From: Bianchi, Adam D -FS
To: Martin, Melissa M -FS
Subject: FW: Objection to the Lava Project
Date: Thursday, May 16, 2019 7:38:44 AM
Attachments: Scanned signature for Dick Artley.doc

From: Dick Artley [redacted]
Sent: Tuesday, May 14, 2019 11:09 AM
To: FS-r02admin-review <r02admin-review@fs.fed.us>
Subject: Objection to the Lava Project

May 14, 2019

ATTN: objection reviewing officer

Below you will find my objection to the EIS and draft ROD for the Medicine Bow Landscape Vegetation Analysis (Lava) Project.

Required 36 CFR § 218.8(d) Objection Information

Proposed Project Name: Medicine Bow Landscape Vegetation Analysis (Lava) Project

Name and Title of the Responsible Official: Russell Bacon, Forest Supervisor

Proposed Project will be Implemented on: Medicine Bow-Routt National Forests and Thunder Basin National Grassland Laramie and Brush Creek/Hayden Ranger Districts

Objection Introduction

This objector submitted his comments on the DEIS for the proposed project on August 9, 2018.

Please direct Supervisor Bacon to modify the final NEPA document to remove or correct the illegal sections and issue a new draft decision document that responds to the modified NEPA document that complies with United States law. As you can see it would never pass court muster.

The Responsible Official allowed the need to accumulate volume (merchantable sized fuels removal) to transcend effective action that will 1) reduce the risk that homes located in the WUI will burn, and 2) increase the risk that residents will be injured should a wildfire occur.

The objector requested the Responsible Official to Analyze another action alternative that will educate people about Dr. Cohen's methods and help people living in the WUI to implement Dr. Cohen's methods if they are unable to do the work themselves.

This wasn't done.

Therefore, the final EA violates **40 CFR 1500.2(e) and (f), NEPA Sec. 101(b)(2), NEPA Sec. 101(c) and Ex. Ord. No. 13045, Apr. 21, 1997 [section 1-101(a)]**

The Agency requires Responsible Officials to use best science. The objector's comments included quotes from and links to many, many scientific papers that clearly shows logging to reduce fuels does not reduce fire intensity or rate of spread … and sometimes exacerbates fire behavior. In addition this non-scientific behavior violates: A **March 9, 2009 White House Memorandum** to heads of executive departments and agencies states:

"Science and the scientific process must inform and guide decisions of my

> *Administration on a wide range of issues, including improvement of public health, protection of the environment, increased efficiency in the use of energy and other resources, mitigation of the threat of climate change, and protection of national security.*

In addition it violates **Executive Order #13563** issued on January 18, 2011 requires federal agencies to use best available science:

> *"General Principles of Regulation.* (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science."

How this objection point can be resolved: Comply with the objector's request above.

The range of alternatives in the NEPA document is inadequate. Only 1 action alternative is analyzed.

This objector requested the Responsible Official to analyze at least 1 citizen-generated alternative to the Proposed Action in detail.

This wasn't done. Instead the Responsible Official displayed short descriptions of the citizen-generated alternatives in the "Alternative Considered but Eliminated from Detailed Study" section.

Therefore, the final NEPA document clearly violates **40 CFR 1501.2(c),40 CFR §1506.1 (a)(2), 40 CFR §1506.2 (e), 36 CFR 220.7(b)(2)(i),** and **NEPA Section 102(2)(E)**

This EIS is also inconsistent with court precedent. The Responsible Official's failure to address a reasonable alternative to the Proposed Action does not differ from the cases summarized below. When this NEPA document is challenged in Federal District Court the judge will cite the following cases in his/her opinion in favor of the plaintiff. There are alternative ways to achieve any goal or need … including the need described in the Purpose and Need that the Responsible Official concludes will be satisfied in only 1 way … by applying the treatments described in the Proposed Action that's unchanged from the Proposed Action described in the scoping package.

Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815, rev'd in part, 490 U.S. 332 (1989) (internal citations omitted) the Court determined that the EIS was inadequate because it failed to examine all reasonable alternatives. The Court held that "the range of alternatives considered must be sufficient to permit a reasoned choice." Here, beyond the statutorily required "no action alternative," only one type of logging alternative – in two versions differing only by extent and focus of acres logged, but not in methods or economic objectives employed - was considered in this case. The FS did not consider other reasonable activities in violation of NEPA. As this proposed project may not be legally authorized under a CE as the notice improperly indicates, an EA or EIS is necessary, including a legally compliant, scientific, ecologically-sound purpose and need, and the development of a full range of ecologically viable alternatives.

Protect Key West, Inc. v. Cheney, 795 F. Supp. 1552 (S.D. Fla. 1992).

