National Headquarters
1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331
www.defenders.org

April 15, 2019

Dan Olsen
Daniel Boone National Forest
1700 Bypass Rd
Winchester, KY 40391

RE: Comments on the Forest Plan Amendment Environmental Assessment

Comments submitted electronically April 15th, 2019 via comments-southern-daniel-boone@fs.fed.us

Dear Mr. Olsen,

Please accept these comments on behalf of Defenders of Wildlife (Defenders) in response to the draft Environmental Analysis ("Draft EA") prepared pursuant to the National Environmental Policy Act ("NEPA") regarding the U.S. Forest Service's planned amendment ("the Planned Amendment") to the 2004 Daniel Boone National Forest Land and Resource Management Plan ("DBNF Plan"). Defenders is a national non-profit conservation organization founded in 1947 focused on conserving and restoring native species and the habitat upon which they depend. We submit the following comments on behalf of our more than 1,800,000 members and supporters nationwide, including more than 15,000 in Kentucky.

Defenders has serious concerns regarding the Planned Amendment and its accompanying Draft EA because they either violate or fail to support the objectives of several federal laws, including the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq*., NEPA, 42 U.S.C. § 4321 *et seq*., and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*. Not only do the Planned Amendment and Draft EA fail to comply with federal law, they would place imperiled species at even greater risk of extinction.

We also have serious concerns that the Forest appears to be seeking more "flexibility" to manage the Forest, while eliminating protection for bats. As discussed in detail below, the Forest has failed to provide the necessary information to support the amendment. If the purpose and need for the amendment includes reducing impacts on aquatic species, then NEPA requires consideration of reasonable alternative plan changes that would accomplish that, something that the Forest has failed to do. In fact, the actual change proposed is to remove seasonal protections for bats, and, in the absence of information indicating otherwise, the driving "need" for this change appears to be motivated by non-conservation related factors. However, the National Forest Management Act

places substantive obligations on the agency to protect and recover species which cannot be ignored in pursuit of other expectations.

I. The Planned Amendment Must Comply with the National Forest Management Act and its Implementing Regulations.

A. National Forest Management Act Background and Planning Rule

The National Forest Management Act, 1600 U.S.C. §1600 *et seq*., was enacted in 1976 in large part to elevate the value of ecosystems, habitat, and wildlife on our national forests to the same level as timber harvest and other uses. NFMA codified an important national priority: forest plans must provide for the diversity of habitat and animals found on national forests. Most importantly, the law set a substantive threshold Forest Service management actions must comply with for sustaining the diversity of ecosystems, habitats, plants and animals on national forests. Specifically, NFMA requires the Forest Service to develop planning regulations that shall "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B). This diversity requirement has been interpreted by the agency in the NFMA planning regulations and by the courts.

Court interpretations of the diversity requirement of the rule include a ruling that the NFMA diversity mandate not only imposes a substantive standard on the Forest Service, it "confirms the Forest Service's duty to protect [all] wildlife." *Seattle Audubon Society v. Moseley*, 1489. Courts have also recognized that the Forest Service's "statutory duty clearly requires protection of the entire biological community." *Sierra Club v. Espy*, 364.

In April 2012, the Forest Service finalized regulations implementing the NFMA. *See* 16 U.S.C. § 1604, 36 C.F.R. § 219. These regulations, commonly referred to as the "2012 Planning Rule," established a process for developing and updating forest plans and set conservation requirements that the plans must meet to sustain and restore the diversity of ecosystems, plant and animal communities and at-risk species.

B. To Comply with the 2012 Planning Rule, the Forest Service Must Document New Information and Best Available Science Regarding Amendments to the DBNF Plan.

Pursuant to NFMA, the Forest Service must provide justification for amending the DBNF Plan that meets the criteria established by NFMA. Although NMFA authorizes the Forest Service to amend forest plans, this authorization is accompanied by crucial limitations to prevent arbitrary amendments. Pursuant to the 2012 Planning Rule, an amendment must be based on a "preliminary identification of the need to change the plan," which may be based on "a new assessment; a monitoring report; or other documentation of new information, changed conditions, or changed circumstances." 36 C.F.R. § 219.13(b)(1). Inherent in these requirements is an intent that the responsible official explain what the new information is and why the new information renders the existing forest plan language inadequate. The Planning Rule further states that "[t]he responsible

official shall document how the best available scientific information was used to inform the amendment decision…" 36 C.F.R. § 219.3. Moreover, "[s]uch documentation must: Identify what information was determined to be the best available scientific information, explain the basis for that determination, and explain how the information was applied to the issues considered." *Id.*

1. "Need for the Proposal."

The Draft EA identifies the following "Need for the Proposal:"

> Since the 2004 Forest Plan was signed, there is new information specific to bat habitat management, there are additional Threatened and Endangered species and Designated Critical Habitat, and new USFWS documents regarding definitions and hibernacula for bats. These have combined to create circumstances where the Forest Plan's direction needs to be updated. There is also a need to change some standards from project level to the DBNF landscape level. (Draft EA at 3.)

The Draft EA, however, does not identify and document what new information specific to bat habitat management is being referenced in its "Need for the Proposal." To comply with the 2012 Planning Rule, the Forest Service must demonstrate that this change was in response to "new information, changed conditions, or changed circumstances" that render the existing forest plan language inadequate. 36 C.F.R. § 219.13(b)(1).

Moreover, while not required for plan amendments as it is for revisions, public review of the preliminary need for change would be beneficial to ensure understanding of how the new information is being interpreted in the context of the DBNF Plan. Without this information, it is impossible for the public to assess whether the best available scientific information is being used to determine the need for change and to develop the amendment, as required by the Planning Rule. *See* 36 C.F.R. §219.3. In the absence of this information, it appears that the Forest Service is seeking more "flexibility" to manage DBNF for other purposes, while eliminating protection for bats.

