No. 22-35137

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWAN VIEW COALITION and FRIENDS OF THE WILD SWAN,
Plaintiff-Appellants,

v.

KURTIS E. STEELE, et al.,
Defendant-Appellees,

and

MONTANA LOGGING ASSOCIATION
and AMERICAN FOREST RESOURCE COUNCIL,
Intervenor-Defendant-Appellees.

On Appeal from the United States District Court
District Court for Montana

9:19-cv-00060-DWM
Hon. Donald W. Molloy

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiff-appellants Friends of the Wild Swan and Swan View Coalition hereby certify that none of the plaintiff-appellant organizations has a parent corporation and that no publicly held corporation holds 10 percent or more of any plaintiff-appellant organizations' stock.

INTRODUCTION

This case concerns the government's unexamined abandonment of key habitat protections for threatened wildlife species in northwest Montana. The Flathead National Forest includes 2.4 million acres of public land in the heart of the Rocky Mountains and the core of the Northern Continental Divide Ecosystem. Its unique position within a larger complex of wilderness and unroaded areas bordering Glacier National Park makes the Flathead a central part of one of the largest and last remaining wild areas of the lower-48 states. The Flathead Forest has long provided important habitat for grizzly bears and bull trout, species listed as "threatened" under the Endangered Species Act ("ESA"). However, much of the value of the Flathead Forest's grizzly bear and bull trout habitat arises from the fact that large areas of the Flathead remain unroaded, as forest roads threaten a variety of harmful effects to these species.

Longstanding Flathead National Forest Plan direction required the U.S. Forest Service ("Forest Service") to limit road miles and reclaim excess roads in grizzly bear and bull trout habitat. To comply with these road-density limitations, this road-management framework required the Forest Service to compensate for building new roads by fully reclaiming other roads in the Forest according to stringent measures such that they no longer existed on the landscape and motorized use was precluded. These strict measures ensured no net increase in the total

number of roads and thereby limited associated wildlife disturbance in the Flathead Forest.

However, the Forest Service's 2018 Land Management Plan for the Flathead National Forest ("Revised Plan") abandoned this protective road-management framework. Instead of removing roads from the landscape, the new plan provides that the Forest Service may remove a road from road-density calculations if the agency simply blocks the entrance of a road. This change not only leaves roads and their harmful environmental effects on the landscape, but also facilitates new road construction, enabling the Forest Service to more quickly and easily remove old roads from road-density calculations—and thereby build new roads without violating limitations on road density in grizzly bear habitat.

The Revised Plan thus fundamentally alters the regulatory landscape for grizzly bears and bull trout habitat in the Flathead National Forest. Nevertheless, the Forest Service and U.S. Fish and Wildlife Service ("Fish and Wildlife Service") failed to meaningfully consider the impacts of this road-management change on grizzly bears and bull trout before approving the Revised Plan. Their failure to undertake such analysis violated governing legal requirements in the ESA and National Environmental Policy Act ("NEPA").

When Plaintiff-Appellants Swan View Coalition and Friends of the Wild Swan (collectively "Swan View") challenged these agencies' actions in the district

court, the court below ruled for Swan View on narrow issues but rejected key aspects of their claims. Swan View now asks this Court to reverse the challenged rulings of the district court and remand the Revised Plan to the Forest Service for further consideration.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 16 U.S.C. § 1540(g)(1) because Swan View's claims arise under the ESA and NEPA, 42 U.S.C. § 4321 et seq. The district court's judgment was final, and this Court has jurisdiction under 28 U.S.C. § 1291. The district court entered final judgment on June 24, 2021. 1-ER-00010–73. Swan View filed a motion to alter or amend the judgment with respect to the remedy on July 22, 2021, which the district court denied on December 10, 2021. 1-ER-00002–07. Federal Defendants filed a notice of appeal on February 8, 2022 (Case No. 22-35123) and Defendants-Intervenors filed a notice of appeal on February 9, 2022 (Case No. 22-35124). 2-ER-206–07, 2-ER-202–05. Swan View filed an appeal on February 15, 2022 (Case No. 22-35137), within the time allowed by Federal Rule of Appellate Procedure 4(a)(1)(B) and (3). 5-ER-01038–43.

Federal Defendants and Defendant-Intervenors moved to dismiss their appeals on June 13, 2022 (2-ER-00198–201), and this Court dismissed the appeals

on June 15, 2022 (2-ER-00194–97). Swan View's appeal is the only one remaining in this case.

The district court's judgment in this case included a remand to the Fish and Wildlife Service of that agency's challenged Biological Opinion. The district court's remand order does not alter this Court's jurisdiction over Swan View's appeal. 28 U.S.C. § 1291 provides this Court with jurisdiction over "appeals from all final decisions of the district courts of the United States," subject to exceptions that do not apply here. The district court's order is final with respect to Swan View's NEPA claims because the district court denied those claims in their entirety and therefore did not order any remand on the NEPA issues. See 1-ER-00021–27. The district court's order with respect to the ESA claims that Swan View raises on appeal is also final. This Court has held that "[t]he requirement of finality is to be given a practical rather than a technical construction." Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1175 (9th Cir. 2011) (quotations and citations omitted). The district court's remand order required no agency reconsideration of the ESA issues presented by Swan View on appeal and the Federal Defendants announced on June 22, 2022 that they had completed the remand process ordered by the district court without reconsidering those issues. See 2-ER-00075–77. Where, as here, the agency has already completed the court-ordered remand process without consideration of appellants' current claims on appeal, "as a practical matter, the

work of both the district court and the agency is complete." Sierra Forest Legacy, 646 F.3d at 1176 (finding jurisdiction over appeal where agency had issued draft supplemental NEPA analysis that failed to consider the appealed issues). This Court therefore has jurisdiction over Swan View's appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Whether the Fish and Wildlife Service violated the ESA when it concluded that the Revised Plan would not jeopardize grizzly bears but failed to consider significant impacts to grizzly bears from the Revised Plan's new road-management measures.

2) Whether the Forest Service also violated the ESA by arbitrarily relying on the Fish and Wildlife Service's unlawful no-jeopardy conclusion.

3) Whether the Forest Service also violated NEPA where the agency's Environmental Impact Statement ("EIS") failed to rationally consider impacts to grizzly bears and bull trout from the Revised Plan's weakening of road-closure requirements.

STATEMENT REGARDING ADDENDUM

Pursuant to Circuit Rule 28-2.7, the text of relevant statutory and regulatory provisions is set forth in an addendum at the end of this brief.

