

March 25, 2003

Appeal Deciding Officer:
Randy Moore,
Regional Forester
USDA Forest Service
310 West Wisconsin Avenue, suite 500
Milwaukee, WI 53203

Deciding Officer:
Mark Van Every,
District Ranger
Superior National Forest
118 S. 4th Ave. East
Ely, MN 55731

Re: Notice of Appeal of the Decision Notice and FONSI for the Big Grass Environmental Assessment ("Big Grass project").

Dear Reviewing Officer:

The Sierra Club North Star Chapter ("Sierra Club") hereby files this Notice of Appeal of the Decision Notice and FONSI for the Big Grass timber sale dated February 8, 2003, (date by when legal notice was published in the Ely Timberjay) pursuant to 36 C.F.R. § 215.

Pursuant to 36 C.F.R. §215.14(b), the Appellant provides the following information:

- (1) This is a Notice of Appeal filed pursuant to 36 C.F.R. 215.
- (2) The names and address of the Appellant is: Sierra Club North Star Chapter, 2327 E. East Franklin Ave Minneapolis MN 55406 phone: 612-659-9129 fax: 612-659-9124

All correspondence or contacts about this appeal should be directed to: Sharon Stephens, Forestry Committee, Sierra Club North Star Chapter, 2327 East Franklin Ave Minneapolis MN 55406 phone: 612- 659-9129 fax: 612- 659-9124.

- (3) The Appellant objects to the decision to adopt Alternative 4 from the Environmental Assessment prepared for the Decision Notice and Finding Of No Significant Impact for the Big Grass Timber Sale by Mark Van Every District Ranger for the Kawishiwi District, Superior National Forest in Minnesota, dated January 31, 2003.

(4) The Appellant appeals the Decision and the FONSI because of the following objections:

- I. The EA did not adequately identify and consider the project's impact to the Boundary Waters Wilderness Area.**
- II. The EA did not adequately identify and consider the project's indirect and cumulative effects.**
- III. The EA improperly relies on mitigation measures and best management practices to comply with NEPA.**
- IV. The EA fails to consider an adequate range of alternatives.**
- V. The EA's analysis of impacts and mitigation measures related to soil productivity is insufficient.**
- VI. The EA's analysis of Management Indicator Species is insufficient.**
- VII. The EA's analysis of the Canadian Lynx is insufficient.**
- VIII. The Finding of No Significant Impact is arbitrary and capricious.**

Discussion of each objection follows:

I. The EA did not adequately identify and consider the project's impact to the Boundary Waters Wilderness Area.

The Big Grass Project Area is bordered on the north and south by the BWCA wilderness. The unique requirements of this location were neither sufficiently emphasized nor adequately resolved by the discussion in the EA or the decision notice. Commercial logging and controlled burning in this area is obviously an extraordinarily controversial issue -and it is certainly one that is of immediate interest to many Minnesotans. For those thousands of recreational users who prize the BWCA wilderness, such proposed logging is deeply discouraging and totally unacceptable. We submit that the impact of the Big Grass project is thus "significant" as that term is defined by federal law. 40 C.F.R. §1508.27.

The project area, along the Echo Trail, is a gateway for recreational forest users throughout the year. Alternative 4 will adversely affect the experience of many recreational users: (1) In the short term, in terms of noise, smoke, etc.; (2) in the intermediate term, by leaving more than 1500 acres of clear cut behind; and (3) in the long term, by exacerbating the discontinuity between the existing forest and that in the BWCA wilderness. The project area runs between the Trout lake Unit of the BWCAW from the Central Unit, and therefore it plays an integral role in migrations, dispersals, and flows across two sections of the wilderness landscape.

Special concerns about connectivity within this particular setting are not adequately addressed by the EA or Decision Notice. The proposed project area forms a narrow

corridor connecting two sections of BWCA wilderness. The proposed action alternatives threaten to further isolate the smaller Trout lake unit of the BWCA.

Several treatment units (e.g. U-52, NC-1, U3, U4, BL-U3, U-9, U- 13, HL-U1, HL-U3, HL-U4, NC-10, HL-U5, U-28, and NC-18) are directly adjacent to potential wilderness areas. With so many treatment units adjacent to the BWCAW, the noise and emissions from logging operations will permeate the wilderness, diminishing the experience of solitude for visitors. Unit HI-U3 even appears to overlap with the Agassa Potential Wilderness Area. Of greatest concern, however, are treatment units U-52, NC-1, U-3, U4, and NC- 2. These units are situated in the narrow corridor between the Big lake Potential Wilderness Area and the BWCAW, and therefore, cutting in this location would reduce the wilderness character of the area.