2. Significant Caves

We agree that relevant definitions should be harmonized where possible in response to forest plan amendments. However, to meet the requirements of the 2012 Planning Rule, these changes must be in response to "new information, changed conditions, or changed circumstances," they must be based on the best available scientific information, and the Forest Service must document how this is the case. *See* 36 C.F.R. §§ 219.13(b)(1), 219.3.

The Draft EA cites new "terminology used within USFWS Draft Indiana Bat Recovery plan (USDI-FWS 2007a) and the Virginia Big-eared Bat Recovery Plan" as the source of a new definition of "priority hibernacula," which replaces the concept of significant caves. Draft EA at 4. However, the Draft EA does not identify new science that indicates a need to change management of the five-mile

protection zone for these areas. Instead it introduces questions about the effect of that seasonal buffer on the ability to implement projects. To comply with the 2012 Planning Rule, the Forest Service must explain new information, changed conditions, or changed circumstances to support this assertion of a need to amend this provision in the forest plan, and it must document why it selected the proposed revision.

3. Snags

The Draft EA states that, "science suggests that using a broader landscape approach is more appropriate," citing a specific scientific source for this new information. Draft EA at 4. We agree that snag occurrence may naturally vary across a landscape and we could support a "broader landscape approach" in concept. However, we have specific objections to how the forest plan would be changed to incorporate this new approach (see below). Moreover, to comply with the 2012 Planning Rule, the Forest Service must explain why it selected the proposed revision.

4. Roost trees

The scoping letter refers to a new "USFWS range wide definition," but no specific source is cited there or in the Draft EA. Scoping Letter at 2. To comply with the 2012 Planning Rule, the Forest Service must explain new information, changed conditions, or changed circumstances to support this assertion of a need to amend this provision in the forest plan, and it must document why it selected the proposed revision.

The Draft EA further suggests that its change in USFWS range wide definition requires additional changes in standards so that they "provide flexibility to implement forest management activities." This amounts to a non sequitur that expands the scope well beyond the new information about roost trees. Again, there is no new information provided to support the statement in the scoping letter that "[i]mplementing the roost trees standards according to the current definitions results in ineffective forest health prescriptions with a lot of undesirable tree species left standing and a reduction in genetic quality (also known as high grading of stands)." Draft EA at 4. To comply with the 2012 Planning Rule, the Forest Service must explain new information, changed conditions, or changed circumstances to support this assertion of a need to amend this provision in the forest plan, and it must document why it selected the proposed revision.

5. Prescribed fire

The scoping letter indicates that the "Forest Plan limits prescribed fire treatments during growing season." Scoping Letter at 3. This is unrelated to the new information about listed species cited in the "Purpose and Need." The Forest made a conscious decision in its revised forest plan to impose this limit. The Draft EA asserts that "There is a need to conduct growing season burns to assist with wildlife opening management and the restoration of grasslands and wooded grasslands," without providing new information or changed circumstances cited to justify a need to change that

decision. Draft EA at 4. To comply with the 2012 Planning Rule, the Forest Service must explain new information, changed conditions, or changed circumstances to support this assertion of a need to amend this provision in the forest plan, and it must document why it selected the proposed revision.

6. Identification of new threatened or endangered species and critical habitat designation

We agree that new ESA requirements for additional species or critical habitat found on the Forest should lead to a review of how well the forest plan protects the species and habitat. We would expect to see some sort of analysis of effects of the current plan, and that it would likely be based on experience with recent projects implemented under that plan. However, the scoping letter and Draft EA provide no supporting information for the need to change the plan to better protect aquatic species. The Forest Service must provide this information in order to comply with the 2012 Planning Rule.

Moreover, if the purpose and need for this plan amendment includes reducing impacts on aquatic species, then NEPA requires consideration of other reasonable alternative plan changes that would accomplish that. This statement in the scoping document appears to be arbitrary: "We are not proposing to change any of the plan components related to aquatic species or riparian corridors." Scoping Letter at 3.

In fact, the actual change proposed is to remove seasonal protections for bats, and the driving "need" for this change appears to be "increases in project costs, reduction in acreage treated, delays in project implementation." Scoping Letter at 3. There is no information provided about the area affected or the costs to support this need for change, and this problem should be remedied in order to comply with the 2012 Planning Rule.

7. Information that should be considered

We support the use of the USFWS Kentucky Field Office Revised Conservation Strategy for Forest Dwelling Bats (USDI-FWS 2016) for new definitions. This strategy, and its scientific background should also be considered new information that is the best available scientific information regarding the need for and effectiveness of particular conservation measures (36 CFR §219.3). It is not cited elsewhere in the Draft EA. We note that it continues to refer to 5-mile-radius "maternity buffers," while this amendment proposal would eliminate them. Eliminating the buffers would increase the number of "avoidable impacts" that the USFWS remains concerned about.

A fundamental premise of the need to change the forest plan is that winter logging produces too much sediment. This is contradicted by statements like, "Best Management Practices have been included in past project planning to reduce the risk of adverse effects to listed aquatic species and Critical Habitats…" Draft EA at 4. We don't believe that the possibility that "risk could be further

minimized by removing the restrictive seasonality treatment dates in the Forest Plan Standards" warrants the extreme action of abandoning scientifically based, necessary conservation measures for at-risk species. A much fuller presentation of new information about sediment conditions is needed to validate sediment reduction as a purpose. On the other hand, the fact that there are newly listed aquatic species may warrant stronger measures than BMPs – forest plan standards.

C. NFMA Requires That the Forest Plan Be Revised

Because of the role that listed species played in the development of the 2004 revised forest plan, newly listed species and critical habitat, and new science and recovery strategies for previously listed species, and how this affects other forest programs constitute "significant" changes in the conditions on the Daniel Boone National Forest. Therefore, NFMA requires that the plan be revised (16 U.S.C. §1604(f)(5)).

