



Keeping Northwest California wild since 1977

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*Transmitted via electronic mail*

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**RE: Request for Supplemental Environmental Analysis and the Reinitiation of Consultation under the Endangered Species Act over the Impacts of Marijuana Cultivation and Forest Service Actions and Inactions**

Dear Responsible Officials,

The Environmental Protection Information Center (“EPIC”) formally requests that the United States Forest Service (“Forest Service”) immediately initiate analysis of the impacts of marijuana (*Cannabis sp.*) cultivation on national forest lands, and the effects of Forest Service actions and inactions that may be exacerbating or facilitating marijuana cultivation. This letter sets forth the legal obligations of the Forest Service in the face of new information about environmental impacts not previously considered by the agency. The Forest Service is obligated to analyze and respond to new information pursuant to the National Environmental Policy Act (“NEPA”) as well as ongoing duties under the Endangered Species Act (“ESA”).

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## **Introduction**

The impacts of marijuana cultivation on national forest lands in northwestern California have been documented by numerous sources, including the U.S. Forest Service, fish and wildlife agencies, law enforcement officials, media outlets and the general public. Some specific impacts include the clearing of vegetation, dewatering of creeks and rivers, poisoning of wildlife through the use of pesticides such as anticoagulant rodenticides, and pervasive pollution from fertilizers and other chemicals. The Forest Service has gone on record many times detailing the impacts of marijuana cultivation, generally in the context of law enforcement actions, but also in warnings to the public recreating on national forest lands.

In response to this overwhelming information about impacts and dangers posed on the Mendocino National Forest, on July 20, 2011, EPIC formally requested that the Forest Service address the impacts of marijuana cultivation on the Mendocino National Forest pursuant to NEPA. On August 24, 2011, the acting Forest Supervisor, Lee Johnson, responded to EPIC's request in a short two-page letter, dismissing the impacts and refusing to act. In this letter, we reiterate our request for supplemental NEPA analysis and also request that the Forest Service address this new threat on ESA-listed and candidate species. We also respond directly to then acting Forest Supervisor Lee Johnson's assertions that the Forest Service need not address the impacts of marijuana cultivation or the synergistic effects of ongoing Forest Service actions and inactions. Supervisor Johnson states that the Forest Service need not analyze illegal actions because they are not Forest Service actions. However, this misses the mark, as explained below, as numerous ongoing actions and inactions by the Forest Service are what need to be updated and analyzed in light of extensive marijuana cultivation on national forests.

As an example of instances where the Forest Service has indeed analyzed and prepared environmental documentation in response to non-federal actions is the Supplemental Environmental Impact Statement for management of Port Orford Cedar in southwest Oregon. In that document, the Forest Service recognized that its actions, including logging and road building, were facilitating the spread of a fungal root disease, *Phytophthora lateralis*, that was killing Port Orford Cedar. The fungal root disease is analogous to marijuana cultivation on national forests as Forest Service actions and inactions can influence the spread. Like the fungal root disease, a new outside force is acting on and impacting national forest lands and resources. Similarly, in the context of Travel Management Plans, the Forest Service did in fact analyze and respond to the impacts of illegal or unauthorized motorized roads and trails constructed on national forest lands by individuals. This illegal road and trail building activity was accounted for in the Forest Service's environmental analyses and travel plans. Finally, the impacts of climate change on national forests is another outside force that even the Chief of the Forest Service has recognized as a non-federal action that must be addressed in the context of Forest Service decision making.

## **Ongoing Forest Service Actions and Inactions Requiring Supplemental Environmental Analysis**

National forests are managed under the National Forest Management Act ("NFMA") and

other laws. Under NFMA, each forest is required to develop a Land and Resource Management Plan (“Forest Plan”). The Forest Plan, once adopted, is not a static document, but is instead constantly implemented through specific projects and may also be amended. The Forest Plans for each national forest at issue here are ongoing actions. However, the Forest Plans do not address the impacts of marijuana cultivation or take into account agency actions that may exacerbate or facilitate those impacts. In addition to the Forest Plans, each national forest has recently completed Travel Management Plans that designate and categorize roads and trails, both motorized and non-motorized. None of these Travel Management Plans have addressed the impacts of marijuana cultivation or the potential for Forest Service roads and trails in facilitating marijuana cultivation. Lastly, a long list of ongoing and planned projects, ranging from timber sales, grazing allotment reauthorizations, road maintenance and building, and other projects throughout the four national forests at issue in this letter also constitute ongoing and proposed actions that must take into account the potential for impacts from marijuana cultivation and whether the project will exacerbate those impacts or even facilitate the cultivation itself.