Logging along the wilderness boundary creates the potential for illegal trespasses into the BWCAW. Of special concerns are roads R1, R2, R3, S9, S10, R7, R11, R15, R12/12a, R61, R28, R25, R34, R42, R44, R49, and R54. Each of these roads terminates extremely close to the boundary of the BWCAW, thus increasing the likelihood of illegal off-road vehicle use in the wilderness. Statements in the EA and Decision Notice (See Appendix H, Response 14-4) that all temporary roads will be closed do not satisfy our concerns. The Superior is full of ineffective closures, including at least two that allow entry into the BWCAW. The legacy of such a project will doubtlessly include an increased amount of ATV use in the area, with concomitant risks of spread of noxious weeds, soil compaction, and a further disruption in the ecosystem. Such use threatens to further isolate the Trout lake unit of the BWCA.

Given the magnitude of the proposed timber sale in Alternative 4, site specific mitigation measure should be in place, especially so close to the Boundary Waters Wilderness Area. Given the special concerns raised by the location of the Project Area, we submit that the finding of “no significant impact” was unreasonable. The decision should be reversed and remanded so that an EIS can be conducted in which these issues can be adequately analyzed. Site specific mitigation measure should be in place, especially so close to the Boundary Waters Wilderness Area.

Our concern remains for units U-52, NC-1, U3, U4, BL-U3, U-9, U- 13, HL-U1, HL-U3, HL-U4, NC-10, HL-U5, U-28, and NC-18 because they are all directly adjacent to the BWCAW. Many of these units in Alternative 4 are slated for clearcuts, which we do not believe to be suitable along the wilderness boundary.

The Decision Notice states that the “physical effects are limited to the project area and adjacent areas.. . and that there will be no significant effects in the area such as historical or cultural resources, prime forest lands, wetland or floodplains, wild and scenic rivers, scientific resources or ecologically critical areas” (emphasis added) (Decision Notice Page 14).

It is difficult to understand how the Forest Service made this conclusion given that the adjacent area for many of the project's unit is the Boundary Waters Wilderness. The Environmental Analysis incorrectly inferred that the project's activities would not significantly affect the quality of the Boundary Waters merely because they occur immediate outside the Boundary Waters boundaries. Moreover, the Environmental Assessment failed to consider the substantial impact the project will have on the Boundary Waters, impacts that do not stop at a boundary line on a map.

Areas immediately outside the BWCAW should be managed less intensively to create a gradual transition between the wilderness and the rest of the Superior National Forest. Such an alternative is viable and thus such a compromise should have been considered, and would have also been consistent with the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 and applicable regulations and rules. The BWCAW was designated as one of the original wilderness areas in the United States in 1964 by the Wilderness Act. The BWCAW lies entirely within the Superior National Forest.

When determining whether the impacts of a proposed timber sale are or are not "significant," the Forest Service must take the context of the project into consideration. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action." 40 C.F.R. 1508.27(a). In addition,

"Factors that an agency must consider in determining whether an action "significantly" affects the environment within the meaning of § 102(2)(C) of the National Environmental Policy Act, [42 U.S.C.S. § 4332](#)(2)(C) include, inter alia, (1) the degree to which the effects on the quality of the human environment are likely to be highly controversial, [40 C.F.R. § 1508.27\(b\)\(4\)](#); (2) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks, [40 C.F.R. § 1508.27\(b\)\(5\)](#); (3) whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by breaking the action down into small component parts, [40 C.F.R. § 1508.27\(b\)\(7\)](#); and (4) whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment, [40 C.F.R. § 1508.27\(b\)\(10\)](#)." *Sierra Club v. United States Forest Service* 843 F.2d 1190, 1193 (9th Cir. 1988).

II. The EA Did Not Adequately Identify and Consider Reasonably Foreseeable Indirect and Cumulative Effects.

The Forest Service Handbook requires that “[c]onsideration must be given to the incremental effects of past, present, and reasonably foreseeable related future actions of the Forest Service, as well as those of other agencies and individuals.” F.S.H. § 1909.15,15.1. “Cumulative impacts” are the collective environmental impacts of all “past, present, and reasonably foreseeable future actions” taking place in the affected area. *Sierra Club v. United States Forest Service*, 843 F.2d 1190, 1194 (9th Cir. 1988), quoting 42 C.F.R. § 1508.7 (1987).

