

SIERRA CLUB, ET AL. APPEAL OF THE THAN BROOK PROJECT

June 30, 2005

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Subject: Notice of Appeal, Statement of Reasons, and Request for Relief – Than Forest Resources Management Project, Saco Ranger District of the White Mountain National Forest

Sierra Club and its New Hampshire Chapter, Forest Watch, The Wilderness Society, and Frank Robey submit this administrative appeal in accordance with the requirements of 36 C.F.R. § 215 and the content requirements of 36 C.F.R. § 215.14.

Sierra Club is the lead appellant and signature verification of authorship is provided below, along with all appellants' names, addresses, and telephone numbers.



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Appellants file this appeal under 36 C.F.R. § 215 in response to the decision by Terry Miller, District Ranger, Saco Ranger District of the White Mountain National Forest, to proceed with the Than Forest Resources Management Project, signed on May 16, 2006.

Appellants request that the Forest Service halt implementation of the project and remand the decision until the Saco Ranger District can demonstrate compliance with the National Environmental Policy Act, the National Forest Management Act, NFMA regulations, and policies described in our statement of reasons. See final section for detailed Relief Requested.

Our rationale for specific changes, our explanation for the disagreement and why we believe the Responsible Official's decision failed to consider our substantive comments, and how we believe the decision specifically violates law, regulation, or policy follow in our Statement of Facts and Statement of Reasons.

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STATEMENT OF FACTS

Within the viewshed of Mt. Washington¹ and the Appalachian National Scenic Trail,² and within the Wild River Inventoried Roadless Area (“Wild River IRA”) and the watershed of the Wildcat Wild and Scenic River, the Saco District of the White Mountain National Forest (“WMNF”) has proposed the Than Forest Resources Management Project (“Than Brook Project”). The Saco District analyzed the environmental impacts from the Than Brook Project in an Environmental Assessment (“EA”) and on May 16, 2006 issued a Decision Notice (“DN”) and Finding of No Significant Impact (“FONSI”) in lieu of analysis in an Environmental Impact Statement (“EIS”).

The Than Brook Project would log 473 acres of forest and build new roads within the Wild River IRA. At 71,387 acres, Wild River is the largest national forest inventoried roadless area east of the Rocky Mountains. Road building within the Wild River IRA includes a short segment of new construction (200 feet) and about one quarter of a mile of reconstruction (Ellis River area), as well as construction of permanent concrete abutments³ for a removable bridge across the Ellis River,⁴ an eligible Wild and Scenic River. The Forest Service considers a bridge

¹ Mt. Washington is New Hampshire’s highest peak. See Table 13. Seen Acres in New Individual Openings by Alternative and Cumulatively. EA at 69.

² “Seen area from Wildcat Peak and the App[a]lachian Trail are from three to four miles, except Unit 20, which is a clearcut in Alternative 4 only, and lies 1.5 miles distant. . . . Wildcat Peak seen acres for Alt. 4 includes 60 acres of new clearcut opening at an average site distance of 3.4 miles.” EA at 68-69. “

³ Permanent abutments are described by Rod Wilson of the FS: “Cement abutments would be set back from the waters edge, and wing walls extending to the right and left toward the existing rock ledge that confines the old log stringers. The sill on the other side would be at or beyond the high water line - on the rocks, and does not need wing walls. Since the other side is quite high already, the cement footing/sill is expected to be a couple feet high or so . . . width of a road + 2 feet, and 2-3 feet in depth. (a Rectangle in shape).” E-mail from Rod Wilson to Frank Robey (sent: Thursday, June 01, 2006 11:43 AM, on file with Frank Robey).

⁴ Ellis River Crossing: “Reconstruction of 1500 feet of NFSR 5555 (Ellis River Crossing) to a three season road with a temporary bridge and permanent abutments at the Ellis River crossing” EA at 41.

a non-conforming structure in a potential wilderness area.⁵ The Wild River IRA, along with “all 27 inventoried roadless areas meet[s] minimum Wilderness evaluation criteria” WMNF Plan EIS at 2-7.

According to the Forest Service,

[t]he Wild River roadless area was determined to highly meet the following criteria: consists of representative landscapes not currently found in existing Wilderness; manageability of the area; meets wilderness values of opportunities for solitude and unconfined recreation; level of public interest; meets wilderness values of aesthetics and scenery; history of roadless area disposition; meets values of research, education, and historical/cultural; and regional size significance (Administrative Record).

WMNF Plan EIS at 3-394. In addition,

“Approximately 44 percent of comments received in response to the White Mountain National Forest Forest Plan revision NOI addressed roadless areas. Of these, 796, or more than 5 percent of all comments, commented specifically on [the Wild River] area. Ninety percent of the comments on this Inventoried Roadless Area indicated that the area should be protected as Wilderness, and an organization has formed to actively solicit support for Wilderness designation.”

WMNF Plan FEIS, Appendix C at C-198.

While the WMNF Plan EIS analyzes the effects of designating areas as Wilderness (see WMNF Plan EIS Alternative 2 discussion about Wild River), there is no discussion of adverse environmental effects to areas within the Wild River IRA not proposed for Wilderness. See WMNF Plan EIS at 3-400 to 3-401. This includes the area where the Than Brook Project is proposed.

The Than Brook Project is the first of four new proposals under the 2005 WMNF Land and Resources Management Plan (“WMNF Plan”) where the Forest Service proposes commercial logging and road construction or reconstruction within an inventoried roadless area

⁵ For example, “The Moriah Brook Bridge, 2.5 miles within the [Wild River] Inventoried Roadless Area boundary, crosses the Wild River. It would be a non-conforming structure and would be considered for removal.” WMNF Plan EIS, Appendix C at C-197 (Wild River IRA).

(“IRA”). The other three are the Mill Brook Project in the Kilkenny IRA, the Batchelder Brook Project in the South Carr Mtn. IRA, and the Wildwood Project in the Jobildunk IRA.⁶ The WMNF is the only national forest in the Appalachian Mountains where the Forest Service proposes commercial logging and road building in IRAs.

The Forest Service plans to allow timber contractors to construct 23.6 miles of new skid trails, which would cause 57 acres of soil disturbance, EA at 75, Table 15; however, it did not know the location of these skid trails at the time the DN was signed.⁷ “[S]kid trails are a concern for soil erosion because they may expose mineral soil (Patric 1976).” EA at 73. The waters of the White Mountain National Forest are designated as “Outstanding Resource Waters” by the State of New Hampshire, which includes the reaches of the Wildcat and Ellis Rivers. EA at 90. “Stream crossings can cause increased sediment inputs to streams during installation and use.” EA at 92. “Sediment problems associated with stream crossings can be very persistent (Stafford et al., 1996) . . .” EA at 93.

The Saco Ranger District of the White Mountain National Forest did not include a separate initial scoping period for public comments, but combined the scoping and 36 C.F.R. § 215 comment periods with the issuance of a “scoping package.”⁸ Consequently, the public was not afforded review of a nearly complete NEPA analysis during the official comment period, which other WMNF Ranger Districts normally include during the official comment period in the form of a draft EA or its equivalent.⁹

Other facts about specific issues are provided throughout the statement of reasons.

⁶ See http://www.fs.fed.us/r9/forests/white_mountain/projects/projects/index.php for links to project documents.

⁷ Email from Rod Wilson, Saco Ranger District NEPA Coordinator and Silviculturist for the Than Brook Project, White Mountain National Forest, to Frank Robey, Than Brook Project Appellant (June 2, 2006, 10:06 a.m. EDT)

⁸ See Than Forest Resources Management Project “Scoping Report,” available at http://www.fs.fed.us/r9/forests/white_mountain/projects/projects/assessments/than/than.html

⁹ See Vegetation Management at http://www.fs.fed.us/r9/forests/white_mountain/projects/projects/index.php and http://www.fs.fed.us/r9/forests/white_mountain/projects/projects/assessments_archive/projects_archive_list.htm

STATEMENT OF REASONS

I. The Than Brook Project requires preparation of an Environmental Impact Statement because it will have a significant effect on the quality of the human environment

The Forest Service erred in issuing a FONSI for the Than Brook Project because logging and building roads in an inventoried roadless area and the other project areas will have significant effect on the human environment, requiring the Forest Service to prepare an EIS.

A. An Environmental Impact Statement is required because the Than Brook Project would substantially alter the roadless character of the Wild River Inventoried Roadless Area

In the Than Brook Project, the Forest Service is proposing to both build roads and log within an inventoried roadless area, and therefore, NEPA and Forest Service regulations require preparation of an EIS. According to Forest Service rules,

Road construction and reconstruction in inventoried roadless and contiguous unroaded areas constitute a significant environmental effect, as defined in the Council on Environmental Quality regulations (40 CFR Part 1508) and the Forest Service Environmental Procedures Handbook (FSH 1909.15, Section 05) and, therefore, requires the preparation of an environmental impact statement (FSH 1909.15, Section 20.6).

66 Fed. Reg. 3219, 3236, FSM 7712.16b(1)(c) (Jan. 12, 2001) (later removed). This statement is consistent with current Forest Service NEPA regulations, which require preparation of a site-specific EIS for projects “that would substantially alter the undeveloped character of an inventoried roadless area” 57 Fed. Reg. 43180, 43200 (Sept. 18, 1992); FSH 1909.15, Ch. 20.6(3).

