



DEFENDERS OF WILDLIFE
PRESIDENTIAL TRANSITION WHITE PAPER

WILDLIFE CONSERVATION ON FEDERAL PUBLIC LANDS

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CHALLENGE

Our national network of public lands comprises a treasure of immeasurable value. These spaces are uniquely American, with national icons such as Yosemite and Great Smoky Mountain national parks, the wildlife refuges that host millions of birds traveling the skies of North America and the hushed ancient forests of Washington and Oregon.

National wildlife refuges, national forests, national parks and lands managed by the Bureau of Land Management (BLM) cover almost one third of our country. Largely concentrated in the West, these lands and waters are vitally important to wildlife conservation, providing some of the last remaining contiguous blocks of habitat. Federal lands form the backbone of many large-scale conservation plans, harboring important populations of many rare and endangered species.

When we measure the fish, wildlife, and plant life found on our federal public lands, we discover that the American people are the owners and stewards of an incredibly valuable natural asset. The United States' varied climate, topography and geology make it "the most ecologically diverse nation on earth."¹ Nearly one-quarter of the mammals found in the United States occur only in America.² Much of this living diversity occurs on the expanse of lands owned by the American people and managed in the public interest by the federal government.

Under the outgoing administration, the stewardship of federal lands has been sidelined and compromised as resource extraction, development and political agendas have been given precedence over conservation and the public interest. Rampant oil and gas development has replaced wildlife habitat on federal lands, threatening water supplies and the livelihoods of

¹ *Precious Heritage: The Status of Biodiversity in the United States*, ed. Bruce A. Stein, *et al.*, The Nature Conservancy & Association for Biodiversity Information (Oxford University Press, 2000), 208.

² *Ibid.*, 70.

ranchers, outfitters, nature tour operators and other industries that rely on healthy wildlife populations and ecosystems; environmental laws have been ignored and imperiled species put at risk by politics related to U.S. border security; and standards for maintaining viable populations of wildlife on federal lands have been eroded, along with many other assaults on the integrity of our shared environment.

We need a new vision for our federal lands, one that recognizes that ecological sustainability is the fundamental building block for all the uses of our federal lands and an essential ingredient for our economy, health and quality of life. When many of the federal land laws and practices were developed, our natural resources were plentiful, and our population was sparse. Today the opposite is true: natural resources are scarce, the population is growing and the economy is much less dependent on the extraction of natural resources and much more dependent on clean air, clean water, open space and quality of life. The laws and policies governing our nation's federal lands and natural resources should be modernized to reflect this change.

ACTION

We urge the new administration to take the following actions:

- I. Restore environmental review of federal lands management by fully implementing the National Environmental Policy Act..... 3
- II. Reform the management of the National Wildlife Refuge System 6
- III. Restore proper consideration of wildlife and other environmental resources by fully complying with applicable environmental laws in making decisions on U.S. border security..... 11
- IV. Fully protect all remaining roadless areas on national forests and other public lands... 15
- V. Fully consider the impact of global warming on wildlife and habitats on federal lands and incorporate measures to assist wildlife adaptation to global warming in federal land management plans. 18
- VI. Support administrative action and legislation to maintain viable wildlife populations on national forest and BLM lands..... 19
- VII. Ensure energy development on federal lands and waters does not harm crucial wildlife habitats..... 24
- VIII. Enforce the federal Airborne Hunting Act..... 27
- IX. Restore and increase funding to support fish and wildlife conservation on national wildlife refuge, national forest and BLM lands..... 29
- X. Support full and permanent funding of the Land and Water Conservation Fund to expand national conservation land holdings as necessary to fulfill their intended purposes. 35
- XI. Restore protection of all wetlands by clearly defining them as waters of the United States under Section 404 of the Clean Water Act. 38

**I. Restore environmental review of federal lands management by fully
implementing the National Environmental Policy Act.**

The federal public lands of the United States are held in trust for the American people, and activities taken on those lands that may affect public values and resources must undergo sufficient review to identify the impacts of those actions, to enhance agency accountability, legitimacy and trust, and to support balanced and well informed decision-making. In addition, substantive environmental review processes must ensure that the American public will be provided with meaningful opportunities to participate in open and transparent government decision making, including the ability to shape and comment upon government activities on federal public lands, as well as the ability to seek judicial review and other means of dispute resolution.

The central federal law providing this accountability is the National Environmental Policy Act (NEPA). Enacted by Congress in 1970 with overwhelming bipartisan support, NEPA sought to establish a “productive harmony” between man and nature through the application of rational analysis and transparent decision-making processes. NEPA requires federal agencies to account for and disclose the environmental consequences of their actions, to propose and evaluate alternatives to their proposed actions, and to involve citizens in decision-making processes. Sound science, robust citizen involvement and the common-sense “look before you leap” approach of NEPA ensure efficient, effective, and better on-the-ground decisions.

The Bush administration has generally operated under the assumption that environmental review and public involvement are detrimental to effective and efficient decision-making on federal public lands. Upon taking office, the Bush administration undertook a coordinated effort to dismantle and undermine the longstanding, common-sense policies set forth in NEPA by exempting an array of potentially harmful and controversial land management activities from substantive environmental review, and by diminishing public participation, transparency and judicial review in the decision-making processes governing our federal public lands.

NEPA has a long and successful history of increasing the sensitivity of federal agency decision-making to environmental concerns. Projects that would have had serious environmental consequences have been dramatically improved and other damaging proposals have been abandoned altogether. A return to full implementation of NEPA in federal land management planning should be a top priority for the new administration.

First 100 days:

The new administration should suspend forest planning under the 2008 Bush administration National Forest Management Act planning regulations, which inappropriately assume that forest plans have no environmental consequences.

National forest land and resource management plans directly determine the direction of management for millions of acres of federal forests and grasslands, including deciding what activities may proceed, where those activities may occur and where they may not occur, and the environmental safeguards that apply to specific activities or for specific areas within each forest, such as stream buffer zones and standards for construction of roads. The Bush administration, however, has consistently claimed that forest plans are only “vision documents” that result in no environmental impact, and has adopted planning regulations that eliminate NEPA analysis in forest planning. This is in contravention of both the National Forest Management Act (NFMA), which requires that forest plans be prepared in accordance with NEPA,³ and the Council on Environmental Quality (CEQ) regulations implementing NEPA. The CEQ regulations specifically provide that “[a]doption of formal plans, such as official documents prepared or approved by federal agencies which *guide or prescribe* alternative uses of Federal resources, upon which future agency actions will be based”⁴ is considered to be a “federal action” within the scope of NEPA. There is no question that these plans have significant and immediate affects on the environment, warranting environmental review under NEPA, as they govern nearly every action on every acre of every national forest and grassland. The new administration should suspend forest planning under the 2008 planning rule, and ensure that the requirements under NEPA are fully applied to national forest planning processes.

The new administration should review the use of categorical exclusions from NEPA analysis in federal land management planning and suspend inappropriate exemptions.

The Bush administration widely expanded categories of U.S. Forest Service and Bureau of Land Management (BLM) actions that are exempted from substantive NEPA review by crafting targeted administrative and legislative changes to the rules and policies governing Forest Service and BLM actions. Typically, “categorical exemptions” from substantive review are reserved for non-controversial, routine actions that are demonstrated to have insignificant impacts on the environment. The Bush administration adopted categorical exclusions from NEPA for oil and gas exploration and development, grazing, and fuel-load treatments in forests and logging activities on BLM and Forest Service lands, exempting a host of activities from any kind of environmental analysis, even if those activities occur in environmentally-sensitive areas, and diminishing public participation in federal agency decision making processes. These activities have significant environmental implications, and should be subject to thorough environmental review under NEPA. Before any more activities are approved under these exemptions, the new administration should comprehensively review all categorical exclusions currently used in Forest Service and BLM land management planning to ensure that they meet CEQ categorical exclusion

³ See National Forest Management Act § 1604(g)(1).

⁴ Council on Environmental Quality Regulations, 40 C.F.R. § 1508.18(b) (2007) (emphasis added).

requirements – most importantly, that they have no significant individual or cumulative impact on the human environment – and are therefore consistent with NEPA. The administration should suspend use of all categorical exclusions that do not meet this requirement, and require that those actions be subject to the full environmental review process required by NEPA. (A detailed list of categorical exclusions promulgated by the Bush administration is found in Appendix A).

First year:

The new administration should initiate a rulemaking to restore procedures under the Appeals Reform Act for notice and comment and appeal of all Forest Service projects, including those categorically excluded.

The Bush administration severely undermined the public's ability to participate in and challenge land management activities taking place on Forest Service lands, including mining, logging, grazing, and energy projects by developing new appeal procedures under the Appeals Reform Act adopted in June 2003 for Forest Service projects. These procedures excuse the Forest Service from providing notice, opportunity to comment, and a right of appeal on projects that are categorically excluded from NEPA including, but not limited to, those outlined above. The effect of these procedures is to virtually eliminate the public's ability to both provide input on and challenge projects that the agency, in its discretion, determines to have no environmental impact, virtually quashing all ability of the public to participate in the decision-making process on these activities.

The administration rationalized these rollbacks under the pretext that these changes enhanced efficiency in the Forest Service's decision-making process. The administration claimed that litigation brought on behalf of, and appeals by, environmental groups, stalled critical fuels reduction projects designed to protect communities from catastrophic fire. However, the Government Accountability Office (GAO) has issued multiple reports finding that the administration's claims of "analysis paralysis" are a myth. In fact, in 2003 the GAO found that 95 percent of the 818 Forest Service fuels reduction projects in FY 2001 and 2002 were ready for implementation within the standard 90-day review period, and that 97 percent of the 818 Forest Service fuels reduction projects in FY 2001 and 2002 proceeded without litigation.⁵ An earlier 2001 report found that 99 percent of proposed FY 2001 Forest Service hazardous fuels reduction projects were not appealed, and none were litigated.⁶ The new administration must restore transparency to these projects and reinstitute policies and procedures for notice, comment and appeal.

⁵ U.S. General Accountability Office, *Forest Service: Information on Appeals and Litigation Activities Involving Fuels Reduction Activities* (Washington, D.C., 2003), 4, <http://www.gao.gov/new.items/d0452.pdf>.

⁶ The Wilderness Society, *Forest Service Continues to Blow Smoke: Latest GAO Report, University Study Show McInnis Wildfire Bill Based on Flawed Assumptions*, May 20, 2003, <http://www.wilderness.org/Library/Documents/upload/GAO-Report-Finds-Appeals-Do-Not-Slow-Fuel-Reduction-Projects.pdf>.

The new administration should strengthen the NEPA process through improved management, training and funding for NEPA compliance.

