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First name: Stan

Last name: Van Velsor

Organization: The Wilderness Society

Title:

Comments: Please accept our scoping comments on the Notice of Intent to prepare an Environmental Impact Statement on the proposal to designate over-snow vehicle use on NFS lands within the Stanislaus National Forest.

August 10, 2015

Phyllis Ashmead, on behalf of Jeanne Higgins Stanislaus National Forest

19777 Greenley Road

Sonora, CA 95370

Submitted via email & project webpage

Re: Scoping Comments on Stanislaus National Forest Over-Snow Vehicle Use Designation Proposed Action

The Forest Service's new rule governing over-snow vehicle (OSV) use requires national forests with adequate snowfall to designate and display on an "over-snow vehicle use map" specific areas and routes

where OSV use is permitted based on resource protection needs and other recreational uses.<sup>1</sup> Implemented correctly, the rule presents an important opportunity enhance quality recreation opportunities for both motorized and non-motorized users, protect wildlife during the vulnerable winter season, prevent avoidable damage to key conservation lands and forest resources, and restore balance to the winter backcountry.<sup>2</sup>

The Stanislaus is one of the very first national forests to undergo winter travel management planning under the new OSV rule. To ensure rule implementation is off to the right start and avoid the specter of litigation that has plagued summer-time travel management planning, it is critical that the Stanislaus's OSV plan satisfies the Forest Service's substantive legal duty to locate areas and trails designated as open to OSV use to minimize resource damage and conflicts with the majority of winter visitors enjoying non-motorized, quiet forms of recreation.<sup>3</sup> Unfortunately, as detailed below, the Stanislaus's proposed action and OSV planning process to-date fall short of what is required to comply with that duty and with the plain language of the final OSV rule.

1 36 C.F.R. part 212, subpart C, 80 Fed. Reg. 4500 (Jan. 28, 2015).

2 Currently, approximately 94 million acres within national forests that receive regular snowfall are open to OSV use, while only about 30 million acres outside of designated wilderness (where motorized uses are prohibited by statute) are closed to that use. Winter Wildlands Alliance, Winter Recreation on National Forest Lands, p. 4 & Fig. 3 (2015), available at <http://winterwildlands.org/wp-content/uploads/2015/06/2015-Winter-Rec-Report.pdf> and attached. According to the Forest Service, the status quo on the Stanislaus National Forest is similar, with approximately 59% of the forest currently open to cross-country OSV use. Proposed Action, p. 5 (OSV use allowed on 532,696 of 900,106 acres under existing management). That number is inflated, however, as it includes Near Natural and other areas closed to motorized uses under the governing Forest Plan but for which the agency never issued specific closure orders, as well as low-elevation and steep-terrain areas unsuitable for OSV use. Proposed Action, pp. 6, 9.

3 According to recent Forest Service National Visitor Use Monitoring data, the Stanislaus sees an average of 10,139

cross-county ski visits per year, but only 2,928 snowmobile visits per year.

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I. The Forest Service must conduct travel analysis to inform its proposed action

Current Forest Service directives governing travel management planning require the agency to conduct travel analysis to inform its decision-making.<sup>4</sup> Travel analysis must be completed prior to formulation of a proposed action and should “form the basis for proposed actions related to designation of roads, trails, and areas for motor vehicle use.”<sup>5</sup> More specifically, travel analysis is designed to “[i]dentify management opportunities and priorities[,] formulate proposals for changes[,] . . . [c]ompare motor vehicle use . . . with desired conditions

established in the applicable land management plan, and describe options for modifying the forest transportation system that would achieve desired conditions.”<sup>6</sup> The Stanislaus, however, appears to have skipped this critical step in the process and instead developed a proposed action that largely rubber stamps the status quo for OSV management and in some instances erodes existing protections. Given that the proposed action is not informed by travel analysis (and has other infirmities that are described below), the Forest Service should conduct travel analysis and then modify its proposed action as necessary to reflect that analysis and to satisfy the other requirements of the OSV rule.

## II. The Forest Service may not designate vast open areas wherever OSV use is “not otherwise prohibited”

The Stanislaus’s proposed action would designate 141,073 acres, or about 15% of the forest, as open to cross-country OSV use. While we are pleased to see a reduction in the acreage open to cross-country travel, the Forest Service’s approach of locating those open areas “in any part of the Stanislaus National Forest where OSVs are not otherwise prohibited” is improper.<sup>7</sup>

First, it relies on superseded language from the draft rule – that OSV use be “designated as allowed, restricted, or prohibited” – to sanction an improper “open unless designated closed” approach. The Forest Service specifically rejected such an approach in its final rule, which requires the agency to “designate” areas and routes for OSV use and prohibits OSV use outside of the designated system.<sup>8</sup> In other words, the final rule requires forests to make OSV designations under a consistent “closed unless designated open” approach and not to designate areas as open essentially by default.<sup>9</sup> To the extent the

4 See generally Forest Service Handbook (FSH) 7709.55, chs. 10 & 20; Forest Service Manual (FSM) 7712 & 7715.

5 See FSH 7709.55, §§ 13(3) & 21.6; FSM 7715.03(2).

6 FSH 7709.55, § 21.5.

7 Proposed Action, p. 6. As we noted above in note 2, however, the purported reduction in open acreage is artificially inflated and misleading.

8 See 36 C.F.R. §§ 212.80(a), 212.81(a), 261.14.

9 Recognizing that the draft rule would have permitted inconsistent management approaches, with corresponding confusion among users and enforcement difficulties, the Forest Service in the final rule determined that “it would be clearer for the public and would enhance consistency in travel management planning and decision-making if the Responsible Official were required to designate a system of routes and areas where OSV use is prohibited unless allowed” (i.e., marked open on a map). 80 Fed. Reg. at 4507.

Stanislaus proposes to designate as open all areas where OSVs are not otherwise prohibited, that approach also violates the rule’s requirement to identify and delineate discrete open areas.<sup>10</sup>

To comply with the plain language of the final rule, the Stanislaus must abandon the approach articulated in its proposed action. Rather than leaving portions of the forest open by default, the Forest Service should look closely at the entire forest and designate as open only those discrete, delineated areas that are appropriate for cross-country OSV use and minimize environmental damage and conflicts with other recreational uses, as described below. All other areas that are not determined to be appropriate for open designation then must be closed, thus moving the forest into the required “closed unless designated open” management regime.