The Ninth Circuit Court of Appeals has held that “the decision to harvest timber on a previously undeveloped tract of land is an irreversible and irretrievable decision which could have serious environmental consequences.” *Smith v. U.S. Forest Service*, 33 F.3d 1072, 1078 (9th Cir. 1994) (quoting *Natl. Audubon Society v. U.S. Forest Service*, 46 F.3d 1437, 1448 (9th

Cir. 1994 and its lower court opinion; internal quotations omitted); *see California v. Block*, 690 F.2d 753, 763 (9th Cir.1982). The same court also held that “the decision to harvest timber in a 5,000 acre roadless area is environmentally significant.” *Smith*, 33 F.3d at 1079.

In *Smith*, the Forest Service did not prepare an EIS in connection with a roadless area timber sale, but instead only issued an EA and FONSI. *Id.* at 1075. There, the Forest Service acknowledged that the proposed timber sale would affect a 5,000 acre roadless area, and the court held that therefore the NEPA documents were insufficient. *Id.* at 1077, 1079. Just like in *Smith*, the Forest Service has acknowledged that the Than Brook Project—a timber sale—would affect a roadless area—the Wild River IRA at 71,387 acres. Just like in *Smith*, the Forest Service only prepared an EA and FONSI for the Than Brook Project. This level of NEPA analysis is insufficient to comply with NEPA, because the Than Brook Project’s effects are environmentally significant and the decision to harvest timber on the undeveloped Wild River IRA will have serious environmental, irreversible, and irretrievable consequences.

The Than Brook Project is remarkably similar to one of the specific examples provided in the Forest Service’s NEPA Handbook, which requires the Forest Service to prepare an EIS when “[c]onstructing roads and harvesting timber in a 56,000 acre inventoried roadless area where the proposed road and harvest units impact 3,000 acres in only one part of the roadless area.” FSH 1909.15 Ch. 20.6(3)(a). Similarly, the Than Brook Project would construct a new segment of road within the roadless area (200 ft road to access Stands 18-20), reconstruct another segment (1,500 feet reconstruction of FR 5555) and, as part of the reconstruction, add permanent concrete abutments for a removable bridge (Ellis River road & bridge). DN at 6, Figure 1. The project would also harvest timber in 473 acres within the IRA. When extrapolated, the roads and proposed harvest units are likely to have an indirect impact on an area well over 1,000 acres

based on the distribution of logging units that would fragment the western part of the Wild River IRA. *Id.* The Than Brook Project proposal is similar enough to the example in the Forest Service's NEPA Handbook to raise significant doubts that a FONSI was appropriate and that, instead, an EIS should have been prepared. This is supported by the fact that the Forest Service never provided a comparison to the NEPA Handbook standard during its NEPA analysis to distinguish the Than Brook Project from the example provided. Rather, the Than Brook analysis is based on criteria in the Forest Service's Planning Handbook, which does not address NEPA concerns. See FSH 1909.12, Ch. 71.12.

Consequently, the Forest Service's FONSI is unlawful and the Forest Service must prepare an EIS for the Than Brook Project because it would substantially alter the undeveloped character of the Wild River IRA.

B. An Environmental Impact Statement is required because the Than Brook Project meets several of the factors required for "significance" in the NEPA Regulations

When environmental effects from the proposed logging and road building in the entire area are combined with the roadless logging and road building, the Than Brook Project is even more likely to constitute a significant effect on the quality of the human environment. For the following reasons, the proposed action will be highly controversial, it will set a precedent for future actions, and it will affect unique geographic characteristics. 40 CFR § 1508.27. In combination, these factors trigger "significance" and an EIS must be prepared.

CEQ has promulgated regulations detailing how agencies should fulfill these NEPA obligations. CEQ's regulations require a discussion of context and intensity. Intensity is further subdivided into 10 items that agencies should consider when taking a "hard look" at whether a project will have "significant" environmental impacts. These include "beneficial and adverse impacts, the degree to which the proposed action affects public health and safety, the degree to

which the action may adversely affect an endangered or threatened species, the degree to which the effects on the quality of the human environment are likely to be highly controversial, the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks, the degree to which the action may establish a precedent for future actions, whether the action results in cumulatively significant impacts, the degree to which the action may adversely affect scientific, cultural, or historical resources, whether the action threatens a violation of Federal, State, or local law, and the unique characteristics of the geographic area such as proximity to park lands or wild/scenic rivers. (40 CFR § 1508.27). Unless an agency takes a "hard look" and determines that the proposed action has no "significant" environmental impact, an EIS is necessary.

The CEQ regulations point out “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).

With this in mind, the Than Brook Project, while a local action, must also be viewed in a national context, since it would be one of the first projects to log, build roads, and permanent structures in an IRA since the Roadless Area Conservation Rule. Under the Roadless Area Conservation Rule—which may still be reinstated by the courts (see Section VIII. below)—it is reasonable to conclude that the proposed implementation of the Than Brook Project will have national repercussions. We point to a recent editorial by The Keene Sentinel newspaper that put the roadless area issues in both a local and national context, referring to an Oregon timber sale:

The original idea was to protect almost 60 million acres of near-wilderness from road-building, on the grounds that once it's gone, it's gone. Much of the land is in the West, but about 45,000 acres are in the White Mountain National Forest, mostly in New Hampshire. That land was supposed to be added to the 308,000

acres in the state from which roads are already prohibited, a gift to future generations.

The roadless plan began as a textbook example of how government should respond to public initiatives. In 1999 and 2000, the U.S. Forest Service held 600 citizen forums around the country - including in Concord and Rutland - to gauge support for a proposed restriction on new road construction on pristine woodlands belonging to the American people. The Forest Service eventually initially received 2.5 million comments from members of the public, with more than 95 percent favoring the idea. Of the 8,198 New Hampshire citizens sending in views at that time, 7,634 either supported the plan or said it should be even stronger. . . .

But within weeks of the signing, the Bush administration began working to reverse the policy. . . . The roadless rule fell in the Oregon woods last week. You heard it here.

Tim-ber Editorial, The Keene Sentinel, Keene, N.H. (June 13, 2006); also attached as Exhibit I – The Keene Sentinel Editorial. The Forest Service must not only view this project in a local context, but also a national context. When viewed in a nation context, this project will be significant because it is only the second timber sale in the nation to be approved in an IRA since the repeal of the Roadless Area Conservation Rule.

Second, the project must be viewed with respect to its intensity, which here includes factors of controversy, precedent, and the effect on unique characteristics. The presence of one such factor may be sufficient to deem the action significant in certain circumstances. *See Sierra Club v. United States Forest Service*, 843 F.2d 1190, 1192 (9th Cir.1988); *see also Friends of the Earth v. United States Army Corps of Eng'rs*, 109 F.Supp.2d 30, 43 (D.D.C.2000).

1. The Degree to Which the Effects Will Be Highly Controversial

The degree to which the effect on the quality of the human environment is likely to be highly controversial refers to instances where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use. *Town of*

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Orangetown v. Gorsuch, 718 F.2d 29, 39 (2d Cir. 1983); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir.1973)); *Town of Cave Creek, Az. v. F.A.A.*, 325 F.3d 320, 331 (D.C. Cir. 2003).

The Ninth Circuit Court of Appeals has held that a timber sale or reopening a road can be “highly controversial” and therefore the actions require preparation of an EIS. *See e.g. Sierra Club*, 843 F.2d 1190; *Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172 (9th Cir. 1982). In *Sierra Club*, the Forest Service decided to award several timber contracts that contained groves of giant sequoia redwoods without preparing an EIS. *Sierra Club*, 843 F.2d at 1192. Sierra Club produced evidence about the EAs' inadequacies, casting serious doubt on the Forest Service's conclusions. The court observed that “[t]his is precisely the type of “controversial” action for which an EIS must be prepared.” *Id.* at 1193. In *Foundation for North American Wild Sheep*, the Forest Service prepared an EA and FONSI after proposing to reopened a road, claiming there would be no significant impact on a rare herd of Bighorn sheep. *Foundation for North American Wild Sheep*, 681 F.2d at 1182. Two state agencies filed comments disagreeing with the Forest Service’s claim, and the court held that the Forest Service must prepare an EIS to reopen the road. *Id.* “To conclude otherwise would violate the well-established principle that an agency is bound by the terms of its own regulations and would render 40 C.F.R. s 1508.27(b)(4) a nullity.” *Id.*

Similar to both cases in the Ninth Circuit, Sierra Club pointed out in its comments that the logging and road building in the Wild River IRA would be significant and highly controversial and therefore the Forest Service must prepare an EIS. Our official comments pointed out the Forest Service own statement that “[o]n many NFS lands, roadless area management has been a major point of conflict in the adoption of land management plans. This controversy continues today, accompanying most proposals to harvest timber, build roads, or

otherwise develop these areas. The volume of appeals, litigation, and congressional debate over the last 20 years illustrates the importance that many Americans attach to the remaining roadless portions of NFS lands.” Roadless Area Conservation Rule FEIS at S-1. (emphasis added).

The same controversy exists in the White Mountain National Forest, as was expressed during the WMNF Plan EIS:

“Approximately 44 percent of comments received in response to the White Mountain National Forest Plan revision NOI addressed roadless areas. Of these, 796, or more than 5 percent of all comments, commented specifically on this [the Wild River] area. Ninety percent of the comments on this Inventoried Roadless Area indicated that the area should be protected as Wilderness, and an organization has formed to actively solicit support for Wilderness designation.”