Although NEPA has been in effect for over three decades, federal agencies still struggle to carry out its mandate to include environmental values and public input in federal decision-making. Instead, NEPA documents are often seen as ends themselves rather than means to better decision-making and, therefore, become large, costly, burdensome, and often are completely ignored by decision-makers. The administration should institute a program for the training of all agency staffers charged with conducting NEPA analyses, seeking to make these analyses more useful and effective, and focus particular attention on difficult technical issues, such as cumulative effects analysis and adaptive management.

Increased funding and staffing levels for all federal agencies with NEPA responsibilities should also be guaranteed in order to carry out the tasks essential for proper and efficient NEPA compliance. The Council on Environmental Quality, the agency within the Executive Office of the President charged by law with overseeing the proper implementation of NEPA, should be given increased staff and funding to carry out its responsibilities, including its important efforts to ensure that the NEPA process is effective and efficient

First Term:

The new administration should require sound scientific monitoring of project impacts.

Enhanced monitoring and evaluation is essential to ensure that mitigation measures are being implemented successfully. Targeted monitoring is necessary to establish baseline information about species' responses, changes in species distributions and abundances, and the effects of different conservation practices on species populations. Improved monitoring also will provide the basic data necessary to conduct adaptive management in the highly dynamic environment of climate change. This information will allow decision-makers to determine whether projects or programs are causing unanticipated environmental effects, and can therefore help ensure that NEPA supports a responsive approach to managing the environmental effects of agency actions. The administration should develop a standardized and comprehensive methodology across agencies to monitor the impacts of federal projects on the environment over time, including evaluating the impacts of climate change on the baseline environment and the cumulative impacts of climate change and federal projects.

II. Reform the management of the National Wildlife Refuge System

The National Wildlife Refuge System is the largest system of lands in the world dedicated to wildlife conservation. More than 547 wildlife refuges and thousands of small prairie wetlands totaling nearly 100 million acres have been established across all U.S. states and territories. They provide essential habitat for migratory birds and other wildlife, a safe haven for endangered species, protection of imperiled ecosystems, and recreational opportunities such as fishing, hunting, wildlife watching and environmental education for nearly 40 million annual visitors.

Unfortunately, our national wildlife refuges are not immune from the threats facing wildlife and natural areas everywhere. Wildlife refuges not only face encroachment from housing and commercial development on their borders, but increasingly from invasive species, impacts from a rapidly changing climate, threats to maintaining adequate water quality and quantity, oil and natural gas drilling and other energy development such as wind turbines, and a sharply reduced workforce. In a world with ever-shrinking natural areas, America must act quickly to safeguard our unique natural resources for the benefit of wildlife and millions of present and future Americans.

Persistent budget shortfalls coupled with lack of progress on important policies have led to a troubling erosion of the Refuge System's ability to achieve its wildlife conservation mission and public outreach objectives. Recent assessments from the Government Accountability Office (GAO)⁷ and Management Systems International (MSI)⁸ strongly validate these observations.

Eleven years ago, Congress passed the sweeping National Wildlife Refuge System Improvement Act to reform a system of lands starving for a mission, critical management standards, and funding. Congress had the foresight to write a timeless piece of legislation that provides direction even in a changing world. The Refuge Improvement Act gave the refuge system a mission for the first time. The Act directs the refuge system to be managed using modern scientific programs; to monitor the status and trends of fish, wildlife, and plants to detect changes, measure progress and to adapt management; to maintain the biological integrity, diversity, and environmental health of the system; to maintain adequate water quality and quantity; and to strategically grow the Refuge System to meet its mission. Finally, Congress required each refuge to have a comprehensive conservation plan, developed with the input of the American public, to ensure that each refuge was managed in a way that best contributes to the Refuge System's mission and a refuge's particular purpose.

Lack of funding and lack of political leadership over the last several years has prevented the Refuge System from fulfilling this promise. According to MSI, the Refuge System is underperforming in most of these areas, inhibiting it from addressing the threats of today, and leaving the Refuge System unprepared to meet the tremendous challenges associated with climate change.

First 100 Days:

The new administration should immediately block actions that allow incompatible uses on nationally important wildlife refuges.

The Bush administration has attempted to avoid the strong refuge compatibility standard for secondary uses of the Refuge System through proposed land exchanges, project

⁷ Wildlife Refuges: Trends in Funding, Staffing, Habitat Management, and Visitor Services for Fiscal Years 2002 through 2007 [GAO-08-1179T](#), September 24, 2008

⁸ An Independent Evaluation of the Effectiveness of the U.S. Fish and Wildlife Service's National Wildlife Refuge System. Management Systems International. 2008.

segmentation, and limited analysis. At Yukon Flats National Wildlife Refuge in Alaska, the Fish and Wildlife Service is processing a land exchange that would allow oil and gas development on what is currently refuge land. This land exchange would damage vital wildlife habitat and set a terrible precedent for refuges around the country and should be immediately halted.

At Izembek National Wildlife Refuge in Alaska, the Alaska congressional delegation has successfully included a bill into a larger public lands package that would authorize a land exchange and remove wilderness protection on the refuge in order to construct an unnecessary and damaging road through its biological heart, an area of internationally renowned wetlands. This proposal would also create a damaging precedent for wildlife refuges and wilderness areas around the country. The new administration should oppose inclusion of this proposal in public lands bills in Congress.

Additionally, a number of compatibility determinations have been tainted by political influence at Kofa National Wildlife Refuge in Arizona, Pea Island in North Carolina, and elsewhere. These compatibility determinations for use of refuges should be reviewed.

First Year:

The new administration should support permanent protection of the Arctic National Wildlife Refuge.

The Arctic National Wildlife Refuge is America's Serengeti, and is the crown jewel of the National Wildlife Refuge System. Drilling in the coastal plain of the refuge would be devastating to the largest onshore denning habitat for federally threatened polar bears, the calving grounds for the 100,000-strong Porcupine caribou herd, and millions of migratory birds that migrate to every state and six continents.

America needs a comprehensive energy policy that doesn't sacrifice our national treasures. It is time to permanently protect the Arctic Refuge and focus on comprehensive energy reform.

The new administration should develop a strategic habitat protection policy.

While the nation has amassed impressive holdings that benefit wildlife, including national wildlife refuges, national parks, national forests and Wilderness areas, current human population and development trends threaten to overwhelm the value these lands now hold for wildlife and ecosystem integrity. There is a tremendous need for a forward thinking strategy to conserve America's wildlife resources and habitats. In addition, with the effects of climate change now bearing down upon already stressed plant and wildlife populations, the administration should prioritize the development of an interconnected system of wildlife conservation lands while working to reduce dispersal barriers.

Recognizing these threats, the visionary Refuge Improvement Act called on the Department of the Interior to orchestrate "the continued growth of the System in a manner that is best designed to accomplish the mission of the System, [and] to contribute to the conservation of the ecosystems of the United States...." Despite the dramatic ecological changes occurring across the country, the FWS has yet to systematically or proactively prioritize needed land

acquisitions to preserve the spectacular biodiversity found in this country. A recent independent assessment, the MSI Report, gave the FWS a failing grade in this metric, calling it “ineffective” at strategically growing the Refuge System. The report cited the significant decline in land acquisitions in recent years, as well as the FWS sharply decreasing the amount of land acquisition funding it requests from Congress. Other observations included that the land ultimately purchased often “does not match the priorities identified by the Refuge System’s Land Acquisition Priority System.”

The new administration should prepare a habitat protection plan in the context of climate change, population growth, projected land-use patterns, water availability, and habitat connectivity. It should focus on connecting and buffering areas of existing quality habitat through strategic land acquisitions or easements, protecting particularly imperiled ecosystems and species currently under-protected by existing conservation areas, and working to secure adequate water quantity and quality for wildlife purposes.

The new administration should develop a water resources policy.

Compared to other federal land management agencies, the FWS typically manages areas that are wetter, lower in elevation, and higher in biodiversity; often freshwater wetlands or coastal marshes. The importance of natural areas such as wildlife refuges to maintaining biodiversity, water quality, and flood control cannot be overstated.

Unfortunately, with increasing water demands from agricultural and urban development, many refuges are struggling to secure enough water to meet their conservation targets. The authors of the Refuge Improvement Act showed foresight in addressing the emerging water crisis on wildlife refuges, a crisis now exacerbated by climate change and intense regional droughts. The Act was unequivocal when it stated that “adequate water quantity and water quality” must be maintained to “fulfill the mission of the system and the purposes of each refuge.”

The FWS has long recognized that water availability is one of the most challenging problems facing the Refuge System. To quote the FWS from *Fulfilling the Promise*: “The Service needs to be a strong advocate for fish, wildlife, and plants in the adjudication and allocation of water rights and the protection of natural hydrological systems. A comprehensive assessment of the availability of water supply, projected water needs, and status of existing and needed water rights should be completed for each refuge.” Although more than 150 assessments have been completed, many are outdated and there is little evidence that they were performed in a standardized or thorough manner. Unfortunately, a decade has now elapsed with the Refuge System making little progress toward the comprehensive goals outlined in *Fulfilling the Promise*.

The Refuge System must develop a national water policy that standardizes protocol for water assessments and helps land managers secure and defend water rights on wildlife refuges. In the face of increasing human demand, droughts, floods, and altered timing and volume of water flows, the Refuge System must anticipate and appropriately plan for future water challenges. As part of this planning effort, the Refuge System should secure the hydrologists and equipment, and foster the institutional commitment necessary to thoroughly catalogue existing water use along with current and projected needs. Currently, some FWS regions

have no dedicated hydrologists or water monitoring programs at all. With such limited capacity, it is not surprising that many wildlife refuges, particularly in the East, have not documented current water usage or projected future needs. Documentation will be absolutely critical if refuge water rights are legally challenged as water supplies dwindle. Thorough documentation of usage is essential not only to defend one's rights, but also to assert what refuges actually need. Some of the necessary inventory and monitoring can be done in conjunction with partners, but all data needs to be standardized and accessible in a centralized database.

The new administration should promulgate regulations for mineral extraction on refuges.

Although the federal government owns almost all of the surface acreage in the Refuge System, in some cases subsurface mineral rights are owned by private parties, creating a split estate. There is inherent tension between the property rights associated with these minerals and the mandate to manage national wildlife refuges for the primary purpose of wildlife conservation. The proper balance between these competing interests remains largely undefined. This tension is exacerbated by FWS's failure to promulgate detailed regulations governing private mineral estates, despite the fact that the National Park Service (NPS) and U.S. Forest Service have developed regulations for the land systems they administer. As a result, FWS oversight of private mineral estates within national wildlife refuges is often ineffective and inconsistent, varying widely among regions and individual refuges.