Also, if information now exists that the effects of the forest plan on aquatic resources are different than was projected for the forest plan, this suggests a fundamental error in the rationale for adopting the plan. It raises a question of whether the projected amount of timber volume that could be produced was correct. This also indicates that the plan should be revised.

D. Amendment Requirements and Species of Conservation Concern

We agree that there is no question that the purpose and effects of this proposed amendment would be "directly related" to the diversity requirements of §219.9, so they must be met (36 CFR §219.13(b)(5)). However, its requirement for ecosystem integrity specifically also incorporates the requirements of §219.8. As a significant amendment, it would also necessarily implicate the timber requirements of NFMA and §219.11, as described above.

The diversity requirements of §219.9 and the amendment requirements of §219.13 include an obligation to provide plan components that contribute to recovery of listed species and maintain viable populations of species of conservation concern (SCC). The identification of SCC as part of a forest plan amendment has implications for the disclosure of effects and should have been included as part of scoping for the NEPA process. SCC should be identified early enough in the assessment process to be considered in the development of plan components and should include public notice and participation prior to the final comment opportunity. (*See* 1909.12 FSH §12.52a.)

E. Plan Components Are Inadequate for Complying with NFMA Requirements

There may be a misperception that management guidance in addition to the forest plan can meet requirements that "plan components" provide for diversity (36 CFR §219.9). An example is this statement: "Effects to PETS, MIS, CS, and Migratory Bird species will be evaluated for consistency with the Forest Plan and Programmatic BAE prior to project implementation." Draft EA at 31. NFMA only requires that projects be consistent with plan components in a forest plan (not effects).

We address the specific proposed plan components here.

1. Forest-wide objectives

We support the addition of the two objectives under Goal 1.1 as being potentially beneficial to wildlife. We would expect that a conservation strategy for roadside management would lead to new plan components to govern future road maintenance, and another amendment and associated public participation (or they could be included in a plan revision).

2. Roost trees and snags

Key standards in the current plan are replaced by guidelines with no explanation. More importantly neither of the guidelines actually includes any criteria that must be met, never mind the scientifically supported biological criteria required for at-risk species. DB-WLF-1 requires "suitable roost trees across the entire forested landscape." This could arguably be met by simply having more than one tree in more than one place. DB-WLF-2 includes vague language about "customarily" retaining "large" snags, which provides no certainty or accountability. The amended plan would clearly allow the number of roost trees and snags to be reduced below the ecological conditions needed for bats and is inadequate on its face for complying with requirements for their viability (36 CFR §219.9(b)(1)). NFMA invalidated a "trust me" approach to forest planning with regard to diversity and species viability (16 U.S.C. 1604(g)(3)(B)).

We agree with the stated purpose of ecosystem integrity and diversity. §219.9 actually requires that key ecosystem components like roost trees and snags be managed within their natural range of variation for number, size, species and distribution (36 CFR §219.19, "ecological integrity"). The forest planning process must determine what that is, and the plan must include components to provide certainty that management would provide these features. (Distribution should be based on the needs of relevant species, and we agree it is not necessarily applicable to each acre.)

DB-WL-7 in the current plan required that trees to be retained must be designated prior to project implementation. No rationale was provided for eliminating this requirement, and it should be retained.

3. Maternity habitat

The existing plan prohibits tree cutting based on distance and dates. The replacement language (DB-WL-5) retains distance requirements and the dates but eliminates the prohibition for vegetation management projects. If a project falls within those date and distance criteria, and if it is a "new construction project," it would require consultation with USFWS. This is a meaningless requirement since the ESA requires consultation for projects with adverse effects regardless, and it does not fulfill the Forest's responsibility for plan

components to provide ecological conditions. In DB-WL-6, the basis for the northern long-eared bat 4D rule is not applicable to endangered bat species.

4. Hibernacula

The existing plan prohibits or conditions (requiring USFWS protocol for Indiana bat use for non-vegetation management projects) tree removal based on dates and distances from caves. The replacement language (DB-WLF-7) reduces a 5-mile restricted zone to ¼ mile of "Hibernacula and Maternity Cave Prescription Area," allowing unrestricted removal of roost trees on a much larger area. There is no mention of any new science that suggests the much larger protected area was unnecessary for bat viability.

5. Prescribed burning

The existing plan prohibits prescribed burning in roosting areas based on dates. The replacement language (DB-Fire-9) allows additional unrestricted burning in May, and in June and July after consultation with USFWS. Again, this is a meaningless requirement, so plan components provide no protection of bats from prescribed burning. DB-Fire-8 requires an assessment, but assessments have no force or effect without a required action based on that assessment.

The forest plan must contribute to recovery of listed species (36 CFR §219.9(b)), and there is no scientific basis for concluding that the forest plan would contribute to recovery without these existing protective measures. Also, the attempt to defer decisions about conservation measures to project consultation ignores the fact that the standard for project consultation is jeopardy and the requirement for the forest plan is to contribute to recovery.

II. The Draft EA Must Be Revised to Comply with All Requirements of NEPA

A. NEPA Background

NEPA requires federal agencies to take a hard look at the environmental consequences of their actions before they act. *See* 42 U.S.C. §§ 4321, 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.25. When agencies prepare an EA pursuant to NEPA, they must determine whether an action is a "major federal actions significantly affecting the quality of the human environment," and if it is, the agency must prepare an Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C). The key element of this analysis is to evaluate the direct, indirect, and cumulative impacts—also referred to as effects—of several alternatives, including the proposed action, to determine whether an alternative with more conservation potential is available. *See* C.F.R. §§ 1502.16(a)-(b), 1502.25(c),1508.16, 1508.27(b)(7).