WMNF Plan FEIS, Appendix C at C-198.

We know of no other projects in the eastern United States, since the initiation of the Roadless Area Conservation Rule, where the Forest Service has proposed new road building and road reconstruction in an IRA. In addition, the Forest Service plans to install permanent concrete abutments for a bridge over the Ellis eligible WSR, which is a non-conforming structure in an area that qualifies for wilderness, such as an IRA. WMNF Plan EIS, Appendix C at C-197 (referring to the Moriah Brook Bridge as a non-conforming structure within the Wild River IRA).

The controversy described in the Roadless Area Conservation Rule continues to intensify because IRAs are so rare in the eastern United States and because the public demands that these areas be protected. Therefore, any logging, road building, or other structures proposed for construction in an IRA would be considered highly controversial. For this reason the Than Brook Project constitutes a major federal action requiring the preparation of an EIS. 40 CFR § 1508.27.

2. The Degree to Which the Action will Set a Precedent for Future Actions

The Than Brook Project is the first project to allow commercial logging, road construction, and reconstruction in an IRA in the eastern United States, and it would set a precedent for other similar future actions that have significant effects on the undeveloped roadless and wilderness character of those areas. In deciding whether an EIS is necessary, the Forest Service must consider the “degree to which an action may establish a precedent for future actions with significant effects.” *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985) (emphasis and internal quotations omitted).

The Than Brook Project is only the first of at least four new proposals under the WMNF Plan where the Forest Service proposes commercial logging, road construction, and reconstruction within IRAs. The other three that the Forest Service has initiated are the Batchelder Brook Project in the South Carr Mtn. IRA, the Wildwood Project in the Jobildunk IRA, and the Mill Brook Project in the Kilkenny IRA. The WMNF is the first and only national forest in the Appalachian Mountains where the Forest Service proposes commercial logging and road building in IRAs, and therefore the Than Brook Project will set a precedent for road building and logging in an inventoried roadless area. In fact, we know of no other projects in the eastern United States, since the initiation of the Roadless Area Conservation Rule, where the Forest Service has proposed new road building and road reconstruction in an IRA. Therefore, the logging and road building proposed in the Than Brook Project would set a precedent for similar future actions that could similarly significantly impact the undeveloped roadless and wilderness character of an area, and potentially disqualify these areas from consideration as future wilderness.

The Forest Service is mistaken in its FONSI that “past harvests and associated road activities . . . in areas that later . . . were found to meet the criteria for inventoried “roadless”

areas . . .” did not set a precedent. DN/FONSI at 16. While these timber sales and road projects may not have disqualified areas from being included in the roadless inventory, the Forest Service has disqualified areas from being recommended for wilderness designation for this very reason. While all IRAs on the WMNF met “minimum Wilderness evaluation criteria . . .” WMNF Plan EIS at 2-7, past timber harvest has been used against recommending part of the South Carr Mtn. IRA for wilderness: “The Three Ponds area and the associated trail system were originally constructed as timber haul roads. This persistent evidence of harvest activity precludes the retention of the area’s Wilderness character.” WMNF Plan EIS at 3-32. This was one of the factors considered against a wilderness recommendation for the area. Similarly, this same reason could be used to preclude part of the Wild River IRA from a wilderness recommendation. The Ellis River Timber (1974) and the Wildcat Brook Timber Sale (1982) were previously implemented in what has now become the Wild River IRA, EA at 115, Figure 13, and in combination with the Than Brook Timber sale will present “persistent evidence of harvest activity” to preclude this part of the IRA from a wilderness recommendation. WMNF Plan EIS at 3-32.

The analysis in the EA and FONSI is incomplete and does not consider the effects of the many miles of road that the Forest Service built that disqualified areas from consideration for wilderness recommendation. In addition, the Than Brook Project, in combination with past project within the Wild River IRA, will allow the Forest Service to preclude recommendation of part of the roadless area for wilderness based on “persistent evidence of harvest activity.” *Id.*

3. The Unique Characteristics of the Than Brook Project Area, Such as Proximity to Park Lands or WSR

The clearcuts in the Than Brook Project would be visible not only from the Appalachian National Scenic Trail, but also from Mount Washington State Park. In addition, the project

would directly affect the Ellis eligible Wild and Scenic River through the construction of permanent concrete abutments. Since these unique resources will be adversely affected, the Than Brook Project is a significant action and the Forest Service should prepare an EIS.

The Forest Services describes that new individual openings will be seen from Mount Washington, which is a popular New Hampshire State Park. EA at 69, Table 13. In addition, the Forest Service describes that, within a sight distance of 1.5 miles, hikers on the Appalachian National Scenic Trail will be able to see Unit 20, which is planned as a clearcut. EA at 68-69. In fact, hikers will be able to see a total of 60 acres of new clearcut openings from Wildcat Peak on the Appalachian Trail. *Id.* These visual scars on the land are inconsistent with the purposes of a national scenic trail.

In addition, the Forest Service plans to install permanent concrete abutments for a temporary log hauling bridge on rock ledges on the banks of the Ellis eligible Wild and Scenic River. EA at 41. While this permanent scar is acknowledged throughout the EA, an analysis of the effects from these permanent abutments on the “recreational” designation of the Ellis River is not provided. EA at 106, Sec. 3.6.3. There is no explanation how these permanent structures are consistent with the requirement to “[m]anage eligible rivers to maintain their classification and eligibility until congress designates the segments or decides not to designate them.” *Id.* (referring to the WMNF Plan standard). It is not enough to dismiss this analysis by concluding that because the free-flowing nature of the river is maintained there will not be a significant impact to this unique characteristic.

For this reason the Than Brook Project constitutes a major federal action requiring the preparation of an EIS. 40 CFR § 1508.27.

II. The analysis of Than Brook Project’s effects on the Roadless Character of the Wild River IRA is incomplete and therefore insufficient under NEPA

The Than Brook Project environmental analysis is incomplete, because it did not provide an analysis of the Than Brook Project's adverse effects on a number of the Wild River IRA's roadless characteristics. In preparing its NEPA analysis on the Than Brook Project, the Forest Service has used the wrong standard to evaluate the adverse effects from the Than Brook Project on the undeveloped character of the Wild River IRA. Although the Forest Service claims the portion of the Wild River IRA where the Than Brook Project is planned will still qualify as a roadless area after implementation, it confuses "roadless area criteria"—used in the forest planning and described at FSH 1909.12, Ch. 71—with "undeveloped character" of roadless areas, which is described elsewhere. The incomplete analysis violates NEPA's "hard look" requirement.

In the planning context for the eastern U.S., the Forest Service has relaxed its roadless criteria to allow up to 1/2 mile of improved road for each 1,000 acres of "roadless" land, and up to twenty percent of the land in an even-aged condition. FSH 1909.12, Ch. 71.12. This criteria recognizes that:

National Forest System lands in the eastern United States have been acquired over time from private ownership. Criteria for inventorying roadless areas in the East recognize that much, if not all of the land, shows some signs of human activity and modification even though they have shown high recuperative capabilities.

Id. By using this relaxed criteria, the Forest Service acknowledges that some past management and road-building should not disqualify roadless areas from the forest planning inventory. The inventory criteria, however, is very different from roadless character. Roadless character describes those characteristics most often present in inventoried roadless areas, which encompass

. . . unique opportunities for dispersed recreation, sources of clean drinking water, and large undisturbed landscapes that offer privacy and seclusion. In addition, these areas provide a bulwark against the spread of nonnative invasive plant species, support a diversity of habitats for native plant and animal species,

conserve biological diversity, and provide opportunities for study, research, and education.

Roadless Area Conservation Rule FEIS, p. S-1. In the Roadless Area Conservation Rule FEIS, the Forest Service identified nine roadless characteristics that make up the undeveloped character of IRAs. These are described as:

Resources or features that are often present in and characterize inventoried roadless areas, including: (1) High quality or undisturbed soil, water, and air; (2) Sources of public drinking water; (3) Diversity of plant and animal communities; (4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land; (5) Primitive, semi-primitive nonmotorized and semi-primitive motorized classes of dispersed recreation; (6) Reference landscapes; (7) Natural appearing landscapes with high scenic quality; (8) Traditional cultural properties and sacred sites; and (9) Other locally identified unique characteristics.

66 Fed. Reg. 3244, 3272 (January 12, 2001); Roadless Area Conservation Rule FEIS at 3-3 to 3-7 (providing detailed descriptions of each of these nine characteristics). These characteristics must be used to determine whether a project “would substantially alter the undeveloped character” of the an IRA. FSH 1909.15, Ch. 20.6(3).

The Forest Service has recently used these characteristics in their NEPA analysis where projects would potentially have an effect on roadless character. E.g. Exhibit A – Three Basin DEIS, Sec. 3.8.3 at 3-55 to 3-60 (full DEIS available at <http://www.fs.fed.us/r4/caribou-targhee/projects/#projects> (last viewed on 5/31/2006)) and Exhibit B – Harris Fuel Reduction EA, Sec. 3.9 at 3-83 to 3-84 (full EA available at http://www.fs.fed.us/r2/psicc/sp1/harrispark_fuels.shtml (last viewed on 5/31/2006)). It is important to note the distinction between these two western projects and the Than Brook Project. In these western projects, the Forest Service and conservation groups agreed that neither project was inconsistent with the Roadless Area Conservation Rule because the action either avoided the IRA entirely or because it only implemented fuel reduction treatments. In contrast, the Than

Brook Project does not meet the standards in the Roadless Area Conservation Rule because the proposed new road, the reconstruction of another, the construction of permanent concrete bridge abutments, and commercial logging are inconsistent with the rule's prohibitions, and none of the exception apply.