In 2002, the last year for which data were available, over one-fourth of all national wildlife refuges had oil and natural gas activities, including over 1,800 active wells and 2,600 inactive wells scattered across 155 wildlife refuges. As with oil and gas activities anywhere, these operations frequently result not only in significant wildlife disturbance, but also in oil spills, leaking pipelines, abandoned infrastructure and equipment such as leaking oil drums, toxic chemical gas leaks, fires, spread of invasive species, severe erosion, wildlife exposure to open reserve pits, reduced or eliminated public access, and wildlife mortality.

In response to Congressional concern over this mounting destruction of natural resources, the Government Accountability Office (GAO) undertook a detailed study of private oil and gas estates on refuges, concluding in 2003 that management and oversight of oil and gas operations was inadequate, and making specific recommendations to address numerous problems. For example, the GAO found that FWS had very little knowledge regarding the extent of oil and gas development occurring on refuges. Further, FWS had not assessed the cumulative environmental impact of these activities on refuge resources. A follow-up assessment by GAO in 2007 found that FWS and the Department of the Interior had made little or no progress in most areas, and concluded that "more action is needed." A year later, the FWS has still not deployed a database to collect basic information on oil and gas activities and their effect on refuge wildlife or habitat. Instead of undertaking diligent efforts to address these gaps in knowledge, FWS instead has essentially decided not to regulate any non-federal oil and gas operations on Refuge System lands.

The shortcomings of the FWS regulatory regime are sharply underscored by the National Park Service's comprehensive and substantive oversight of the same activities. Promulgated in 1979, Park Service's rules require that oil and gas operators submit a detailed plan of

operations, with precise information concerning the location, extent, and duration of proposed activities and associated infrastructure; the affected environment and anticipated environmental consequences; technologically achievable alternatives to the proposed operations; measures to protect surface and subsurface waters; and many other standards. The Park Service also retains the authority to reject inadequate or incomplete plans of operations. Additionally, Park Service's regulations require specific authorization for any use of water within Park Service lands, establish substantive reclamation requirements and operating standards, mandate registration of oil and gas related commercial vehicles with the agency, require guaranteed performance bonds, provide for specific damage clauses, and allow public participation and comment on a proposed plan of operations.

With adverse or even devastating impacts from private mineral development occurring with alarming regularity, the FWS must take immediate action to overhaul the management of mineral activities on national wildlife refuges. New regulations should be promulgated that establish a detailed and precautionary approach to the approval and subsequent management of mineral activities on refuges. Upfront fees should be collected in all states for foreseeable damages from any new mineral activities. This will allow the FWS to quickly begin restoration, mitigation and monitoring of these sites soon after injury occurs, which will avert more costly and potentially devastating impacts to refuge resources. A separate fund should be established for clean-up and restoration of refuge sites damaged by mineral activities. New operators would pay into this fund upon initiating mineral activities. The fund should be used by FWS for current and future clean-up and restoration costs.

The new administration should develop an invasive species control initiative.

After direct habitat loss, invasive species are believed to be the second leading cause of species decline in the U.S. Refuge managers across the country almost unanimously agree that non-native, invasive species are the top threat to wildlife and habitat on refuges. According to the FWS, 2.4 million acres of refuge lands are now smothered with invasive plants, while more than 4,400 invasive animal populations impact native species on millions more acres. In fiscal year 2006, the last year in which a comprehensive assessment of needs was assembled, the Refuge System carried a \$360 million backlog on critical invasive species control projects. Of course, the problem is much larger than the Refuge System and ultimate solutions demand a broader approach. The Director should establish an invasive species initiative designed to prevent the establishment of new populations of invasive species, and begin the process of reducing the impacts of existing populations. The initiative should strengthen the use of invasive species "strike teams" as a method to quickly assess and eradicate new infestations and should permanently codify the Volunteers and Invasives Program, which is now subject to annual authorization and appropriations.

III. Restore proper consideration of wildlife and other environmental resources by fully complying with applicable environmental laws in making decisions on U.S. border security.

One-quarter of the 1,950 mile U.S.-Mexico border lies within federal public lands. This includes hundreds of miles within the National Park system alone, running through such national treasures as Big Bend National Park and Organ Pipe Cactus National Monument.

These borderlands are tremendously diverse, and many imperiled species depend upon borderland habitat for their continued existence. In Arizona alone, the Border Patrol estimates that 39 species protected or proposed to be protected under the Endangered Species Act are already being affected by its operations.

Illegal border crossings and enforcement activities along the border are placing a tremendous burden on federal land management agencies and causing long-term damage to natural and cultural resources. But not only are these resources threatened, the very laws designed for their protection are threatened as well.

Environmental laws are the cornerstone to ensuring that our Nation's valuable natural resources are adequately protected, and that rights to public notification and participation are respected. In a series of successive legislative enactments, Congress has steadily provided federal agencies with increasingly wide latitude to disregard the applicability of such laws in relation to border security operations and infrastructure proposals. This trend culminated with the 2005 enactment of section 102 of the REAL ID Act, which provides the Department of Homeland Security (DHS) Secretary the "sole discretion" to waive all laws he "determines necessary to ensure expeditious construction of the barriers and roads" not only along, but "in the vicinity" of all 6,000 miles of U.S. international borders with both Mexico and Canada—an incredibly ill-defined and sweeping grant of powers to an unelected official.⁹

In addition, Congress passed the Secure Fence Act in 2006 which requires DHS to build five segments of border wall, totaling 700 miles. The bill also requires a feasibility study of a "state-of-the-art infrastructure security system" along the northern border.¹⁰ Although the Secure Fence Act has subsequently been amended to remove requirements that specific sections of wall be built, it still directs DHS to construct "not less than 700 miles" of border wall, and agency proposals largely overlap with the areas identified under the original Act. The border wall severely fragments wildlife habitat and impedes wildlife movements needed for foraging and breeding, threatening to extirpate wildlife populations.

Notably, the border fence construction approved under the Secure Fence Act is subject to the sweeping "waiver" provision under section 102 of the REAL ID Act.

First 100 days:

The new administration should immediately issue guidance or other binding direction that the administration will not invoke the REAL ID waiver in relation to any proposed border security infrastructure.

The nonpartisan Congressional Research Service characterized the waiver authority in Section 102 of the REAL ID Act as "unprecedented" and its unilateral grant of legislating authority to an executive branch official may violate the Constitution's fundamental

⁹ 8 U.S.C. 1103 [note](#).

¹⁰ Nuñez-Neto, B. & Viña, S. *Border Security: Barriers Along the U.S. International Border*. Congressional Research Service, Dec. 12, 2006.

separation of powers doctrine.¹¹ The Supreme Court, however, has thus far refused to hear challenges to the provision's constitutionality.¹²

Despite its unprecedented sweep, the Real ID Act was passed as a “rider” to “must pass” legislation—an emergency supplemental appropriations bill that provided funds for the wars in Iraq and Afghanistan, as well as tsunami-relief efforts—and thus was never given Committee consideration or hearings. As stated by one member during the limited floor debate held on the bill, “a waiver this broad is unprecedented. It would waive all laws, including laws protecting civil rights; laws protecting the health and safety of workers; laws, such as the Davis-Bacon Act, which are intended to ensure that construction workers on federally-funded projects are paid the prevailing wage; environmental laws; and laws respecting sacred burial grounds”

The new administration should issue guidance or other binding direction that it will not invoke the REAL ID waiver in relation to any proposed border security infrastructure. The Clinton administration issued similar guidance in relation to a precursor to the REAL ID Act, that allowed the Attorney General to waive NEPA and the ESA.¹³

First year:

The new administration should suspend all construction within areas where Secretary Chertoff utilized the REAL ID Act waiver authority.

Six months after its passage, DHS Secretary Michael Chertoff on September 22, 2005 invoked the Real ID Act to “waive in their entirety,” the requirements of nine laws, including the Endangered Species Act, Clean Water Act, and National Historic Preservation Act, as they applied to construction of a 3 ½ mile stretch of a secondary border security fence in San Diego.¹⁴ The waiver overrode the objections of the California Coastal Commission, a state agency, to the project's design because of anticipated damage to a State Park, as well as coastal wetlands and habitat for several endangered species.¹⁵ Secretary Chertoff has subsequently invoked the waiver four additional times, including, a waiver that resulted in a federal district court lifting the preliminary injunction it had granted against border wall construction within the San Pedro Riparian National Conservation Area (NCA) in litigation brought by Defenders of Wildlife.¹⁶ On April 1, 2008, Secretary Chertoff

¹¹ Liptak, A. *Challenges Arise to Border Fence Project*. New York Times, April 8, 2008

¹² Winograd, B. *The Grants That Got Away*. <http://www.scotusblog.com/wp/the-grants-that-got-away>. Accessed 18 August 2008.

¹³ March 6, 1997 Memorandum From Immigration and Naturalization Service Assistant Commissioner

¹⁴ *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the Real ID Act of 2005*. 70 Fed. Reg. 55,622-623 (Sept. 22, 2005).

¹⁵ Berestein, L. *Feds Override Laws, Give OK to Border Fence*. San Diego Union-Tribune, Sept. 15, 2005; Neuman, J. *U.S. Acts to Finish Divisive Border Fence; Environmental Laws are Waived by the Homeland Security Chief to Allow Last Section to be Built Through Wetlands Near San Diego*. Los Angeles Times, Sept. 15, 2005.

¹⁶ *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006*, 72 FR 60870 (Oct. 26, 2007).

invoked REAL ID to waive 35 laws that would otherwise apply to more than 470 miles of proposed wall construction.¹⁷

Already, the effects of the REAL ID Act are being seen in areas where laws were waived for border wall construction. For example, in the San Pedro case, Defenders secured a temporary restraining order partially on its NEPA claim that the wall's impacts on erosion and hydrological processes were not adequately considered. Secretary Chertoff subsequently waived NEPA and 18 other laws, and heavy summer monsoon rains in 2008 have, as predicted, caused significant gullying and erosion within the San Pedro NCA, even washing out one section of the wall.¹⁸

The new administration should implement an environmental mitigation program for wall construction.

DHS has committed to providing \$50 million to the Department of the Interior to fund projects to mitigate damages to threatened and endangered species from wall construction. To date, no mitigation projects have been funded by DHS. Though much of the harm to wildlife and natural resources is un-mitigatable, conservation and restoration projects can help species by reducing threats from other sources.

First term:

The new administration should prioritize and work with Congress to pass legislation to comprehensively address immigration and border security issues, including natural resource protection and repeal of section 102 of the REAL ID Act.