STATEMENT OF THE CASE

I. THE ENDANGERED SPECIES ACT

"The ESA is 'the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.' It represents a commitment 'to halt and reverse the trend toward species extinction, whatever the cost.'" Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1059 (9th Cir. 2018) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180, 184 (1978)) (internal citation omitted).

Under the ESA, before authorizing an action that may affect ESA-listed grizzly bears or bull trout, the Forest Service must formally consult with the Fish and Wildlife Service to ensure the action is not likely to jeopardize these species or destroy or adversely modify their designated critical habitat. See 16 U.S.C. § 1536(a)(2). The consultation process culminates in the Fish and Wildlife Service's issuance of a biological opinion reflecting its jeopardy determination based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2), (b)(3)(A); see 50 C.F.R. § 402.14.

The Fish and Wildlife Service violates the ESA if it issues a biological opinion that "fails to 'consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made.'" Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1121 (9th Cir. 2012) (alterations in original) (citation omitted). In turn, the Forest Service violates the

ESA if it approves or implements action in reliance on a flawed biological opinion from the Fish and Wildlife Service and/or fails "to discuss information that would undercut the [biological] opinion's conclusion." Id. at 1128.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA requires all federal agencies proposing an action "significantly affecting the quality of the human environment," to prepare an EIS detailing "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action." 42 U.S.C. § 4332(C); see also 40 C.F.R. § 1502.14.[1] The EIS helps ensure "that environmental concerns [will] be integrated into the very process of agency decision-making." Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). The Forest Service violates NEPA if it fails to disclose and take a "hard look" at all expected environmental impacts of a proposed agency action. N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006).

[1] This brief cites to the 1978 NEPA regulations, which govern the Forest Service's environmental review in this case. See NEPA Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978). Recent changes to the NEPA regulations apply to NEPA processes begun after September 14, 2020, which post-dates the NEPA process at issue here. See 40 C.F.R. § 1506.13.

III. THREATENED GRIZZLY BEARS

The grizzly bear, Ursus arctos horribilis, once numbered roughly 50,000 individuals in the western United States. 82 Fed. Reg. 30,502, 30,508 (June 30, 2017). Before European-American settlement of the American West, grizzly bears roamed from the Great Plains to the Pacific coast, inhabiting all but the hottest and most arid desert lands. Id. With European-American settlement, however, grizzlies were "shot, poisoned, and trapped wherever they were found," eliminating them from all but a few mountain redoubts far removed from human intolerance. Crow Indian Tribe v. United States, 343 F. Supp. 3d 999, 1004 (D. Mont. 2018) (quotation omitted), aff'd in part, remanded in part, 965 F.3d 662 (9th Cir. 2020).

In an historical blink of an eye, humans reduced the range of grizzly bears by more than 98%, isolating the remaining bears in a few remnant islands of wild country. 82 Fed. Reg. 30,502 at 30,508. By the 1930s, the grizzly bear population in the continental United States had plummeted to fewer than 1,000 individuals. See id. Recognizing the imperiled status of the species, the Fish and Wildlife Service listed grizzly bears throughout the lower-48 United States as a threatened species under the ESA in 1975, two years after the Act was passed. 40 Fed. Reg. 31,734 (July 28, 1975) (Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species).

Conservation efforts under the ESA have helped bring grizzly bears back from the brink, but the species continues to face numerous threats and remains confined to a few isolated populations in the northwest United States. See 4-ER-00803–04 (describing designated grizzly bear recovery zones). One of these remnant populations occurs in the Northern Continental Divide Ecosystem, a large block of public land extending from Glacier National Park south to the mountains near Missoula, Montana. See ER-00818.

Among the chief threats to grizzly bears are roads in their habitat. Roads and associated human use displace grizzly bears and increase grizzly mortality risk from poaching and conflicts with humans during the bears' non-denning season. 4-ER-00824–25 (Biological Opinion). Displacement occurs because grizzly bears form "negative association[s] with roads aris[ing] from the fear of vehicles, vehicle noise, and other human-related activities around roads," as well as "from human scent along roads and hunting and shooting along or from roads." 4-ER-00848. As a result, grizzly bears avoid roads, adjusting "their habitat use patterns in part" according to the density of roads in an area. 5-ER-00995–96. Crucially, a well-documented and longstanding body of scientific evidence demonstrates that this impact extends to low-use and even closed roads. Even where "roads [are] closed to public travel," researchers have documented bear "avoidance of high total road densities areas." 5-ER-00973–74. Reviewing this evidence, the Fish and Wildlife

Service has acknowledged that "[g]rizzly bears … learn to avoid the disturbance generated by roads and may not choose to use these habitats even long after road closures." 4-ER-00848 (Biological Opinion); see also 5-ER-00990 (Fish and Wildlife Service: grizzlies "learn to avoid the disturbance and annoyance generated by roads," and "may not change this resultant avoidance behavior for long periods after road closures and lack of negative reinforcement").

These impacts of high road density injure individual female grizzly bears "by significantly disrupting normal behavioral patterns, including breeding, feeding, or sheltering." 4-ER-00885 (Fish and Wildlife Service incidental take statement). In particular, high road density impairs female grizzly bears' "inherent reproductive potential" because displacement and disturbance impacts mean that females "may fail to breed at their potential frequency or they would fail to complete gestation due to decreased fitness." Id. Thus, according to seminal research by biological scientists Richard Mace and Timothy Manley in the Flathead Forest in the 1990s, "if unroaded habitats are reduced in quantity or size, the number of adult females will eventually decline," harming the grizzly bear population. 5-ER-01029.

The adequacy of grizzly bear habitat is so closely tied to road density that the Fish and Wildlife Service uses road density as a surrogate for measuring

impacts that constitute "take" of this species. 4-ER-00886 (Biological Opinion).[2] For the Flathead Forest, this includes monitoring and limiting separate levels of open motorized route density ("open road density") and total motorized route density ("total road density"), id., in recognition of the fact that even roads closed during the grizzly bear non-denning season must be limited to safeguard grizzly bear habitat.[3] This critical recognition stems from the aforementioned Mace and Manley research, which found that adult grizzly bears used habitats less than expected when open road density exceeded one mile per square mile, 5-ER-01022, while habitat use by all sex and age classes of grizzly bears was less than expected where total road densities exceeded two miles per square mile, id., 5-ER-01028. Mace and Manley also observed that female grizzly bears tended to use habitat more than 0.5 miles from roads or trails greater than expected. 5-ER-01020–22; 4-ER-00850.