A different picture emerges when the Roadless Area Conservation Rule FEIS characteristics are analyzed against implementation of the Than Brook Project. While the Forest Service is correct in stating that the Wild River IRA may still meet the roadless "criteria" in the Planning Handbook, the Than Brook Project is likely to have a significant impact on the "undeveloped character" as defined in the list of roadless characteristics. The Than Brook Project will have a substantial effect on unique opportunities for dispersed recreation and the large undisturbed landscape of the 71,387 acre Wild River IRA that offers privacy and seclusion. The proposed roads and skid trails are likely to allow new pathways for nonnative invasive species that would have an adverse effect on biological diversity and reduce unfragmented habitats that certain native plant and animal species prefer. The 473 acres of commercial logging and the effects from road building and skid trails will substantially change the undeveloped character of a part of the Wild River IRA. Little, if any, of this analysis is presented in the EA.

Most, if not all, of the nine characteristics are present in the portion of the Wild River IRA where the Than Brook Project is proposed. The Than Brook Project will affect high quality soils through road building, compacting soils with skid trail used by heavy equipment, skidding logs that causes erosion, and removing biomass that would eventually enrich the soil. There is no specific discussion of the potential effects from the construction of 23.6 miles of new skid trails, which would cause 57 acres of soil disturbance. EA at 75, Table 15.

Soil movement, resulting from erosion in sloped areas caused by road building and

skidding will adversely affect high quality waters, which are all designated by the State of New Hampshire as Class B “Outstanding Resource Waters.” EA at 90. In the project area, these waters have also been recognized by the U.S. Congress and the Forest Service through the designation of the Wildcat Wild and Scenic River (WSR) and the decision in the WMNF Plan that the Ellis River is an eligible WSR.

Diversity of plant and animal communities will be adversely affected because logging inherently simplifies forest structure and the proposed clearcutting will result in forest fragmentation. This simplification and fragmentation has the potential to adversely affect habitats for rare species such as the endangered Indiana Bat and other sensitive species that benefit from undisturbed older forests.

Portions of the project area are in a semi-primitive nonmotorized class of recreation opportunity, and recreationists will be adversely affected by Than Brook Project activities. Most of the stands proposed for logging have not been entered for many decades and represent part of a larger reference landscape in the White Mountains that is rare in the eastern United States. In fact, at 71,387 acres, the Wild River IRA is the largest national forest roadless area east of the Rocky Mountains. The project area has high scenic quality as observed from within the project area as well as from Mount Washington State Park and the nearby Appalachian National Scenic Trail, which traverses the Wild River IRA on Wildcat Ridge. EA at 68-69.

All of these resource conditions, both individually or in combination, contribute to the area’s undeveloped character. A series of photographs taken by appellant Frank Robey on May 25, 2006 show the pristine conditions and scenic nature of part of the project area near Units 27 and 25, as well as the pristine conditions at the location of the temporary bridge crossing over the Ellis River. See photographs in Exhibit C – Frank Robey Declaration. These photographs show

not only the diverse forest and structure, but also the undisturbed nature of the area and the many springs and wetlands in the area.

In its analysis, the Forest Service admits that it only considered two factors or “measurement indicators” with respect to roadless and wilderness characteristics of the Wild River IRA: “*Measurement Indicators*: - Acres of regeneration harvest/ and total harvest (cumulatively) within Wild River IRA; - Miles of new road added to, and cumulatively within the Wild River IRA . . .” EA at 28. The Forest Service explains that “[i]n order to remain roadless, the [Wild River IRA] must have less than 1/2 mile of improved roads per 1,000 acres. To reach 1/2 mile per 1,000 acres, a total of 35.7 miles of improved road would need to be present in the [Wild River IRA].” In other words, the Forest Service makes the absurd claim that it could build over 35 miles of new road within the Wild River IRA without having a significant adverse effects on the undeveloped character of the Wild River IRA.

In its “detailed” analysis, the Forest Service lists the planning inventory criteria that it claims were considered during the WMNF Forest Plan Roadless Inventory process and the project analysis. Table 24, EA at 137-138. It then spends a mere two paragraphs further describing the criteria, mistakenly referring to these criteria as “roadless characteristics” and admitting that it relied on miles of new road and regeneration harvest as the primary factors in its analysis. EA at 138. Although the Forest Service admits “[t]he timber harvest activities would affect the untrammelled, natural appearance of this portion of the IRA,” it claims “these effects would be temporary and should not be noticeable to the eye within a decade or two. These [e]ffects include the appearance of skid trails, stumps, and openings.” *Id.* at 142. While acknowledging substantial effects from skid trails on the area’s roadless character lasting for decades, the Forest Service does not complete the analysis on roadless characteristics by

describing the effects from skid trails on “high quality or undisturbed soil [and] water.”

Roadless Area Conservation Rule FEIS at 3-3 (stating that these “key resources are the foundation upon which other resource values and outputs depend. Healthy watersheds provide clean water for domestic, agricultural, and industrial uses; help maintain abundant and healthy fish and wildlife populations; and are the basis for many forms of outdoor recreation.”).

Furthermore, there is no analysis on the effects on sources of drinking water. *Id.* at 3-6 (stating that “NFS lands contain watersheds that are important sources of public drinking water. Careful management of these watersheds is crucial in maintaining the flow of clean water to a growing population.”). While the EA states that “[n]o waters in the Analysis Area are listed by the State of New Hampshire as not meeting water quality standards for . . . drinking water,” EA at 90-91, it provides no analysis on the effects on the drinking water source of Jackson, N.H., located directly downstream from the Wild River IRA and the Wildcat and Ellis rivers.

The analysis includes the effects from project implementation on “solitude”; however, this criteria is neither a roadless inventory criteria, FSH 1909.12, Ch. 71.12, nor a roadless characteristic. *See* Roadless Area Conservation Rule at 3-3 to 3-7. The use of “solitude” or “sights and sounds” as criteria has been “intensely criticized” as a factor in any potential wilderness analysis by the U.S. Congress. House Report 95-540 (accompanying H.R. 3454 and P.L. 95-237, The Endangered American Wilderness Act of 1978). Instead, the analysis should have included a detailed analysis on the effects from the project on “Primitive, Semi-Primitive Non-Motorized, and Semi-Primitive Motorized classes of recreation opportunities.” Roadless Area Conservation Rule FEIS at 3-5 (describing roadless areas as often providing “outstanding recreation opportunities such as hiking, camping, picnicking, wildlife viewing, hunting, fishing, cross-country skiing, and canoeing. While they may have many Wilderness-like attributes;

unlike Wilderness, the use of mountain bikes, and other mechanized means of travel is often allowed.”) Yet, there is no analysis in this section on the likely long-term effects from the almost impenetrable nature of young even-aged stands on primitive types of recreation. Effects also include viewing of wildlife that prefers older forest and adverse effects on fishing from increased sedimentation. The analysis only discusses the short-term effect from noise during implementation of the project.

Similar analysis is missing for “Reference landscapes . . . Natural appearing landscapes with high scenic quality . . . Traditional cultural properties and sacred sites; and . . . Other locally identified unique characteristics.” Roadless Area Conservation Rule FEIS at 3-7.

All of these analyses belong in the roadless section and analysis elsewhere in the EA is not sufficient. Although the Forest Service has included sections on soils, watersheds and water quality, visual resources and recreation, the *Smith* court held that addressing soil quality, water quality, vegetation, wildlife and fishery resources, recreational value, and scenic quality did not excuse its failure to address the environmental significance of roadless areas. *Smith*, 33 F.3d at 1078. The failure to adequately consider the roadless characteristics of the (partially) non-inventoried area there was fatal to the project. *Id.* Similarly, the failure to consider these effects on the roadless characteristics of the Wild River IRA is also fatal to the Than Brook Project.

The Forest Service’s erroneous use of the planning and inventory criteria from the FSH in place of undeveloped roadless character described in the Roadless Area Conservation Rule FEIS is arbitrary and capricious. Furthermore, the incomplete analysis of the effects on the roadless character of the Wild River IRA violates NEPA by failing to take a “hard look” at environmental consequences. Consequently, the Forest Service’s actions are significant because they would substantially alter the undeveloped character of the Wild River IRA.

III. The portion of the Wild River IRA not included in the Forest Service's Wilderness proposal will still qualify for Wilderness in the future, and therefore the NEPA analysis must analyze the effects from the Than Brook Project on the area's wilderness character

Nowhere in the Than Brook Project environmental analysis, the WMNF Forest Plan EIS, its Record of Decision, or the WMNF Forest Plan does the Forest Service provide an analysis of the adverse effects from the Than Brook Project—or any other possible logging projects—on the wilderness character of that portion of the Wild River IRA not proposed for Wilderness. Therefore, the analysis is incomplete and violates NEPA because it did not take a hard look at these environmental consequences.