## III. The Forest Service must apply the minimization criteria to actually minimize impacts when designating each area and trail open to OSV use

### A. Background

In response to the growing use of dirt bikes, snowmobiles, all-terrain vehicles, and other off-road vehicles (ORVs) and the corresponding environmental damage, social conflicts, and public safety concerns, Presidents Nixon and Carter issued Executive Orders 11,644 and 11,989 in 1972 and 1977, respectively, requiring federal land management agencies to plan for ORV use based on protecting resources and other uses.<sup>11</sup> When designating areas or trails available for ORV use, agencies must locate them to:

- (1) minimize damage to soil, watershed, vegetation, or other resources of the public lands;
- (2) minimize harassment of wildlife or significant disruption of wildlife habitats; and
- (3) minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands.<sup>12</sup>

The Forest Service codified these “minimization criteria” in subparts B and now C of its travel management regulations.<sup>13</sup> The agency has struggled, however, to properly apply the criteria in its travel management decisions, leading to a suite of federal court cases invalidating Forest Service travel management plans – including the Stanislaus’ 2009 plan.<sup>14</sup> Collectively, these cases confirm the Forest Service’s substantive legal obligation to meaningfully apply and implement – not just identify or consider

10 36 C.F.R. § 212.1 (“Area” defined as “[a] discrete, specifically delineated space that is smaller . . . than a Ranger District.”).

11 Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972), as amended by Exec. Order No. 11989, 42 Fed. Reg.

26,959 (May 24, 1977).

12 Exec. Order No. 11644, § 3(a).

13 36 C.F.R. §§ 212.55, 212.81(d).

14 See *WildEarth Guardians v. U.S. Forest Serv.*, ---F.3d---, No. 12-35434, 2015 U.S. App. LEXIS 10447, at \*26-33 (9th Cir. June 22, 2015); *Friends of the Clearwater v. U.S. Forest Serv.*, No. 3:13-CV-00515-EJL, 2015 U.S. Dist. LEXIS

30671, at \*37-52 (D. Idaho Mar. 11, 2015); *The Wilderness Soc’y v. U.S. Forest Serv.*, No. CV08-363-E-EJL, 2013 U.S. Dist. LEXIS 153036, at \*22-32 (D. Idaho Oct. 22, 2013); *Cent. Sierra Envtl. Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1094-98 (E.D. Cal. 2013); *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1071-74 (D. Idaho 2011).

–the minimization criteria when designating each area and trail, and to show in the administrative record how it did so.

It has been over four decades since President Nixon first obligated the Forest Service to minimize impacts associated with ORV use, including snowmobiles. Yet the agency has systematically failed to do so. In the meantime, irresponsible and mismanaged ORV use continues to degrade soil, air, and water quality, threaten imperiled wildlife species, and diminish the experience of the majority of public lands visitors who enjoy the natural landscape through quiet, non-motorized forms of recreation.

As one of the first forests to implement the new OSV rule, it is important that the Stanislaus properly apply and implement the minimization criteria and ensure that the agency’s repeated failures in the summer-time travel planning context are not a harbinger for winter travel planning. The following discussion describes in more detail how the Forest Service must apply the minimization criteria to designate areas and trails for OSV use that minimize impacts to vulnerable wildlife and the majority of national forest visitors seeking to enjoy nature free from noise and pollution.

## B. Proper application of the minimization criteria

The executive orders require the Forest Service to minimize impacts – not just identify or consider them –when designating areas or trails for OSV use, and to demonstrate in the administrative record how it did so. As the Ninth Circuit Court of Appeals recently held, “[w]hat is required is that the Forest Service document how it evaluated and applied [relevant] data on an area-by-area [or route-by-route] basis with the objective of minimizing impacts as specified in the [Travel Management Rule].”<sup>15</sup> To satisfy its substantive duty to minimize impacts, the Forest Service must apply a transparent and common-sense methodology for meaningful application of each minimization criterion to each area and trail being considered for designation. That methodology must include several key elements.

First, proper application of the minimization criteria is not solely an office exercise. Rather, the Forest Service must get out on the ground, gather site-specific information, and actually apply the criteria to minimize resource damage and user conflicts associated with each designated area and route.<sup>16</sup>

<sup>15</sup> WildEarth Guardians, ---F.3d---, 2015 U.S. App. LEXIS 10447, at \*29; see also *id.* at \*32 (“consideration” of the minimization criteria is insufficient; rather, the agency “must apply the data it has compiled to show how it designed the areas open to snowmobile use ‘with the objective of minimizing’” impacts). Importantly, efforts to mitigate impacts associated with a designated OSV system are insufficient to fully satisfy the duty to minimize impacts, as specified in the executive orders. See Exec. Order 11,644, § 3(a) (“Areas and trails shall be located to minimize” impacts and conflicts.). Thus, application of the minimization criteria should be approached in two steps: first, the agency locates areas and routes to minimize impacts, and second, the agency establishes site-specific management actions to further reduce impacts. Similarly, the Forest Service may not rely on compliance with the relevant forest plan as a proxy for application of the minimization criteria because doing so conflates separate and distinct legal obligations. See *Friends of the Clearwater*, 2015 U.S. Dist. LEXIS 30671, at \*46 (“Merely concluding that the proposed action is consistent with the Forest Plan does not . . . satisfy the requirement that the Forest Service provide some explanation or analysis showing that it considered the minimizing criteria and took some action to minimize environmental damage when designating routes.”).

<sup>16</sup> See, e.g., *Idaho Conservation League*, 766 F. Supp. 2d at 1074-77 (invalidating travel management plan that failed to utilize monitoring and other site-specific data showing resource damage).

Second, effective application of the minimization criteria must include meaningful opportunities for public participation and input early in the planning process.<sup>17</sup> In many cases, public lands users and other stakeholders are the best source of information for identifying resource and user conflicts. We have identified some of those conflicts on the Stanislaus throughout these comments. The Central Sierra Environmental Resource Center (CSERC) and Snowlands Network and Winter Wildlands Alliance have identified other conflicts in their respective comment letters.

Third, application of the minimization criteria should be informed by the best available scientific information and associated strategies and methodologies for minimizing impacts to particular resources.<sup>18</sup> Winter Wildlands Alliance recently published a comprehensive literature review and best management practices (BMPs) for OSV use on national forests.<sup>19</sup> The BMPs provide guidelines, based on peer-reviewed science, for OSV designation decisions that are intended to minimize conflicts with other winter recreational uses and impacts to wildlife, water quality, soils, and vegetation. The Forest Service should incorporate these BMPs into its winter travel planning decisions. In addition to generalized BMPs, application of the minimization criteria should incorporate any site- or resource-specific scientific information or analysis. For example, to effectively minimize the significant noise impacts associated with OSV use, the Forest Service should conduct soundscape modeling and incorporate the results of that modeling into its decision-making.<sup>20</sup> Other site- or resource-specific information might include, for example, air quality modeling or monitoring; wildlife population, habitat, or monitoring data; or visitor

use data.

Fourth, proper application of the minimization criteria must address both site-specific and larger-scale impacts.<sup>21</sup> For example, the Forest Service must assess and minimize landscape-scale impacts such as habitat fragmentation; cumulative noise, and air and water quality impacts; and degradation of wilderness-quality lands and associated opportunities for primitive forms of recreation. The agency also must assess and minimize site-specific impacts to soils, vegetation, water, and other public lands resources, sensitive wildlife habitat, and important areas for non-motorized recreation.