[2] Under the ESA, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a protected species. 16 U.S.C. § 1532(19).

[3] Open road density includes roads open to public use during the grizzly bear non-denning season. 3-ER-00572 (Revised Plan). The definition of total road density previously referred to all roads, including open roads and roads closed during the non-denning season, though the Revised Plan upended that definition to exclude a significant number of closed roads that used to count toward total road density calculations. See Statement of the Case Sections V & VI, infra.

IV. THREATENED BULL TROUT

The bull trout, Salvelinus confluentus, is a migratory char (a close relative of trout) in the salmonid family. 64 Fed. Reg. 58910 (Nov. 1, 1999); 4-ER-00712. Historically, bull trout thrived in major river drainages from Alaska to California; however, remnant populations now exist primarily in Washington, Oregon, Idaho, and Montana. 4-ER-00714.

The Fish and Wildlife Service listed bull trout across the lower-48 United States as a threatened species under the ESA in 1999. 64 Fed. Reg. 58910; 4-ER-00712. At the time of their listing, bull trout had been extirpated from approximately 60 percent of their historical range. 5-ER-00932. In 2010, the Fish and Wildlife Service designated critical habitat for bull trout under the ESA, which included many creeks and other watersheds within and downstream from the Flathead National Forest. 75 Fed. Reg. 63,898 (Oct. 18, 2010); 4-ER-00679.

The coterminous United States population of bull trout comprises 109 occupied core areas, each of which plays an important role in the conservation of the species as a whole. 4-ER-00721. Bull trout numbers are low in many areas, and despite ESA protections, the Fish and Wildlife Service has found that bull trout populations "are considered depressed or declining across much of [the species'] range." 4-ER-00728.

The bull trout's imperiled status is largely attributable to degradation of its habitat, and roads, new road construction, and improper reclamation of closed roads are all important factors in degrading bull trout habitat. "[B]ull trout generally have the most specific habitat requirements" of all native salmonids in the Pacific Northwest, needing clean, cold water to spawn, develop, and survive. 5-ER-00932. Roads contribute sediment into bull trout habitat that impairs reproduction by "reduc[ing] survival of eggs and embryos" and "negatively affecting juveniles and adults by interfering with foraging, clogging gills, physically abrading tissues, and disrupting orientation and movement patterns." 5-ER-00935 (Bull Trout Recovery Plan). Sediment can also "lead to changes in channel morphology and water temperature," 4-ER-00754 (Biological Opinion), threatening to render an impacted stream uninhabitable by bull trout, which have "extremely low tolerance for warm water temperatures." 5-ER-00935 (Bull Trout Recovery Plan).

Roads deliver sediment to streams "by direct erosion of cut and fill slopes associated with stream crossings or by surface runoff from roads and ditches that carries sediment-laden water directly or indirectly to streams." 4-ER-00754 (Biological Opinion). "Vehicle traffic also contributes to sediment delivery from roads, particularly if ruts develop in the road and if traffic is heavy when the ground is more saturated." Id. Road construction can increase sediment delivery

to streams "due to the heavy equipment required for road grading, ditch cleaning, culvert replacement, road ripping/decompaction, and the installation of water bars." 4-ER-00755.

Further, stream-aligned culverts supporting a road can trap debris and ultimately fail, leading the stream to run over the roadbed and thereby causing erosion and sedimentation. 2-ER-00348. The Fish and Wildlife Service has acknowledged that, "[w]hatever the design life, any crossing structure would have a 100% chance of failure over its installation life if it is not removed after the road is abandoned." 5-ER-00968–69 (Fish and Wildlife Service, biological opinion on Moose Post-Fire Project (2002)) (emphasis added). As the Fish and Wildlife Service has also stated, "[t]he potential for roads to have detrimental effects on aquatic resources exists as long as the road is retained." 4-ER-00755 (Biological Opinion). Therefore, as the agency concluded in its own 2015 Bull Trout Recovery Plan, reducing the threat that sedimentation poses to bull trout requires "maintaining bridges, culverts, and crossings" and "decommissioning surplus roads and removing culverts and bridges on closed roads." 5-ER-00935.

V. THE FLATHEAD FOREST'S PRIOR ROAD-MANAGEMENT FRAMEWORK

Spurred to address the impacts of roads on grizzly bears by the pioneering Mace and Manley scientific research and a public conservation campaign, the Forest Service in 1995 issued Amendment 19 to the 1986 Flathead Forest

management plan. 4-ER-00834. Amendment 19 set limitations on road density—with separate standards for open road density and total road density—within grizzly bear habitat. Id. Specifically, Amendment 19 allowed "no net increase in total motorized access density greater than 2 miles per square mile" and "no net increase in open motorized access density greater than 1 mile per square mile" in bear management subunits throughout the Forest.[4] 5-ER-00980. Further, Amendment 19 required the Forest Service to "limit high density (> 1 mile/square mile) open motorized access to no more than 19 percent" of a bear management subunit "within 5 years" and "limit high-density (> 2 miles / square mile) total motorized access to … no more than 19 percent in 10 years." Id. Under Amendment 19, total motorized access density included all roads that have not been fully reclaimed, while open motorized access density included all roads that are open to public use during times of year when grizzly bears are active and out of their dens. 5-ER-00985–86. Amendment 19 also required the Forest Service to "provide security core areas"—essentially unroaded habitat areas—"that equal or exceed 60 percent of each [grizzly bear management subunit in the Forest] in 5 years, and 68 percent in 10 years." 5-ER-00980; see also 5-ER-00986

[4] A bear management subunit is a subdivision of the Northern Continental Divide Ecosystem "representing the approximate size of an average annual female grizzly bear home range." 3-ER-00551.

(Amendment 19 Environmental Assessment) (defining "security core" as an area that is at least 0.3 miles from open roads and high-intensity non-motorized trails.").