The Ninth Circuit Court of Appeals held that “the possibility of future wilderness classification triggers, at the very least, an obligation on the part of the agency to disclose the fact that development will affect a 5,000 acre roadless area.” *Smith*, 33 F.3d at 1078. Under the Wilderness Act, an area has the potential to be designated wilderness by Congress if it: “(1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.” 16 U.S.C. § 1131(c). The “agency must, under NEPA, consider the effect of a logging project on such a resource.” *Smith*, 33 F.3d at 1079.

To provide an example of a wilderness character analysis, the Three Basin DEIS analysis, discussed *supra*, describes “six wilderness characteristics” as: “Natural Integrity . . . Apparent Naturalness . . . Remoteness . . . Solitude . . . Opportunity for Primitive Recreation . . . Special ecological, geological, or cultural features,” Exhibit A – Three Basin DEIS, Sec. 3.8.3 at 3-53 to

3-54, and analyzes the project's effects on these resources. Another example can be found in the Forest Service's Androscoggin Ranger District of the WMNF as it recently considered wilderness character in its Peaked Hill Project EA. There, the Forest Service admits that the "[a]nalysis of Wilderness characteristics may involve some of the same criteria as the roadless characteristics. However, a proposed project may not affect an area's designation as Roadless . . . but it may still affect an area's Wilderness characteristics (because it may affect some change in solitude or degree of disturbance)." Exhibit D – Peaked Hill EA at 33. It went on to provide an analysis—albeit incomplete—of the effects from the Peaked Hill Project on two wilderness characteristics from FSH 1909.12, Ch. 7.2 (discussing solitude and degree of disturbance/natural appearance; but not discussing natural integrity, remoteness, opportunity for primitive recreation, and special ecological, geological, or cultural features). Just like in Peaked Hill, the Than Brook analysis on the wilderness characteristics is dealt with in a cursory fashion, and the analysis does not go beyond "solitude" and "degree of disturbance."

While the proposed road construction, skid trails, and logging within the Wild River IRA would have an admitted effect on the wilderness character of the Wild River IRA, this analysis is must be done at some level. The Peaked Hill EA suggests that "once an area has qualified as Roadless, it is evaluated in the Forest Plan Revision process to determine if it has characteristics consistent with a Wilderness, and ultimately whether it should be recommended to Congress for Wilderness designation." Exhibit D – Peaked Hill EA at 33.

The combined forest plan and project analysis on wilderness character is nearly identical in all respects to the flawed analysis during RARE II. *Cal. v. Block*, 690 F.3d 753 (1982). In *Block*, when the Forest Service released roadless areas from its RARE II inventory to non-wilderness designation, it did not evaluate the adverse environmental consequences of doing so.

Id. at 762. The court noted that “[t]he ‘critical decision’ to commit these areas for nonwilderness uses, at least for the next ten to fifteen years, is ‘irreversible and irretrievable.’ The site-specific impact of this decisive allocative decision must therefore be carefully scrutinized” *Id.* at 763. It further noted that NEPA “requires an agency to assess the wilderness value of each area and to evaluate the impact of [n]onwilderness designations upon each area's wilderness characteristics and value.” *Id.* at 764. It subsequently held that the Forest Service did not attempt to “forecast the value lost under various developmental regimes,” which it held was a violation of NEPA regulations at 40 C.F.R. § 1500.8(a)(3)(i). *Id.*

In the WMNF, the Wild River IRA, along with “all 27 inventoried roadless areas meet[s] minimum Wilderness evaluation criteria” WMNF Plan EIS at 2-7. In addition,

[t]he Wild River roadless area was determined to highly meet the following criteria: consists of representative landscapes not currently found in existing Wilderness; manageability of the area; meets wilderness values of opportunities for solitude and unconfined recreation; level of public interest; meets wilderness values of aesthetics and scenery; history of roadless area disposition; meets values of research, education, and historical/cultural; and regional size significance (Administrative Record).

WMNF Plan EIS at 3-394. The analysis did not distinguish between the area recommended for designation as Wilderness and the remainder of the area, which includes the Than Brook Project.

Yet, nowhere in the Than Brook EA or the WMNF Plan EIS, WMNF Plan ROD, or the WMNF Plan is there any discussion on how road building and logging in general, or the Than Brook Project specifically, would affect these wilderness characteristics when the WMNF “released” its IRAs to Management Area (“MA”) 2.1 status (general multiple use). The only analysis on effects we could find with respect to the Wild River IRA is directed at the designation of the Wild River area as Wilderness, not nonwilderness per M.A. 2.1. For example:

Timber stand improvement prescriptions have been implemented in this Inventoried Roadless Area within the previous two decades (see Natural Integrity and Appearance, above). These prescriptions, and the costs associated with their implementation, facilitated the growth of high quality sawlogs intended for future harvest. Wilderness designation of the Inventoried Roadless Areas would preclude the recovery of these investments, as well as ultimately preclude harvest on 15,479 acres of suitable land.

WMNF Forest Plan EIS, Appendix C at C-198 (referring to the Wild River IRA).

While the EA briefly mentions the effects of the Than Brook Project on solitude and degree of disturbance, as in Peaked Hill, this is hardly a sufficient analysis under NEPA. There is no mention of the potential effects from the construction of 23.6 miles of new skid trails, which would cause 57 acres of soil disturbance. EA at 75, Table 15. A sufficient analysis would include an in-depth exploration of the project's effects on all six wilderness characteristics discussed in the Three Basin EIS above. A sufficient analysis would also analyze the project's effects on those specific characteristics of the Wild River IRA that are described in the WMNF EIS at 3-394. For those reasons, the Forest Service did not take a hard look at the consequences of the project on wilderness character, which violates NEPA. Just like in the *Block* case, the Forest Service did not attempt to forecast the values lost from building roads and logging in the Wild River IRA, and the NEPA analysis violates 40 C.F.R. § 1500.8(a)(3)(i).

IV. The decision, and the FONSI violate NEPA procedures that require that a FONSI be made available for public review for 30 days if the project is closely similar to actions that normally require an EIS.

The Than Brook Project violates NEPA because the Forest Service did not make its finding of no significant impact (FONSI) available for 30 days before it made its final decision. “In certain limited circumstances, . . . the agency shall make the [FONSI] available for public review . . . for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin.” 40 C.F.R. § 1501.4(e)(2)(i).

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One of these circumstances occurs when “[t]he proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement” 40 C.F.R. § 1501.4(2)(i). *Pogliani v. U.S. Army Corps of Engineers*, 166 F.Supp.2d 673 (N.D.N.Y. (2001) (“[P]laintiffs correctly assert that such pre-filing disclosure and public involvement is required prior to . . . actions which ‘normally require[] the preparation of an [EIS],’ 40 C.F.R. § 1501.4(e)(2)(i)”).

This was the precise issue in *Citizens Advisory Committee on Private Prisons, Inc. v. U.S. Dept. of Justice*, 197 F.Supp.2d 226, 246-247 (W.D. Pa. 2001), where the court held that the Federal Bureau of Prisons violated NEPA for failing to make a FONSI available to the public before committing to a project when the type of project normally requires preparation of an EIS. In the *Private Prisons* case, the Bureau of Prisons maintained certain categories of projects that normally required preparation of an EIS, which include new Federal prison construction. Although the Bureau argued that its project did not fit within such a category, because the prison was being built by a private contractor, the court reject this argument and held that the Bureau must make their FONSI available for the public’s review. The court noted specifically that, even if the project would not be considered a new Federal prison construction, which normally requires an EIS, “it is easily ‘similar’ to such a project, which is all the CEQ regulations require. 40 C.F.R. § 1501.4(e)(2)(i).” (emphasis added) *Id.* n. 18.

Similarly, in the Than commenting process, no FONSI was made available for public review before the Forest Service decided to proceed; nor were appellants given the opportunity to comment on the flawed environmental analysis that would have informed decision makers of the significance of an action that normally require preparation of an EIS. Here, the Forest Service has planned an action within an IRA, which normally requires the preparation of an EIS.

FSH 1909.15 Ch. 20.6(3) (requiring preparation of an EIS for actions “that would substantially alter the undeveloped character of an inventoried roadless area of 5,000 acres or more . . .”). The Wild River IRA, at over 70,000 acres, obviously meets the 5,000 acre requirement. The action is “closely similar” to one that would normally require preparation of an EIS. 40 C.F.R. § 1501.4(2)(i). In fact, the Than Brook Project is remarkably similar to one of the specific examples provided in the Forest Service Handbook (FSH), in which an EIS is required for “Constructing roads and harvesting timber in a 56,000 acre inventoried roadless area where the proposed road and harvest units impact 3,000 acres in only one part of the roadless area.” FSH 1909.15 Ch. 20.6(3)(a). The Than Brook Project would construct a new segment of road within the roadless area, reconstruct another segment by adding permanent concrete abutments for a removable bridge (Ellis River road & bridge), and harvest timber in 473 acres in an area where the proposed road and harvest units would impact over 1,000 acres in only one part of the Wild River IRA. Moreover, as we have demonstrated in a previous section, Forest Service decisions to log or build roads in IRAs normally require preparation of an EIS.

The agency did not make the FONSI available to the public for a project that would log and build roads in an IRA, which is closely similar to the type of project normally requiring an EIS. For those reasons, the Than Brook Project public comment process and decision to proceed without additional public review violates NEPA.