The Forest Service Handbook requires every EA to identify and consider cumulative effects: “For each alternative, estimate the direct, indirect, and cumulative environmental effects, including the effectiveness of the mitigation measures, that would result from implementing each of the alternatives, including the no action alternative. Also, identify any additional mitigation measures that may be required, such as measures common to all alternatives.” 1909.15 FSH § 15.

The CEQ Regulations also state: “Effects’ include: ...(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8.

The Big Grass EA neither mentions nor identifies the impacts from a number of similar projects being proposed in this area or from past projects in the area. For example, on May 30, 2002 the La Croix Ranger District of the Superior National Forest sent out a decision notice to proceed with the Plantation Timber Sale Project. The Plantation project also is located along the Echo Trail corridor, but the project’s effects are not mentioned in the Big Grass EA.

The Decision Notice suggests that in many instances the analysis of cumulative effects was *implicit* in the analysis and “may not be entirely obvious in the EA.” Decision Notice, Response 14-3. It provides the example of how the cumulative effects were implicitly incorporated, “in the analysis for fragmentation and age class distribution without having to mention past individual timber sales.” Id. The Decision Notice goes on to note: “In addition, approximately 23 past timber sale records were located, which represented the past 30 years of commercial harvests on federal lands in the BGPA. Although this list is not a complete timber sale list, the existing age class distribution of the area reflect ALL past timber sales and stand replacement natural disturbances. This existing age class distribution is the most reliable source for past cumulative effects for age class.” Id.

The suggestion that an analysis of cumulative effects was implicitly addressed is not sufficient to address this crucial concern. To comply with NEPA, an EA needs to explicitly identify and analyze cumulative effects. Merely considering an age-class distribution, for example, does not seem to meet the requirements of NEPA. Obviously existing age-class distributions are a reliable source of information about the cumulative

effects for age class. This is nearly tautological; it does not answer the question of what other cumulative effects from past projects in this area. To address these concerns, and to be in compliance with NEPA, cumulative effects from such projects need to be explicitly analyzed.

III. The EA improperly relies on mitigation measures and best management practices to comply with NEPA.

The Decision Notice and the Environmental Assessment reference BMPs and mitigation measures numerous times to address concerns of the project's impact to resources, including, but not limited to such resources as soils, management indicator species, and threatened and endangered species, and concerns about fragmentation.

Such reliance on BMPs and mitigation measures has been found to be inconsistent with NEPA by the federal court system. Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372 (C.A.9(ID)1998). provides clarification with respect to the Forest Service's duty to properly formulate and discuss mitigation measures:

"The Forest Service's perfunctory description of mitigating measures is inconsistent with the "hard look" it is required to render under NEPA . . . A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA."[\[1\]](#)

While the use of BMPs is to be encouraged in timber salvage projects, we note that the use of these measures is not in and of themselves sufficient to ensure compliance with the law.

"The Forest Service's broad generalizations and vague references to mitigation measures in relation to the streams affected . . . do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide."[\[2\]](#)

[\[1\]](#) 137 F.3d at 1380 (quoting Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1154 (9th Cir. 1997) and Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986), rev'd on other grounds, 485 U.S. 439 (1988).

[\[2\]](#) Id. at 1381.

A more through systematic analysis of the proposed use of best management practices and mitigation measures within the project area, as well as a discussion of their effectiveness is required.

IV. The analysis of impacts and mitigation measures related to soil productivity is insufficient.

Several of the analyses in the EA failed to provide the detailed, site-specific information required by NEPA. All of these analyses are essential to the EA and if any one of them is insufficient then the subsequent DN and FONSI is not adequately supported and must be reversed.

The NFMA requires the Forest Service to monitor the effects of forest management practices on soils to ensure sustained productivity.

In the Big Grass EA, the Forest Service failed to provide the requisite site-specific data on soils, past soil loss, soil integrity, and its ability to regenerate trees within five years. Specifically, the FS needs to provide data supporting the finding of lack of significant soil disturbance. Specific studies indicating successful regeneration, natural or manual, on logging disturbed sites in this region should be included. This area has been heavily logged for the past 120 years.