To ensure that total road density calculations reflected on-the-ground conditions, Amendment 19 required the Forest Service to reclaim any road it excluded from total road-density calculations. 5-ER-00985. To "reclaim" a road, Amendment 19 imposed minimum treatment requirements, including: (1) removing all stream-aligned culverts; (2) treating the first portion of the road to preclude motorized and non-motorized use; and (3) treating the remainder of the road to discourage its use as a motorized or non-motorized travelway. 5-ER-00985. Amendment 19 further specified that treating the length of a reclaimed road should include "sporadic placement of natural debris over most of the road length, and surface treatment to encourage natural, planted or seeded revegetation." 5-ER-00985. Until such treatment took effect, Amendment 19 required the Forest Service to continue counting a treated road in its total road-density calculations. 5-ER-00986; Swan View Coal. v. Barbouletos, No. CV 06-73-M-DWM, 2008 WL 5682094, at *3 (D. Mont. June 13, 2008) ("Roads that [were] treated for reclamation but not yet fully reclaimed must be included in the calculation of total motorized access density."). The Forest Service contemplated that this "lag time

for the treatment to become effective" could take up to ten years. 5-ER-00986.[5] While the Forest Service adopted these measures to protect grizzly bear habitat, the agency has acknowledged that Amendment 19 standards also help to conserve bull trout. 5-ER-00906 (Biological Assessment).

When the Forest Service issued Amendment 19, much of the Flathead Forest did not comply with the Amendment's open and total road-density limitations. Thus, under Amendment 19, the Forest Service decommissioned and removed from its road system about 730 miles of Flathead roads since 1995 in an effort to meet road-density requirements. 2-ER-00332. However, the Forest Service still needed to reclaim an additional 518 miles of roads to meet Amendment 19 standards at the time the agency revised the Flathead plan in 2018. 2-ER-00335.

In addition to requiring removal of hundreds of miles of roads, Amendment 19 had the practical impact of discouraging new roadbuilding in grizzly bear habitat through its rigorous reclamation requirements. Because open and total road densities on the Flathead exceeded Amendment 19 standards, the amendment prevented the Forest Service from constructing new roads in grizzly bear habitat

[5] In addition to being time consuming, reclaiming roads under Amendment 19 was costly. In 1995, the Forest Service estimated the cost of culvert removal at $200 per culvert; seeding roadways at $275 per acre; seeding and mulching bare cutslopes at $1,200–$2,000 per acre; and reclaiming/recontouring at $1,000–$5,000 per mile. 5-ER-00983 (Amendment 19 Environmental Assessment).

until it had expended time and resources to reclaim comparable miles of roads elsewhere. 5-ER-00980 (Amendment 19 Decision Notice requiring that "Forest Service actions will result in a net gain towards the objectives on National Forest System lands"). As a result, under Amendment 19, the Forest Service constructed only 3.2 miles of new roads in Flathead grizzly habitat between 1996 and 2010. 5-ER-00926 (Forest Service report on Amendment 19 compliance).

VI. THE REVISED FOREST PLAN

The Revised Plan challenged in this case eliminates Amendment 19's vital habitat protections. As an initial matter, the Revised Plan backtracks on Amendment 19's limitations on open and total road density, stating that the Forest Service will instead maintain "baseline" open and total road density levels that existed in the Flathead Forest's grizzly bear habitat in 2011, rather than reclaiming the 518 miles of roads that remain necessary to meet Amendment 19's requirement. 2-ER-00341 (Final EIS); 3-ER-00551 (Revised Plan defining "baseline" as "conditions as of December 31, 2011").

Further, the Revised Plan undermines even its lesser road-density objective by substantially weakening the road reclamation requirements necessary to exempt roads from total road-density calculations. Under the Revised Plan, "roads do not count towards total motorized route density as long as they meet the definition of impassable." 3-ER-00578. In turn, the Revised Plan allows the Forest Service to

deem a road "impassable" if only "the first 50 to 300 feet … has been treated to make it inaccessible to wheeled motorized vehicles during the non-denning season," and provides that "natural vegetation growth, … scarified ground, fallen trees, boulders, or culvert or bridge removal" can be sufficient to meet this criterion. 3-ER-00578. The Revised Plan contains no requirement to treat the remainder of the road through recontouring to original slope, placement of debris, or revegetation with shrubs or trees as contemplated by Amendment 19. Compare 3-ER-00578 (Revised Plan) with 5-ER-00986 (Amendment 19). Thus, under the Revised Plan, the Forest Service may deem an existing road "impassable" and exempt from open and total road-density limitations as long as the agency puts a minimal barrier, such as boulders or fallen trees, across the first 50 feet of the road, and no more is required. See 3-ER-00578.

The Revised Plan's exclusion of so-called impassable roads from total road-density calculations significantly undermines grizzly bear habitat protections. By permitting the Forest Service to retain intact roads on the landscape while excluding them from total road-density calculations, the Revised Plan divorces such calculations from actual on-the-ground road conditions. The result is that roads that, in the real world, displace and harm grizzly bears may be retained on the landscape without appearing in the agency's technical accounting of forest road densities. Moreover, by artificially undercounting total road density, the Revised

Plan allows the Forest Service to undertake new road construction without technically violating road-density limitations—and roadbuilding will be further aided by the reduction in time and resources required to only render roads "impassable" under the Revised Plan. See 5-ER-00986 (Forest Service statement that reclaiming roads under Amendment 19 could take up to ten years); 5-ER-00983 (detailing costs associated with reclaiming roads under Amendment 19). This change represents a stark departure from Amendment 19's prior requirement to treat the entire length of a reclaimed road—and wait for such treatment to take effect—before removing the road from total road-density calculations. 5-ER-00985–86. It is also incompatible with established grizzly bear science showing that roads degrade grizzly bear habitat and displace bears regardless of motor vehicle use. See 5-ER-00973–74 (Mace & Waller study documenting grizzly bear "avoidance of high total road densities areas" even where "roads [are] closed to public travel"); 4-ER-00848 (Biological Opinion) ("Grizzly bears … learn to avoid

the disturbance generated by roads and may not choose to use these habitats even long after road closures.").[6]

Nevertheless, the Forest Service and Fish and Wildlife Service failed to grapple with the impacts of the Revised Plan's significant road-management changes. The Forest Service simply claimed in the Revised Plan that the agency's new road-management direction will provide "on-the-ground levels of security for grizzly bears that have supported the NCDE grizzly bear population." 2-ER-00341 (Final EIS). The Fish and Wildlife Service's November 2017 Biological Opinion for the Revised Plan similarly concluded that the Revised Plan will not jeopardize the grizzly bear because it "will require projects to result[] in no net increase above baseline [road-density] conditions" that existed in 2011. 4-ER-00879.