Ultimately, long-term conservation of the border area natural resources and wildlife must be integrated within a comprehensive approach that addresses all of the causes of illegal border traffic and related enforcement. Comprehensive immigration reform proposals, such as S. 2611 introduced by Senator Arlen Specter (R-PA) in the 109th Congress, attempt to establish a more orderly lawful immigration system by creating a guest-worker program, and providing for increased work and family visas. One of the main goals of these proposals is to reduce illegal immigration, which would in turn decrease the need for environmentally-damaging enforcement efforts.

S. 2611 contained several specific environmental provisions, including a requirement that DHS, in coordination with the Departments of the Interior, Agriculture, and other agencies, assess the “international, national, and regional environmental impact” of fence construction; a requirement that the DHS Secretary coordinate with the Secretaries of the Interior and Agriculture to develop a border protection strategy that “best protects” federal lands; direction that all Border Patrol agents undergo natural resource training coordinated with federal land management agencies; and an emphasis on the use of low-impact technologies on federal lands.

¹⁷ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended. 73 FR 18293 (April 3, 2008).

¹⁸ Associated Press, *Critics of Fence Point to Flood at Border Sites*. New York Times, August 26, 1998.

In particular, the new administration should support repeal of section 102 of the REAL ID Act. By addressing root causes of illegal immigration, emphasizing cooperation with the Mexican government, and requiring that environmental considerations be integrated into border security efforts, broad immigration reform efforts provide much greater opportunities for borderland environmental protection and the continued success of transboundary conservation initiatives than is provided for by current legislation and policy.

IV. Fully protect all remaining roadless areas on national forests and other public lands.

There are more than 58 million acres of inventoried roadless areas on America's national forests. These special places are unique in that they are relatively pristine, having escaped road building and associated resource extraction over the last 100 years. Roadless areas are vitally important to the nation's water supply, fish and wildlife conservation, recreation, and local economies. Though roadless areas comprise only a tiny fraction of the U.S. land area, they are found within a third of the over 2,000 major watersheds in the country, providing clean water to millions of people.¹⁹ Roadless areas nationwide support more than 220 threatened, endangered and proposed species for federal listing under the Endangered Species Act, and 1,930 sensitive species.²⁰ Roadless areas will be increasingly important as refugia for species impacted by global warming.

The widely popular Roadless Area Conservation Rule, issued in 2001 by the Clinton Administration after more than 600 public meetings and a record 1.6 million public comments, sought to protect these values that Americans value so highly. The "Roadless Rule" protected 58.5 million acres of our National Forest System in 38 states, and the diverse wildlife and plant life that inhabit those lands. These areas are the roughly 30 percent of the national forests where roads have not been built and that have not been logged or otherwise exploited or protected as wilderness. The Roadless Rule represented a common-sense, balanced approach to managing road building in national forests: no existing roads or recreational trails were closed, access for private property owners was not restricted, and no existing leases or permits for mineral development or oil and gas operations were impeded. At the same time, new roads were permitted to be built to respond to fires and other natural disasters. The rule thereby protected the most pristine, untouched and unspoiled areas of our national forests from logging, mining and other damaging activities.

On January 20, 2001, the same day President Bush was sworn into office, the administration swiftly acted to derail the Roadless Rule by issuing a directive that prohibited the rule from being implemented until a status review could be completed. After completing the review, the administration indicated its intention to overhaul the rule and, in December 2001, issued an interim rule that removed protections for contiguous roadless areas. Over this same time period and continuing through the next three years, industry groups and the States of Idaho, Alaska, Utah, North Dakota and Wyoming attempted to overturn the rule through litigation, which the administration refused to adequately defend. Through this time, the rule was

¹⁹ U.S. Forest Service. Forest Service Roadless Area Conservation. Final Environmental Impact Statement Volume 1. USDA Forest Service. Washington D.C. Office. November 2000.

²⁰ *Ibid.*

technically still in place, although periodically enjoined by different federal courts, despite both the barrage of legal challenges and the administration's efforts to substantively weaken its protections.

Despite an earlier 9th Circuit Court of Appeals ruling upholding the Roadless Rule on the challenge brought by the State of Idaho, in July 2003, the U.S. District Court in Wyoming ruled that the Roadless Rule violated the National Environmental Policy Act and the Wilderness Act and issued an injunction. This decision, which was issued in response to the challenge brought by the State of Wyoming, was appealed to the 10th Circuit Court of Appeals. Then, in May 2005, the Bush Administration finally repealed the Clinton rule, and replaced it with one that removed federal protections for roadless areas, rendering the Wyoming appeal moot. The 2005 rule adopted a voluntary process that allowed individual states to petition the Forest Service with proposals as to how to manage roadless areas in the state, thereby giving the state the choice as to whether to protect roadless areas in national forests within the state and to what degree. Thereafter, twenty environmental organizations, including Defenders of Wildlife, filed suit challenging the Bush Administration's repeal of the Roadless Rule in the U.S. District Court for the Northern District of California. In September 2006, the District Court found against the Bush Administration, and reinstated the original Roadless Rule. As of October 2008, this case was pending in the 9th Circuit Court of Appeals.

Following the California District Court's decision, the State of Wyoming immediately sought reinstatement of the July 2003 decision enjoining the Roadless Rule and, when its request was denied, filed a new suit challenging the legality of the Roadless Rule. In an August 2008 opinion, the U.S. District Court in Wyoming agreed with the State of Wyoming, and overturned the rule, citing failure to comply with The Wilderness Act as well as the public participation provisions of NEPA, despite one of the most extensive public participation processes in history. This decision was immediately appealed to the 10th Circuit Court of Appeals and was still pending as of October 2008. The competing and conflicting lawsuits surrounding the rule need to be resolved by the next administration.

First 100 Days:

The new administration should vigorously defend the Clinton administration's Roadless Area Conservation Rule in all outstanding appeals, withdraw from any ongoing rulemakings begun under the Bush Administration's petition process, and initiate any necessary rulemakings to reverse state- or forest-specific rulemakings weakening protections for roadless areas

The 58 million acres of roadless areas in our national forests are not only vital habitat for countless animals, particularly fish and large, wide-ranging, and reclusive species like grizzlies, wolves, lynx, wolverine, and elk, but these pristine areas are also critical for preserving the nation's drinking water supplies, and are highly-valued for recreation opportunities. With the repeal of the Roadless Rule, these values that the majority of Americans support are imperiled.

The new administration should take every effort to reinstate the Roadless Rule by vigorously defending it in the appeals pending in the 9th and 10th Circuit Courts of Appeals. It should

also withdraw from the rulemaking process now pending for roadless areas of the national forests of Colorado. Any roadless area rulemakings that have been finalized under the Bush Administration's petition process as of the date the new administration takes office, such as those that are applicable to the roadless areas within the national forests located in Idaho, should also be rescinded and these areas should be made subject to the requirements of the Roadless Rule. Last, the new administration should immediately institute rulemaking proceedings that would again subject the Tongass National Forest in Alaska to the requirements of the Roadless Rule.

First Year:

The new administration should direct the U.S. Forest Service to focus scarce resources on road-maintenance and habitat restoration rather than costly road-building and development in pristine lands

In the rest of the National Forest System, the road network is deteriorating causing severe safety and environmental problems. In 2001, the U.S. Forest Service adopted a new road management rule that directed the agency to maintain a safe, environmentally-sound road network that was both responsive to the public's needs and affordable to manage. This rule was adopted in response to the increasingly problematic condition of deteriorating and unmaintained national forest roads, including both National Forest System roads and non-designated, user-created roads and off-highway vehicle tracks. That year, the Forest Service estimated that at the then-existing funding levels, the Forest Service's entire road network would be in an overall poor condition as of 2020. Unfortunately, both funding levels for this account and the number of miles decommissioned by the Forest Service have shown a general downward trend since 2001. In Fiscal Year 2003, over \$11 million was appropriated for decommissioning roads. This fell to approximately \$4.7 million in Fiscal Year 2008, and the President's request for Fiscal Year 2009 is a paltry \$3.7 million.

Deteriorating, under-managed and unmaintained roads pose a costly problem for the Forest Service, ecologically and economically. The National Forest System has over 446,000 miles of classified and unclassified roads,²¹ and is burdened with a \$10 billion road maintenance backlog.²² Nationally, the Forest Service estimates that they need to remove an estimated 186,000 miles of roads to bring the road system down to a manageable, maintainable system that still meets the needs of the agency and forest users.²³ Unfortunately, the Forest Service's budget line item for this account has consistently fallen since adoption of this policy.

These roads contribute to water quality problems in streams with threatened, endangered and sensitive species, in streams which serve as community water sources and where repairs are needed due to storm events. Deteriorating and unmaintained roads also serve as vectors

²¹ USDA (2001). *National Forest System Road Management Strategy: Environmental Assessment*.

²² USDA (1998). *Draft National Forest Road System and Use*. Compiled by Gerald Coghlan and Richard Sowa. Forest Service Engineering Staff. Washington, D.C., at p. 19, available at http://www.fs.fed.us/eng/road_mgt/roadsummary.pdf

²³ Ihara, Ph.D., D.M., Hackett, Ph.D., S.C., and Manning, J.J. Reinvestment in Jobs, Communities and Forests: The Benefits and Costs of a National Program for Road Removal on U.S. Forest Service Lands, A Preliminary Analysis. The Center for Environmental Economic Development. p. 5, available at <http://www.wildlandscpr.org/files/NFSRoadRmoval.pdf>.

for invasive species; accelerate erosion and sedimentation of streams, thereby impacting water quality and flood control; fragment wildlife habitat; and spread forest diseases.

To forestall the chronic under-funding that has occurred during the Bush Administration, the new administration should request a significant increase in the Forest Service's account for decommissioning roads. In order to make real progress in decommissioning these roads, by the end of the first term, at least \$93 million should be appropriated every year for this purpose.²⁴ In addition, in accordance with the 2001 road management rule, the new administration should ensure that the Forest Service prioritizes decommissioning of roads that pose the greatest risk to public safety or to the environment.

V. Fully consider the impact of global warming on wildlife and habitats on federal lands and incorporate measures to assist wildlife adaptation to global warming in federal land management plans.

Federal lands provide some of the last and best core habitat areas in the country, yet the species and habitats these lands were set aside for are and will be undergoing tremendous ecological change as the climate changes. According to the Government Accountability Office, however, the federal land management agencies are woefully unprepared for this challenge; federal land management agencies have not made climate change a priority, and have provided resource managers with no guidance about how to address the impacts of climate change. In addition, "resource managers do not have sufficient site-specific information to plan for and manage the effects of climate change."²⁵

In addition, the research, monitoring, and inventory capacity of federal natural resource agencies is sorely lacking. Without a baseline inventory of existing resources and a coordinated, robust monitoring program, agencies will not be able to understand changes in species and ecosystems in response to climate change, and will not be able to adequately develop solutions.

