencies argued that clearcutting caused short-term, localized degradation of aquatic habitat, but had long-term restorative benefits. They made this argument by counting the percentage of a subwatershed in hydrologically mature conditions
(e.g., closed canopy cover) ten or more years after the sale at issue would be cut. Because more
trees would grow back than would be cut in that individual timber sale, the agencies concluded
that the net effect of the logging would be restorative. The courts found that this approach
ignored the cumulative and near-term impacts of the logging.

The courts never made an over-arching pronouncement disallowing activities that
legitimately have only short-term localized effects. Instead, they cast doubt on the agencies’
characterization of large-scale clearcut logging as having only short-term localized effects when
it takes 25-30 years for trees to provide sufficient cover to regulate the flow of precipitation and
when such logging affects runoff and flows beyond the location of the logging.

The PCFFA litigation never challenged restoration activities. In fact, when the district
court issued a preliminary injunction in PCFFA III, it was the agencies that stopped restoration
activities under the guise of that injunction. The PCFFA plaintiffs immediately objected and the
judge immediately clarified that neither the case nor the court’s order stopped restoration
activities. The fact that the agencies have lumped restoration and harmful logging activities
together caused some restoration projects to be tied up, but the agencies’ feigned “confusion”
over whether restoration activities themselves are prohibited by the PCFFA litigation is
disingenuous.

Again, the agencies never tried to comply with PCFFA II and III. Instead, they threw up
their hands, claiming that they could not distinguish between clearcut logging and restoration
activities to comply with the court rulings. They cite no rulings or even passages to support this
absurd proposition. Certainly, the approach presented by Dr. Reeves distinguishes between
activities that degrade aquatic habitat and those that do not. In asking the agencies to release
some thinning sales in PCFFA III, the plaintiffs spelled out how the agencies can assess the full
impacts of such activities on salmon populations, including the short-term sediment and other
impacts of the sales and related activities, in light of the environmental baseline conditions and
the seasonal locations and needs of listed fish populations. Such an assessment might lead to
minor additional mitigation, such as limitations on road construction or restrictions on wet-
season log hauling, but would not bar otherwise benign sales.

D. The Proposed Amendment Seeks to Create a Loophole in Which the Agencies
Could Act In Disregard of the Watershed Analysis.

The NFP currently directs the Forest Service and BLM to “use the results of watershed
analysis” to determine whether each project is consistent with the ACS objectives. Such a
finding “must include a description of the existing condition, a description of the range of natural
variability of the important physical and biological components of a given watershed, and how
the proposed project or management action maintains the existing condition or moves it within
the range of natural variability.” NFP ROD at B-10.

The Plan BiOp conditioned its no-jeopardy determination on full application of
watershed analysis at the project and watershed scales. Plan BiOp at 38. Moreover, the
biological opinion’s binding incidental take statement directs the agencies to “apply the results of
watershed analysis and other relevant information to reach findings that actions either ‘meet’ or
‘do not prevent attainment’ of the ACS objectives.” Id. at 66. Moreover, “[m]anagers are
expected to use information gathered during watershed analysis to make more informed management decisions that better reflect the habitat needs of’ salmon. Id. at 21. During the early consultations on NFP logging impacts on Umpqua cutthroat trout, the NMFS biologist asserted that projects must adhere to watershed analysis recommendations to pass muster. AR 62 (Exhibit 21).

The proposed amendment would substitute the following language: “The project record will demonstrate how the agency used relevant information from applicable watershed analysis to provide context for the design and site-specific assessment of the project, recognizing that watershed analysis is not a decision-making process in and of itself.” DSEIS at 18.

This amendment would mark a significant backtracking from the role that watershed analysis is designed to play under the NFP. It would create a loophole that would allow the agencies to repeat the types of abuses held invalid by the district court in PCFFA II. For several of the timber sales, the watershed analysis identified desired future conditions for the watershed and specific actions that would lead toward attainment and others that would prevent attainment of those conditions. While the watershed analysis pointed in one direction, the timber sales went in the opposite direction by logging in subwatersheds slated for restoration. If the watershed analysis is to be used to determine whether a project will lead toward the natural range of variability or attainment of the ACS objectives, such actions are flatly prohibited. If the watershed analysis, instead, must only be used to “provide context,” it may mean that its core findings and recommendations can be disregarded. In the PCFFA II litigation, NMFS argued that the agencies had used the watershed analysis to describe historic or baseline conditions in the NEPA documentation for the project. In other words, the watershed analysis provided some context for the site-specific assessment. Yet the agencies acted contrary to the watershed analysis findings that certain areas are too important to salmon recovery or too degraded to withstand further harmful activities. The agencies must not backtrack from the role watershed analysis was designed to fill. If that is where the agencies are headed, however, it is imperative that the DSEIS disclose the nature of this shift and evaluate the impacts of actions that could be allowed to proceed through this loophole.

III. IN LIGHT OF THE INDUSTRY DEMANDS AND SECRET NEGOTIATIONS THAT PRECIPITATED THE PROPOSED AMENDMENT, A MORE OBJECTIVE ANALYSIS OF THE ENVIRONMENTAL IMPACTS IS WARRANTED.