These agencies similarly disregarded the harm that the Revised Plan's abandonment of Amendment 19's reclamation requirements threatens to bull trout. In particular, eliminating Amendment 19's culvert-removal requirement harms bull

[6] Excluding purportedly "impassable" roads from open road density calculations is also unjustified because motorized vehicles in the Forest's grizzly habitat regularly bypass the same minimal barriers that the Revised Plan now deems sufficient to render roads "impassable." See 5-ER-00956 (2004 Swan View Coalition road-closure survey finding that 160 of 256 surveyed roads "displayed evidence of motorized travel over, through, or around the closure," including 73 "permanent" barriers endorsed by the Revised Plan); 4-ER-00668–69 (Forest Service survey finding that up to 15 percent of gates, barriers, and signs were deemed ineffective in a given year in the Flathead Forest between 1995 and 2016).

trout because removing culverts from reclaimed roads under Amendment 19 precluded culvert-driven sedimentation impacts to bull trout streams. See 5-ER-00941 (2015 Bull Trout Recovery Plan) ("sediment impacts from roads can be addressed by … decommissioning surplus roads and removing culverts and bridges on closed roads.").

In place of mandatory culvert removal, the Revised Plan purported to address impacts to bull trout by including a new guideline ("FW-GDL-CWN-01") providing that "net increases in stream crossings and road lengths should be avoided in riparian management zones unless the net increase improves ecological function in aquatic ecosystems." 3-ER-00397 (emphasis added). However, as a "guideline" describing what the Forest Service "should" do, this provision is not mandatory. See 3-ER-00385 (defining "guideline"). Further, it applies only in a "conservation watershed network" that excludes significant portions of bull trout streams in the Flathead Forest that have been designated as critical habitat for this species under the ESA, including Swan Lake and surrounding lands, the Cyclone Creek headwaters, and portions of the Swan River and Flathead River watersheds. Compare 3-ER-00614 (map of conservation watershed network), with 5-ER-

00918–21 (maps of bull trout critical habitat).[7] The Fish and Wildlife Service failed to discuss such limitations in concluding in its Biological Opinion that the Revised Plan does "not allow[] a net increase of road network" in the conservation watershed network. 4-ER-00756–57.

VII. DISTRICT COURT DECISION

On April 15, 2019, Swan View filed a lawsuit in the U.S. District Court for the District of Montana challenging the Revised Flathead Forest Plan, the accompanying EIS, and the Fish and Wildlife Service's Biological Opinion. 2-ER-00219–63 (Complaint). The lawsuit alleged that the Fish and Wildlife Service and the Forest Service failed to rationally consider impacts to grizzly bear and bull trout habitat from the Revised Plan's new rules governing roads and instead wrongly asserted that the Plan would maintain the on-the-ground conditions that

[7] Similarly, the Revised Plan included a vague and non-mandatory guideline ("FW-GDL-IFS-04") stating that impassable or stored roads "should be left in a hydrologically stable condition," but not calling for culvert removal. 3-ER-00446 (emphasis added).

had prevailed under the prior, more protective management regime. 2-ER-00253–62.[8]

On June 24, 2021, the district court issued an order on cross-motions for summary judgment that granted in part, and denied in part, Swan View's and the Federal Defendants' motions. 1-ER-00010–73. In favor of Swan View, the district court first determined that the Fish and Wildlife Service's Biological Opinion for the Revised Plan violated the ESA by failing to rationally consider the impacts to grizzly bears from unauthorized motorized use associated with the Plan's ineffective road-closure requirements. 1-ER-00029–34. Second, the district court found that the Biological Opinion failed to rationally consider impacts to bull trout from the Revised Plan's abandonment of prior requirements that the Forest Service remove all stream-aligned culverts when closing roads. 1-ER-00034–38. Third, the district court held that the Forest Service violated the ESA by arbitrarily relying on the unlawful Biological Opinion. 1-ER-00060–62.

[8] A separate set of plaintiffs, WildEarth Guardians, et al., challenged these same agency actions in a separate case that was consolidated with Swan View's litigation. See 2-ER-214–18. The WildEarth Guardians complaint raised similar issues to those raised by Swan View but also raised a number of separate issues. The plaintiffs undertook joint briefing of overlapping issues. WildEarth Guardians filed its own appeal of the district court's judgment (Case No. 22-35135), but voluntarily dismissed that appeal by motion granted by this Court on June 15, 2022. See 2-ER-00194–97.

However, the district court made no determination in Swan View's favor on their claim that the Fish and Wildlife Service and the Forest Service unlawfully failed to consider that roads—even without unauthorized motorized use—displace grizzly bears. 1-ER-00027–34. Nevertheless, the district court's order stated that it granted the Federal Defendants' summary judgment motion in all respects except "to the limited extent" that the district court affirmatively ruled in Swan View's favor. 1-ER-00073. Further, the district court determined that the Forest Service's EIS analyzing the Revised Plan's impacts to grizzly bears and bull trout—which contains substantially similar analysis to the Biological Opinion that the court found inadequate in the ESA context—did not violate NEPA. 1-ER-00021–25. Finally, the district court remanded the Biological Opinion to the Fish and Wildlife Service for further consideration consistent with its opinion but declined Swan View's request to remand the Revised Plan or vacate its unlawful provisions. 1-ER-00073.[9]

On June 15, 2022, Federal Defendants filed a notice in the district court asserting that they had satisfied their remand obligations pursuant to the district court's June 24, 2021 order and judgment. See 2-ER-00075–77. The notice

[9] Swan View subsequently filed a motion to alter or amend the judgment, requesting that the district court vacate the challenged provisions of the Revised Plan and remand the Plan to the Forest Service, 2-ER-00208–13, which the district court denied, 1-ER-00002–07.

described and attached a revised Biological Opinion regarding the Revised Flathead Forest Plan that the Fish and Wildlife Service prepared in February 2022. See 2-ER-00078– 193. The revised Biological Opinion addressed only the specific issues remanded by the district court and did not include any new analysis addressing the issues raised by Swan View in this appeal. See generally 2-ER-00078–193.[10]

STANDARDS OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. Greater Yellowstone Coal, Inc. v. Servheen, 665 F.3d 1015, 1023 (9th Cir. 2011).

This challenge is brought under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), and the APA, 5 U.S.C. § 706(2). The ESA and NEPA do not contain standards of review; therefore, courts borrow the standard from the APA, 5 U.S.C. § 706(2). W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 481, 496 (9th Cir. 2011). Under the APA, a reviewing court "shall" set aside agency actions, findings, or conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Japanese Vill., LLC v. Fed. Transit Admin., 843 F.3d 445, 453 (9th Cir. 2016) (quoting 5 U.S.C. § 706(2)(A)).