Fifth, the Forest Service should account for predicted climate change impacts in its application of the minimization criteria and designation decisions.<sup>22</sup> Already climate change is leading to reduced and less

<sup>17</sup> See 36 C.F.R. § 212.52(a).

<sup>18</sup> See *Friends of the Clearwater*, 2015 U.S. Dist. LEXIS 30671, at \*24-30, 40-52 (invalidating route designations that failed to consider best available science on impacts of motorized routes on elk habitat effectiveness or to select routes with the objective of minimizing impacts to that habitat and other forest resources).

<sup>19</sup> Winter Wildlands Alliance, *Snowmobile Best Management Practices for Forest Service Travel Planning: A Comprehensive Literature Review and Recommendations for Management* (Dec. 2014), available at <http://winterwildlands.org/wp-content/uploads/2015/02/BMP-Report.pdf> and attached.

<sup>20</sup> See, e.g., *Snowmobile Best Management Practices*, pp. 6-7 (describing noise simulation modeling used in Yellowstone National Park).

<sup>21</sup> See, e.g., *Idaho Conservation League*, 766 F. Supp. 2d at 1066-68, 1074-77 (invalidating travel plan that failed to consider aggregate impacts of short motorized routes on wilderness values or site-specific erosion and other impacts of particular routes).

<sup>22</sup> See, e.g., 77 Fed. Reg. 77,801, 77,828-29 (Dec. 24, 2014) (Council on Environmental Quality's revised draft guidance on consideration of climate change in NEPA states: "Climate change can increase the vulnerability of a resource, ecosystem, human community, or structure, which would then be more susceptible to climate change

reliable snowpack and increasing the vulnerability of wildlife, soils, and water resources to disturbance, compaction, and pollution impacts associated with OSV use.<sup>23</sup>

Sixth, application of the minimization criteria must take into account available resources for monitoring and enforcement of the designated system.<sup>24</sup> To ease enforcement obligations and ensure user compliance in the first place, OSV designation decisions should establish clear boundaries and simple, consistent restrictions designed to minimize resource damage and user conflicts.

Finally, the Forest Service should consider whether to designate areas or trails by "class of vehicle" and/or "time of year," as provided for in the OSV rule.<sup>25</sup> That provision allows forests to tailor their designation decisions to account for snowfall patterns and different and evolving OSV technologies, and to minimize corresponding social and environmental impacts.

### C. Area designations

The Forest Service's substantive duty to minimize impacts associated with OSV use applies to both area and route designations. Minimization of impacts associated with OSV area allocations is particularly important because the OSV rule permits the Forest Service to designate larger areas open to cross-country travel than in the summer-time travel planning context. As the Ninth Circuit recently held, the Forest Service must "apply the minimization criteria to each area it designate[s] for snowmobile use" and "provide a . . . granular minimization analysis to fulfill the objectives of Executive Order 11644."<sup>26</sup> Importantly, the agency "cannot rely upon a forest-wide reduction in the total area open to snowmobiles as a basis for demonstrating compliance with the minimization criteria," which are "concerned with the effects of each particularized area."<sup>27</sup> The agency is "under

an affirmative obligation to actually show that it aimed to minimize environmental damage when designating . . . areas.”<sup>28</sup>

Under these standards, the Stanislaus’ proposal to designate 141,073 acres as open to OSV use is problematic.<sup>29</sup> We are particularly concerned with the proposal to designate as open 13,623 acres in the Eagle/Night and Pacific Valley Near Natural Areas. Broadly speaking, these and other roadless areas provide a host of environmental and social benefits – including clean air and water, critical wildlife

and other effects and result in a proposed action’s effects being more environmentally damaging. . . . Such considerations are squarely within the realm of NEPA, informing decisions on whether to proceed with and how to design the proposed action so as to minimize impacts on the environment, as well as informing possible adaptation measures to address these impacts, ultimately enabling the selection of smarter, more resilient actions.”).

23 See Snowmobile Best Management Practices, pp. 4-5, 10, 13.

24 See *Sierra Club v. U.S. Forest Serv.*, 857 F. Supp. 2d 1167, 1176-78 (D. Utah 2012) (NEPA requires agency to take a hard look at the impacts of illegal motorized use on forest resources and the likelihood of illegal use continuing under each alternative).

25 36 C.F.R. § 212.81(a).

26 *WildEarth Guardians*, ---F.3d---, 2015 U.S. App. LEXIS 10447, at \*27-28.

27 *WildEarth Guardians*, ---F.3d---, 2015 U.S. App. LEXIS 10447, at \*32-33.

28 *WildEarth Guardians*, ---F.3d---, 2015 U.S. App. LEXIS 10447, at \*31-32 (quotations and citations omitted).

29 As described above, the proposed action also conflicts with the plain language of the new rule, which requires the agency to follow a “closed unless designated open” approach and to specifically delineate discrete open areas.

habitat, climate refugia, and opportunities for primitive, non-motorized forms of recreation – and serve as the cornerstones for ecological integrity, conservation biology, and climate change adaptation in our national forests.<sup>30</sup> Given their importance, a number of laws and policies obligate the Forest Service to consider managing roadless lands for conservation purposes and to preserve their wilderness character and associated benefits.<sup>31</sup>

The Eagle/Night and Pacific Valley Near Natural Areas serve important ecological and social roles on the Stanislaus National Forest. The Eagle/Night Area is adjacent to the Emigrant Wilderness and encompasses two Inventoried Roadless Areas, while the Pacific Valley Area borders the Carson-Iceberg Wilderness and encompasses segments of eligible and proposed Wild and Scenic Rivers.<sup>32</sup> The Pacific Valley Area in particular “presents a unique opportunity to provide an outstanding area for semi- primitive non-motorized (SPNM) recreation outside of the designated Wilderness system” and represents “perhaps the best opportunity for this type of recreation area in the Sierra Nevada.”<sup>33</sup> To retain the areas’ primitive characteristics, the 1991 forest plan allocated them as “Near Natural,” semi- primitive non-motorized, areas.<sup>34</sup> Thus, the areas are managed to emphasize “a natural appearing landscape in a non-motorized setting” and pursuant to forest-wide standards and guidelines for “Closed Motor Vehicle Travel Management.”<sup>35</sup> The management direction for Near Natural Areas also emphasizes protections for wildlife habitat, including giving “special attention to Fisher and pine marten habitat areas over 7000 feet elevation.”<sup>36</sup> Accompanying maps in the plan show that the portions of the Eagle/Night and Pacific Valley Near Natural Areas proposed for OSV use overlap completely or significantly with fisher and/or marten habitat.<sup>37</sup>

Despite the clear direction in the forest plan, the Forest Service apparently has failed to enforce these areas’ non-motorized settings and, based on “historic” and illegal use, now proposes to officially open portions of them to OSV use. This proposal is contrary to governing forest plan direction,<sup>38</sup> rewards illegal and irresponsible behavior, and, if adopted by the agency, almost certainly will violate the executive order minimization criteria. Absent robust application of the minimization criteria and a showing that allowing cross-country travel in those areas in fact minimizes resource damage and

30 See, e.g., 66 Fed. Reg. 3244, 3245-47 (Jan. 12, 2001) (preamble to Roadless Area Conservation Rule describing host of key ecosystem and other services of roadless forest lands); The Wilderness Society, Transportation Infrastructure and Access on National Forest Lands and Grasslands: A Literature Review (May 2014) (describing the values of roadless lands and the adverse impacts of roads and access allowed by road networks to terrestrial and aquatic systems) (attached).