The Council of Environmental Quality (CEQ) provides guidance on when an effect is significant. *See* 40 C.F.R. § 1508.27. The implementing regulations published by CEQ define "significantly" in

terms of "both context and intensity," with the intensity analysis comprised of ten factors. *Id.* One such factor is that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." *Id.* at 1508.27(b)(1). Another consideration is whether possible effects are "highly uncertain or involve unique or unknown risks." *Id.* at 1508.27(b)(5). Moreover, significance may also exist if multiple individually insignificant impacts are cumulatively significant. *Id.* at 1508.27(b)(7). Finally, another crucial factor is whether "the action may adversely affect [a listed] species or its [critical] habitat. *Id.* at 1508.27(b)(9).

B. The Effects Analysis is Flawed

The Draft EA does not meet NEPA's requirements because its effects analysis is overly-conclusory, fails to consider pertinent information, and improperly analyzes other information. The basic premise of the Draft EA's effects analysis seems to be that the only change in management would be the season of harvest – that the same areas would be harvested and the same amount of land would be logged, just at a different time of year. However, the scoping letter revealed that one purpose of the action is to remedy the "reduction in acreage treated" caused by the seasonal bat restrictions. Scoping Letter at 3. The effects analysis cannot ignore what the Forest concedes is a foreseeable (and apparently desirable) outcome.

One assumption is that "ground-disturbing activities are within the 2004 Forest Plan projected levels." Draft EA at 18. It may be true that any increased acreage treated as a result of the amendment would still be less than what was projected by the forest plan; however, the point of reference for effects analysis (the no-action alternative) for this amendment is the real effects of the plan that have actually occurred. New information indicates that the projected harvest levels for the plan with the current restrictions were wrong, and this error should not be perpetuated. The effects of increased harvest must be disclosed.

"Flexibility" is frequently cited as a purpose and a desirable result of this amendment. The assumption seems to be that flexibility for timing of management activities would always be used to reduce environmental impacts, without recognizing the uncertainty that lack of standards creates. Effects disclosures must consider that flexibility would also allow greater environmental impacts.

The Draft EA sometimes speculates on things that "could" occur that are not required by the forest plan. For example, "Follow up treatments could be employed to reduce this effect and improve habitat conditions…" Draft EA at 19. Where such mitigation measures have been suggested in the Draft EA they should be included as plan components in the amendment.

In other cases, it is not clear if existing plan components are being referenced: "For all species analyzed above, survey and or habitat consideration prior to implementing a project and consideration of habitat and potential improvements would reduce potential negative effects." Draft EA at 20. Specific plan components should be referenced. A requirement to protect "known" roost tree locations is not likely to be effective if there is no requirement to survey prior to activities.

Perhaps the key issue that the Draft EA must address is how to balance short-term adverse effects to at-risk species ("fine-filter") with long-term beneficial effects. Before they can be compared to short-term adverse impacts, long-term benefits to "coarse-filter" ecological conditions must first be described in terms of a natural range of variation for key characteristics for at-risk species, as required by Sections 219.9 and 219.19 of the 2012 Planning Rule. That has not been done here. Then, if the plan is being changed to delay achievement of conditions needed for recovery it is not contributing to recovery as required by Section 219.9 of the 2012 the Planning Rule.

The reason this issue is critically important for this amendment is because it affects species that are well below their natural range of variation and therefore at-risk. Increased short-term risk at the "fine-filter" species scale should weigh heavy in the balance against long-term benefits. If passive management would eventually lead to recovery (long-term risk is minimal), it may mean that the Forest Service must proceed less aggressively until that has occurred.

Instead the Draft EA summarily dismisses short-term risk with unsubstantiated subjective conclusions like, "effects are expected to be short-term and temporary in nature." Carried to its extreme this argument says that, "Timber management encourages growth of new trees, providing a source of future roost trees," which is tantamount to saying that it's acceptable to destroy bat habitat because it grows back. Draft EA at 25. Considering this question requires a more in-depth analysis than this.

Overall, there is minimal effects "analysis" beyond subjective conclusions, and the disclosure of information about reasonably foreseeable effects is inexcusable.

The only place where there is any quantitative disclosure is the increased acres in the 1.J prescription area size due to discovery of additional caves (Draft EA at 22), and the "total forested habitat acres suitable for bat roosting and foraging." Draft EA at 24. There is no mention of the size of the area where seasonal restrictions on tree removal have been eliminated (amount suitable for timber harvest, amount within the buffer areas for hibernacula). There is no basis for assessing effects on bats without this information. While, "The maximum treatment acres analyzed and approved in the 2004 Forest plan remains unchanged," the likely levels of treatment and the season when they would occur have both changed and would have effects. Draft EA at 23.

1. Vegetation

The Draft EA states that "snag and roost trees would still be maintained." Draft EA at 21. This is incorrect as explained above. Strict per acre requirements for snag and roost trees are being replaced with essentially no requirements. The effects of voluntary discretionary protection cannot be the same as the effects of mandatory per acre limits. The Draft EA makes an assumption that "the presence of snags and suitable roost trees would be analyzed across the Forest Plan Amendment landscape during site-specific project planning, and strategies would be assigned within stands to meet landscape-level habitat needs for threatened and endangered species," but there is no

requirement to do so. Draft EA at 21-22. In fact, the Planning Rule requires that the forest plan identify desired conditions (which may vary across a landscape) within the natural range of variation, and this obligation cannot be deferred to project-by-project decision-making by writing a blank check.

These statements capture the essence of this problem: "The Proposed Action would allow land managers to focus snag retention and roost tree development across the landscape where they are most needed. Increased flexibility within site-specific project planning would ensure that snags and roost trees are maintained across the landscape where they are most needed (O'Keefe & Loeb 2017)." Draft EA at 22. Yes, it would "allow" this, but the increased "flexibility" could also be used in ways that are detrimental to at-risk species. It "ensures" nothing, and the effects analysis must address this.

2. Bats

The Draft EA inexplicably says that 1.J. Prescription "retains the 0.25-mile radius" around caves. Draft EA at 23. The actual radius for the existing 1.J. Prescription (and for other significant bat caves) is 5 miles. This should lead to a significant increase in effects, which was apparently ignored.