[10] Because the revised Biological Opinion's analysis is itself deficient in numerous respects, Swan View filed a complaint challenging it in the Montana district court on May 31, 2022 (Case No. 9:22-cv-00096-DLC-KLD). That case remains pending.

In conducting this review, the Court's job is to "ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." Greater Yellowstone Coal., 665 F.3d at 1023 (quoting Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007)). Although this standard of review is narrow, it demands that this Court conduct a "searching and careful" review. Japanese Vill., LLC, 843 F.3d at 453-54 (quoting Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989)). Agency action is arbitrary and capricious if the agency has "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." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

SUMMARY OF THE ARGUMENT

The Fish and Wildlife Service violated the ESA by issuing a Biological Opinion that arbitrarily determined that the Revised Forest Plan for the Flathead National Forest would not likely jeopardize grizzly bears. The Forest Service violated the ESA by relying on the flawed Biological Opinion and violated NEPA by undertaking an inadequate analysis of the Revised Plan's impacts to grizzly bears, bull trout, and bull trout critical habitat.

Underlying the unlawful agency analyses was the failure to recognize and evaluate the Revised Plan's abandonment of rigorous road-reclamation requirements under former Flathead Forest Plan Amendment 19 that protected and restored grizzly bear habitat and provided important protections to bull trout. For grizzly bears, the agencies violated the ESA and NEPA by entirely failing to consider well-established science showing the displacement impact to grizzly bears of allowing closed roads to remain intact on the landscape, regardless of whether such roads receive motor-vehicle use. See Points I & II, infra. For bull trout, the Forest Service violated NEPA by failing entirely to consider impacts to bull trout and bull trout critical habitat from eliminating Amendment 19's culvert-removal requirements that prevented harmful sedimentation of bull trout streams. See Point III, infra. Swan View respectfully requests that this Court reverse the challenged rulings of the district court and remand the Revised Plan to the Forest Service. See Point IV, infra.

ARGUMENT

I. THE FISH AND WILDLIFE SERVICE VIOLATED THE ESA BY DISREGARDING HARMS TO GRIZZLY BEARS

The Fish and Wildlife Service violated the ESA by failing to acknowledge and rationally examine the Revised Plan's abandonment of Amendment 19's stringent road-reclamation requirements, which will enable the Forest Service to remove roads from counting toward total road-density limitations without actually

removing roads from the landscape. See Ctr. for Biological Diversity v. BLM, 698 F.3d at 1121 (biological opinion must consider relevant factors). This omission is significant because the Fish and Wildlife Service's November 2017 Biological Opinion itself recognized that managing roads is "one of the most important variables in grizzly bear habitat conservation." 4-ER-00847. Moreover, the agency's own benchmarks for measuring road-related impacts to grizzly bears require separate analyses of open road density and total road density, 4-ER-00886 (Biological Opinion), representing an acknowledgment that even roads closed to motorized vehicles during the non-denning season must be limited to ensure the adequacy of grizzly bear habitat.

As discussed, the Revised Plan's new "impassable" road standard effectively nullifies the definition of total road density by excluding from such calculations roads closed by certain minimal entrance barriers. 3-ER-00578 (Revised Plan) (defining "impassable" road). This standard allows the Forest Service to omit roads from measurements of total road density in grizzly bear habitat even when the entire road remains intact on the landscape behind such a minimal entrance barrier. Yet well-established grizzly bear science documents bear "avoidance of high total road densities" even where "roads [are] closed to public travel," 5-ER-00973–74, and the Fish and Wildlife Service itself has acknowledged that

"[g]rizzly bears … may not choose to use [roaded] habitats even long after road closures." 4-ER-00848 (Biological Opinion).[11]

Moreover, by institutionalizing relatively quick and cheap road closures, the Revised Plan makes it easier for the Forest Service to build new roads in grizzly bear habitat without violating limitations on road density. Simply put, it is easier to build a new road in grizzly bear habitat when the agency does not have to undertake costly and time-consuming reclamation of an existing road as an offset measure, as it did under Amendment 19. The Revised Plan's new framework thus sharply departs from the protections of Amendment 19, allowing the Forest Service to increase actual, on-the-ground total road densities in grizzly bear habitat while claiming to maintain habitat conditions that existed in 2011.

Nevertheless, the Fish and Wildlife Service failed entirely to acknowledge or evaluate the threat to grizzly bears posed by these management changes in concluding that the Revised Plan will not jeopardize grizzly bears. Instead, the agency simply asserted in its Biological Opinion that the Revised Plan will not jeopardize grizzly bears because it "will require projects to result[] in no net increase above baseline [road-density] conditions" that existed in 2011. 4-ER-

[11] Under Amendment 19, roads closed only with barrier devices all counted toward the cap on total road density. 5-ER-00985–86 (establishing reclamation requirements required to remove roads from total road-density calculations).

00879 (Biological Opinion); see also 3-ER-00551 (Revised Plan) (defining "baseline" as "conditions as of December 31, 2011"). In so concluding, the Fish and Wildlife Service did not consider that the Revised Plan eliminated Amendment 19 mandates that imposed demanding reclamation standards that removed roads from the landscape, ensured the integrity of road closures, and created a substantial disincentive for new road construction in grizzly habitat. Because the Fish and Wildlife Service "failed to consider an important aspect of the problem," it violated the ESA. Ctr. for Biological Diversity v. BLM, 698 F.3d at 1109 (citation omitted).

The district court erred in declining to grant summary judgment to Swan View on this ESA issue. The district court did not acknowledge or discuss Swan View's claim that the Fish and Wildlife Service's Biological Opinion violated the ESA by failing to grapple with established grizzly bear science showing that roads displace grizzly bears even when they do not receive unauthorized motorized use. Instead, the district court ruled for Swan View on its separate ESA argument that the Fish and Wildlife Service overlooked impacts arising from unauthorized motorized use on so-called impassable roads, 1-ER-00034, and held that "Plaintiffs fail on their remaining ESA claims," 1-ER-00021, and granted summary judgment to Federal Defendants on all issues in which the court did not affirmatively rule in Swan View's favor, 1-ER-00073.