V. The official comment period violates NEPA procedures that require the public be given as much environmental information as practical

The Forest Service did not provide the public with adequate information during the official comment period, thereby precluding the public and appellants from providing meaningful informed comments on potentially adverse environmental impacts.

The Council on Environmental Quality (CEQ) regulations require that the public be

given as much environmental information as is practicable, prior to completion of the EA, so that the public has sufficient basis to address those subject areas that the agency must consider in preparing an EA or EIS. NEPA § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 40 C.F.R. §§ 1501.4(e)(2), 1508.9. CEQ regulations require that the agency involve the public, “to the extent practicable, in preparing [an EA],” 40 C.F.R. § 1501.4(b), and that “[a]gencies shall . . . make diligent efforts to involve the public in preparing and implementing their NEPA procedures,” *Id.* § 1506.6.

Appellant Sierra Club pointed out the importance of having adequate information available during the comment period by providing details about how it was able to improve the analysis for another project on the White Mountain National Forest called Peaked Hill. For the Peaked Hill project, a full NEPA analysis was made available to the public in the form of a draft EA, and Sierra Club’s informed comments led to the addition of over a dozen pages of analysis, including a new analysis on the effects on the wilderness character of the inventoried roadless area (IRA) near the project. See Exhibit E – Sierra Club’s Peaked Hill Comments; Exhibit F – Draft Peaked Hill EA; and Exhibit D – Final Peaked Hill EA. A similar analysis about the wilderness character of the project area is missing from the Than Brook Project EA (see preceding analysis about wilderness character). Without detailed analysis, appellants were not able to determine the extent of the project’s effects on wilderness character. Moreover, appellants were unable to provide specific feedback to the Forest Service about the need to include analysis of the effectiveness of mitigation measures presently lacking from the analysis, as discussed below. Furthermore, the environmental analysis could have been improved by additional comments on the issues of viability, also discussed below. These are important issues to appellants and, without this information, Sierra Club cannot adequately fulfill its mission to

“explore, enjoy, and protect the wild places of the earth.”

Sierra Club, as well as The Wilderness Society and Forest Watch consider national forests roadless areas the last remnants of those “wild places,” and protecting their character, as well as water quality and species viability, are issues of great interest to appellants and our collective members in New Hampshire, Maine, and Vermont.

In addition, the Forest Service does not provide a sufficient explanation why the Forest Service could not have made more information available to the public as part of the 30-day comment period. While this information may not be required by the Appeals Reform Act Regulations, 36 C.F.R. § 215, it is required in order to comply with NEPA, which is a completely distinct requirement. See NEPA § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 40 C.F.R. §§ 1501.4(e)(2), 1508.9.

The Than Brook Project is unusual in this respect when compared to other projects prepared in the WMNF. For projects on other Ranger Districts of the WMNF, the Forest Service has provided more than enough information during the 30-day comment period in the form of a draft EA or its equivalent to inform the public under NEPA. Furthermore, most other project proposals on the WMNF where an EA is prepared include a separate initial scoping period, whereas the Than Brook Project did not. See, for example, the [Peaked Hill Project](#) (Androscoggin RD provided initial scoping period and draft EA for comment), the [Farwell Mountain Project](#) (Androscoggin RD provided initial scoping period and draft EA for comment), the [Wildwood Project](#) (Pemigewasset RD provided initial scoping period and draft EA equivalent for comment), [Batchelder Brook Project](#) (Pemigewasset RD provided scoping period and draft EA equivalent for comment), and the [Mill Brook Project](#) (Androscoggin RD provided initial scoping period and draft EA or its equivalent is expected for comment). This is

especially troubling given the fact that the proposal is in the Wild River IRA, the watershed of the Wildcat WSR, the watershed of the eligible Ellis WSR, and because its clearcuts will be visible from Mount Washington and the Appalachian Trail. It is also troubling, since it may set a precedent for other IRA projects planned in the WMNF.

The phenomenon of avoiding adequate public involvement is apparently unique to the Saco Ranger District. In a previous project on the Saco, the Forest Service also only provided a 30-day comment period without initial scoping. See [Popples Vegetation Management Project](#) (Saco RD, only one comment period provided).

For Than Brook, the Forest Service did not involve the public to extent practicable in preparing the EA or make diligent efforts to involve the public in preparing and implementing its NEPA procedures, because it did not furnish adequate information for the public to provide meaningful comments that would have greatly improved the analysis. For those reasons, the Than Brook Project public comment process and decision to proceed without additional public review violates NEPA.

VI. The Than Brook Project prejudices the rights of plaintiffs in pending litigation

If appellants, who are also plaintiffs in *Wilderness Society, et al. v. U.S. Forest Service*, Case No. 05-04038-EDL (N.D. Cal.), are successful in their case to set aside the current Roadless Petition Rule, 36 C.F.R. § 294 (2005), then the Than Brook Project will be in violation of the Roadless Area Conservation Rule. 36 C.F.R. § 294 (2001). The proposed roadless area activities in the Than Brook Project would prejudice the rights of plaintiffs in pending litigation that challenges the Forest Service's attempted repeal of the Roadless Area Conservation Rule and seeks to restore that rule. The Than Brook Project proposes to cut timber and reconstruct roads in inventoried roadless areas. These activities are prohibited under the Roadless Area

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Conservation Rule. *See* 36 C.F.R. §§ 294.12(a), 294.13(a).

In seeking to authorize the development of roadless areas for this project, the Forest Service is relying on its May 2005 rulemaking, which purported to repeal the Roadless Area Conservation Rule. However, as the Forest Service well knows, the repeal of the Roadless Area Conservation Rule has been challenged in two lawsuits pending in the United States District Court for the Northern District of California – one filed by the states of California, Oregon, New Mexico and Washington, and one filed by a coalition of conservation organizations, which includes appellants. Both lawsuits seek to have the Roadless Area Conservation Rule reinstated, pursuant to controlling case law from the U.S. Court of Appeals for the Ninth Circuit. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.”).

The Roadless Area Conservation Rule would then apply to all IRAs in the WMNF because the rule defines protected IRAs as “[a]reas identified in a set of inventoried roadless area maps, contained in Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000 . . . or any subsequent update or revision of those maps.” 36 C.F.R. § 294.11 (2001) (emphasis added). Therefore, upon reinstatement of the Roadless Conservation Rule, the Wild River IRA would be protected from the type of logging and road building proposed by the Than Brook Project.

Pending the results of these lawsuits, the Forest Service should not authorize any activities, such as the Than Brook Project, that prejudice the rights of the plaintiffs by developing inventoried roadless areas that would be protected by the Roadless Area Conservation Rule.

VII. The Than Brook Project analysis cannot justify a FONSI, since the effectiveness of prescribed mitigation measures are not sufficiently described and analyzed in the EA

The Than Brook EA contains a list of mitigation measures but only discusses these in a general sense and does not analyze any mitigation measures in detail or explain how effective these measures would be, in violation of NEPA's "hard look" requirements.

Although mitigation measures need not completely compensate for adverse environmental impacts, the agency must analyze mitigation measures in detail and explain how effective the measures would be. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir.1986), *rev'd on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Id.* Instead, mitigation measures should be supported by analytical data, *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir.1998). The general invocation of the term "Best Management Practices" does not satisfy the NEPA requirement that the analysis discuss measures to mitigate the proposed action's adverse environmental impacts. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F.Supp. 586 (D.C.Cal.1983). Furthermore:

As a general rule, the [NEPA] regulations contemplate that agencies ... should not rely on the possibility of mitigation to avoid the EIS requirement. . . . If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS [Preparation of an EIS] is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

Sierra Club v. Marsh, 768 F.2d 868, 877 (1st Cir. 1985) (emphasis in original).

The Than Brook Project is similar in many respects to a logging proposal in the Lamb Brook area of the Green Mountain National Forest. There, the Second Circuit Court of Appeals held that

When the adequacy of proposed mitigation measures is supported by substantial

evidence, the agency may use those measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS In practice, mitigation measures have been found to be sufficiently supported when based on studies conducted by the agency We emphasize the requirement that mitigation measures be supported by substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS. That is to say, agencies should define "significance" broadly and not rely on proposed mitigation measures as an excuse to avoid preparing an EIS. . . . The Forest Service conducted no study of its likely effects, proposed no monitoring to determine how effective the proposed mitigation would be, and did not consider alternatives in the event Measure K fails [T]here is no indication that the agency reviewed these measures at the time of its decision, or that it afforded the public an opportunity to comment on them. Absent substantial evidence to support the efficacy of Measure K, we, like the district court, are left with the firm conviction that the Forest Service could not have adequately considered the significance of its proposed action's impact on the environment The mode of analysis employed in this case is intended to allow an agency to omit the preparation of an EIS when it determines that a mitigation measure will sufficiently limit the negative environmental impact of a proposed project. In the instant case, for example, had Measure K included a program to monitor and ensure its effectiveness, there would then have been substantial evidence to support it. We hope our holding that the Forest Service's attempt to moderate one of the anticipated impacts of its proposed logging project was not supported by substantial evidence will ensure that such agencies in NEPA cases propose mitigation measures supported by studies and/or procedures to monitor their effectiveness.

National Audubon Society v. Hoffman, 132 F.3d 7, 17 (2d Cir. 1997) (emphasis added).