In the response to public comments, the FS indicates that they have complied with NFMA requirements by “addressing long-term productivity through use of standards and guidelines that were developed on an Ecological landtype (ELT) basis. Ecological landtypes 11 and 17 would potentially be susceptible to nutrient losses with clearcut with reserve harvesting. On these sites full tree logging is not allowed. The nutrient rich tops and branches would remain on site or be redistributed on site.” We submit that by merely distinguishing these landtypes and withholding types 11 and 17 from “full logging” the FS has not conducted a sufficient soils analysis as required by NFMA. Rather, soils in the project area should be identified in a site-specific manner with field data showing where each soil type is, its condition, and how each proposed alternatives specific activities will impact. Each soil type should be analyzed as to the effect of clearcutting on the sustainability of the soil from the loss of carbon in the soil, the addition of CO₂ to the atmosphere, and the effect this will have on the regeneration of trees and the subsequent viability of sensitive species.

Contrary to the Decision Notice and FONSI, the chosen alternative could significantly impact soil productivity. A significant change in productivity is defined as the minimum level of change in productivity of reduced growth that is detectable using current technology. (See Stone, Douglas M., Joseph A. Gates, and John D. Elioff. *Are We Maintaining Aspen Productivity on Sand Soils?* - attached to our comments to this project submitted September 3, 2002 and incorporated by reference into this administrative appeal).

The EA's estimate of the amount of land to be impacted by soil disturbance – 387 acres -- is likely far too conservative. The effects of logging on soil quality are just beginning to be studied and indications are that compaction of soils and loss of biomass due to harvesting have far more significant affects than previously considered. According to one recent study, compaction resulted in soil disturbance ranging from 17% - 51% of the "managed" area, depending on equipment used. (Large equipment 51%, chainsaw felling and small skidder

17%, cut-to-length equipment 33%). Winter harvesting did not significantly alleviate disturbance (45% heavy equipment, 8-17% other methods). (see *"Soil disturbance and aspen regeneration on clay soils: Three case histories"* by Douglas M. Stone and John D. Elioff, attached to our comments to this project submitted September 3, 2002 and incorporated by reference into this administrative appeal).

In addition, system and permanent special use roads need to be explicitly considered in the EA when determining detrimental soil conditions. These roads have considerable and irretrievable effects that should be considered for overall cumulative impacts to the soils of the area.

Again - site specific mitigation measure should be in place, especially so close to the Boundary Waters Wilderness Area.

NFMA requires the Forest Service to insure that timber will be harvested only where soils will not be irreversibly damaged. 16 U.S.C. § 1604(g)(3)(E)(I). All management prescriptions must conserve soil resources and not allow significant or permanent impairment of the productivity of the land. 36 C.F.R. § 219.27(a)(1). All management prescriptions that involve the vegetative manipulation of tree cover for any purpose shall avoid permanent impairment of site productivity and ensure conservation of soil resources. 36 C.F.R. § 219.27(b)(5).

Pursuant to NFMA, the conservation of soil resources involves the analysis, protection, enhancement, treatment, and evaluation of soil resources and their response under management, and shall be guided by instructions in official technical handbooks. 36 C.F.R. § 219.27(f). These handbooks must show specific ways to avoid or mitigate damage, and maintain or enhance productivity on specific sites. Id.

The Forest Service's stated policy on soil management is to "[m]anage forest and rangelands in a manner that will improve soil productivity. Use appropriate soils information systems in support of all management activities affecting, or influenced by, the soil resource." FSM 2550.3, and "[t]o rehabilitate soils that are in an unsatisfactory condition." FSM 2550.02.

In order to meet its stated policies and objectives, the Forest Service is required to survey and monitor soil quality. See FSM 2551 and 2554, to "advise decision-makers when adjustments are needed in land management practices to protect or improve soil productivity." FSM 2554.02

Chapter 2 of the Soil Management Handbook, entitled Soil Quality Monitoring, at 2.03 restates the Forest Service policy to "[d]esign and implement management practices to maintain or improve the long-term inherent productive capabilities of the soil resource" and to "[p]lan and conduct soil quality monitoring to determine if soil management goals, objectives, and standards as outlined in Forest plans are being achieved." FSH 2509.18.

Section 2 of Chapter 2 describes the standards to be followed in the development of soil quality standards. The Forest Service is directed to “[e]stablish threshold values where soil disturbances become detrimental, that is, result in significant change.” The Forest Service should also use “compaction, erosion, puddling, protective plant cover and burning, as applicable, to categorize soil disturbances,” and to “define the areal extent that detrimental soil conditions, which reflect significant change in productivity, may occur.” Id.

The project fails to provide sufficient information to allow the public or the decision maker to accurately determine whether soil disturbance may be detrimental and if soils will be significantly impaired or irreversibly damaged, or whether soil resources will be conserved or improved. The decision to proceed with the sale is therefore arbitrary and capricious agency action, an abuse of discretion, and is in violation of NFMA. See 5 U.S.C. § 706. Accordingly, the decision to proceed with the project should be set aside. Id.