The same invalid assumption about snag and roost tree retention described above leads to invalid analysis of effects on bats from likely reduced snag and roost trees. Snag retention would not necessarily "still occur." The conclusion that, "There is no anticipated change in the availability of suitable roost trees across the landscape due to the Proposed Action," is not supported by the plan language or any analysis. Draft EA at 24. This conclusion is fundamental to a determination of viability:

> "Suitable roosting, swarming, foraging, and hibernating habitat will continue to be available across the Forest under the Proposed Action… therefore, the Proposed Action will not cause a loss of species viability or habitat availability for any bat species" (Draft EA at 26.)

The Draft EA states that certain factors "will be used in burn plan design to minimize smoke impacts caused by prescribed fire activity." Draft EA at 23. In fact, DB-Fire-8 only requires assessments, so the likely effects of smoke are understated.

There is no cumulative effects analysis for bats, as required by NEPA. The Draft EA needs to consider the effect of changes in bat populations since the plan was adopted due to white-nose syndrome and the likely future effects.

3. Sensitive species

The discussion of sensitive species is more specific regarding individual at-risk species and their needs than the rest of the document; however, to the extent it is based on the same flawed assumptions it is deficient. It focuses only on "increasing the time of year when activities may occur" (and not increasing levels of activities), and it assumes "buffers will continue to protect suitable habitat," (when in fact the size of the buffers has been significantly reduced). Draft EA at 31. These assumptions are also reflected in Table A7.

The comparison of short-term adverse effects to long-term benefits discussed earlier is again entirely subjective. It is also sometimes entirely speculative, such as "judicious cutting might result in beech presence over a longer period of time" (Draft EA at 32), and "Opportunities would be available to reduce potential impact to larvae and potentially improve habitat." Draft EA at 35. In particular, we think that species sensitive to adverse effects specific to summer tree removal through effects on breeding or desiccation, or from logging equipment, warrant a harder look.

There are references to locations for some species in relation to where management would be changed or not changed, such as "habitat in which monarchs are likely to be found" and "the Red River Gorge area." The EA must disclose where those locations are and where the area "likely to be affected by proposed Forest Plan changes" is. Draft EA at 32. There also needs to be some description of the scale of effects relative to the range of the species and within the plan area.

We are encouraged that the Forest determined that the early hairstreak and six-banded longhorn beetle "were not otherwise protected by existing plan components." Draft EA at 32. However, the Draft EA does not provide the new information this is based on so that we could consider whether simply adding an objective is sufficient to protect the species.

4. Aquatic species

The information provided about aquatic effects contradicts the purpose and need. Allowing summer logging is not expected to have impacts on aquatic species because "current riparian corridor Standards are not changed in this proposed forest plan amendment" (Draft EA at 36) and BMPs will be adhered to. If these are the factors that drive effects on aquatic resources, then this should be what constrains the amount of winter logging as well. In contrast, the Draft EA also only barely concedes that the amendment "may potentially" decrease stream sedimentation. Draft EA at 36. This uncertain potential benefit can hardly be used to outweigh the clearly increased risks to bats. This lukewarm benefit does not support the claim that habitat for aquatic species is "expected to locally improve" in Tables A10 and A11.

Also, since newly listed aquatic species were the basis for removing bat protections, we would also expect to see some discussion of the status and trend of these species in areas subject to the bat

standards and how that is affected by management. That is necessary to support any claim of beneficial effects from the proposed amendment.

C. NEPA requires the Forest Service to conduct a comprehensive analysis of the proposal's impacts on listed species independent of Section 7 consultation

The Forest Service must complete a comprehensive NEPA analysis on the significance of the impacts of the proposed amended forest plan to ESA-listed species, in addition to completing ESA Section 7 consultation, because these two legally-required procedures serve different functions. One crucial factor when determining whether an action will have a significant impact is whether "the action may adversely affect [a listed] species or its [critical] habitat." 40 C.F.R. § 1508.27(b)(9). Unlike the "no jeopardy" standard applied in ESA Section 7 consultation, significance for NEPA purposes need not necessarily indicate that the action is "likely to jeopardize the continued existence of any endangered species or threatened species…" 16 U.S.C. § 1536(a)(2). Rather, a lower threshold exists for the impacts of an agency action on a species to be considered "significant" under NEPA than for that same action to cause jeopardy under the ESA. Thus, a federal agency's legal obligations under NEPA and the ESA are entirely separate, and compliance with ESA Section 7's prohibition against jeopardizing a species' continued existence, 16 U.S.C. § 1536(a)(2), does not simultaneously satisfy NEPA's requirements to analyze significant impacts short of the threat of extinction.

Courts have repeatedly upheld the need for agencies to engage in separate NEPA analyses and Section 7 consultations for species, noting the difference in standards for a finding of significant impacts under NEPA and a finding of jeopardy under the ESA. *See Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1275–76 (10th Cir. 2004) (recognizing FWS conclusion that action not likely to cause jeopardy does not necessarily mean impacts are insignificant); *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) ("A [Finding of No Significant Impact under NEPA] . . . must be based on a review of the potential for significant impact, including impact short of extinction. Clearly, there can be a significant impact on a species even if its existence is not jeopardized."); *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1302 (E.D. Cal. 2000) (requiring [Environmental Impact Statement] under NEPA even though mitigation plan satisfied ESA); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) (rejecting agency's request for the court to "accept that its consultation with [FWS under the ESA] constitutes a substitute for compliance with NEPA."); *Forest Service Employees for Envtl. Ethics v. U.S. Forest Service*, 726 F. Supp. 2d 1195, 1213 (D. Mont. 2010) ("Plaintiff correctly observes that [*Envtl. Prot. Info. Ctr. v. U.S. Forest Service*, 451 F. 3d 1005 (9th Cir. 2006)] does not allow an action agency to completely ignore an issue in its NEPA documents so long as the matter is discussed in adequate detail in a biological opinion….").