31 See Sections IV & V below.

32 Stanislaus National Forest, Forest Plan Direction, pp. 119-20 (April 2010).

33 Stanislaus National Forest, Land and Resource Management Plan, Record of Decision, p. 28 (Oct. 28, 1991).

34 Stanislaus Forest Plan Direction, pp. 119-20.

35 Stanislaus Forest Plan Direction, pp. 53, 119, and 121.

36 Stanislaus National Forest, Land and Resource Management Plan and Environmental Impact Statement, p. IV- 108 (Oct. 28, 1991) (Forest Plan FEIS).

37 Forest Plan FEIS, Map 3, Appendix I.

38 We discuss in Section V below the agency's obligations under the 2012 National Forest System Land Management Planning Rule for amending current forest plan direction to remedy this inconsistency. Absent a plan

amendment, a decision to the Near Natural Areas to OSV use would violate the National Forest Management Act's consistency provision, 16 U.S.C. § 1604(i).

conflicts with other recreational uses and identified wildlife habitat, designating portions of Near Natural Areas as open to OSV use will violate the agency's substantive legal obligations under Executive Order 11644.

In addition to closure of the Near Natural Areas, we support the proposals submitted by CSERC and by Snowlands Network and Winter Wildlands Alliance to close important non-motorized winter recreation areas, habitat for at-risk furbearer and listed amphibian species, and areas that encourage trespass into designated or recommended wilderness and other non-motorized areas. Beyond the specific areas identified for closure in those proposals, the Forest Service also must apply the minimization criteria to any and all other discrete, specifically delineated areas being considered for designation as open to OSV use.

With respect to non-motorized winter recreation, the noise, air quality, viewshed, and other impacts associated with OSV use can greatly diminish the experience of non-motorized users.<sup>39</sup> To satisfy the executive order requirement to minimize those conflicts, areas of high value for non-motorized winter recreation should be closed to OSV travel. Importantly, these areas may occur across all Recreation Opportunity Spectrum categories, including roaded natural, rural, and urban areas that may have a wholly different character in the winter and provide excellent winter recreation opportunities. The proposed alternative submitted by Snowlands Network and Winter Wildlands Alliance focuses on identifying high-value non-motorized winter recreation areas.

OSV use can have significant adverse impacts on a number of wildlife species.<sup>40</sup> To satisfy the executive order requirement to minimize harassment of wildlife and disturbance to wildlife habitat, important wildlife habitat – which may include nesting and denning areas, ungulate winter range, migratory corridors, watersheds/waterbodies containing important spawning habitat, designated or proposed critical habitat, and habitat identified in a recovery plan – should be closed to OSV travel. The comments and proposed alternative submitted by CSERC focus on identifying conflicts with at-risk furbearer and imperiled amphibian species.

#### D. Trail designations

The Stanislaus' proposed action would rubber stamp the status quo by designating 58 miles of groomed trails, as well as adding another 98 miles of ungroomed designated OSV trails. Under the plain terms of the executive orders, the Forest Service must apply the minimization criteria to all trails designated for OSV use – even if those trails are located in areas of the forest that would be designated as open to cross-country OSV use.<sup>41</sup> When



designated and placed on a map, trails focus the impacts of OSV use to

39 See Snowmobile Best Management Practices, pp. 5-8.

40 See Snowmobile Best Management Practices, pp. 9-12.

41 According to the map of the proposed action, it appears that at least some of the trails proposed for designation are located in areas of the Stanislaus that would be open to cross-country OSV use. Unfortunately, the map is

exceedingly difficult to interpret and appears not to depict the 98 miles of proposed ungroomed trails. Without that information, it is impossible for the public to effectively comment on the proposal and identify potential conflicts between the proposed trails and sensitive resources or other recreational uses, which the agency is obligated to minimize. Moreover, as described in CSERC's comments, there appears to be some question about

those locations and generally increase the number of OSV users visiting the area. This is particularly true of groomed trails within areas otherwise open to cross-country travel. Groomed trails are desirable for traveling faster and further into remote areas. In addition, grooming often results in widening the footprint of the trail. The widened trail is then used in summer by wheeled motorized vehicles resulting in other impacts and conflicts. Moreover, the impacts associated with OSV use on designated trails extend beyond the trail corridor itself. As part of applying and implementing the minimization criteria, the Forest Service must address noise, air quality, habitat fragmentation, and other landscape-scale impacts associated with trail use. This is especially important on the Stanislaus where many trails proposed for designation are located adjacent or in close proximity to designated or recommended Wilderness and other key conservation and wildlife habitat areas, and may facilitate trespass into those areas.

To satisfy the minimization criteria, the Forest Service should make its route designations based on the following best management practices, which are addressed in the attached Snowmobile Best Management Practices report:

- Locate designated routes away from the high-value and sensitive resource areas
- Not exceed motorized route density thresholds based on best available scientific information in suitable habitat for relevant wildlife
- Locate routes to maintain large un-fragmented, undisturbed, and connected blocks of habitat where OSV use is prohibited
- Allocate unplowed roads fairly between designated OSV routes and non-motorized routes closed to OSV use
- Where necessary to designate an OSV route through a non-motorized area, locate and manage the route to minimize disturbance by imposing speed and idling limitations and ensuring that use is restricted to the trail itself
- Locate routes designated within open areas – especially groomed routes – to minimize environmental damage and conflicts with other recreational uses

#### E. Minimum snow depth

Minimum snow depth restrictions can be an important tool in further minimizing impacts associated with OSV area and trail designations – particularly with climate change leading to reduced and less reliable snowpack. The best available science shows that minimum snow depths should be at least 18 inches for cross-country travel and 12 inches for travel on groomed trails.<sup>42</sup> We are pleased to see the Stanislaus' proposal to prohibit OSV use absent "continuous and supportable snow covering the landscape at 5,000 feet in elevation and above."<sup>43</sup> This is consistent with the stated purpose of the

whether the forest is proposing to designate additional miles of ungroomed routes – beyond the 98 miles identified in the Proposed Action – in areas designated as open to cross-country travel. The agency is obligated to identify any such routes and apply and implement the minimization criteria prior to designating them.