Moreover, the Project Fails to ensure that there will no Substantial and Permanent Impairment of Productivity of Land, in Violation of the National Forest Management Act

NFMA requires the Forest Service to insure that management systems used will not produce substantial and permanent impairment of the land. 16 U.S.C. § 1604(g)(3)(C). All management prescriptions must conserve soil resources and not allow significant or permanent impairment of the productivity of the land. 36 C.F.R. § 219.27(a)(1). In addition, all management prescriptions that involve the vegetative manipulation of tree cover for any purpose shall avoid permanent impairment of site productivity and ensure conservation of soil resources. 36 C.F.R. § 219.27(b)(5).

Finally, the project analysis fails to ensure that there will be no Detrimental Changes in Water Temperatures, Blockages of Water Courses, and Deposits of Sediment, or Serious and Adverse Effects on Water Conditions and Fish Habitat, in Violation of the National Forest Management Act

NFMA requires the Forest Service to insure that timber will be harvested only where protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat. 16 U.S.C. § 1604(g)(3)(E)(III).

Forest-wide mitigation measures and best management practices must be site specific and must be proven to be effective. Speculative reliance on these measures and practices that have not be shown to be effective is contrary to NEPA and applicable case law.

V. The EA fails to consider an adequate range of alternatives.

An environmental assessment must include a rigorous exploration of all reasonable alternatives. 40 CFR 1501.14. When the potential number of possible alternatives is very large, the alternatives explored must at least represent the full spectrum of reasonable alternatives. (See NEPA's 40 Questions, #1b and 40 C.F.R. §1502.14)

What constitutes a “reasonable alternative” depends on the particular facts of the case. Obviously, the EA cannot explore every possibility. But in order to comply with NEPA, the EA must consider a range of alternatives that truly reflect the viable management options for a particular area. When a project area borders protected wilderness, factors such as recreation, wildlife habitat, visual quality must be weighed much more heavily than they might in other circumstances.

The existence of a single viable but unexamined alternative renders an environmental impact analysis inadequate. Idaho Conservation League v. Mumma, 956 F. 2d 1508 (9th Cir. 1992) The same principle that the court found applicable in *Mumma* holds in the case of an Environmental Analysis. In *Mumma*, the Ninth Circuit stated:

The alternative section is the heart of the environmental impact statement, 40 C.F.R. 1502.14; hence, [t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate. *Citizens for a Better Henderson v. Hodel*, 768 F. 2d 1051, 1057 (9th Cir. 1985). While the practicalities of the requirement are difficult to define, NEPA provides that all agencies of the Federal Government shall, to the fullest extent possible, [s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. 42 U.S.C. 4332(2)(E). Whether a particular EIS has met this demand can best be determined by its purpose, which is to >ensure[] that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences, and [to] provide] the public with information on the environmental impact of a proposed action and encourage] public participation in the development of that information. *Kunzman*, 817 F. 2d at 492; see also *Citizens for a Better Henderson*, 768 F. 2d at 1056.

Friends of the Bitterroot, Inc. v. U.S. Forest Serv., No. CV-90-76-BU, 25 E.L.R. 21186 (D. Mt. 1994) provides an illustrative example. In that case, the Forest Service considered seven alternatives, but the Court held that the Forest Service failed to comply with NEPA because the agency had failed to consider an additional viable alternative which would have protected roadless areas. The Forest Service claimed that such an alternative would not further the purposes of the proposed action, but the Court disagreed.

In this instance, the Big Grass Decision Notice maintains that the EA considered all reasonable alternatives that are within the scope of the purposes of the proposed action. “Only alternatives that meet the purpose and need as stated in Chapter 1, Section 1.2 need to be developed and/or discussed in detail, and therefore, no additional alternatives were developed.” Decision Notice, Appendix H, Response 5-6.

The four alternatives that were considered in detail in the EA did not cover the “full spectrum” of reasonable alternatives. The three action alternatives are nearly identical in respect to four key features: (1) The amount of timber harvested: (1592, 1622, and 1776 acres, respectively); (2) The amount of timber to be clearcut (1413, 1422, 1573 acres); (3) The amount of timber to be thinned (179, 200, 203 acres); and (4) The amount of proposed road construction (21.6, 22.9, 25.2 miles). Viable alternatives remain unconsidered: In particular, the Forest Service should have considered actions that involved less timber harvesting.