Moreover, because NEPA analyses are subject to public comment and biological opinions are not, if an agency fails to conduct an adequate NEPA analysis of the significance of an action's impacts on species, the public is deprived of the opportunity to be fully informed of and comment on those impacts. NEPA regulations require the drafting agency to solicit comment from "those persons or

organizations who may be interested or affected." 50 C.F.R 1503.1(a)(4). Thus, relying solely on ESA consultation to evaluate the significance of a proposal's impacts on ESA-listed species is wholly inadequate for NEPA purposes, because no opportunity for public comment is required prior to the issuance of the biological opinion. Public comment is one of the means by which NEPA promotes its purpose of "sensitizing all federal agencies to the environmental impacts of its actions." *Nat'l Audubon Soc. v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005). The inclusion of these viewpoints in the decision-making process was the "paramount Congressional desire" in creating a statute that would increase agency awareness of environmental trade-offs. *State of Cal. v. Block*, 690 F.2d 753, 771 (9th Cir. 1982).

However, the Draft EA, as explained in detail above, fails to conduct an adequate, comprehensive NEPA analysis of the impacts of the proposed amendments on listed species. The Forest Service, therefore, must revise the Draft EA to incorporate this analysis, ensure that it applies NEPA's significant impacts standard rather than the ESA's jeopardy standard, and reissue the revised Draft EA for public comment.

D. Alternatives

As we have pointed out, the purpose and need for this amendment is not clearly stated but appears quite broad. It includes bat conservation, aquatic species conservation and apparently timber production, but seems to be primarily focused on reducing sediment. Even under this relatively narrow view of the scope, eliminating standards for tree felling dates is obviously not the only reasonable alternative. The Draft EA even explicitly and arbitrarily excludes reasonable alternatives: "The Proposed Action does not change standard BMPs used to reduce erosion, nor is there a change in the mandatory riparian buffer areas in harvest units." Draft EA at 18. Classifying these bat protection areas as not suitable for timber production would be an alternative that could also reduce the perceived need to harvest these areas at times that create greater risks to aquatic species.

E. Species of Conservation Concern

The Planning Rule requires that SCC be identified in either of two circumstances: "if scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse impacts to a specific species, or if the proposed amendment would substantially lessen protections for a specific species…" (36 CFR §219.13(b)(6)). The shortcomings of the NEPA effects analysis preclude a defensible identification of SCC.

Further, the Draft EA defines "substantial adverse effects" as "impacts which could: lead to species listing under the ESA; cause loss of viability in the Planning area; or cause population level declines." Draft EA at 59-60. This would be a higher bar than what is needed to identify SCC in the Planning Rule: "substantial concern about the species' capability to persist over the long-term in the plan area" (36 CFR §219.9(c)), so it would exclude species that the Planning Rule requires to be included. The Draft EA also completely ignored the second prong of the Planning Rule SCC requirements for

amendments, and this amendment is a clear example of an amendment that would "substantially lessen protections" for at-risk bat species.

F. Viability

A viability analysis is required to determine compliance with Planning Rule requirements for SCC. We believe that a comparable analysis is necessary for listed species in order to demonstrate contribution to recovery (we assume that recovered species would then have to meet requirements applicable to SCC). That analysis must describe the ecological conditions needed for the species and demonstrate that plan components would provide those conditions (subject to the exception in §219.9(b)(2)). Viability analysis is also necessary to demonstrate compliance with agency policy requirements for sensitive species.

Appendix C in the Draft EA describes the process used to address plant and animal diversity. Much of the information it describes is not found in the Draft EA, so it is not possible to review it, including the "affected environment," "community viability evaluations", and "anticipated changes in terrestrial and aquatic habitat." The key final step is:

> "… the at-risk species that may be affected by this amendment are all assessed to see if the ecological conditions necessary to either (1) contribute to the recovery of federally listed threatened and endangered species, (2) conserve proposed and candidate species, and (3) maintain viable population of the other species of concern, are being provided. The results of this analysis is summarized in Appendix A." (Draft EA at 58.)

Appendix A contains a one-sentence conclusion for each species. The record fails to document the actual analysis of ecological conditions it did for each species to reach the conclusion. This creates a gap in information that amounts to a "black-box approach" to effects analysis that does not adequately inform the decision-maker or the public or provide a defensible rationale for a decision.

Sensitive species and listed species were addressed above, including the deficiencies that make the Draft EA inadequate for a viability analysis. The only discussion of effects specific to SCC is found in Table A5, an "Effects Summary," which consists of conclusory statements. There needs to be a discussion for these species that provides at least as much detail as for sensitive species, while avoiding the flaws described above for those analyses.

G. The Forest Service Has Not Demonstrated that There Will Be No Significant Impacts.

The Forest Service has failed to demonstrate that it is not required to prepare an EIS because it has not shown that the proposal will have no significant impacts. First, the Draft EA is deeply flawed, given its defective effects analysis, its failure to evaluate additional alternatives, its inadequate consideration of species of conservation concern, and its lack of a viability analysis. The findings in the Draft EA, therefore, cannot be relied upon to conclude that there are no significant impacts.

Moreover, many of the intensity factors provided for in the CEQ regulations indicate that the proposal would result in significant impacts. *See* 40 C.F.R. 1508.27(b). For one, even if the proposal were to benefit aquatic species—which is questionable—"[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." *Id.* at 1508.27(b)(1). Furthermore, the proposal provides for significant uncertainty, such as to what extent actors would take advantage of there being no acreage requirements for snag and roost trees and the extent to which prescribed burning will take place. *See Id.* at 1508.27(b)(5) (significance can be impacted when effects are "highly uncertain or involve unique or unknown risks").