42 See Snowmobile Best Management Practices, p. 14 (Inyo, Sequoia, and Sierra National Forests proposing a minimum snow depth of 18 inches in their revised forest plans to protect forest resources).

project to, among other things, “ensur[e] that OSV use occurs where there is adequate snow.”<sup>44</sup> The proposed minimum depth of 12 inches, however, is insufficient to minimize impacts to water quality, soils, and vegetation and to buffer for variable snow conditions (e.g., while a shaded trailhead may have 12 inches of snow, south-facing slopes further up the trail may have little or no snow). In addition to increasing its minimum snow depths to those supported by the best available science, the Forest Service should address its plans to enforce minimum snow depth restrictions, including protocols for monitoring the required “continuous and supportable snow cover,” communicating conditions to the public, and implementing emergency closures when snowpack falls below the relevant thresholds.

While there may be instances where a larger minimum snow depth (in excess of the 18 inches supported by the best available scientific information) is an important tool in buffering impacts associated with OSV use, this form of mitigation is not a substitute for application and implementation of the minimization criteria, which requires areas and trails to be located to minimize impacts in the first instance. Accordingly, the Stanislaus’ proposal to permit cross-country OSV use in the sensitive Stanislaus Meadow pursuant to a 24-inch minimum snow depth is inappropriate. As explained in more detail in CSERC’s comments, the meadow is a critical breeding area for the Sierra Nevada yellow-legged frog, and must be closed to OSV use to minimize impacts to that imperiled species.

#### F. Other mitigation measures and best management practices

To further minimize impacts associated with area and route designations, the Forest Service should incorporate the following mitigation measures and best management practices into its OSV use plan, which are addressed in the attached Snowmobile Best Management Practices report:

- Encourage, incentivize, or require Best Available Technology for OSV noise and emissions controls, particularly in sensitive or high-conflict areas.
  - Where possible, designate separate trailhead/parking/staging areas for OSV open areas and high-demand OSV routes, and locate those areas away from the high-value and sensitive resource areas described above. Separate motorized and non-motorized trailheads should be established where possible in shared use areas.
  - Clearly identified season of use restrictions based on wildlife needs, water quality considerations, average snow depth figures, and other relevant information, with those restrictions serving as bookends, and minimum snow depth requirements providing an additional limitation on use.
  - Require minimum snow depths of at least 12 inches for OSV travel on designated trails and at least 18 inches for off-trail OSV travel, or sufficient depth to protect water quality, soils, and vegetation. Minimum snow depths should be consistent throughout the region to avoid enforcement difficulties.
  - Ensure adequate design and maintenance of designated routes, including bridges, culverts, and roadbed to reduce hydrological and erosion impacts during spring run-off.
  - Restrict use by class or type of OSV as necessary to minimize impacts.
- 
- Provide public education and outreach.
  - Monitor and enforce closed routes and areas, seasonal restrictions, and minimum snow depths. Minimum snow depths should be reported regularly on the forest website, with measurements taken at established locations that are representative of varying snow depths based on factors such as wind, orientation, slope, tree cover, etc.
  - Establish an adaptive management framework that utilizes monitoring to determine efficacy of current management.

## G. Integrating the minimization criteria with the NEPA process

Application of the minimization criteria under the executive orders and analysis of the direct, indirect, and cumulative impacts of a range of reasonable alternatives under NEPA should complement and reinforce one another. As discussed above, the executive orders require application of the minimization criteria to each designated area and route, and the corresponding NEPA analysis should analyze impacts associated with the entire system proposed for designation under each alternative – regardless of the extent to which that system is already reflected in current OSV management. As the Ninth Circuit Court of Appeals recently explained, “[a]lthough related, NEPA and [the minimization criteria] set forth separate requirements.”<sup>45</sup> In this case, the Stanislaus is proposing to designate OSV use for the indefinite future, and the impacts – both direct, indirect, and cumulative – from that authorization must be fully disclosed and analyzed.

In most cases, including on the Stanislaus, cross-country OSV travel has been allowed by default across vast portions of the national forests, with that use and its associated impacts never being subjected to a thorough NEPA analysis or application of the minimization criteria. The NEPA analysis for the travel plan must analyze – and minimize – the impacts of designations that allow continued OSV travel in those areas. Similarly, the Forest Service must analyze and minimize impacts associated with designating existing OSV routes that have not previously been subject to NEPA or the minimization criteria. This is, of course, in addition to analyzing and minimizing impacts associated with designating any new or previously unauthorized areas or trails, such as the proposal to open portions of several Near Natural Areas.

To facilitate this required analysis and comply with NEPA, the EIS must include an alternative under which no areas or routes would be designated as open to recreational OSV use.<sup>46</sup> This alternative is necessary to provide an accurate comparison for analysis of the impacts associated with all the area and route designations made in the winter travel plan – including those that allow continued OSV travel in existing areas or on existing routes. Unlike in a typical NEPA analysis where the no action alternative provides that baseline for comparison, the no action alternative for most winter travel planning efforts, including on the Stanislaus, reflects the current management status quo allowing cross-country OSV travel by default across vast portions of the forest. This is similar to the situation in Western Watersheds

<sup>45</sup> WildEarth Guardians, ---F.3d---, 2015 U.S. App. LEXIS 10447, at \*29 n. 11.

<sup>46</sup> Specially authorized or permitted OSV uses to, for example, access valid existing rights would still be allowed. See 36 C.F.R. § 212.81(a) (describing exempted uses).

Project v. Abbey, where the Ninth Circuit overturned a BLM NEPA analysis that failed to analyze an alternative that would eliminate grazing in the Missouri Breaks National Monument.<sup>47</sup> Absent such an alternative, and where both the no action and action alternatives permitted continued grazing, the court found that the agency was “operating with limited information on grazing impacts,” in violation of NEPA.<sup>48</sup> The same is true here, where an alternative that designates no areas or trails open to OSV use is necessary to facilitate a fully informed decision about the impacts of the action alternatives.

## IV. The proposed forest plan amendment will short-circuit and prejudice the upcoming forest plan revision process

The Stanislaus National Forest is currently scheduled to begin a comprehensive revision of its 1991 forest plan in 2016. Under the 2012 planning rule governing the revision process, the forest will be required to “[i]dentify and evaluate lands that may be suitable for inclusion in the National Wilderness Preservation System and determine whether to recommend any such lands for wilderness designation.”<sup>49</sup> The agency’s directives governing the wilderness inventory and evaluation process (Chapter 70 of Forest Service Handbook (FSH) 1909.12), require the forest to first conduct a comprehensive inventory of all roadless lands that may be suitable for wilderness designation and then evaluate the wilderness characteristics of those lands pursuant to the criteria in section 2(c)

of The Wilderness Act of 1964, 16 U.S.C. § 1131(c).<sup>50</sup> Based on the results of the evaluation and public input, the forest then must analyze in the EIS for the plan revision potential recommended wilderness areas, and ultimately decide whether to recommend any of those areas for wilderness designation.<sup>51</sup> Forest plans must “provide for . . . management of areas recommended for wilderness designation to protect and maintain the ecological and social characteristics that provide the basis for their suitability for wilderness designation.”<sup>52</sup> Complementing the wilderness inventory and evaluation process – and discussed in more detail in Section V below – are the substantive requirements of the 2012 planning rule to provide for ecological sustainability and integrity, species diversity, and sustainable recreation.<sup>53</sup> A robust network of conserved roadless lands, including designated and recommended wilderness, is a critical component of achieving those substantive requirements. The Chapter 70 directives are designed to facilitate creation of such a network through a transparent process with meaningful opportunities for public engagement and input.