The district court's adverse disposition of Swan View's ESA claim related to impacts to grizzly bears from unused roads was contradicted by the district court's own discussion of established grizzly bear science. In its discussion of the background of this case, the district court quoted the Fish and Wildlife Service's conclusion in its Biological Opinion that grizzly bears avoid roads "even long after road closures" and then further stated that "[t]he science supports Plaintiffs' argument that, generally, bears avoid roads, particularly motorized ones." 1-ER-00029–30. Notwithstanding these background acknowledgements of the central thrust of Swan View's argument on this point, the district court reached no legal conclusion in Swan View's favor on this aspect of Swan View's contentions and instead issued an order and judgment that appeared to resolve all unaddressed ESA issues in the Federal Defendants' favor. For the reasons discussed, this disposition of Swan View's ESA argument on the issue of impacts to grizzly bears from forest roads that do not receive unauthorized use was erroneous and should be reversed.

II. THE FOREST SERVICE VIOLATED THE ESA BY RELYING ON THE FISH AND WILDLIFE SERVICE'S UNLAWFUL BIOLOGICAL OPINION

For its part, the Forest Service violated the ESA by approving the Revised Plan in reliance on the Fish and Wildlife Service's flawed Biological Opinion to conclude that the plan will not jeopardize grizzly bears. See 2-ER-00299–301; 16 U.S.C. § 1536(a)(2). "Section 7 of the ESA imposes a substantive duty on the

[action agency] to ensure that its actions are not likely to jeopardize the continued existence of [a listed species] or result in destruction or adverse modification of critical habitat." Ctr. for Biological Diversity v. BLM, 698 F.3d at 1127; see also Wild Fish Conservancy v. Salazar, 628 F.3d 513, 532 (9th Cir. 2010) (agency reliance on legally flawed biological opinion results in "an action based on reasoning 'not in accordance with law' and [is] thus arbitrary and capricious") (citation omitted). Accordingly, where the Forest Service relies on a Biological Opinion that fails to consider or even acknowledge critical issues, the Forest Service itself violates the ESA. Ctr. for Biological Diversity v. BLM, 698 F.3d at 1109–10; Wild Fish Conservancy, 628 F.3d at 532.

The district court recognized the Forest Service's independent obligations under the ESA, holding that the agency violated the ESA to the extent it relied on the Fish and Wildlife Service's unlawful conclusions that disregarded unauthorized motorized use. 1-ER-00051–53. However, because the district court did not hold that the Fish and Wildlife Service equally erred in failing to consider impacts to grizzly bears from roads left on the landscape regardless of motorized use, the district court issued no corresponding finding that the Forest Service erred on this ground as well. See id. For the same reasons discussed above with respect to the Fish and Wildlife Service's ESA violation, this Court should also hold that the Forest Service violated the ESA for arbitrarily relying on the Fish and Wildlife

Service's unlawful conclusion. Ctr. for Biological Diversity v. BLM, 698 F.3d at 1109; Wild Fish Conservancy, 628 F.3d at 532.

III. THE FOREST SERVICE VIOLATED NEPA BY FAILING TO EVALUATE OR DISCLOSE ITS WEAKENING OF ROAD-MANAGEMENT STANDARDS

In addition to violating the ESA, the Forest Service violated NEPA's requirement that agencies take a "hard look" at all the expected environmental impacts of their actions threatening a significant impact on the human environment. See 42 U.S.C. § 4332(2)(C). NEPA's "hard look" obligation requires agencies to consider potential environmental impacts, including "all foreseeable direct and indirect impacts," and "should involve a discussion of adverse impacts that does not improperly minimize negative side effects." N. Alaska Envtl. Ctr., 457 F.3d at 975.

A. Grizzly Bears

The Forest Service's EIS for the Revised Plan violated NEPA by failing entirely to consider impacts to grizzly bears arising from the Revised Plan's weakening of road-management requirements. The agency failed to consider or disclose the impacts of the Revised Plan's abandonment of Amendment 19's stringent road-reclamation requirements or its resulting impact on grizzly bears. Instead, the Forest Service's EIS simply asserted that the Revised Plan will "retain levels of open or total road densities and secure core that have supported grizzly

bear recovery on the Flathead National Forest." 2-ER-00344 (Final EIS). This discussion failed to analyze or disclose the consequences of substituting the Revised Plan's weakened road-closure requirements for Amendment 19's standards requiring comprehensive treatment of forest roads, including removal of culverts, to ensure that such routes "no longer function as a road." 5-ER-00986. It equally overlooked the implications of these management changes in light of the well-established body of scientific evidence establishing that grizzly bears are displaced from otherwise productive habitats by forest roads even when such roads are closed to public travel due to learned avoidance of such human developments. See 5-ER-00973–74 (Mace & Waller study). Yet NEPA's "hard look" obligation encompasses a mandate that agencies must ensure the "scientific integrity[] of the discussions and analyses in environmental impact statements." 40 C.F.R. § 1502.24. The Forest Service therefore violated NEPA.

The district court erred in reaching a contrary conclusion. For grizzly bears, the district court reasoned, in relevant part, that "[t]he Draft EIS specifically stated that the Revised Plan 'would replace Amendment 19 and other 1986 Flathead Forest plan direction related to grizzly bears in its entirety,'" 1-ER-00023 (quoting Draft EIS), and the Final EIS "acknowledged that … the alternative selected for the Revised Plan 'would provide the most opportunity for wheeled motor vehicle use' within the Forest." 1-ER-00024 (quoting Final EIS). However, the broad

agency statements referenced by the district court fail to grapple with the impacts to grizzly bears that would result from these acknowledged management changes, including displacement impacts and resulting harms to bear reproduction that are well documented in the best available science. 5-ER-00973; 4-ER-00848.

The district court's statements also failed to recognize that the Forest Service's NEPA analysis suffered from the same infirmities that the district court found unlawful in its examination of the Biological Opinion—and the Forest Service's arbitrary reliance on that Opinion—under the ESA: the agency failed to consider impacts to grizzly bears from unauthorized motorized use on so-called "impassable" roads. As with the agencies' ESA analyses, the Forest Service's NEPA analysis is unlawful where the agency failed entirely to consider an important aspect of the problem—as the district court found occurred here in connection with road-management impacts on grizzly bears. See W. Watersheds Project, 632 F.3d at 481, 496 (the APA's "arbitrary and capricious" standard applies to agency action under the ESA and NEPA); see also 1-ER-00033–34, 00062 (district court opinion). It was therefore error for the district court to grant Swan View's ESA claim while rejecting Swan View's substantially parallel NEPA claim. Moreover, as discussed in the context of the ESA, the Forest Service further violated NEPA by failing to consider that roads left on the landscape—regardless of motor vehicle use—degrade grizzly bear habitat and displace bears.