For example, many elements of the proposal increase the likelihood that listed species or critical habitat may be adversely affected. *See* 40 C.F.R. § 1508.27(b)(9). As discussed above, the proposal could place listed species and critical habitat at risk for reasons including, but not limited to:

(1) summer tree removal can impact breeding
(2) the proposal does not impose acreage requirements for snag and roost trees,
(3) the proposal only provides for a .25-mile protective radius around caves,
(4) the proposal allows for unlimited prescribed burning.
(5) the proposal partly relies on buffers that have been significantly reduced to protect suitable habitat,
(6) the proposal could lead to an increased level of activities, and
(7) the EA acknowledges that "judicious cutting might result in beech presence over a longer period of time."

Courts, too, have noted that removing protective conservation measures from a forest plan can be significant. *See Citizens for Better Forestry v. USDA*, 632 F. Supp. 2d 968, 980 (ND California 2009).

Thus, not only has the Forest Service failed to demonstrate that the proposal will not cause significant impacts; it is likely that the proposal *will* cause significant impacts, in which case it must draft an EIS. The amendments being proposed comprise "significant" changes in the plan because they change the underlying premise for protection of listed species. In accordance with the Planning Rule, an EIS is required for a significant amendment. *See* §219.13(b)(3). However, we do not believe that a significant amendment should be initiated when a revision is required, as noted on p. 6 of this comment. (We note also that the revised Daniel Boone forest plan has reached its 15-year limit imposed by NFMA.)

III. Endangered Species Act

A. The Biological Assessment

The Biological Assessment (BA) states that forest management practices would be limited to 5,500 acres annually and 28,000 acres annually of prescribed fire but does not cite which forest plan standards this is referring to. This is also broken down into two seasons without explaining why. To determine whether the plan should be changed, this must be compared to comparable figures for the existing plan.

It states that activities in proximity to hibernacula must "meet Goals and Objectives set-forth in the Forest Plan." BA at 72. This is not the requirement for consistency in the Planning Rule. Only standards must be "met," and where standards are absent, overreliance on goals and objective could underestimate effects.

The rationale provided in the BA for effects determinations is improper. Adverse effects can be ignored only if they are insignificant or discountable, and optimistic predictions about future habitat improvement cannot be used to offset short-term adverse effects. Indiana bat "Pathway 7" is an example of improper rationale for a NLAA call:

> The majority of tree removal associated with activities proposed across the Daniel Boone National Forest is intended to improve forested habitat conditions within the Action Area. While the habitat may be altered to some degree, the conservation measures are intended to ensure that there is no significant loss of forested habitat or fragmentation that would result in measurable effects to Indiana bats.

"Insignificant" effects must be demonstrated, not just intended or assumed, especially when based on expected long-term consequences.

The BA repeatedly states, "The Daniel Boone National Forest is not aware of future state, tribal, local, or private actions within the action areas at this time." *See* BA at 88, 89, 97, 102. It's not possible to believe that additional tree removal is not occurring that could affect these species.

The BA relies on "Project Design Criteria" as the basis for a NLAA determination for Virginia big-eared bat "Pathway 5" without citing the applicable forest plan components. The action being consulted on is the forest plan.

The BA includes this questionable statement with regard to gray bats:

> "Forest management practices which occur on the DBNF do not fragment forest, i.e., permanently remove trees, but rather influence the structure and composition of the forest. Habitat conditions are changed in small units relative to the forest landscape." (BA at 99.)

Again, this needs to be supported by a reference to the direction in the forest plan that requires this. However, there is nothing inherent in the definition of "fragmentation" that excuses temporary conditions.

The boilerplate rationale applied to aquatic species, resulting in a NLAA determination, is:

> "Affects to waterbodies with potential to support federally listed species, including designated critical habitat, will be analyzed as site specific projects are developed. The

> following determination is provided for projects disconnected from aquatic habitat and associated species."

It is not clear what the second sentence means, but analysis of the effects of the forest plan cannot be deferred to individual projects. The same "interpretation" also suggests that, "This guidance has not been changed in the forest plan amendment." That is irrelevant, since consultation is occurring on the "Plan as amended." All effects must be considered. This approach belies the supposed concern for these aquatic species that is being used to justify this amendment.

For the Kentucky arrow darter, the BA says:

> "The Daniel Boone National Forest entered into a Candidate Conservation Agreement (CCA) with USFWS to promote conservation of the Kentucky arrow darter. The CCA principles are used to guide conservation of Kentucky arrow darter on Daniel Boone National Forest." (BA at 64.)

Candidate conservation agreements are not a substitute for forest plan components, which are the subject of this consultation. The ESA analysis must assume these requirements are not met by the forest plan. If they are necessary to conserve the species, they must be in the forest plan (and then they could be consulted on).

For listed plant species, the effects determination in the EA is "a small, unlikely possibility of nonnative invasive plant species or fire affecting the habitat or plants, but the possibility would be addressed site specifically." Adverse effects of a proposed action can be ignored only if they are insignificant or discountable. The fact that there would be a subsequent consultation is irrelevant to this determination.

B. The Forest Service must engage in Section 7 consultation for listed species or critical habitat that may be affected by the Proposed Amended DBNF Plan.

Section 7(a)(2), 16 U.S.C. § 1536(a)(2), mandates that the U.S. Forest Service, in consultation with the U.S. Fish and Wildlife Service ("FWS"), must insure that any action it authorizes, funds, or carries out is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The Draft EA indicates that a number of species listed as endangered or threatened pursuant to the Endangered Species Act may be affected by the proposed Plan Amendments. Therefore, the Forest Service must comply with its section 7(a)(2) obligations in taking any final agency action to amend the Plan.