The deficiencies in the Than Brook analysis of mitigation measures are nearly identical to those in the *Hoffman* case. In Than Brook, there is no effectiveness analysis on mitigations for soil erosion or adverse effects on water quality because the location of 23.6 miles of skid trails are unknown. Furthermore, the public was not afforded an opportunity to comment on proposed mitigation measures, in violation of NEPA.

A. Analysis of the effectiveness of mitigation measures to protect soils and prevent soil erosion are insufficient.

The Forests Service notes that “soil erosion and compaction are the potential physical hazards resulting from the Proposed Action.” EA at 71. “Surface soil erosion is typically a

concern related to roads and skid trails. The soils in the Project Area are rated as having a high surface soil erosion hazard relative to other soils on the White Mountain National Forest (USDA-Forest Service, 1986a).” EA at 72. “Roads and skid trails are a concern for soil erosion because they may expose mineral soil (Patric 1976).” EA at 73. The potential effects from erosion cannot be understated because the selected action (Alt. 4) would construct 23.6 miles of new skid trails, which would cause 57 acres of soil disturbance. EA at 75, Table 15. To mitigate soil erosion, the Forest Service proposes to use the State of New Hampshire’s “Best Management Practices,” (“BMPs”) which are similar to those of the State of Maine. EA at 72-73. However, these are not “studies conducted by the agency . . .” *Hoffman*, 132 F.3d at 17. The Forest Service is not likely to be able to rely on them to comply with NEPA. Maine has documented the effectiveness of its BMPs; however, results from a similar New Hampshire study have not been published. EA at 72-73. Because of the similarities, we are therefore to “assume” the effectiveness of New Hampshire’s BMPs. *Id.* at 73. Regardless of this claim, none of the New Hampshire BMPs are described in the EA, nor are they discussed in enough detail that their effectiveness could be evaluated in the Than Brook NEPA analysis.

While general design features and mitigation measures are listed in Appendix A of the EA, these are not applied in any specific way to mitigate soil erosion in each unit of the project area. In addition, there is no discussion of the effects of the various skid trails to access each unit in the EA. In fact, this analysis is not even possible in the EA, given the fact that the Forest Service does not yet know the location of its skid trails or some of its landings:

We do not have actual skid road locations. These are determined by the sale administrator based on equipment capabilities, current soil conditions, and logger preferences with acceptance and approval by the sale administrator (Ken Jaeger). Landing locations were identified, but not in the EA. I have a copy of our "expected Landing locations" in the project file. . . . That accounts for two new constructed landings, and 4 existing landings. That is likely all that we will need. However, I added

one additional landing for the analysis as there is always the possibility of one additional landing being needed.

Email from Rod Wilson, Saco Ranger District NEPA Coordinator and Silviculturist for the Than Brook Project, White Mountain National Forest, to Frank Robey, Than Brook Project Appellant (June 2, 2006, 10:06 a.m. EDT), *see* Exhibit C – Frank Robey Declaration (copy of e-mail attached to Exhibit C and on file with Frank Robey).

Without knowing the specific location of skid trails and landings, it is impossible to provide an accurate NEPA analysis of the potential effect from soil erosion. Nor is it possible to determine whether BMPs, design criteria, or mitigation measures would mitigate the adverse environmental effects from the erosive soil loss admitted in the EA. Without this site-specific data, the project analysis is fatally flawed. Furthermore, the Forest Service does not discuss alternative actions should the BMPs, design features, or mitigation measures fail.

B. Analysis of the effectiveness of mitigation measures to protect water quality are insufficient.

“Under antidegradation provisions, all waters of the National Forest are designated as ‘Outstanding Resource Waters’ (ORW) and shall be maintained and protected (NHDES, 1999).” EA at 90. “The State of New Hampshire designates these reaches [of the Wildcat and Ellis River] as Class B . . . the second highest quality, considered acceptable for fishing, swimming and other recreational purposes and, after adequate treatment, for use as water supplies.” *Id.* “No waters in the Analysis Area are listed by the State of New Hampshire as not meeting water quality standards for aquatic life, drinking water, recreation, or wildlife.” EA at 90-91. “Timber harvest has the potential to affect stream temperature and water chemistry at the localized scale.” EA at 91. “Stream crossings can cause increased sediment inputs to streams during installation and use.” EA at 92. “Sediment problems associated with stream crossings can be very persistent

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(Stafford et al., 1996) . . .” EA at 93. “Forest Plan Standards and Guidelines state that new skid roads and classified roads should not be located within the stream or pond management zone, which is a minimum of 50 feet in width.” EA at 94.

“Up to 500 feet of road construction is proposed . . . located approximately 1000 feet from Wildcat Brook, the nearest mapped stream. . . . One new log truck crossing is proposed across the Ellis River . . . five temporary skidder bridge crossings are proposed under Alternative 4 In addition to these main skidder bridges, crossings of small unmapped intermittent streams would be needed under all Action Alternatives.” EA at 92. The Forest Service would also construct 23.6 miles of new skid trails, which would cause 57 acres of soil disturbance. EA at 75, Table 15.

To begin with, there seem to be some violations of WMNF Plan standards, which require that skid roads not be located within 50 feet of streams, and the fact that the project will effect a number of small unmapped intermittent streams. We have confirmed that there are a large number of these unmapped streams in the project area. See Exhibit C – Frank Robey Declaration, Figures 5-7 and ¶ 6 (Robey describes that “[a]s I followed the Unit 25 boundary, it was much more difficult to walk due to the large number of streams that cross the boundary and run into the Unit.”). According to the EA, “Skidding patterns are designed to fit the terrain to control the volume, velocity, concentration, and direction of runoff water in a manner that would minimize erosion and sedimentation. . . . This would be implemented by the Timber Sale Administrator.” EA at 87. However, “[w]e do not have actual skid road locations.” Email from Rod Wilson, Saco Ranger District NEPA Coordinator and Silviculturist for the Than Brook Project, White Mountain National Forest, to Frank Robey, Than Brook Project Appellant (June 2, 2006, 10:06 a.m. EDT) (copy attached and on file with Frank Robey).

Unfortunately, the design of skidding patterns is not included in the EA and the Forest Service will only provide this design after the NEPA analysis is completed. Just like in our discussion of the effects on soil erosion, the Forest Service cannot sufficiently analyze the effects on water quality because the location of 23.6 miles of new skid trails is unknown. Therefore, it is impossible to adequately assess the effectiveness of BMPs, design features, or mitigation measures that are planned to mitigate adverse effects on water quality. Again, without this data, the project analysis is fatally flawed. Furthermore, the Forest Service does not describe monitoring of water quality and does not discuss alternative actions should the BMPs, design features, or mitigation measures fail.

C. The public was not afforded an opportunity to comment on prescribed mitigation measures.

The Forest Service, under NEPA, should have allowed the public to comment on proposed mitigation measures during its NEPA commenting process. As the *Hoffman* court pointed out in its review of the Lamb Brook timber sale, “[T]here is no indication that the agency . . . afforded the public an opportunity to comment on [mitigation measures].” *Hoffman*, 132 F.3d at 17. As previously discussed, the Saco District provided inadequate information during the official 30-day comment period. While the public comment package included a one-page Appendix on project mitigations, none of these measures specifically discuss our soil erosion and water quality concerns outlined above. Although Sierra Club provided general comments concerning the effectiveness of mitigation measures, it could not comment on mitigation measures absent from the scoping package. As the *Hoffman* case suggests, the public and appellants should have been afforded an opportunity to comment on the mitigation measures that were subsequently discussed in the EA.

Substantial evidence to show the adequacy of proposed mitigation measures is not

provided in the Than Brook EA, nor is there a detailed analysis that the agency can refer to that shows how these measures will reduce environmental impacts below the level of significance that would require an EIS. A detailed analysis of mitigation measures would provide for criteria based on specific conditions in the project area, including the location of skid trails. The environmental analysis must not only describe proven mitigation measures for soils and water quality, but it must also provide an explanation of the effectiveness of these mitigation measures as applied to each unit proposed for management. Here, the Forest Service only relied on a list of mitigation measures and no real analysis to support its FONSI. Just like in the *Hoffman* case, the Forest Service has proposed inadequate monitoring to determine how effective the proposed mitigation would be, and did not consider alternatives in the event mitigation measures fail. Because Appendix A from the final EA was not released with the 30-day comment period, the Forest Service did not afford the public an opportunity to comment on these mitigation measures. And because evidence is absent to support the efficacy of mitigation measures, the Forest Service could not have adequately considered the significance of its proposed action's impact on the environment. For those reasons, “the Forest Service violated NEPA by failing to adequately consider all relevant environmental factors prior to making its finding of no significant impact.” *Hoffman*, 132 F.3d at 17.

VIII. The Forest Service has not sufficiently analyzed or monitored management indicator species or their habitat for the Than Brook Project area in violation of 36 C.F.R. § 219.19

The analysis in the Than Brook analysis fails to sufficiently analyze viability of species affected by the proposed logging and road building. The viability requirements of the 1982 NFMA Rule, 36 C.F.R. § 219 (1999), continue to apply to this project and the WMNF because the plan was developed using the 1982 rule; therefore, the Than Brook Project must meet 36

C.F.R. § 219.19 (1999) and provide a sufficient analysis of the project's effects on species viability.