B. Bull Trout

The Forest Service further violated the ESA by failing to consider the Revised Plan's abandonment and modification of important requirements that protected bull trout habitat in the Flathead Forest. The Revised Plan eliminated Amendment 19 road-reclamation standards that included a culvert-removal requirement, thereby subjecting bull trout to new threats of erosion and sedimentation impacts.

Nevertheless, the Forest Service's EIS failed to grapple with or disclose the Revised Plan's impacts to bull trout, ignoring the impact of discarding Amendment 19's road-density and associated culvert-removal requirements. Instead, the Forest Service in the EIS asserted that, under a new Revised Plan guideline ("FW-GDL-CWN-01"), "there would be no net increase in the length of roads and stream crossings inside riparian management zones for watersheds within the conservation watershed network." 2-ER-00366 (Final EIS). This analysis ignored that such increases are governed only by a guideline, which is expressly phrased in terms of what the Forest Service "should" do and is, by definition, non-binding. 3-ER-00385 (defining "guideline"); 3-ER-00397 (defining "FW-GDL-CWN-01"). Further, the cited guideline has a narrower geographic scope than the regime it replaced. It excludes key areas of designated bull trout critical habitat in the areas of Swan Lake and surrounding lands, the Cyclone Creek headwaters, and portions

of the Swan River and Flathead River watersheds—all of which were covered by Amendment 19. Compare 3-ER-00614 (map of conservation watershed network), with 5-ER-00918–21 (maps of bull trout critical habitat). The Forest Service entirely ignored this point.

As with grizzly bears, the district court dismissed Swan View's NEPA claims regarding impacts to bull trout from the Revised Plan's abandonment of culvert-removal requirements despite the district court finding corresponding violations of the ESA. In the ESA context, the district court deemed it "inexplicable" for the Fish and Wildlife Service to determine that culvert removal is no longer required. 1-ER-00036–37. Nevertheless, the district court dismissed Swan View's parallel NEPA arguments, stating generally that the Forest Service "consider[ed] the effects of 'motorized trails, travel management, and roads' on aquatic species, including bull trout …, consider[ed] the effects of the Revised Plan's road management on aquatic species …, and analyzed the general effects of the proposed action." 1-ER-00026. Yet these general agency statements referenced by the district court failed to include any agency analysis of the culvert-related impacts that the district court itself found compelling in the ESA context.

In short, the district court's disparate treatment of Swan View's NEPA and ESA claims was unjustified and erroneous. See W. Watersheds Project, 632 F.3d at 481 ("arbitrary and capricious" standard applies to agency action under the ESA

and NEPA). This Court should therefore reverse the district court's holdings on these issues with respect to NEPA.

IV. THE COURT SHOULD REMAND THE REVISED PLAN AND EIS TO THE FOREST SERVICE

To remedy the legal violations discussed above, this Court should remand the Revised Forest Plan to the Forest Service. Remand is the basic judicial remedy for arbitrary and capricious agency action and is intended to direct the offending agency to "reconsider[] or replace[] the action." All. for the Wild Rockies v. U.S. Forest Serv., 907 F.3d 1105, 1121 (9th Cir. 2018). Here, remand is warranted to remedy the Federal Defendants' ESA and NEPA violations.

Without remand of the Revised Plan, the issue of replacing the Revised Plan's unlawful provisions with more protective requirements will not come directly before the agency. Declining to remand the Revised Plan would therefore leave the Forest Service without any clear judicial direction to reconsider, much less replace, provisions of the Revised Plan that violate the ESA and NEPA. Such an omission raises "real dangers" of "[b]ureaucratic rationalization and bureaucratic momentum," in which agencies embark on a path of ratifying decisions already made rather than reconsidering them. N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988); see also Sierra Club v. Marsh, 872 F2d 497, 504 (1st Cir. 1989) (noting "the difficulty of stopping a bureaucratic steam roller, once started") (Breyer, J.). Accordingly, a remand is warranted here.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellants Swan View Coalition and Friends of the Wild Swan respectfully request that this Court reverse the challenged rulings of the district court and issue an order remanding the Revised Plan to the Forest Service.

Respectfully submitted this 15th day of August, 2022.

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FOR THE NINTH CIRCUIT

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Benjamin J. Scrimshaw

Addendum

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§ 1536. Interagency cooperation

Currentness

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

Addendum 1

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that--

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

Addendum 2

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

Addendum 3

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of Title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

Addendum 4

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications.

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Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to--

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary--

(A) determine that the Federal agency concerned and the exemption applicant have--

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

Addendum 6

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

Addendum 7

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person--

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that--

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action--

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless--

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

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If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

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(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section--

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

CREDIT(S)

(Pub.L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub.L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub.L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub.L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub.L. 99-659, Title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3742; Pub.L. 100-707, Title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

Addendum 10

Notes of Decisions (903)

16 U.S.C.A. § 1536, 16 USCA § 1536
Current through P.L. 117-164. Some statute sections may be more current, see credits for details.

End of Document

Addendum 11

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Limitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir.(Fla.), Sep. 15, 2010

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Currentness

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) 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;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

Addendum 12

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

Addendum 13

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13352

<Aug. 26, 2004, 69 F.R. 52989>

Facilitation of Cooperative Conservation

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

Sec. 2. Definition. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

Sec. 3. Federal Activities. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

Addendum 14

Sec. 4. White House Conference on Cooperative Conservation. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 5. General Provision. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH

Notes of Decisions (5212)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 4332, 42 USCA § 4332
Current through P.L. 117-164. Some statute sections may be more current, see credits for details.

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Addendum 15

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1502.24

§ 1502.24 Methodology and scientific accuracy.

Effective: [See Text Amendments] to September 13, 2020

Agencies shall insure the professional integrity, including 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.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

End of Document

Addendum 16

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Subchapter A. National Environmental Policy Act Implementing Regulations (Refs & Annos)
Part 1506. Other Requirements of NEPA (Refs & Annos)

40 C.F.R. § 1506.13

§ 1506.13 Effective date.

Effective: September 14, 2020
Currentness

The regulations in this subchapter apply to any NEPA process begun after September 14, 2020. An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020.

SOURCE: 85 FR 43357, July 16, 2020; 85 FR 43370, July 16, 2020, unless otherwise noted.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

Notes of Decisions (4)

Current through Aug. 12, 2022, 87 FR 49772, except for 40 CFR § 52.220, which is current through July 28, 2022. Some sections may be more current. See credits for details.

End of Document