### **Requirements of the National Environmental Policy Act**

Under NEPA, the Forest Service has a “continuing obligation” to gather and evaluate new information relevant to the environmental impact of its actions. *See Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023-24 (9th Cir. 1980) (citing 42 U.S.C. 4332(2)(A), (B)); *Essex County Preservation Ass’n v. Campbell*, 536 F.2d 956, 960-61 (1st Cir. 1976); *Society for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 917-18 (D.C. Cir. 1975)). As the Ninth Circuit has explained, “an agency that has prepared an EIS cannot simply rest on the original document. The agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a “hard look” at the environmental effects of [its] planned action, even after a proposal has received initial approval.” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557-58 (9th Cir. 2000) (quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (1989)). New circumstances and information that come to light after a decision require the agency to issue supplemental NEPA analysis in an EA or an EIS under the CEQ regulations if this information is relevant to environmental concerns and bears on the proposed action or its impacts. *See* 40 C.F.R. § 1502.9(c)(1)(ii); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989); *see also Sierra Club v. Bosworth*, 465 F.Supp.2d 931 (N.D. Cal. 2006) (because the Forest Service bears a continuing duty under NEPA, the Sequoia National Forest was required to supplement its NEPA analysis because of significant new circumstances and information related to Pacific Fisher).

### **Requirements of the Endangered Species Act**

The purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend and to conserve and recover those species so that they no longer require the protections of the Act. 16 U.S.C. § 1531(b). To ensure that the statutory purpose will be carried out, the ESA imposes both substantive and procedural requirements on all federal agencies, including the Forest Service.

Section 7 of the ESA requires the Forest Service, in consultation with the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”), to insure that any

action authorized, funded or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of critical habitat of such species. 16 U.S.C. § 1536(a)(2). In fulfilling this requirement, agencies must use “the best scientific and commercial data available.” *Id.* As explained above, Forest Plans, Travel Management Plans and specific projects are all ongoing actions that require attention by the Forest Service under the ESA.

If the Forest Service determines that an action “may affect” a listed species or its critical habitat, the agency must initiate formal consultation with FWS and NMFS. 50 C.F.R. § 402.14. If FWS and NMFS conclude that the proposed action “will jeopardize the continued existence” of a listed species, or result in the destruction or “adverse modification” of designated critical habitat, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS and NMFS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS and NMFS consider necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the Forest Service to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

Alternatively, the Forest Service may enter into “informal consultation” to determine if formal consultation is required. 50 C.F.R. § 402.13. If, during informal consultation, it is determined by the Forest Service, with the written concurrence of the FWS and NMFS, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated. *Id.* However, without a biological opinion and an incidental take statement from FWS and NMFS, the Forest Service is not authorized to “take” any listed species, nor may it jeopardize the species or adversely modify critical habitat.

The re-initiation of formal consultation is required and must be requested by the Forest Service or FWS and NMFS if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) ***new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered***; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16 (emphasis added).

After the initiation or re-initiation of consultation, the Forest Service is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

### **New Information Not Previously Considered under NEPA & ESA Analyses**

As set forth below, significant new information surrounding the impacts of marijuana cultivation on national forests requires the Forest Service to take a “hard look” at the environmental consequences of marijuana cultivation in the context of Forest Plans, Travel

Management Plans, and specific projects. The information below is not exhaustive, but it certainly constitutes enough information to form the basis for a new analysis by the Forest Service. This new information along with information already on file with the Forest Service counsels the Forest Service to immediately prepare supplemental environmental analyses and reinitiate consultation under the ESA.

### **Terrestrial Impacts of Marijuana Cultivation**

- Clearing of vegetation

Forest Service officials, local environmental groups and law enforcement have documented extensive clearing of vegetation on national forests.

- Chemical applications

Just like other industrial agriculture, chemicals are applied in marijuana cultivation operations on national forests. Some estimates of the actual amounts of chemicals suggest that an average cultivation site of about 5 acres and 7,000 plants can contain 20 pounds of rat poison, 30 bags of fertilizer, plant growth hormones, insecticides, herbicides, fungicides, and a variety of other chemical inputs.