47 719 F.3d 1035, 1050-53 (9th Cir. 2013).

48 See also, e.g., *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 708-11 (10th Cir.

2009) (invalidating NEPA analysis that failed to analyze an alternative that would close the entire area to oil and gas development because, “[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded”).

49 36 C.F.R. § 219.7(c)(2)(v).

50 FSH 1909.12, ch. 70, §§ 71-72.

51 FSH 1909.12, ch. 70, §§ 73-74.

52 36 C.F.R. § 219.10(b)(iv).

53 36 C.F.R. §§ 219.8-219.10.

The proposed amendment to the 1991 forest plan to permit OSV use in portions of the Eagle/Night and Pacific Valley Near Natural Areas, however, would undercut the upcoming forest plan revision and wilderness inventory process. Given their ecological importance, existing Near Natural Areas almost certainly will be identified through that process as the backbone of the forest’s strategy to provide for ecological integrity, species diversity, and sustainable recreation. The areas are likely to be key candidates for potential recommended wilderness or other conservation-oriented designations or management strategies. By legitimizing OSV use in those areas, the proposed amendment would short-circuit and prejudice the upcoming comprehensive planning process. OSV use and other motorized and mechanized modes of travel diminish an area’s wilderness potential and, once established, discourage the Forest Service and Congress from threatening motorized users’ expectations by recommending or designating the area as wilderness.<sup>54</sup>

The upcoming planning process is the appropriate place to make any decisions about the management of Near Natural and other important conservation areas. Thus, the forest should not pursue the proposed plan amendment as part of its OSV use designation project, and should abandon its proposal to open Near Natural Areas to OSV use unless and until the agency determines through the upcoming forest plan revision and Chapter 70 process that motorized use in those areas is appropriate.

V. The proposed forest plan amendment must satisfy the substantive and procedural requirements of the 2012 planning rule

Should the forest proceed with the proposed forest plan amendment, the amendment is subject to the 2012 planning rule provisions at 36 C.F.R. part 219, and not the provisions of the 1982 planning rule under which the current forest plan was developed.<sup>55</sup> Thus, the Forest Service must ensure that the amendment satisfies the substantive requirements of the 2012 planning rule. Those requirements include providing for ecological sustainability by “maintain[ing] or restor[ing]”: (a) “the ecological integrity of terrestrial and aquatic ecosystems

and watersheds,” including “structure, function, composition, and connectivity;” (b) air and water quality, soils and soil productivity, and water resources; and (c) “the ecological integrity of riparian areas,” including their “structure, function, composition, and connectivity.”<sup>56</sup> Plans also must provide for: (a) “the diversity of plant and animal communities;” (b) “the persistence of native species;” and (c) “the diversity of ecosystems and habitat types.”<sup>57</sup> In providing for social and economic sustainability, plans must account for “[s]ustainable

<sup>54</sup> See, e.g., Idaho Conservation League, *In Need of Protection: How Off-Road Vehicles and Snowmobiles Are Threatening the Forest Service’s Recommended Wilderness Areas* (2011) (providing examples where OSV use has diminished naturalness, opportunities for primitive and unconfined types of recreation, and ecological, geological, or other features of scientific, educational, scenic, or historical value within recommended wilderness) (attached); cf. *Mont. Wilderness Alliance v. McAllister*, 666 F.3d 549, 555-58 (9th Cir. 2011) (Forest Service failed to maintain wilderness character of wilderness study areas by ignoring impacts of increased motorized and mechanized recreational use on opportunities for solitude).

<sup>55</sup> 36 C.F.R. § 219.17(b)(2) (following a 3-year transition period that expired May 9, 2015, “all plan amendments must be initiated, completed and approved under the requirements of this part”).

<sup>56</sup> 36 C.F.R. § 219.8(a).

<sup>57</sup> 36 C.F.R. § 219.9.

recreation; including recreation settings, opportunities, and access; and scenic character.”<sup>58</sup> The decision document for the plan amendment “must include . . . [a]n explanation of how the plan components meet [those substantive] requirements.”<sup>59</sup> In satisfying the substantive requirements, the agency must “use the best available scientific information to inform the planning process.”<sup>60</sup>

As the Forest Service recognizes, the proposal to open portions of the Eagle/Night and Pacific Valley Near Natural Areas to OSV use will require an amendment to the 1991 forest plan, which prohibits motorized uses in those areas. As described above, these areas encompass key roadless and other conservation lands and resources, provide important habitat and corridors for sensitive wildlife species, offer unique, high-quality opportunities for primitive, non-motorized recreation, and may be key candidates for recommended wilderness in the upcoming forest plan revision. Accordingly, the areas serve important functions in maintaining the integrity and diversity of the forest’s ecosystems and plant and animal communities and in providing for sustainable recreation. To preserve and protect these important functions, the Forest Service in its 1991 forest plan determined that the areas should be managed with an “[e]mphasis . . . on providing a natural appearing landscape in a non-motorized setting.”<sup>61</sup> The proposed forest plan amendment would severely erode those protections by permitting cross-country OSV use in portions of those areas, with corresponding adverse impacts on the integrity and diversity of the forest’s ecosystems and plant and animal communities and on the provision of sustainable, non-motorized forms of recreation.<sup>62</sup> Accordingly, the proposed amendment is unlikely to satisfy the substantive requirements of the 2012 planning rule.

In addition to its substantive provisions, the 2012 planning rule prescribes the process for a plan amendment: The process for amending a plan includes: Preliminary identification of the need to change the plan, development of a proposed amendment, consideration of the environmental effects of the proposal, providing an opportunity to comment on the proposed amendment, providing an opportunity to object before the proposal is approved, and, finally, approval of the plan amendment. The appropriate NEPA documentation for an amendment may be an environmental impact statement, an environmental assessment, or a categorical exclusion, depending upon the scope and scale of the amendment and its likely effects.<sup>63</sup>

58 36 C.F.R. § 219.8(b)(2).

59 36 C.F.R. § 219.14(a)(2).

60 36 C.F.R. § 219.3.

61 Stanislaus Forest Plan Direction, p. 119.

62 See generally Snowmobile Best Management Practices, pp. 5-14 (summarizing best available scientific information on the adverse impacts of OSV use on key elements of the integrity and diversity of ecosystems and plant and animal communities, including air, water, and soil quality, snowpack chemistry, vegetation, soundscape, and denning, foraging, and other sensitive wildlife habitat).

63 36 C.F.R. § 219.5(a)(2)(ii); see also id. § 219.13(b)(1) (explaining that “[t]he responsible official shall . . . [b]ase an amendment on a preliminary identification of the need to change the plan”).