The action alternatives ranged from harvesting 79% to harvesting 88% of all timber deemed available for commercial sale. We submit that this would not represent the full spectrum of reasonable alternatives under almost any circumstances. But when considering the particular facts of this sale, it cannot possibly be said to be an adequate representation.

To provide just one example: the Sierra Club maintains serious concerns about units U-52, NC-1, U3, U4, BL-U3, U-9, U-13, HL-U1, HL-U3, HL-U4, NC-10, HL-U5, U-28, and NC-18 because they are all directly adjacent to the BWCAW. Many of these units are slated for clearcuts, which we do not believe to be suitable along the wilderness boundary. Instead, areas immediately outside the BWCAW should be managed less intensively to create a gradual transition between the wilderness and the rest of the Superior National Forest. Such an alternative is viable and thus such a compromise should have been considered, and would have also been consistent with the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 and applicable regulations and rules. The BWCAW was designated as one of the original wilderness areas in the United States in 1964 by the Wilderness Act. The BWCAW lies entirely within the Superior National Forest. The fact that no such intermediate alternative was put forth means that the Forest Service failed to provide an adequate range of viable alternatives.

By limiting the alternatives to a narrow range, the Forest Service discouraged public participation and did not allow for a reasonable consideration of the full range of viable alternatives. In particular, no viable alternative was considered which would have reflected the attitudes of a significant proportion of Minnesotans who object to timber harvesting in this area. The obligatory presence of the No Action Alternative was insufficient. By itself this alternative does not adequately represent a range of compromise positions that many in the public would have found preferable to the narrow range of action alternatives. This very clearly runs counter to the purpose of NEPA.

VI. The analysis of Management Indicator Species is insufficient.

Quite obviously, the Forest Service has failed to obtain the necessary data for management indicator species in this case and instead assumes that enough habitat will remain to maintain viable populations. This approach, which exclusively relies on habitat estimates, without checking the actual populations, ensures that any changes in population will go undetected and was unambiguously rejected recently in federal court. "The Forest Service is obligated by the plain language of the National Forest Management Act's regulations to acquire and analyze hard population data for its selected management indicator species . . . Under this clear language, it may not rely solely on habitat trend data as a proxy for population data or to extrapolate population trends." Forest Guardians et al. v. United States Forest Service, No. CV 00-714 JP/KPM-ACE.

The Forest Service must 1) provide sufficient habitat for species to guarantee their viability well distributed across the planning area, (2) they must verify that viability by in-the-field populations counts of either the species or a representative species known as a management indicator species, and (3) they must disclose their plans, the impacts of their plans, and the accurate, up-to-date scientific basis for their findings in documents subject to public scrutiny before they make final decisions on carrying out those plans.

Forest Service planning regulations require the agency to avoid actions which could lead to the listing of sensitive species. This is codified in the NFMA regulations at 219.19, which require that, "Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area."

Furthermore, the Secretary of Agriculture's Policy on Fish and Wildlife (Dept. Reg. 9500-4) direct the FS to "manage habitats for all native and desired nonnative plants, fish and wildlife species to maintain viable populations of each species; identify and recover threatened and endangered plant and animal species..." and to avoid actions "...which may cause species to become threatened or endangered.

In the case of the Boreal Owl, the species is on the threshold of being listed, and there is a serious question raised of viability in Minnesota, therefore, the burden is on the Forest Service to avoid actions which may cause it to become listed, and which would jeopardize its viability.

In addition, the requirements of section 219.19 read, "each alternative shall establish objectives for the maintenance and improvement of habitat for management indicator species selected under paragraph (g)(1) of this section, to the degree consistent with overall multiple

use objectives of the alternative. To meet this goal, management planning for the fish and wildlife resource shall meet the requirements set forth in paragraphs (a)(1) through (a)(7) of this section."

Clearly this project is "management planning for the fish and wildlife resource," and therefore, must comply with the requirements in this section. This means site-specific data on MIS must be generated to determine the effects of the proposed action on the ecosystem. Yet, the EA only often refers to "forest-wide" monitoring. Without the detailed site-specific data required, this project cannot be complying with the requirements of 219.19, and therefore is in violation of NFMA.

The FS is required to monitor population trends of wildlife to determine the effects of management upon such species. The NFMA Statute itself requires that the agency will "insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;" (16 USC 1604(g)). A further monitoring requirement is set forth in the NFMA regulations, at 26 C.F.R. 219.19(a)(6), which requires that "population trends of the management indicator species will be monitored and relationships to habitat changes determined." This requirement is repeated in the Superior Forest Plan and in the Record of Decision for the Superior Forest Plan.