To comply with its ESA section 7(a)(2) obligations, the Forest Service must first determine whether its action "may affect" each listed species or critical habitat for that species present in the action area. 50 C.F.R. § 402.14. If it determines that its proposed action will not affect certain listed species

or critical habitats, it is not obligated to consult further with the FWS for those species. 50 C.F.R. § 402.14. The threshold for triggering consultation is low. 50 C.F.R. §§ 402.13, 402.14; see also *House v. U.S. Forest Serv.*, 974 F. Supp. 1022, 1028–29 (E.D. Ky. 1997) (explaining process); *Heartwood v. Kempthorne*, 302 Fed. App'x. 394, 395 (6th Cir. 2008) (same).

To complete informal consultation, the Forest Service must determine, with the written concurrence of the FWS, that the action is not likely to adversely affect listed species or critical habitat. 50 C.F.R. § 402.13(a). If the action is likely to adversely affect any listed species or designated critical habitat, the Forest Service and the FWS must proceed to formal consultation for those species. *Id.* § 402.14. To complete formal consultation, if it determines that the Forest Service action is not likely to result in jeopardy or destruction or adverse modification of critical habitat, the FWS must issue a biological opinion, explaining how the proposed action will affect the listed species or habitat, together with an incidental take statement and any reasonable and prudent measures necessary to avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. §§ 402.14(g)–(i). If the FWS, however, determines that the action is likely to jeopardize the species or result in the destruction or adverse modification of critical habitat, it "shall suggest those reasonable and prudent alternatives which [it] believes" would not result in jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3). By regulation, formal consultation must conclude within ninety days after its initiation unless the action agency and the consulting agency mutually agree to extend the consultation for a specific time period. *Id.* § 402.14(e).

Throughout the consultation process, both the Forest Service and FWS must use "the best scientific and commercial data available." *See* 16 U.S.C. § 1536(a)(2). Once the Forest Service has initiated consultation, ESA Section 7(d) prohibits it from making "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [ESA Section 7(a)(2)]." 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

Because the duty to avoid jeopardy continues as long as an agency has discretionary control over its action, the Forest Service is required to reinitiate (and FWS must request it to reinitiate) consultation under four circumstances prescribed by regulation:

> (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
> (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

C. The Forest Service must satisfy requirements under ESA Section 7 for all listed species or critical habitat that may be affected by the proposed amended DBNF Plan.

The Forest Service must meet its ESA Section 7 responsibilities for all listed species or critical habitat that may be affected by the proposed amendments to the DBNF Plan, regardless of whether the species were listed or the habitats were designated before or after the existing DBNF FMP was signed in 2004. When the revised DBNF FMP was developed in 2004, the agencies engaged in consultation and FWS issued a biological opinion on the effects of the FMP on the Indiana bat.[1] In 2007, the Forest Service reinitiated consultation regarding new biological information for the Indiana bat and range-wide incidental take issued for the species in other biological opinions.[2]

Since then, a number of species occurring in the DBNF have received ESA protections:

DBNF Species Listed or Currently Under Review Since 2004

Species	**Listing Date**	**Status**
Cumberland darter (*Etheostoma susanae)*	09/08/2011	Endangered
Snuffbox (*Epioblasma triquetra)*	03/15/2012	Endangered
Sheepnose (*Plethobasus cyphyus)*	04/12/2012	Endangered
Rabbitsfoot (*Quadrula cylindrica)*	10/17/2013	Threatened
Fluted Kidneyshell (*Ptychobranchus subtentum)*	10/28/2013	Endangered
Northern long-eared bat (*Myotis septentrionalis)*	05/04/2015	Threatened
White fringeless orchid (*Platanthera integrilabia)*	10/13/2016	Threatened
Kentucky arrow darter (*Etheostoma spilotum)*	11/04/2016	Threatened
Rockcastle aster (*Eurybia saxicastellii)*	As of 3/26/19	Under Review

Draft EA, app. B, tbl. B1. Moreover, 39 units of critical habitat in DBNF have been designated since 2004. *See* Draft EA, app. B, tbl. B2.

The Forest Service must fully comply with its ESA section 7(a)(2) obligations with respect to all listed species and designated critical habitat that may be affected by the proposed amended DBNF forest plan. The Forest Service is not relieved of its duty to comply with the ESA section 7(a)(2) consultation obligations here by Congress' recent amendment to NFMA to alter the Forest Service's obligations to reinitiate consultation on an approved forest plan when new species are listed. *See* Consolidated Appropriations Act, Pub. L. No. 115-141 § 208(a) (2018). This amendment does not relieve the Forest Service of this duty to engage in consultation when a Forest Plan is amended, as is

[1] *See* Letter from Virgil Lee Andrews, Jr., Field Supervisor, FWS to Robert T. Jacobs, Regional Forester, Forest Service re "FWS #04-0227; Final Biological Opinion on implementation of the revised Land and Resource Management Plan and its effects on the Indiana bat, Daniel Boone National Forest, Kentucky" (Mar. 20, 2004).
[2] Letter from Virgil Lee Andrews, Jr., Field Supervisor, FWS to Charles L. Meyers, Regional Forester, Forest Service re "FWS #07-B-0580; Revised Final Biological Opinion on implementation of the revised Land and Resource Management Plan and its effects on the Indiana bat, Daniel Boone National Forest, Kentucky (Apr. 3, 2007).

contemplated here. 16 U.S.C. § 1604(d)(2)(C), (d)(2)(C)(ii), (d)(2)(C)(ii)(II) ("Nothing in this paragraph affects any applicable requirement of the Secretary to consult with the head of any other Federal department or agency… with respect to… an amendment or revision to a land management plan…").

We appreciate the opportunity to comment at this time and are grateful for the extended comment period to allow for us to provide more substantive comments. We look forward to engaging further in this Plan Amendment process and wish to be added to your list for any future correspondence related to this matter. If you have any questions or require any further explanation of our comments or concerns, please feel free to contact me directly.

Respectfully submitted,

Ben Prater
Director Southeast Program
Defenders of Wildlife
828-412-0981
bprater@defenders.org