First 100 Days:

The new administration should issue an Executive Order requiring agencies to consider and analyze the effects of climate change on natural resources and identify actions necessary to alleviate these effects in long-range plans, in federal land management plans, and in undertaking other major actions.

Future conservation and land and water management investments must be "climate-smart" and analyze how the effects of climate change may alter agency decisions. An Executive Order requiring better planning for climate change impacts and adaptation measures should include a requirement for each agency to issue new planning guidance to provide the

²⁴ Reinvestment in Jobs, Communities and Forests: The Benefits and Costs of a National Program for Road Removal on U.S. Forest Service Lands, A Preliminary Analysis, at p. 10.

²⁵ GAO 2007. Climate Change: Agencies Should Develop Guidance for Addressing the Effects on Federal Land Water Resources. GAO-07-863.

necessary tools to agency planners and field managers to be able to address these complex issues.

First Year:

The new administration should establish an interagency team to develop standardized inventory and monitoring protocols and to determine areas of overlap of existing programs to streamline monitoring programs moving forward.

Each agency and many field offices have existing monitoring programs, from those that are national in scope, like the Forest Service's Forest Inventory and Analysis Program, to those that are local, such as annual duck counts at a national wildlife refuge. These programs are rarely coordinated within each agency, and more rarely coordinated with other federal and state agencies or universities. In the face of climate change, it is more important than ever to maximize these programs and establish new ones to efficiently provide comparable data that is useful to detect environmental changes, determine causes of environmental change, and to refine agency actions and practices.

The new administration should establish an interagency team to develop policies to facilitate active adaptive management based on strategic monitoring

Scientists agree, the only effective way of addressing climate change impacts on natural ecosystems and wildlife is to develop more effective active adaptive management based on strategic monitoring. Under climate change a new formulation of adaptive management will require that resource managers adopt a more experimental approach – testing new hypotheses, specifically designed to learn from and make the necessary “course corrections” in response to new information or changing climatic factors. With the tremendous uncertainties associated with climate change modeling, designing management structures, indicators and measures that specifically seek and incorporate new information is vital. Many of our wildlife, natural resource and environmental laws, however, require certainty against measurable outcomes in agency decision making, for instance by requiring decade-long management plans for individual land units and measures of population numbers. New policies and institutional frameworks are needed to facilitate the adoption of adaptive management approaches that provide the public transparency and accountability of government decision making, while allowing flexibility to respond to changing information due to climate and the many other environmental changes.

VI. Support administrative action and legislation to maintain viable wildlife populations on national forest and BLM lands.

The U.S. Forest Service and BLM have the challenging management task of managing federal lands to provide multiple social, economic and ecological benefits to the American people over time, including recreation opportunities, fish and wildlife, energy, minerals, timber, forage for livestock, and many other values, benefits, and uses. The implementation of this multiple-use mission has proven challenging, and in some cases controversial, for the Forest Service and BLM. Federal land managers have found it difficult to balance the often competing demands on Forest Service and BLM lands, causing stress on the agencies, agency personnel, and the lands due to a lack of clear direction on how to effectively and

efficiently conduct multiple-use policy. Increasingly, a wide range of interested parties, including sportsmen, scientists and policy makers, are recognizing that aspects of Forest Service and BLM management policies need to be clarified to effectively implement multiple-use policies.

In 1976, Congress responded to the increasingly high values that Americans placed on their federal lands and passed the National Forest Management Act (NFMA). The enactment of NFMA is a watershed moment in public lands management in that it provided the Forest Service with the mandate to conserve the diversity of life found on national forests and grasslands. In 1982, the Reagan administration adopted final regulations initially developed by the Carter administration implementing NFMA. Together, NFMA and its implementing regulations provided the Forest Service with the congressional mandate and critical policy tools to ensure that land health values were sustained in the face of social and economic pressures calling for maximization of short-term resource extraction values.

Specifically, NFMA and its implementing regulations required the Forest Service to maintain biological diversity and viable wildlife populations on their lands. NFMA gave the Forest Service a strong and clear mandate to manage their lands in order to “provide for diversity of plant and animal communities.”²⁶ The 1982 regulations elaborated on this “diversity provision” and required the Forest Service to “maintain viable populations of existing native” species.²⁷

Viable fish, wildlife and plant populations are integral to maintaining ecological diversity and are an indication of overall land health. Biologists define a viable population as one that can sustain itself over a period of at least 100 years. To sustain itself over time the population must have a sufficient number of individuals, well distributed across the landscape, with the reproductive success and survival rates that will allow it to persist over the long term.

Beginning in 2001, the Bush administration began the process of rolling back protections afforded under the viability rule. Defenders of Wildlife and other organizations have challenged the Bush NFMA regulations in court. A 2005 version of the rules was challenged by Defenders of Wildlife and other conservation organizations, and was thrown out by a federal court in 2007. Following the completion of a superficial environmental impact statement and a new public comment period, the Bush administration re-promulgated nearly identical regulations in April 2008, which Defenders of Wildlife and its partners are again challenging in federal court. The lawsuit alleges that the Forest Service violated the National Environmental Policy Act and Endangered Species Act by approving the new regulations based on faulty environmental analyses that failed to evaluate adequately the environmental impacts of the new regulations. Contrary to common sense and the law, the Bush administration defends its decision by claiming that the regulations, which govern the development of management plans for every national forest, will have no environmental effects on the 193 million acres of national forest lands or the endangered species that live there.

²⁶ 16 U.S.C. § 1604(g)(3)(B).

²⁷ The 1982 regulation only applied to vertebrate species – fish, reptiles, amphibians, birds and mammals.

Under the Bush administration rollbacks, longstanding concepts of balanced multiple-use management and science-based decision-making became secondary to the narrow pursuit of resource extraction projects without careful consideration of fish, wildlife and other social and environmental values. Under the Bush regulations, national forest managers could craft forest plans, and therefore move ahead with harmful logging, mining, and drilling projects, without considering the impacts to fish and wildlife populations. In doing so, the 2008 Bush NFMA rollbacks encourage faulty and risky decision-making. Removing the wildlife viability standard and associated monitoring functions can be analogized to taking away a doctor's diagnostic toolbox – we deprive ourselves of the information we need to know if the system is functioning properly, or if it is ailing.

Specifically, the 2008 planning rule abandons all requirements to protect species viability. It simply states a vague “overall goal” with no standards that calls upon forest plan components to “establish a framework to provide the characteristics of ecosystem diversity,” makes it a discretionary decision to address concerns over any individual species in decline, and leaves all specific requirements regarding providing for diversity of plant and animal communities to Forest Service guidance documents. In addition, the 2008 rule abandoned all enforceable provisions for species-level monitoring and assessment, including those requirements for groups of species that generally “represent” various habitat types and/or that serve as a proxy for assessing the effects of management activities on wildlife in general, replacing them with requirements to merely monitor habitat composition. The 2008 rule's shift in focus to monitoring habitat composition, rather than requiring standards for the management and monitoring of wildlife populations, is contrary to notions of applied conservation science, and is completely insufficient to assess whether ecological diversity is being sustained. Only through a coupling of wildlife population surveys and habitat monitoring can this goal be achieved.

The problem for fish and wildlife is even more severe for lands managed by BLM. BLM manages more wildlife habitat than any other federal or state agency; its lands hold an incredible array (more than 1,500) of sensitive species, are increasingly recognized for their high overall habitat values, and have long been sought out for outstanding fishing and hunting opportunities. Yet the agency lacks clear statutory or regulatory direction to conserve fish and wildlife resources valued by all Americans.

Under the Federal Land Policy and Management Act (FLPMA), BLM manages its lands for multiple purposes—including timber, energy, recreation, range and wildlife resources. Although FLPMA advises the BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands” and “to minimize adverse impacts on the natural, environmental, scientific, cultural, and other resources and values of the public lands,” the BLM enjoys wide discretion under the multiple use mandate to favor other values, such as energy development, over the fish and wildlife for which it has stewardship responsibility.²⁸ In addition, although the BLM has policies in place to help prevent species from being listed under the Endangered Species Act, the policies are vague and difficult to enforce. Historically, the agency's culture has bent its discretion toward promoting resource extraction and the pursuit of short-term economic objectives, and its emphasis on such development has increased in the Bush administration, as evidenced by its aggressive

²⁸ 43 U.S.C. §§ 1732(b), (d)(2)(A).

implementation of energy development projects in places like Wyoming, Colorado and New Mexico. From 2001 to 2007, nearly 21,000 gas and oil wells were drilled on federal public land in the Rocky Mountain States of Colorado, Wyoming, Utah, New Mexico and Montana;²⁹ by comparison, fewer than 9,500 wells were drilled between 1995 and 2000.³⁰

First 100 Days:

The new administration should immediately rescind the 2008 National Forest Management Act regulations and reinstate the 1982 NFMA regulations as interim measures.

As discussed above, the 2008 NFMA regulations removed well-defined forest planning standards, including longstanding provisions for maintaining, managing and measuring fish and wildlife populations, and replaced them with vague and overly discretionary guidelines. According to the Forest Service, roughly 40 forest plans are being prepared under the 2008 NFMA regulations. Finalization and implementation of these forest plans will have negative impacts on fish and wildlife populations and other important public values.

The new administration should immediately rescind the 2008 NFMA regulations and reinstate the 1982 regulations as an interim measure to both ensure strong, standard-based forest management planning, and provide a known management framework for managers and interested parties. The 1982 regulations provide an environmentally sound starting point for more effective and efficient policy adjustments to be implemented by the new administration.

First Year:

The new administration should encourage the introduction and passage of legislation that codifies the wildlife viability requirement for the Forest Service, expands that requirement to the Bureau of Land Management, and requires resource managers to use state-of-the-art conservation planning tools in their land management decisions.

After rescinding the controversial and unproductive 2008 NFMA regulations and restoring standard-based and conservation-oriented land management planning to our national forests, the next step for the new administration should be to end the years-long battle over forest planning regulations and codify science-based wildlife viability requirements for both Forest Service and BLM lands.

There is growing consensus that congressional intervention in Forest Service and BLM fish and wildlife policy is necessary to adequately clarify agency mission under multiple-use doctrine. Severe vacillations in regulatory policy have negatively impacted the agencies

²⁹ Data were unavailable for Fiscal Year 2005. If these data were included the number of wells drilled in this period would be even greater.

³⁰ U.S. Dept. of the Interior, U.S. Bureau of Land Management, "BLM Publications: Agency Mission & Statistics - Public Land Statistics," <http://www.blm.gov/publications>.