The rule also establishes requirements for public participation, directing the agency to reach out to stakeholders early and throughout the process using collaborative processes where appropriate and feasible.<sup>64</sup>

It is unclear, based on the proposed action and scoping notice, if and how the Forest Service intends to satisfy these procedural requirements. Presumably the forest intends to analyze the proposed amendment in the EIS for the proposal to designate roads, trails, and areas for OSV use and to identify trails for grooming. The current proposed action, however, fails to identify a preliminary need to change the current plan, as required by the rule, and instead simply proposes a plan amendment that would exempt portions of the Eagle/Night and Pacific Valley Near Natural Areas from management prescriptions designed to protect the areas’ natural character and other conservation values. To the extent the forest has identified a need to change those protections, it is to accommodate and perpetuate illegal “historic” OSV use in those areas. This is not a legitimate need to change the current plan. The Forest Service must provide a legitimate preliminary need to change prior to proceeding with the proposed amendment.

#### VI. Endangered Species Act compliance

Under the Endangered Species Act, the Forest Service must ensure that its actions will not jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitat.<sup>65</sup> Three relevant amphibian species were recently listed as threatened or endangered (Sierra Nevada yellow-legged frog, Mountain yellow-legged frog, and Yosemite toad), with proposed critical habitat for the Sierra Nevada yellow-legged frog and Yosemite toad located on the Stanislaus.<sup>66</sup> Due to the presence of the listed amphibian species, the proposed critical habitat, and the potential adverse effects of OSV travel, the forest must formally consult with the U.S. Fish and Wildlife Service as part of its winter travel planning process.<sup>67</sup>

The Forest Service’s obligations under the Endangered Species Act are in addition to its executive order obligation to locate OSV areas and trails to minimize impacts to imperiled amphibians and their habitat. Aside from the possibility that OSVs may cause direct mortality through crushing or compaction of subnivean air spaces, OSV use can have a number of indirect adverse effects on amphibian species. For example, pollutants from OSV exhaust are deposited on and accumulate within the snowpack throughout the winter.<sup>68</sup> During spring snowmelt those accumulated pollutants are released, causing elevated acidity levels in surrounding waterways and resulting in higher death rates for aquatic insects and amphibians. Snow and soil compaction associated with OSV use can also have a number of adverse effects on soil and vegetation, and OSV use can result in crushing or trampling of sensitive riparian

64 36 C.F.R. § 219.4(a)(1).

65 16 U.S.C. § 1536(a)(2).

66 79 Fed. Reg. 24,256 (Apr. 29, 2014) (final listing rule); 78 Fed. Reg. 24,516 (Apr. 25, 2013) (proposed critical habitat).

67 See 16 U.S.C. § 1536(a); C.F.R. § 402.14(a).

68 See Snowmobile Best Management Practices, p. 12 (citing studies).

vegetation.<sup>69</sup> As described in more detail in CSERC's comments, known breeding sites and other important habitat, including but not limited to the Stanislaus Meadow, must be closed to OSV use to minimize those adverse impacts.

## VII. Planning for non-motorized winter recreation

With increasing numbers of participants in both motorized and human-powered winter back-country recreation, conflicts between skiers, snowshoers, and snowmobilers has grown and will continue to escalate in many areas. Part of this conflict is due to the disparity in non-motorized opportunities available to skiers and snowshoers on national forests, as compared to snowmobilers. Those disparities are documented in detail in Winter Wildlands Alliance's recent report, Winter Recreation on National Forest Lands.<sup>70</sup> As described above, the Forest Service is obligated under the ORV executive orders to locate designated areas and trails for OSV use to minimize those conflicts, and is required under the 2012 planning rule to provide for sustainable recreation. Yet travel planning efforts are often focused only on the motorized system and largely ignore non-motorized recreation. The result is to perpetuate the disparity in non-motorized recreation opportunities by ignoring one side of the equation.

The solution is to plan for OSV use in the larger winter recreation context. As the Forest Supervisor on the Bitterroot National Forest recently recognized in the Draft Record of Decision for that forest's travel management planning process for both winter and summer ORV uses,

I concluded early in the analysis that motorized recreation opportunities on the Bitterroot National Forest could not be assessed without also considering opportunities for nonmotorized recreation. Motorized and nonmotorized recreation experiences are linked in the sense that one affects the other. This is particularly true for the effects of motorized use on nonmotorized user experiences. Providing quality recreation opportunities for both types of users requires the consideration of motorized use within the context of the full spectrum of uses.<sup>71</sup>

Another forest that has effectively planned for ORV use in the larger recreation context is the White River. That forest's 2011 travel plan, which covered both summer and winter, established clear boundaries and expectations for motorized and non-motorized uses based on factors such as the quality of recreational experiences, average travel distances and terrain needs for motorized versus non-motorized users, crowding, user trends and demands, and locations and availability of access points and staging areas.<sup>72</sup>

The BLM has also recognized the importance of looking holistically at a travel network that includes both motorized and non-motorized recreational routes to ensure opportunities and access for all user groups,

69 See Snowmobile Best Management Practices, p. 13.

70 See generally Winter Recreation on National Forest Lands, pp. 3-7.

71 USDA Forest Service, Draft Record of Decision, Bitterroot National Forest Travel Management Planning Project, p. 1 (April 2015).

72 See USDA Forest Service, Final Environmental Impact Statement, White River National Forest Travel Management Plan, pp. 66-97 (Mar. 2011).

including those seeking quiet use opportunities. That agency's travel and transportation management manual provides:

[T]he recreation program has a specific need to recognize and manage motorized recreational use of off-highway vehicles (OHVs) and non-motorized travel, such as foot, equestrian, and non-motorized mechanical travel. The planning process should consider and address the full range of various modes of travel on public lands, not only motorized access needs. An understanding of the regional supply and demand of recreational opportunities and access needs is important in designating a system of roads, primitive roads, trails, and areas for specific recreation and other uses.<sup>73</sup>

We encourage the Stanislaus National Forest to plan for OSV use in the larger recreation context. This includes proactively planning for both motorized and non-motorized winter uses, considering the array of recreational uses and trends, required settings, desired outcomes, and the recreation niche of the forest. Areas and trails for motorized and non-motorized winter uses should be designated based on that information and in accordance with the executive order minimization criteria (which requires locating motorized elements of the system to minimize adverse impacts to non-motorized winter recreation opportunities). Unfortunately, the current proposed action focuses almost exclusively on the motorized elements of the system. To begin to remedy this deficiency, Snowlands Network and Winter Wildlands Alliance have submitted a proposal that identifies important areas for non-motorized winter recreation. We support that proposal and encourage the agency to adopt it as part of a modified proposed action and preferred alternative.