Opinion excerpt:

"Carefully comparing the procedure followed by the Navy in preparing the EA on Peary Court with what is required by law, see id. at 682, leads to the inescapable conclusion that the September 1988 EA was wholly inadequate. Far from the requisite 'hard look,' the Navy barely took any look at the environmental consequences of the project in the EA. Because the EA does not evince a good faith effort to 'study and identify' relevant problems and alternatives, any analysis of whether the Navy 'convincingly' established the insignificance or planned mitigation of environmental harms would be pointless."

Cabinet Mountains Wilderness v. Peterson, 685 F. 2d 678, 682 (D.C. Cir.1982) established four useful criteria, which virtually all federal courts use, for reviewing an agency decision to forego preparation of an EIS: (1) whether the agency took a "hard look" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that the changes in the project sufficiently reduced it to a minimum."

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S.Ct. 1835, 1846, 104 L.Ed.2d 351 (1989); ***Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council***, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978) (mandate to agencies under NEPA is "essentially procedural"). The procedural requirements derive from 42 U.S.C. 4332(2)(C)(i-iv), which directs all agencies of the federal government to prepare for "major Federal actions" a detailed statement on (1) the environmental impact of the proposed action; (ii) any unavoidable adverse environmental effects if a project is implemented; (iii) alternatives to the proposed action; (iv) the relationship between short-term uses of the environment and maintenance of long-term productivity; and (v) any irreversible

and irretrievable commitments of resources involved in the project's implementation.

Resources Limited v. Robertson, 8 F. 3d 1394 (9th Cir. 1993);

Opinion excerpt:

"The 'existence of a viable but unexamined alternative renders an environmental impact statement inadequate.' ***Mumma*****,** 956 F. 2d at 1519 (citation omitted). An agency's consideration of alternatives is adequate 'if it considers an appropriate range of alternatives, even if it does not consider every available alternative.' ***Headwaters, Inc. v. Bureau of Land Management*****,** 914 F. 2d 1174, 1180-81 (9th Cir. 1990).

In ***California v. Block***, 690 F.2d 753 (9th Cir. 1982), the Forest Service considered only those alternatives with basically the same end result, and the court struck down the agency's decision. The Forest Service did not consider a broad range of alternatives with differing results; arguably, the Forest Service did not consider a "range" of alternatives at all. As stated in **Idaho Conservation League v. Mumma**, 956 F. 2d 1508 (9th Cir. 1992), the existence of a viable but unexamined alternative renders an environmental impact analysis inadequate.

Citizens for a Better Henderson v. Hodel**,** 768 F. 2d 1051, 1057 (9th Cir. 1985).

Opinion excerpt:

> "The alternative section is 'the heart of the environmental impact statement,' 40 C.F.R. 1502.14; hence, '[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate.' “

Friends of the Bitterroot, Inc. v. U.S. Forest Serv., No. CV-90-76-BU, 25 E.L.R. 21186 (D. Mt. 1994).

The court held:

> "In Count II of their complaint, as amended, plaintiffs contend the Trail Creek EIS fails to adequately analyze all reasonable alternatives, including a less environmentally damaging alternative that would exclude logging and road building activity in existing roadless areas within the Beaverhead National Forest. Plaintiffs maintain the EIS

should have addressed an alternative exempting the Beaver Lakes roadless area from the project in order to preserve that area's value as secure wildlife habitat. In response, defendants assert the alternative would not have met the management goals, standards, and objectives of the Beaverhead National Forest Plan. Defendants further maintain the development of such an alternative would not have added any new information to the EIS.

"NEPA requires an EIS provide information in detail and consider every reasonable alternative to a proposed action. ***Citizens for a Better Henderson, supra***, 768 F.2d at 1057; see 42 U.S.C. 4332(2)(c)(iii). An agency's range of alternatives is reviewed under a 'rule of reason' standard that 'requires an agency to set forth only those alternatives necessary to permit a reasoned choice.' ***California v. Block***, 690 F.2d 753, 767 (9th Cir. 1982) ('The touchstone for [a court's] inquiry is whether an EIS' selection and discussion of alternatives fosters informed decision-making and informed public participation.'). Additionally, NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered or which have substantially similar consequences. ***Northern Plains Resource Council v. Lujan***, 874 F.2d 661, 666 (9th Cir. 1989). As a result, an agency's consideration of alternatives is sufficient if it examines an appropriate range of alternatives, even if it does not consider every available alternative. ***Headwaters, Inc. v. Bureau of Land Management***, 914 F.2d 1174, 1181 (9th Cir. 1990).

"Accordingly, the EIS' failure to address an alternative preserving existing roadless lands in the Trail Creek area renders compels this court to REMAND this matter for further administrative proceedings."

How this objection point can be resolved: Comply with the objector's request above.