(including morale and budget), fish and wildlife resources – and in general, multiple-use policy implementation and the provision of long-term benefits to the American people.

Therefore, as a first priority, the administration should coordinate with the appropriate congressional leaders concerning the introduction, passage and implementation of legislation that would apply balanced, science-based fish and wildlife conservation standards to U.S. Forest Service and BLM decision-making processes.

H.R. 7151, introduced by Rep. Ron Kind (D-WI) in the second session of the 110th Congress, seeks to accomplish the following policy goals, which should be incorporated in any legislation or administrative framework developed by the administration and Congress:

- **Restore** the wildlife viability standard to the Forest Service. The mandate to maintain fish and wildlife populations is recognized in NFMA and in the original Forest Service planning regulations dating to the Reagan Administration, but a clear statutory directive to maintain the viability of wildlife populations on Forest Service lands would protect against inconsistent interpretation and improper policy approaches such as that taken by the Bush administration.
- **Modernize** the 1982 Forest Service wildlife viability standard in order reflect the state-of-the-art in conservation science and to achieve greater efficiencies and effectiveness in land management decision-making.
- **Expand** the wildlife viability standard to BLM-managed lands in order to:
 - Elevate BLM fish and wildlife management standards to match the values of the American people
 - Standardize fish and wildlife management and enhance cooperation across agency boundaries, particularly in the area of wildlife corridor management
 - Realize a vision of true landscape-level planning and connectivity management that is increasingly called for in policy circles, and is required to responsibly respond to the challenges brought on by a changing climate.

First Term:

The new administration should develop regulations fully implementing the wildlife viability legislation.

Following the passage of wildlife viability legislation, the administration should collaborate with congressional leaders, stakeholders and the relevant agencies to develop implementing regulations to realize the statutory objectives. The implementing regulations should be crafted to enhance the effectiveness and efficiency of Forest Service and BLM planning, analysis, decision-making, and monitoring. The administration should develop an atmosphere of collaboration between agencies and stakeholders to ensure development of sound policies that will be resilient to political forces, enjoy agency buy-in and the endorsement of on-the-ground practitioners, and pass muster with the scientific community.

The administration also should harmonize these updated wildlife viability regulations within the existing regulatory framework of both NFMA and FLPMA.

VII. Ensure energy development on federal lands and waters does not harm crucial wildlife habitats.

Meeting America's energy needs responsibly is one of the greatest issues facing the country; for our economy, foreign relations, and the world's climate. Unfortunately the energy policy of the past eight years has failed to move America in the right direction in terms of a transition to a low-carbon, sustainable and secure energy future. The Bush administration has done much to limit our future energy choices, from the failure to develop forward thinking policy regarding renewable energy sources, to the rush to fast-track fossil fuel production, at the expense of public values, on much of the federal estate. From the beginning, energy policy was developed behind closed doors largely for the benefit of (and in many cases crafted by) energy companies. The results of this corrupt policy development process were very much out of step with the public interest.

First 100 days:

The new administration should immediately freeze the dangerous fast-track energy policies of the Bush administration.

The Bush administration took questionable and risky steps to expedite energy-related projects on the federal lands and waters. Executive Order 13212 (May, 2001) called for federal agencies to "expedite their review of permits or take other actions as necessary to accelerate the completion of such projects..." For land management agencies like the Bureau of Land Management (BLM), the message³¹ was clear: Remove "restrictive" impediments to companies seeking oil and gas drilling rights on federal wildlands throughout the mountain west. "Impediments", according to the administration, take the form of well established, science-driven, common-sense mitigation measures designed to protect a wide range of public goods: fish and wildlife populations, clean water and air, and recreation opportunities. The results of the administration's fast-tracked energy development policy are alarming: In the Pinedale, Wyoming BLM district, between 2001 and 2004, between 85-90% of protective mitigation "stipulations" for wildlife, including measures to conserve sage grouse and key winter range for big game, were waived at the behest of drilling operators. Overall in southwest Wyoming, 97% of industry's requests to drop wildlife mitigation stipulations were granted.³²

Executive Order 13212 should be rescinded and land management agencies involved in oil and gas leasing activities (including BLM, U.S. Forest Service, U.S. Fish and Wildlife Service, and Minerals Management Service) should be clearly directed to implement a "time-out" on expedited actions. Specifically, the BLM should be required to 1) enforce lease stipulations; 2) use estimates of economically viable oil and gas supplies in developing planning alternatives; and 3) conduct comprehensive environmental assessments under the National

³¹ Conveyed via Instruction Memorandum Nos. 2003-233 and 2003-234.

³² Morton, P. et al. *Drilling in the Rocky Mountains: How Much and at What Cost?* The Wilderness Society, Denver, CO and Seattle, WA.

Environmental Policy Act (NEPA) including the application of data and information, accounting of non-market variables, analysis of cumulative effects.

The new administration should immediately freeze the Bush administration's 11th hour attempt to rush the politicized preparation of a 5-year OCS oil and gas drilling program.

Now is *not* the time to indulge in energy industry driven wish lists for the development of unilateral and potentially disastrous energy policies. For example, on July 14, 2008 President Bush lifted an 18-year executive moratorium on offshore oil drilling in the Outer Continental Shelf that was implemented by his father, and used regulatory measures to pressure Congress on longstanding moratoria. The Minerals Management Service (MMS) proposed changes to the 5-year oil and gas leasing program. This follows an aggressive and controversial 2007 5-year plan that sacrificed sensitive marine habitat in Alaska's Bering, Chukchi and Beaufort seas, and lifted a presidential moratorium on oil and gas drilling in Bristol Bay. Commercial fisheries, tourism, marine ecosystems (including key habitat for polar bears, a diversity of marine wildlife and birds), and local communities are all threatened by misguided oil and gas operations sanctioned in the 2007 plan. Despite the fact that the current 5-year plan is in effect until 2012, in August 2008 the MMS embarked on a new 5-year planning process which will further erode longstanding regulatory protections for sensitive marine ecosystems in the Pacific, Atlantic and central and eastern Gulf of Mexico.

The Bush administration's offshore drilling policy is designed to favor the oil and gas companies. For example, the Bush administration specifically asked the oil and gas industry to comment on Congressional moratoria on offshore drilling, and "to indicate the OCS planning area(s) where the company would be interested in acquiring oil and gas leases regardless of whether the area is currently under Congressional moratoria."³³ This expanded push for offshore oil and gas development ignores the Energy Information Administration's (EIA) conclusions that "access to the Pacific, Atlantic, and eastern Gulf regions would not have a significant impact on domestic crude oil and natural gas production or prices before 2030." And, "any impact on average wellhead prices is expected to be insignificant."³⁴

The new administration should implement an immediate moratorium and review of all proposed oil and gas leases and other federal actions to ensure that they will not jeopardize at-risk fish, wildlife and plants, and refrain from any new oil and gas leasing until adequate measures are in place to prevent harm to at-risk fish, wildlife and plants and their habitat.

Many millions of acres of federal lands and waters are already under lease, but are not producing. Any new energy policy should recognize that providing new leasing opportunities in environmentally sensitive areas to energy companies may be redundant given the amount of acreage already open to exploration and development. The 33.5 million acres of non-producing offshore leases and 34.5 million acres of non-producing onshore leases could produce 4.8 million barrels of oil a day. There are 2,200 producing leases on the

³³ Department of Interior, Minerals Management Service. Request for Comments on the Preparation of a 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program. Federal Register, Vol. 73, No. 149. Friday August 1, 2008.

³⁴ Energy Information Administration. Annual Energy Outlook 2007.

OCS, compared to 6,300 non-producing leases. Existing leases, however, should be subject to new environmental safeguards.

First Year:

The new administration should develop a comprehensive, secure, climate- and environmentally-friendly energy policy for the 21st century.

After immediately reversing the misguided policies of the previous administration, the incoming administration should begin an open and transparent process of crafting energy development policies for federal lands and waters. As a guiding principle, those policies should contribute to the long-term provision of public goods and recognize that the conservation of fish and wildlife populations and the habitats they depend on for survival form the basis for environmental health and economic, social and environmental sustainability.

The new administration should ensure that the management agencies responsible for implementing energy policies receive adequate resources, planning direction and conservation tools to effectively and efficiently conduct energy development activities.

This includes training and funding to conduct environmental and biological data inventories, monitoring and analysis to support comprehensive, adaptive planning processes. The Bush administration completely failed to provide management agencies with the resources to adequately document and analyze the impacts of fast-tracked oil and gas development policies on environmental and biological resources. For example, in the BLM FY05 budget request, monitoring accounts for only 1.6% of the total request. The number of BLM wildlife biologists has decreased by 20% over the last decade, and as of 2003 the agency had only one biologist for every 600,000 acres on staff to support conservation management activities BLM lands.³⁵

The new administration should provide clear policy guidance to agencies managing oil and gas development activities on methods to account for greenhouse gas emissions in NEPA planning and project assessments.

For example, currently the BLM completely fails to address global warming and climate change as a result of oil and gas lease sales within NEPA documents. Oil and gas production, processing, transmission, and distribution activities emit greenhouse gas pollution into the atmosphere, contributing to global warming and climate change. Climate change also impacts the environment, stressing even strong, resilient ecological systems. These impacts must be addressed by BLM, MMS and other agencies as they plan and implement management decisions. The incoming administration should provide direction to BLM, MMS and other federal land management agencies on proper analytical methods to be employed pursuant to NEPA, prior to the sale and issuance of lease rights. The incoming

³⁵ Bureau of Land Management. 2003. Fish, wildlife, botany, and special status species program evaluation. Final report on evaluation findings and recommendations for action plan development. Fish Wildlife and Botany Group, Renewable Resources and Planning Directorate, U.S. Department of Interior, Washington, DC.

administration should articulate how land management agencies shall coordinate project level NEPA processes with resource management plan revisions or amendments, as well as with other federal laws, in particular section 7 of the Endangered Species Act (ESA).

First Term:

The new administration should develop sound policy guidance on the development of renewable energy sources on federal lands and waters.

Clearly, the longer term energy policy objectives on federal lands and waters involve transitioning from a high to a low-carbon energy paradigm. While recognizing the opportunity presented by solar, wind, geothermal, and biofuel energy resources and the urgency to transition from high carbon to low carbon, renewable sources of energy, the administration must move responsibly into this new energy age. A national policy for renewable energy production on federal lands and waters should consider:³⁶

- Federal lands may not be the first option for industrial levels of energy development, given public values associated with those lands, and more viable options on private and state lands;
- There are places on federal lands inappropriate for large scale energy development, including lands possessing high environmental and biological values (i.e. threatened, endangered and sensitive species habitat, crucial wildlife habitat and habitat linkages). Instead, federal land management agencies can focus renewable energy development on previously degraded areas (e.g. brownfields), and areas that provide existing infrastructure;
- Comprehensive planning processes must be applied to renewable energy development projects.