- Direct mortality to wildlife

Wildlife is impacted by cannabis cultivation on national forests through direct mortality. Researchers have documented mortality to Pacific fisher (*Martes pennanti*) as a result of anticoagulant rodenticides applied on national forests, likely introduced through marijuana cultivation.<sup>1</sup> The fisher is a federal candidate for listing under the Endangered Species Act (“ESA”). In addition, these same rat poisons pose a serious threat to the ESA-listed, threatened northern spotted owl (*Strix occidentalis caurina*) as they prey on rodent species that come in contact with marijuana cultivation areas.

### **Aquatic Impacts of Marijuana Cultivation**

- Dewatering springs, streams and rivers

The cultivation sites documented on national forests have extensive irrigation systems and water impoundments. The net effect of thousands of plants is significant dewatering of springs, streams and rivers, including designated Wild and Scenic Rivers.

- Impacts to aquatic species

Anadromous and resident fish species are negatively impacted by marijuana cultivation because

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<sup>1</sup> Gabriel, M.W. et. al. 2012. Anticoagulant Rodenticides on our Public and Community Lands: Spatial Distribution of Exposure and Poisoning of a Rare Forest Carnivore.  
<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0040163>

of dewatering and pollution, including ESA-listed Steelhead (*Oncorhynchus mykiss*), Coho Salmon (*Oncorhynchus kisutch*) and Chinook Salmon (*Oncorhynchus tshawytscha*). For example, adult summer-run steelhead and spring Chinook must hold over in deep pools in the dry season, before spawning in the late-fall. Case in point, a critically imperiled population of summer steelhead in the Middle Fork Eel River and its tributaries are on the brink of extinction, and suffer from dewatering and pollution as a result of marijuana cultivation. Another example is the South Fork Trinity River, and impacts to summer steelhead and spring Chinook.

- Water pollution

The fertilizers and other chemicals used in growing cannabis on national forests runoff into nearby streams and rivers, seriously impacting water quality. Coupled with low flows and higher temperatures, the pollution from cultivation sites on national forests negatively impact water quality.

### **Impacts of Ongoing Forest Service Actions and Inactions on Marijuana Cultivation**

In addition to the new impacts associated with marijuana cultivation on public lands, the Forest Service must also take into account and analyze the agency's ongoing actions and inactions that may be facilitating and exacerbating the impacts of marijuana cultivation. For example, numerous vegetation management projects propose to reduce canopy cover in forests. This reduction in canopy cover allows more sunlight to reach the forest floor, while retaining some forest cover. In many instances, the Forest Service is thinning forest stands that are currently greater than 70% canopy cover down to as little as 30% canopy cover. In the process, the Forest Service may be creating ideal sites for marijuana cultivation. Another factor of Forest Service management is the extensive road system that currently exists on the Mendocino National Forest. The actions and inactions of the Forest Service in maintaining, controlling access and in many instances failing to maintain or decommission roads yields a network of roads and old logging skid trails across the landscape. This network of roads and skid trails potentially allow for ease of access for marijuana cultivation in remote areas of the forest. The Forest Service's recent travel management decisions, decisions to maintain or store roads, and failure to decommission roads have not taken into account the new threats posed by marijuana cultivation in this context.

### **Conclusion**

We hope that this letter along with the attached documentation will prompt the Forest Service to immediately begin to disclose and analyze the environmental impacts of marijuana cultivation and reinitiate consultation on these national forests. Beyond the important issues raised in this letter, our organization encourages administrators in the Forest Service to consider recent public calls by elected officials for increased study of the environmental impacts of cannabis agriculture on public lands. Congressman Mike Thompson was quoted in the September 2, 2012 Eureka Times-Standard as saying, in relation to the environmental impacts of marijuana grows on public lands, that "anything at all that can be done to quantify this -- to show exactly how bad it is -- I think we need to do." Clearly the impetus for supplemental analysis and the reinitiation of consultation is coming from many sectors of our community, and action on the

part of Forest Service land managers is needed to respond effectively to the environmental threats presented by this phenomena. If you have any questions about this letter, please contact me directly at (707) 822-7711. I look forward to hearing from you regarding this matter.

Sincerely,



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