Under the Freedom of Information Act (“FOIA”), Earthjustice obtained on behalf of Biodiversity Northwest, Northwest Ecosystem Alliance, and Oregon Natural Resources Council documents uncovering the timber industry’s inside role in precipitating the proposed amendment to the ACS along with other initiatives to weaken the NFP. The timber industry embarked on an aggressive campaign to increase the volume of timber cut from lands covered by the NFP to 1.1 billion board feet. The industry first made five demands on the government in December 2001: to weaken protections for the northern spotted owl and the marbled murrelet, undercut the ACS, eliminate the survey and manage program, and revert to a pre-NFP view that Oregon and California railroad lands are to be managed with timber as the dominant use. The industry then filed lawsuits corresponding to several of the demands and presented its demands as settlement offers. Initially, the Bush Administration agreed to two of the demands, but after further lobbying by the timber industry, the Administration agreed to all five demands.
The Administration has nonetheless paraded out each initiative to weaken the NFP by itself. The FOIA documents show concerted advocacy to obtain all of these initiatives as part of a package, yet the public is made privy to the proposed changes one by one without a meaningful opportunity to evaluate the sweeping programmatic changes as a whole.

The proposed amendment to the ACS may affect the viability of species that are targeted by other rollbacks. For example, the reversion to the old view that O&C lands must be managed primarily for timber production could eliminate riparian reserves and ACS protections on large blocks of low elevation salmon habitat in Oregon. The DSEIS contains no assessment of the cumulative and overlapping effects of all of these initiatives to weaken the NFP and protections for endangered wildlife and the environment.

The FOIA documents also reveal that the Bush Administration agreed to the weakening of the ACS as part of its “settlement” negotiations with the timber industry. In contrast to the other NFP initiatives, however, the industry had no litigation challenging the ACS. In contrast, the last PCFFA case was still pending at the time of the Administration’s agreement with industry to embark on the rollback of the ACS. The documents reveal that the Administration agreed to pursue the proposed amendment weakening the ACS and a refinement of the ESA consultation process for logging that affects salmon and other aquatic species. These commitments would be part of the commitments made as part of settling the industry lawsuits. In particular, the documents reveal:

The coalition opposes any attempt to incorporate these administrative steps in a resolution of the Pacific Coast Federation of Fishermen’s Associations (PCFFA) cases. The proposed administrative actions lie within the discretion of the relevant federal agencies, and do not require the approval of citizen activists. The Administration is very unlikely to secure such approval from PCFFA without concessions so large as to fundamentally alter the nature of the actions it is contemplating and a time lapse so great as to defeat the objective of a prompt reform of the Northwest Forest Plan. In any event a settlement with PCFFA would not foreclose other dissatisfied citizen activists from challenging any policy decision not to their liking.

In keeping with the timber industry’s desires, the Bush Administration never advised the PCFFA plaintiffs of the ongoing settlement discussions that encompassed the PCFFA litigation. It nonetheless acceded to these demands, including the demand to revise the consultation approach to allow more logging in salmon habitat.

The DSEIS mirrors the timber industry’s demands in its single-minded focus on eliminating obstacles to timber sales. It repeatedly speaks in terms of allowing projects to proceed and of achieving greater timber production volumes from the NFP lands.

What is lost in this rush to increase the cut is a serious and frank assessment of the protections that are being eliminated and the consequences of turning back the clock. The agencies have a legal duty to conduct an objective assessment of the proposed amendment. This
candid disclosure and assessment is made all the more imperative given the genesis of the rollback of ACS protections in secret negotiations with the timber industry.

Respectfully submitted,

Patti Goldman
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
E-mail: pgoldman@earthjustice.org

Attorney for Commenting Organizations
Addresses and Phone Numbers for Commenting Organizations:

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Organization</th>
<th>Address</th>
<th>Phone Numbers</th>
<th>Fax Numbers</th>
<th>Email Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>Glen Spain</td>
<td>Forest Protection Coordinator</td>
<td>Pacific Coast Federation of Fishermen’s Associations</td>
<td>Institute for Fisheries Resources</td>
<td>(541) 689-2000</td>
<td>(541) 689-2500</td>
<td><a href="mailto:fish1ifr@aol.com">fish1ifr@aol.com</a></td>
</tr>
<tr>
<td>Kimberly Baker</td>
<td></td>
<td></td>
<td>P.O. Box 1117</td>
<td>(530) 627-3090</td>
<td></td>
<td><a href="mailto:klam_watch@yahoo.com">klam_watch@yahoo.com</a></td>
</tr>
<tr>
<td>Doug Heiken</td>
<td></td>
<td>Oregon Natural Resources Council</td>
<td>454 Willamette Street, Suite 207</td>
<td>(541) 344-0675</td>
<td>(541) 343-0996</td>
<td><a href="mailto:onrcdoug@efn.org">onrcdoug@efn.org</a></td>
</tr>
<tr>
<td>Bill Arthur</td>
<td></td>
<td>Sierra Club</td>
<td>180 Nickerson, Suite 202</td>
<td>(206) 378-0114</td>
<td>(206) 378-0034</td>
<td><a href="mailto:bill.arthur@sierraclub.org">bill.arthur@sierraclub.org</a></td>
</tr>
<tr>
<td>Francis Eatherington</td>
<td></td>
<td>Umpqua Watersheds</td>
<td>P.O. Box 101</td>
<td>(541) 673-7649</td>
<td>(541) 440-9643</td>
<td><a href="mailto:francis@umpqua-watersheds.org">francis@umpqua-watersheds.org</a></td>
</tr>
<tr>
<td>Anthony Ambrose</td>
<td></td>
<td>Environmental Protection Information Center</td>
<td>P.O. Box 397</td>
<td>(707) 923-2931</td>
<td>(707) 923-4210</td>
<td><a href="mailto:druid@humboldt1.com">druid@humboldt1.com</a></td>
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