VIII. Enforce the federal Airborne Hunting Act.

More than 30 years ago, Congress banned the use of airplanes to hunt or harass wolves and other wildlife by passing the federal Airborne Hunting Act (AHA). This barbaric and unethical practice has been resurrected in Alaska under the guise of wildlife management. Under Governor Sarah Palin, Alaska is claiming this de facto wolf hunting is wildlife management to circumvent the AHA ban. To date nearly 800 wolves have been killed in Alaska by individuals shooting wolves from airplanes or using planes to chase wolves, then land and shoot the exhausted animals at close range.

³⁶ Derived from: Scoping Comments on the Solar Energy Programmatic Environmental Impact Statement. Authored by The Wilderness Society, co-signed by Defenders of Wildlife. July 15, 2008.

First Year:

The new administration should fully enforce the AHA to stop the aerial hunting of wolves and other wildlife in Alaska or any other state.

The Airborne Hunting Act³⁷ makes it unlawful for “[a]ny person” to use aircraft to “shoot[] or attempt[] to shoot for the purpose of capturing or killing any bird, fish, or other animal,” and it also prohibits the use of aircraft “to harass any bird, fish, or other animal.”³⁸ The Act provides a limited exception for persons operating under the authority of a state “to administer or protect or aid in the administration or protection of land, water, wildlife, livestock, domesticated animals, human life or crops.”³⁹ The legislative history makes it clear that this exception was intended to preserve the states’ traditional police powers to protect their land and wildlife, and that it was not intended to authorize the states to engage in airborne hunting of animals to manipulate the natural wildlife populations.

The administration, through the Secretary of the Interior, should, pursuant to the Administrative Procedure Act⁴⁰ and the Department of the Interior’s regulations⁴¹ issue interpretative regulations under the AHA, which would make clear that the State of Alaska is in violation of the Act. The Secretary has the authority to issue interpretative regulations that clarify the circumstances under which a state may issue permits that allow for the airborne shooting of wildlife – as long as such regulations do not transgress the Act’s exception to allow such activities by the state “to administer or protect . . . land, water, wildlife, livestock, domesticated animals, human life, or crops.”

Specifically, the administration should amend 50 C.F.R. § 19.31 – which implements the AHA’s exception for state permits – to insert the following new subparagraph:

(c) A state may not issue permits, or engage in any otherwise prohibited activity under the Airborne Hunting Act, for the purpose of manipulating any wildlife populations.

The new administration should support congressional enactment of the Protect America’s Wildlife Act to make clear that aerial hunting of wolves and other wildlife is prohibited by the AHA.

In September 2007, Rep. George Miller of California introduced H.R. 3663, the Protect America’s Wildlife Act. The bill’s original cosponsors include Reps. John Dingell and Norm Dicks. Although the legislation currently has bipartisan support from 128 co-sponsors, including Democrats and Republicans on the House Natural Resources Committee, that panel has not taken up the legislation due to the opposition of Rep. Don Young, the Ranking Republican on that committee. In the Senate, Dianne Feinstein has indicated an interest in introducing a companion bill.

³⁷ 16 U.S.C. § 742j-1.

³⁸ 16 U.S.C. § 742j-1.

³⁹ 16 U.S.C. § 742j-1(b).

⁴⁰ 5 U.S.C. § 553(e).

⁴¹ 43 C.F.R. § 14.2.

H.R. 3663 would close the loophole in the Airborne Hunting Act (AHA) being exploited by the State of Alaska to allow de facto wolf hunting. It would also enable states to implement wolf control programs in cases of biological emergencies. It also includes a citizen suit provision and would bar states from circumventing the AHA through the “land-and-shoot” practice.

The citizens of Alaska have voted three times on ballot initiatives to restrict wolf control programs. These initiatives passed twice (1996 and 2000) only to be overturned by the state legislature after lobbying by the politically powerful Alaska Outdoor Council. A 2008 initiative was defeated, likely due to the fact that it was included in the August primary which had a record Republican turnout. Legislation, like H.R. 3663, would prevent these wide swings in policy and help conservation wildlife for future generations.

IX. Restore and increase funding to support fish and wildlife conservation on national wildlife refuge, national forest and BLM lands.

America’s national wildlife refuges, national forests and grasslands, and Bureau of Land Management (BLM) lands are severely suffering from gross financial neglect – as a result the conservation of fish and wildlife is suffering as well. From closing visitor centers and a crumbling road and trail system, to the inability to perform basic conservation and research functions, the failure to adequately fund the federal public land system bodes poorly for the people and fish and wildlife of America. Without immediate attention and strategically targeted investments from the incoming administration and Congress, America’s public land system is at risk of rapid and significant deterioration. Investments now can stave off much larger financial needs in the future.

In an era of shrinking federal budgets, Defenders believes there are numerous environmentally damaging programs within the federal environmental and natural resource departments and agencies that should be cut to provide offsets to necessary increases in important natural resource programs. For more information about budget offsets, see the *Green Budget*, developed by over 20 environmental and conservation organizations, available on Defenders of Wildlife’s website, www.defenders.org.⁴²

Whereas other sections of this white paper outline temporally sequenced policy priorities for the incoming administration, it is critical to note that investments in key funding areas must be initiated and sustained over the long term. Generally, each of the priority areas should be articulated and initiated early in the term of the incoming administration and grown and sustained over the course of the term, and beyond.

⁴² Available at http://www.defenders.org/resources/publications/policy_and_legislation/green_budget_fy_2009.pdf

First Term:

The new administration should swiftly and aggressively advocate for more annual funding to ensure the vitality of the National Wildlife Refuge System and its crucial role in protecting America's natural lands, waters and wildlife.

Since 1903, our National Wildlife Refuge System has preserved America's wildlife, hunting and fishing traditions, and ever-shrinking natural areas. Each year, nearly 40 million people hunt, fish, birdwatch, and learn from on-the-ground educational programs on wildlife refuges in every U.S. state and territory. In addition, refuges are critically important on local and regional scales, as visitors generate more than \$1.7 billion in annual sales to local economies, employing over 27,000 U.S. workers. And in keeping with its conservation mandate, the Refuge System provides a last bastion for more than 250 at-risk plant and animal species. But unfortunately, refuges are under siege.

Refuge visitors often show up to find roads and visitor centers closed, viewing platforms and hiking trails in disrepair, and habitat restoration and school education programs eliminated. Non-native, invasive plants have degraded millions of acres and crime is on the rise as only 180 full-time law enforcement officers are now asked to do the job of over 800.

Persistent inadequate budgets have rapidly ballooned the Operations and Maintenance backlog--core needs for the National Wildlife Refuge System to achieve its conservation mission--to \$3.5 billion, and required the creation of downsizing plans for a dramatic 20% reduction of the workforce, or more than 600 professional refuge positions. With over 300 positions recently eliminated and another 250 on the chopping block, these dramatic reductions are burdening dedicated, but overworked, staff tasked with the daunting challenge of:

- Managing and restoring complex wetland, forest, desert, tundra, and tropical habitats. Nearly 3.9 million acres currently sit idle awaiting funding for planned habitat restoration; and 5.38 million additional acres have some type of deferred management),
- Battling with invasive plants and animals in an increasingly warming climate. A warmer climate facilitates the spread of invasive species. 2.3 million acres are currently overrun with invasive plants, with millions more acres infested by over 4,400 invasive animal populations. Last year, funding was available to treat only 14% of that acreage.
- Providing an eager public with the opportunities they deserve. Recent budget shortfalls have forced entire refuges to literally close their doors and lock their front gates, or close for one or more days per week. Fishing and hunting programs, school field trips to refuges, interpretive nature walks by refuge staff, and more have been reduced or eliminated all over the U.S.
- Providing law enforcement on increasingly urban refuges. A comprehensive staffing model developed by the International Association of Chiefs of Police recommended over 800 law enforcement officers for the Refuge System; currently the Refuge System can afford only about 200 officers. This, in a time of illegal immigration-related

A comprehensive analysis in 2008 by the Cooperative Alliance for Refuge Enhancement (CARE), a national coalition of 22 wildlife, sporting, conservation, and scientific organizations, including Defenders of Wildlife, that represent more than 14 million people, found that the Refuge System needs a minimum of \$765 million in annual funding--or just \$7.65 an acre--to properly administer its nearly 100 million acres, educational nature programs, habitat restoration projects, and much more. Funding at this level is conservative, as it would not begin to dent the crushing backlog of mission-critical and other important projects and staffing needs.

The new administration should ensure adequate annual funding for Forest Service and Bureau of Land Management budgets to support science-based comprehensive planning and monitoring requirements.

Science-based planning, including targeted monitoring and state-of-the-art analysis, is fundamental to effectively conserve fish and wildlife on Forest Service and BLM lands. Generally, the incoming administration should ensure that the Forest Service and BLM Land Management and Resource Management planning programs have the capacity to conduct planning efforts in accordance with relevant statutes and regulations and to effectively implement the wildlife policy reforms outlined in this white paper. To realize the planning efficiencies inherent in the policies, it will be necessary to link and coordinate funding of Forest Service and BLM planning efforts at the landscape scale. We recommend that the incoming administration assess the implementation of the Forest Service-BLM “Service First” program as a potential model for interagency cooperation and planning.

Strategic investments in planning must be matched with comparable investments in species and ecosystem assessment, analysis and monitoring – indeed, the hallmark of intelligent land management is the use of comprehensive biological monitoring information to inform adaptive shifts in agency decisions and actions. At the very least, the Forest Service and BLM should be directed, and enabled through appropriations, to cooperatively link species and ecosystem data collection, analysis, planning and decision-making processes in meaningful and cost-efficient manners.

In order to support the science-based management outlined in this white paper, the administration should invest in personnel and programs that enhance the application of policy-relevant information and knowledge to planning and decision-making processes, including investments in Forest Service Research and Development (FS R&D). The administration should recognize that the primary goal is not the simple accumulation of data, but the effective transformation of data into information and knowledge resources that can be applied to improve the quality of land management decision-making processes.

The new administration should invest in the Forest Service Forest Research and Development branch to better understand and respond to climate change and to improve the quality of decision-making

The conservation of fish, wildlife and ecosystems on federal public lands requires that land managers have the necessary information and tools to support complex land management decisions. Quality, well informed, sustainable land management decisions are well informed by data, information and decision support tools. The Forest Service Research and Development (FS R&D) branch is uniquely qualified to provide Forest Service managers, and other forest owners and managers, with policy-relevant information products and state-of-the-art land management and conservation planning tools. However, the FS R&D budget is woefully underfunded to perform these important tasks. The proposed FY 2009 budget is cut \$23 million, or 8 percent, from the FY 2008 enacted levels. This translates to a loss of 110 full time equivalent (FTE) employees.