Here, the Forest Service has failed to meet its federal monitoring and data obligations concerning Management Indicator Species and viability Indicator Species. The reason MIS are designated is to relieve the District of the onerous and impossible task of monitoring every species in the forest. However, it is not meant to relieve the District of doing any kind of monitoring. If there is not data at all, then it is impossible to measure the impacts of the actions proposed and carried through by the government agency. The Eleventh Circuit Court of Appeals found that the Forest Supervisor of the Chattahoochee and Oconee National Forests had to provide population data of MIS before a timber project could be approved. ~ Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999).

"The Forest Service admits in numerous places in the record that sensitive species do occur within the project sites and acknowledges that those individuals would be destroyed by the proposed timber sales. It then notes in each case that because the species also exist elsewhere within the Forest, the timber projects would not significantly impact the species' diversity or viability. Yet, the Forest Service reached this conclusion without gathering any inventory or population data on many of the PETS species. Though these species are, by definition, at risk, nothing in the record indicates that the Forest Service possessed baseline population data from which to measure the impact that their destruction in the project areas would have on the overall forest population. We are nevertheless asked to defer to the Forest Service's conclusion that there will be no significant impact upon these species from the proposed timber projects. Absent record support for the Forest Service's assertions, this we cannot do." *Id.*

"The regulations require that MIS be monitored to determine the effects of habitat changes. The timber projects proposed for the Chattahoochee and Oconee National Forests amount to 2000 acres of habitat change. Yet, despite this extensive habitat change and the fact that the [sic] some MIS populations in the Forest are actually declining, the Forest Service has no population data for half of the MIS in the Forest and thus cannot reliably gauge the impact of the timber projects on these species." Sierra Club v. Martin, at 7 and 13. The statutes, implementing regulations, and case law mandates the Forest Service to monitor and maintain population data on MIS.

In response to public comments, the FS indicated that they were not obligated to collect population data, citing Colorado Environmental Coalition v. Dombek, 185 F.3d 1162 (D.C. Cir. 2000). In that case, involving lynx habitat in Vail, Colorado, the court ruled that the forest service was not obligated to provide population data. But that case is easily distinguished from this one. There, the lynx in question were either not present in the area or in such small number that collecting hard population data was effectively impossible. No one had seen a lynx in the area in 25 years. "Under the circumstances, the best the Forest Service could do to comply with the Forest Plan mandate to develop additional skiing opportunities at existing resorts *and* provide for diversity of plant and animal communities within Category III, was to provide and distribute lynx habitat based on the best information available, on the remote chance a population of reproductive lynx might reoccupy the area in the future." Dombek, 185 F.3d at 1169. In this case, the Forest Service has made no showing that the required population data is effectively impossible to gather.

Finally, and please take particular note that in responding to the comments of this project, the Forest Service made an admission in Appendix H that they do NOT have the population data for all the MIS in the area. The Forest Guardian case cited earlier in this appeal make it clear that the Forest Service cannot rely on habitat trend data but must acquire this data. They have admitted that they this information is incomplete – therefore ANY project activity must be suspended until such data has been accumulated, assessed, and evaluated. The environmental assessment is therefore insufficient and premature until such data has been acquired and analyzed. Federal courts have made in clear in case law such as Sierra Club v. Martin that projects can be suspended until this is complete.

VII. The analysis of the impact to the Canadian Lynx and other threatened and endangered species is insufficient.

Recently, a federal court ordered the U.S. Fish and Wildlife Service has been required to re-examine lynx habitat. In Defenders of Wildlife v. Gale Norton, (No. 00-2996 (GK)), decided December 26, 2002, District Judge Glads Kessler made it clear that the Service is enjoined from issuing any written concurrence that the actions proposed by federal agencies – including the Forest Service – may affect but are not likely to adversely affect the Canadian Lynx.

The Forest Service must consult again with the Fish and Wildlife Service. No projects should forward in lynx habitat until final critical habitat has been designated. A copy of this order has been included for your review.

Under the Endangered Species Act, the Forest Service has an obligation to provide habitat for Gray Wolf, Canadian lynx and **all** other endangered and threatened species, not simply to mitigate negative effects. While the District has provided an estimate as to how much habitat may be reduced or impacted by each of the alternatives, the District has not stated how it intends to comply with the Endangered Species Act in each of the alternatives. It is not sufficient to describe the affected area -but the District must also state it plans to address these impacts.