The Responsible Official does not indicate that temporary roads will be obliterated after use which requires the sideslopes to be brought back to the natural angle of repose such that there will be no recognizable running surface. Temporary roads that are not obliterated become long-term linear sediment sources.

The objector requested the Responsible Official to:

- Obliterate all temporary roads after use and tell the public this will be done

in the rewritten NEPA document and highlight the choice to obliterate temporary roads on the decision document.

- Include a link to the NPDES permits for the roads planned to be constructed for this project.

- Assure that the rewritten NEPA document defines an obliterated road correctly: 1) it contains no running surface, 2) the CMPs have been removed, and 3) the natural sideslope that existed before the road was constructed is reestablished by placing the fill back in the cut.

- Assure the rewritten NEPA document describes a road obliteration monitoring plan to assure the sediment is being reduced as expected. The ROD should indicate the USFS will provide funding for the monitoring and accomplish the monitoring.

This wasn't done.

The Responsible Official proposes to decommission temporary roads after use.

This violates **36 CFR 212.5(b)(2)** because decommissioning a road that will never be needed again does not restore the road to a more natural state. If the road will be used in the future it's not a "temporary" road and should have been constructed to system road standards.

The objector's comments on the draft included 1) USFS literature describing the need for such monitoring, and 2) science describing the superiority of decommissioning clearly showing why the extra cost of obliteration eliminates the need to spend more money in the future trying to eliminate sediment. Clearly, the objector's referenced showed the Responsible Official that obliteration eliminates chronic sediment delivery, restores hillslope hydrology, and reduces impacts to aquatic, riparian, and terrestrial ecosystems of roads crossings.

Therefore, the final NEPA document violates:

- **The Clean Water Act** requires federal official to secure National Pollutant Discharge Elimination System (NPDES) permits when federal officials create point sources for water pollution. NPDES permits have been required since 1972. This case shows some federal officials don't seek out these permits from the EPA because they know the EPA won't grant the permit. Here, the

Responsible Official cares more about accumulating volume than complying with United States law.

- **40 CFR 1500.1(c)** because the ineffective proposal to decommission temporary roads after use will not "protect, restore, and enhance the environment."

- **40 CFR 1500.2(f)** because the ineffective proposal to decommission temporary roads after use will not "restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."

- **40 CFR 1500.2(e)** because the ineffective proposal to decommission temporary roads after use will not "avoid or minimize adverse effects of these actions upon the quality of the human environment."

- The Responsible Official proposes to decommission temporary roads. This violates **36 CFR 212.5(b)(2)** because this does not restore the road to a more natural state.

Decommissioning a road does not "reestablishing former drainage patterns, stabilizing slopes, restoring vegetation, blocking the entrance to the road, installing water bars, removing culverts, reestablishing drainage-ways, removing unstable fills, pulling back road shoulders, scattering slash on the roadbed, completely eliminating the roadbed by restoring natural contours and slopes." **36 CFR 212.5(b)(2)** states that decommissioning actions must include "but are not limited to" the actions listed above.

How this objection point can be resolved: Comply with the objector's request above.

The Proposed Action will clearly cause the resource degradation and destruction described in the ATTACHMENTS to these comments.

The vast majority of scientific logging-related effects literature is authored by

independent scientists not affiliated with the USDA. These independent scientists describe how logging activities will damage and impair the proper functioning of numerous natural resources. The objector presented multiple opposing views attachments with his comments on the draft NEPA document containing statements by hundreds of Ph.D. scientists describing logging-related natural resource damage. Each scientific statement includes the link to the source document that contains the statement.

Professionals (whether they be scientists or public land administrators) do not selectively choose literature citations that will support their case and systematically exclude those that don't.

The objector requested the Responsible Official to include some source documents from the **Opposing Views Attachments** in the References/Literature Cited section of the final NEPA document and also, cite the specific quotes presented for the source literature in the text of the NEPA document the Responsible Official chose to include in the References/Literature Cited. The objector requested the Responsible Official to include links to each **Opposing Views Attachments** that the chose to include in the References/Literature Cited section and explain why this is best science and trumps the information presented in the **Opposing Views Attachments**.

This wasn't done. Incredibly, the References section contains only (emphasis added) documents that support timber harvest or are neutral in spite of the fact hundreds of scientific documents are available that describe the logging-generated resource damage in detail . Don't you think the pubic deserves to weigh the evidence themselves by reading science that both supports and opposes commercial timber harvest?

Keep in mind 40 CFR 1502.9(b) allows the Responsible Official to ignore responding to opposing views only if it can be shown to be irresponsible.