#### VIII. Current and anticipated future over-snow uses

The Forest Service's travel management regulations define OSV as "a motor vehicle that is designed for use over snow and that runs on a track or tracks and/or a ski or skis, while in use over snow."<sup>74</sup> While the requirements of the new rule apply only to OSVs, effective winter travel management planning and compliance with the minimization criteria require the Forest Service to account for existing and potential future over-snow recreational uses that may not satisfy the definition of OSV.<sup>75</sup> For example, fat-tire bike riding is an increasing wintertime mechanized use throughout the Sierra Nevada and nationally. Other new types of motorized or mechanized over-snow uses may also exist or be developed over the life of the winter travel plan. The OSV plan and corresponding NEPA analysis should address the non-OSV over-snow uses that are already occurring on the forest, and should anticipate and provide a process for addressing future over-snow uses through updates to the plan.<sup>76</sup> Failure to address these

<sup>73</sup> BLM Manual 1606.06(A)(1).

<sup>74</sup> 36 C.F.R. § 212.1 (defining over-snow vehicle as "[a] motor vehicle that is designed for use over snow and that runs on a track or tracks and/or a ski or skis, while in use over snow").

<sup>75</sup> See Exec. Order No. 11644, § 3(a)(3) ("Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands . . . ." (emphasis added)).

<sup>76</sup> The Stanislaus' proposed action states that "[o]ther types of motor vehicles that may operate over snow, but do not meet the definition of an OSV, are regulated under Subpart B of the Travel Management Rule," and references the forest's existing motor vehicle use map. Proposed Action, p. 6. The Stanislaus' 2009 Travel Management Plan

ongoing and foreseeable uses of the forest that may be impacted by OSV designations would result in both an inadequate NEPA analysis and inadequate minimization of conflicts with other uses.

#### IX. The Forest Service may not rely on previous OSV decisions that are outdated or failed to apply the minimization criteria

As described above, the Stanislaus' proposed action largely rubber stamps the status quo for OSV management. Given the forest's stated intent to conduct winter travel planning under the new OSV rule and to prepare an environmental impact statement, it may not rely on the rule's grandfathering provision to adopt existing OSV management decisions without further public involvement.<sup>77</sup> Instead, as described above, the Forest Service must apply the minimization criteria to each area and route being considered for designation – even those areas and routes currently open to OSV use.

If the forest were to rely on the grandfathering provision, however, it would have to ensure that the previous OSV designation decisions satisfy requirements of the new rule and any other regulatory requirements. Most critically,



those previous decisions must have been subject to the minimization criteria, and the administrative records for the decisions must demonstrate that the agency applied the criteria when making any OSV area or route designations. If the previous decisions were not subject to the minimization criteria, the Forest Service may not adopt them on its OSV use map.<sup>78</sup>

Similarly, the Forest Service may not adopt previous decisions that rely on an “open unless designated closed” policy. As described above, the final OSV rule rejects this approach and requires the agency to designate discrete, specifically delineated open areas and routes that are located to minimize environmental damage and user conflicts. The grandfathering provision recognizes this, making eligible only previous decisions that “restrict over-snow vehicle use to designated routes and areas.”<sup>79</sup> The agency may not adopt as its area designations previous decisions that permitted cross-country OSV

and corresponding EIS addressed only wheeled over-snow motor vehicles and did not address or analyze the impacts of other non-OSV, over-snow motorized or mechanized uses such as fat bikes or ORVs modified (but not designed) to travel over snow on a track, ski, or other non-wheeled mechanism. Certain winter recreation vehicles and uses are therefore not regulated by existing or proposed plans. A court in 2013 invalidated the 2009 Travel Management Plan for failure to apply the minimization criteria. *Cent. Sierra Envtl. Res. Ctr.*, 916 F. Supp. 2d at 1097-98. The Forest Service is currently addressing application of the minimization criteria to its wheeled off-road vehicle travel system on remand from that decision.

<sup>77</sup> See 36 C.F.R. § 212.81(b) (“Public notice with no further public involvement is sufficient if an administrative unit

or a Ranger District has made previous administrative decisions, under other authorities and including public involvement, which restrict [OSV] use to designated routes and areas . . . and no change is proposed to these previous decisions.”).

<sup>78</sup> The language of the grandfathering provision does not explicitly require that previous OSV decisions have been

subject to the minimization criteria. See 36 C.F.R. § 212.81(b). To the extent the agency interprets the provision to permit adoption of OSV designation decisions that do not satisfy the minimization criteria, the rule itself violates Executive Orders 11644 and 11989. See *Winter Wildlands Alliance v. U.S. Forest Serv.*, No. 1:11-CV-586-REB, 2013

U.S. Dist. LEXIS 47728, at \*32 (D. Idaho Mar. 29, 2013) (requiring the agency to promulgate new OSV travel management rule that complies with the executive orders and making clear that the orders “require[] the Forest Service to ensure that all forest lands are designated for all off-road vehicles”).

<sup>79</sup> 36 C.F.R. § 212.81(b).

travel by default and except where such travel was specifically prohibited – as is the case on the Stanislaus.

Finally, the Forest Service must ensure that previous decisions are not outdated. Older decisions likely did not account for the increased speed, power, and other capabilities of current OSV technology, which allow OSVs to travel further and faster into the backcountry and to access remote areas that were previously inaccessible. Older decisions also may not account for new scientific information on sensitive wildlife and other forest resources and how they are affected by OSV use. They may not account for current recreational use trends and increasing conflict between motorized and non-motorized winter backcountry users. And they may not account for the current and predicted impacts of climate change, which is, among other things, reducing and altering snowpack and increasing the vulnerability of wildlife and other resources to OSV-related impacts. Without this information, the Forest Service cannot demonstrate how those previous decisions minimize impacts based on current circumstances and science. This is almost certainly the case on the Stanislaus, where most relevant decisions were made over two decades ago in the 1991 forest plan.

## X.Conclusion

To comply with the plain language of the OSV rule and the ORV executive orders, the Stanislaus National Forest should conduct travel analysis, modify its proposed action, and then properly apply and implement the minimization criteria to designate areas and trails available for OSV use that minimize impacts to resources and user conflicts. This necessarily will include abandoning the proposal to open portions of Near Natural Areas to OSV use (and the corresponding forest plan amendment) and closing the non-motorized winter recreation areas, important habitat for at-risk furbearer and listed amphibian species, and areas that encourage OSV trespass into designated or recommended wilderness and other non-motorized areas identified by CSERC and by Snowlands Network and Winter Wildlands Alliance.

Thank you for your consideration, and please contact Alison Flint ([alison\\_flint@tw.s.org](mailto:alison_flint@tw.s.org); 303-802-1404) with any questions.

Sincerely,

Alison Flint  
Counsel and Planning Specialist The Wilderness Society  
303.802.1404; [alison\\_flint@tw.s.org](mailto:alison_flint@tw.s.org)

Stan Van Velsor, Ph.D.  
Senior Regional Representative The Wilderness Society

Greg Dyson  
Public Lands Director WildEarth Guardians

Don Rivenes Executive Director Forest issues Group

Susan Britting, Ph.D. Executive Director Sierra Forest Legacy

Rick Delvin Chair  
Tuolumne Group Sierra Club

Karen Schambach President  
Center for Sierra Nevada Conservation