The EA and Decision Notice failed to provide sufficient analysis of impacts of this project to the habitat of the Grey Wolf, Canada Lynx, Bald Eagle, Northern Goshawk, and Boreal Owl -and most importantly -how this loss of habitat would impact the species. The Decision should therefore be remanded for a new analysis of how each of the alternatives and the cumulative impacts may affect the Grey Wolf, Canada Lynx, Bald Eagle, Northern Goshawk.

The Forest Service incorrectly disregards any potential adverse effects on the Canadian lynx by concluding in its Biological Evaluation that post timber harvest, suitable habitat will remain above the minimum levels set by the Lynx Conservation Strategy.

The EA fails to recognize or discuss the extensive set of temporary access corridors, in the form of skid trails and temporary access roads, which will be created for the project. The project will be criss crossed with such travelways, which, in terms of created access corridors, provide the same threats to the lynx as “logging roads” acknowledged in the EA.

It cannot be denied that these roads will lead to “increased human access into suitable habitat” is a significant threat to the species, this potential significant threat isn’t addressed at all. This can hardly be upheld as a “hard look”. In addition, mitigation measures for “protection of soils and water”, such as logging in the winter on snowpack, are detrimental to the lynx – yet the Forest Service still concludes that such snowpack created by project activities is “not likely to increase significantly”. Bobcats compete for food in the territory of the lynx and use the compacted snow trails caused by logging machinery and trucks. This provides access into the lynx habitat, which, without such access, would remain remote and inaccessible. This competition for a modest food supply adversely affects the species.

The Forest Service is arbitrarily disregarding impacts on lynx. This does not constitute a hard look at these impacts. Viability of the species in the forest is clearly an issue pursuant to 36 CFR 219.19. The agency must provide sufficient habitat to maintain the viability of the species. Without a clear explanation of how the species’ viability is going to be maintained even under the stress of the widespread disturbance and entry into their potential habitat the agency cannot stand on conclusory findings of no impact to meet their NEPA and NFMA obligations.

VIII. The Finding of No Significant Impact is arbitrary and capricious.

The Big Grass Project's Environmental Assessment consideration of the above issues cannot be considered compliance with NFMA and NEPA and is arbitrary and capricious. The FONSI is invalid and the Environmental Impact Statement should be prepared. The narrow range of alternatives proposed for this project does not comply with NEPA's mandate and is a violation of NEPA.

The potential for significant impact from this project is great. The project proposes logging adjacent to one of the greatest resources in the United States – one of the original areas included in the Wilderness Act, the Boundary Waters Wilderness Area. The Boundary Waters wilderness will be subjected to edge effects, noise, sedimentation, air pollution from big machinery, and the detrimental effects to recreation within the wilderness area.

In a recent case in the Ottawa National Forest in Michigan, Northwoods Wilderness Recovery v. US. Forest Service, 2003 Fed App, 0084p 96th Cir.) (Recommended by the Court for Full-Text Publication) the Court determined that the Forest Service acted arbitrarily in the Rolling Thunder project because it failed comply with NEPA because there was no scientific or other assessment of logging at levels approved by the project.

Given that the Superior National Forest has been subject to the highest yields of timber commercially harvested of any forest within Region 9 of the Forest Service, and that over 2200 acres of timber have been harvested in the project area in the last 19 years, that the project we find that the Big Grass project does not comply with the National Forest Management Act or NEPA. We ask you to reverse this decision and remand the project back to the District so that the planning may conform to NFMA and NEPA.

Request for Relief

We request that the Regional Forester grant Appellants the following relief:

1. Declare the challenged Decision Notice and FONSI for the Big Grass EA in violation of NFMA, NEPA, the APA and to declare it null and void, and to remand it to the District to be reconsidered or withdrawn;
2. To order the District prepare an Environmental Impact Analysis for the Big Grass Project concerning the project adjacent area (which include the Boundary Waters Wilderness) and to ensure that the Boundary Waters Wilderness would not be adversely affected by the proposed project;
3. To order the District to complete in-the-field population counts of Management Indicator Species, Regional Sensitive Species, and threatened and endangered species in any areas proposed for management activity.

4. To suspend the project until such time the U.S. Fish and Wildlife Service has designated critical habitat for the Canadian Lynx and to then re-initiate consultation with the service as required by Section 6 of the Endangered Species Act;
5. To demonstrate that the project does not impact soil productivity;
6. To prepare a sufficient analysis of the project's indirect and cumulative effects.

Respectfully submitted on this day of March ____, 2003

Sharon Stephens
Legal Committee Chair
Sierra Club North Star Chapter