> *"40 CFR 1502.9 (b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."*

Since this wasn't done, the final NEPA document violates: **40 CFR 1500.1(b) and (c)** and **40 CFR 1500.2(e) and (f)**

How this objection point can be resolved: Comply with the objector's request above.

The NEPA document does not discuss the items shown below that are required by 40 CFR 1502.16.

The objector requested the Responsible Official to include a discussion of the following items in the final NEPA document.

> (e) Energy requirements and conservation potential of various alternatives and mitigation measures.
>
> (f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.
>
> (g) Urban quality, historic and cultural resources, and the design of the buil environment, including the reuse and conservation potential of various alternatives and mitigation measures.

This wasn't done.

Therefore, the final EIS violates **NFMA Section 5 and 40 CFR 1500.1(b) and 40 CFR 1502.16.**

How this objection point can be resolved: Comply with the objector's request above.

Harvesting Dead Lodgepole Pine to Eliminate Mountain Pine Beetle Activity in the Project Area Eliminates the Beneficial Resource Benefits Caused by this Natural Disturbance Event

The objector requested the Responsible Official to respect ecological processes and leave the dead LPP uncut.

This wasn't done.

Therefore, the final EA violates **18 USC 1519 and 18 USC 1001(a)(3), 40 CFR §**

1500.1(b) and **40 CFR §1500.2**

How this objection point can be resolved: Comply with the objector's request above.

Important documents used to generate key information for the NEPA document were not reasonably available to the public.

This objector asked the Responsible Official to make the documents that currently reside as hardcopies in the Project File available as online Appendices to the NEPA document, or clearly indicate the link to the documents where they appears in the References section. This would allow the public to examine the important information contained in Project File hardcopies without driving to Laramie Wyoming.

This wasn't done.

Therefore, the final EIS violates **40 CFR 1500.2(b)**, **40 CFR 1501.2(a) and (b), 40 CFR 1500.2 (d)**, and **40 CFR 1506.6 (a) and (b)**

How this objection point can be resolved: Comply with the objector's request above.

The Responsible Official did not respond to the opposing views attached to the objector's comments.

The objector requested the Responsible Official to respond to the opposing views contained in the Opposing Views Attachments.

This wasn't done.

Therefore, this NEPA document has violated: **40 CFR 1502.9(b)**

40 CFR 1500.2(e) and (f) because it did not "*identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment," and did not "use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."*

40 C.F.R. § 1502.9(a) because the final NEPA document did not *"respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised*."

40 C.F.R. § 1502.9(b) because the agency did not *"make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action."*

The opposing views statements submitted by this objector represented "major points of view." Any thesaurus will show a synonym of "point of view" is an "opinion." Opposing Views must never be considered irresponsible and rejected because of their source.

42 USC § 4372(d)(4) because the final NEPA document does not promote the "advancement of scientific knowledge of the effects of actions and technology on the environment and encourage [1] the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man."

NEPA Sec. 101(b)(2) because the Responsible Official does not "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;"

NEPA Sec. 101(c) because Responsible Official does not comply with the will of Congress: "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

Not responding to responsible opposing views is also inconsistent with court precedent:

> In ***Sierra Club v. Eubanks*** 335 F. Supp. 2d 1070 (ED Cal. 2004), the court stated:
>
> > "credible scientific evidence that [contradicts] a proposed action must also be evaluated and considered."

In ***Seattle Audubon Society v. Lyons*** 871 F. Supp. 1291, 1318 (W.D. Wash. 1994), the court stated:

> "[the EIS] must also disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it."

In ***Seattle Audubon Society v. Moseley*** 798 F. Supp. 1473 (WD Wash. 1992) , the court stated:

> "[t]he agency's explanation is insufficient under NEPA … not because experts disagree, but because the FEIS lacks reasoned discussion of major scientific objections."

In ***Sierra Club v. Bosworth*** 199 F.Supp.2d 971, 980 (N.D. Cal. 2002), the Court held that the Forest Service violated NEPA when it failed to:

> "disclose and analyze scientific opinion in support of and in opposition to the conclusion that the…project will reduce the intensity of future wildfires in the project area."

How this objection point can be resolved: comply with the request discussed above.

The Responsible Official rejected public suggestions for alternatives to be analyzed in detail in addition to the Proposed Action. In spite of the other ideas, the Responsible Official analyzed only the Proposed Action in detail.

The objector requested the Responsible Official to respond to analyze the citizen-generated alternatives in detail.

This wasn't done.

Therefore, this NEPA document has violated **40 CFR 1503.4**

How this objection point can be resolved: comply with the request discussed above.

[redacted]

[redacted]

Sincerely,

Dick Artley's scanned signature is contained in the "signature" attachment.

Dick Artley [retired Nez Perce National Forest forest planner)

[redacted]

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"*Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has*."

Margaret Mead