In the Than Brook project, which implements the Forest Plan, the Forest Service must meet § 219.19's ultimate requirements 1) to maintain viable populations of existing native and desired non-native species in the planning area and must 2) provide habitat to support, at least, a minimum number of reproductive individuals with 3) habitat that is well distributed so that those individuals can interact with others in the planning area. 36 CFR § 219.19 (1999). The Forest Service must also 4) monitor population trends of the management indicator species and determine relationships to habitat changes. 36 CFR § 219.19(a)(6) (1999). All of these requirements apply to the planning area, which includes both the area covered by the Forest Plan as well as the proposed project area. *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999), quoting *Inland Empire Public Lands v. United States Forest Service*, 88 F.3d 754, 760 n. 6 (9th Cir.1996) (rejecting notion that § 219.19 applies only to the promulgation and management of forest plans and noting that areas contained within the boundaries of a National Forest would be covered by a forest plan and thus would also be governed by 36 C.F.R. § 219.19).

Although viability determinations are provided in the EA, there appears to be little, if any, discussion about how the project or the agency will provide habitat to support, at least, a minimum number of reproductive individuals ("minimum numbers") with habitat that is well distributed so that those individuals can interact with others in the planning area ("well distributed"). There also does not appear to be any reference to monitoring of population trends (even if only by habitats) of the management indicator species to determine relationships to habitat changes ("trend monitoring"). A thorough discussion and analysis of these points must be part of a sufficient viability determination.

The only mention of MIS population trends we could find was in the Wildlife Section that discussed effects from the no action alternative: “While populations of species may change within the project area, this alternative of the Than project is not large enough to cause changes of population trends within the WMNF.” EA at 125.

The EA admits that representative community types exist or have the potential to exist in the Project Area for most of the WMNF Plan MIS: scarlet tanagers, blackburnian warblers, chestnut-sided warbler, ruffed grouse, and magnolia warbler. However, there is no analysis in the EA on the effects of this project and others on the White Mountain National Forest that it will maintain “minimum numbers” of each MIS that are “well-distributed” within the planning area (the project and the entire forest). Nor is adequate “trend data” presented to assure that the management in the project or on the entire forest planning area meets the requirements of § 219.19.

The project mentions the Breeding Bird Survey (BBS) in reference to one of the Regional Forest Sensitive Species, the bay-breasted warbler (*Dendroica castanea*). EA at 162 (“Breeding Bird Survey data (1980-1994) showed a continent-wide 12.2% decrease for this species.”). While this bird species is not one of the MIS, it provides evidence that the Forest Service is relying on the BBS for its Forest Plan population monitoring requirements. In fact, the recent draft WMNF Monitoring Guide refers to the BBS as a data collection method for gathering data for MIS population trends. Monitoring Guide at 57, 59, 60.¹⁰ However, the BBS should not be used to monitor population trends because it is a continent-scale survey that is unreliable. A recent court decision has noted the problems with the BBS:

The BBS is a cooperative program sponsored by the governments of the United

¹⁰ Draft WMNF Monitoring Guide available at http://www.fs.fed.us/r9/forests/white_mountain/projects/forest_plan/index.php (last viewed on 6/30/2006)

States and Canada to monitor several North American bird species. . . . The BBS notes . . . problems in its overall data collection, specifically that the trends do not take into account activity outside of the range of the survey; that the surveys are only conducted by roadside, and “may not be representative of regional habitat changes”; and that within the range of the survey, many habitats are not well covered and that species within those habitats are consequently “poorly sampled.”

Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147, 1174 (9th Cir. 2006).

Furthermore, the Forest Service has admitted that the use of BBS data is inappropriate for species trend monitoring:

Other sources of data on trends in bird populations are available such as the US Geological Service’s (USGS) Breeding Bird Surveys (BBS). These surveys have been in place since 1966 and are useful in evaluating regional and range-wide trends. However, the BBS has significant limitations relative to monitoring trends on National Forest lands. All data collected from BBS routes are taken along roadsides on both private and public lands. Roadside surveys do not reflect changes in in-stand forest conditions and therefore are not a good measure of National Forest conditions. More importantly, there are very few survey routes near the Forest.

See Exhibit J – CONF Bird Monitoring (also available at <http://www.fs.fed.us/conf/birds/>).

This could hardly be considered good population data. Any viability analysis based on BBS trends would be completely arbitrary. Because of the lack of MIS analysis, the Than Brook Project violates the National Forest Management Act and 36 CFR § 219.19 with respect to MIS monitoring and viability determinations.

Forest Service Region 9 has claimed that analysis of wildlife habitat conditions and its distribution across the landscape, management indicator species, and species viability analysis are not applicable at the project specific scale, which may explain the lack of MIS analysis in the Than Brook EA. The reason given is that these management tools are only applicable at a larger forest wide scale and are therefore outside the scope of this site-specific project analysis.

However, Federal Courts do not allow appellants to challenge Forest Plan issues until they are ripe through implementation at the project level. *See Ohio Forestry Ass’n v. Sierra Club*, 523

U.S. 726 (“[T]he provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm. . . . The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan . . .”).

The Than Brook Project is ripe in implementing the Forest Plan. Now is the only time that we could potentially challenge the Forest Service’s MIS and viability determinations. Since this issue is ripe with respect to the Than Brook project, a full analysis of the requirements of the viability regulation must be done at the project level. In fact, this analysis cannot be sufficiently done at the Forest Plan level because the plan does not make the requisite irreversible or irretrievable commitments of resources such as those made as part of the Than Brook Project. The Forest Service can only provide a proper analysis of effects on MIS populations and species viability when an imminent threat of harm may occur. If we were to follow Forest Service Region 9’s logic that challenging this aspect of forest planning can only be done at the forest planning level, then the MIS and species viability analysis would forever escape review.

IX. Threshold Issues for The Wilderness Society and Forest Watch

The Wilderness Society (“TWS”) and Forest Watch (“FW”) have shown substantial interest in the protection of roadless areas in the WMNF, and have fulfilled requirements under 36 C.F.R. § 215.11(a) (2002),¹¹ which describes those who may participate in appeals as any person who “otherwise expressed interest in a particular proposed action by the close of the comment period specified in Sec. 215.6.” *Id.* at § 215.11(a)(2).

The reason why TWS did not comment on the Than Brook Project during the single

¹¹ This version of the Appeal Regulations was recently reinstated by the Montana Federal District Court in *Wilderness Society v. Rey*, No. CV03119MDWM, slip. op. at 3 (D. Mont. Apr. 24, 2006) (injunction stating that “this Order will cause the previous regulation, 36 C.F.R. § 215.11(a) to take effect.”)

opportunity for public comment was because it has come to rely on the Forest Service to provide it with direct notice of these types of projects. Here, TWS did not receive notice from the Forest Service about the project, despite a long-standing interest in both vegetation management projects and roadless areas on the White Mountain NF. This is evident in the comments it has filed on such projects over the years and its Forest Plan revision involvement (see below). WMNF staff have usually been quite good about letting TWS know when projects of this type come up so that it can comment in a timely manner; however, it failed to provide TWS with this notice for the Than Brook Project.

TWS provided lengthy comments during the WMNF Plan revision process in reference to protection of the Wild River IRA. These comments demonstrate TWS' substantial interest in roadless areas as demonstrated by major sections in those comments about the subject. See Exhibit G – TWS WMNF DEIS Comments (“TWS Comments”) at 68-97. TWS even provided specific comments about the area that is subject to the Than Brook Project: “Wildcat Ridge: This land should be added to the recommended wilderness in order to improve the connection between the Wild River and Presidential Dry River/Great Gulf wildernesses.” TWS Comments at 89. TWS submitted these comments well before the end of the Than Brook Project comment period.

Similarly, FW also expressed interest in the protection of WMNF roadless areas in its WMNF Plan DEIS (“FW Comments”) comments. FW also wrote about the area that is subject to the Than Brook Project: “At a minimum, we believe the Forest Service should recommend for wilderness the areas described in Alternative 3—Wild River . . . ,” Exhibit H – FW Comments at 4. FW advocated for additional protection of inventoried roadless areas as Wilderness. *Id.* FW also submitted these comments well before the end of the Than Brook

Project comment period.

Since TWS and FW have “otherwise expressed interest” in the protection of the Wild River IRA and the Than Brook Project area before the end of the comment period, they have met the requirements under 36 C.F.R § 215.11(a), which allow them to appeal the Than Brook decision. Furthermore, TWS has come to rely on direct notice from WMNF staff because it has provide this type of notice in the past, and the staff’s failure to provide direct notice for the Than Brook comment period should not disqualify TWS from standing to appeal the decision.

RELIEF REQUESTED

Appellants request the following relief:

1. Withdraw the Than Brook Decision and abandon the project.
2. Alternatively, withdraw the decision and reissue a decision that does not log or build roads within the Wild River IRA, similar to Alt. 5.
3. Remand the decision and FONSI, and instruct the District to prepare an EIS because the project would have a significant effect on the human environment.
4. Remand the decision for a new comment period, allowing the public to provide meaningful input into the NEPA process when presented with a draft EIS.
5. Remand the decision for a sufficient viability analysis in compliance with the requirements of 36 CFR § 219.19.
6. Remand the decision for a sufficient analysis of the effectiveness of mitigation measures and design of alternative actions in case mitigations fail to comply with NEPA.