The Forest Service Research and Development branch is well positioned to be a leader in climate change adaptation science and the development of decision-support tools associated with wildlife adaptation. FS R&D has been involved in climate change research for over 20 years. And although the FY 2009 budget calls for investments in climate change research, it is critical that the administration make targeted investments in adaptation science, and that this research be coordinated with the U.S. Geological Survey National Climate Change and Wildlife Science Center. The Government Accountability Office (GAO) recently reported that federal land managers lack adequate climate change information and tools to make complex decisions concerning wildlife and ecosystem resources at relevant planning scales.⁴³ The incoming administration should ensure that Forest Service R&D has the capacity to provide land managers with the applied tools and knowledge to incorporate climate change impacts into land and resource management planning and decision-making. Furthermore, FS R&D needs to be encouraged to cooperate with elements of the National Forest System on the identification and articulation of key climate change information needs and the development of efficient means to transfer research and knowledge to key planning, monitoring and adaptive management activities associated with climate change and wildlife adaptation. Climate change research is naturally interdisciplinary, and the incoming administration should ensure that the agency has the structural flexibility to work across division lines in fish and wildlife, water and air, fire and fuels, and invasive species, for example, to produce useful scientific information.

In order to support complex and pressing decisions concerning climate change, it is critical that FS R&D develop the capacity to produce policy relevant information and tools associated with planning, analysis, monitoring and adaptive management. Unfortunately, the FS R&D Inventory and Monitoring program area of the Fiscal Year 2009 budget is significantly smaller than the other research program areas. Ignoring investments in planning and monitoring research and development is shortsighted in light of the tremendous social, economic and ecological benefits that are derived from successful planning processes. Specifically, research should be encouraged to develop and transfer

⁴³ GAO 2007. Climate Change: Agencies Should Develop Guidance for Addressing the Effects on Federal Land Water Resources. GAO-07-863.

analytical tools and monitoring protocols that support coordinated species and ecosystem-level planning under the National Forest Management Act.

The new administration should invest in the Forest Service Wildlife and Fisheries Habitat Management program.

Our national forests and grasslands play an essential role in the conservation of our nation's wildlife and habitat. About 425 species listed under the Endangered Species Act and an additional 3,250 at-risk species are found on Forest Service lands.

The Forest Service Wildlife and Fisheries Habitat Management program works with partners to inventory and monitor, manage, and restore habitat on national forests and grasslands in four program areas: 1) Threatened, Endangered and Sensitive Species; 2) Wildlife; 3) Fisheries; and 4) NatureWatch (wildlife viewing and education). Despite the broad array of species and habitat on Forest Service lands that require maintenance and restoration, the budget for this program has been flat at approximately \$130 million over the last eight years. Inflation during this period has substantially eroded the effectiveness of this funding level and the program has declined in a number of areas, including habitat restoration and maintenance; recovery efforts for threatened and endangered species; work with partners and states; inventory and monitoring of species and habitat; and public education and outreach. The static funding level with its diminishing purchasing power also places a limiting factor on ability to develop partnerships and leverage matching funds. In addition, any work done by biologists and botanists on projects for program areas outside the Wildlife and Fish Habitat Management program is supposed to be charged to the benefitting function, e.g. grazing, forest products, energy, rather than the Wildlife and Fish program, however this is not always the case. The extent of this accountability problem is not known.

The FY 2007 appropriation of \$131.7 million for this program helped to generate an additional \$50.4 million in partner contributions, and accomplished more than 4700 projects with and without partners. However, the Forest Service has estimated that it could spend two times that amount or \$260 million in projects that are ready to go with existing staffing.

Early in the new administration, the budget for this program should be increased to at least the level of full capacity for projects with existing staffing, \$260 million. The administration also should assess the program for expansion beyond this level, with a goal of increased staffing and needed projects at field levels where there are substantial gaps and heavy workloads. The administration also should review accounting practices to ensure that the program is not being charged for projects under other program areas.

The administration should complete an inventory of watershed condition on Forest Service lands and should develop and fund a plan for making the needed improvements.

The Forest Service was established, in part, to help secure the nation's water supply, protecting watersheds that supply drinking water to millions of Americans and numerous cities and communities. Eighteen percent of the nation's water supply originates from Forest Service lands. Healthy watersheds are crucial, vibrant components of the healthy ecosystems needed to support both people and wildlife, yet the Forest Service does not have a complete

inventory and national database for watershed condition. It is estimated that watershed improvements are needed in approximately two-thirds of watersheds on National Forest System lands. Examples of needed improvements include projects that connect stream channels, floodplains and shallow ground water in valley bottoms, and restoring aquatic and terrestrial conditions and processes to support beneficial uses of aquatic ecosystems.

The new administration should invest in the Bureau of Land Management Wildlife, Fisheries, and Threatened and Endangered Species Management program, and restore wildlife funding currently diverted to other programs.

BLM manages more land, and more wildlife and fish habitat, than any other federal agency including half of the remaining habitat for the imperiled sage grouse and almost 15 million acres of prairie grasslands vital to many declining grassland dependent species. The diverse habitat managed by BLM supports over 3,000 species of wildlife, more than 300 federally proposed or listed species, and more than 800 special status plant species. The Wildlife, Fisheries, and Threatened and Endangered Species Management programs fund inventory and monitoring, habitat restoration, endangered species recovery, and other proactive conservation activities vital to maintaining healthy, functioning ecosystems and fish, wildlife, and plant populations.

Inappropriately, these programs have been forced to pay for the compliance activities of BLM's energy, grazing and other non-wildlife related programs. Procedurally, funding for compliance work should come from benefiting programs, however in recent years, at least 30 percent of wildlife management programs resources have been routinely diverted to other programs, eroding the ability to conduct proactive species and habitat conservation activities and efforts to recover listed species. While this practice recently has undergone increased scrutiny, no information has emerged to suggest that the situation has been rectified. This diversion of funding must be stopped, or additional funding provided to these two programs to make up for the deficiency.

Even if the diversion were halted, however, the meager funding levels still would not be adequate to the task at hand. The BLM has only one biologist per 591,000 acres of land, tens of millions of dollars are needed for fish passage restoration, and estimated cost for recovery of threatened and endangered species on BLM lands is \$300 million annually over the next five years. Moreover, the status of the wide-ranging declining sage grouse is of great concern throughout the West and significant additional resources will be needed for its protection. Finally, BLM already is seeing changes out on the ground from climate change and must have the ability to address its impacts on wildlife and habitat. The Wildlife, Fisheries, and Threatened and Endangered Species Management programs will need additional funding in future years to address these and other crucial needs.

The new administration should invest in the Bureau of Land Management Challenge Cost Share program

The BLM's Challenge Cost Share program allows the BLM to partner with state and local governments, private individuals and companies and nongovernmental organizations to restore habitat, monitor species, maintain archeological sites, and repair trails, along with other activities. The program, which requires a dollar for dollar match, averages a two-to-one

match-and for some projects, upwards of three to one match-providing tremendous leverage of federal funds. Given the ongoing diversion of resources from the wildlife programs, much of the proactive conservation work being accomplished in field offices is through Challenge Cost Share program partnerships. Annually, the agency turns away on average \$20 million of potential projects that could be leveraged into \$60 million for the total program. Several years ago, when the various individual BLM challenge cost share programs were combined to establish the single current program that serves multiple BLM needs, 70 percent of the funding came from the wildlife challenge cost share, however in recent years, the portion devoted to wildlife has eroded to the point that, in 2009, only 34 percent of the funding is projected to go to wildlife projects. Increasing the CCS program by \$20 million and directing the increase to wildlife would result in an additional \$60 million on the ground investment for wildlife and address gaping needs for projects relating to sage grouse conservation, off-highway vehicle management, invasive species control, and, in the near future, for addressing impacts from climate change.

The new administration should consider leading a multi-jurisdictional effort to address the growing need for landscape scale habitat conservation.

Significant ecological changes such as altered fire regimes, drought, climate change, invasive species, and human induced stressors such as urban and suburban growth and energy development are occurring across whole landscapes, particularly in the West. These alterations are taking place across multiple governmental jurisdictions and land ownerships and cannot be addressed by individual agencies or states taking uncoordinated action. The BLM and, to a lesser extent, other Department of the Interior agencies currently have developed a “Healthy Lands Initiative” intended to begin to address these changes by identifying, planning, and implementing regionally significant conservation opportunities on both public and private lands. However, the new initiative currently receives only a small amount of funding and may not be sufficiently institutionalized in the BLM and other DOI agencies to be truly effective. Other efforts, such as the Western Governors Association initiative on wildlife corridors, the Fish and Wildlife Service’s Strategic Habitat Conservation initiative, and state wildlife action plans, are also underway to address impacts that are occurring at the landscape level.

At the very least, the administration should develop an effective institutionalized cross-cutting program to address this need across federal agencies with land management responsibilities. However, to be truly effective, the administration should consider leading, or helping to lead, an effort across all levels of government and land ownership. Investments made in coordinated landscape-level planning will ensure that investments in federal programs are efficient, not redundant, and cost effective.

X. Support full and permanent funding of the Land and Water Conservation Fund to expand national conservation land holdings as necessary to fulfill their intended purposes.

While the nation has set aside impressive holdings that benefit wildlife and the American people, such as national wildlife refuges, national parks, national forests and wilderness areas, current human population and development trends threaten to overwhelm the value these

lands now have for wildlife and ecosystem integrity. Unfortunately, many of America's natural areas exist as parcels surrounded by land or water currently unsuitable for most wildlife. A soaring human population and relatively unplanned growth in most areas compels the need for a forward thinking strategy to conserve America's wildlife resources and habitats. A recent report by the U.S. Forest Service, "Cooperating Across Boundaries – Partnerships to Conserve Open Space in Rural America" estimates that 6,000 acres of open space are lost each day, four acres each minute. With land values rising quickly and real estate developers often willing to pay more than the appraised value (the federal government cannot pay more than the appraised value of a property), it is imperative to emphasize strategic land acquisitions now. Without providing buffers around core habitat areas and suitable linkages between larger blocks of habitat, America's wildlife, water and air quality, and future hunting, fishing, wildlife watching and other outdoor recreation opportunities will undoubtedly suffer.

In addition, with the effects of climate change now bearing down upon already stressed plant and wildlife populations, the administration should prioritize the development of an interconnected system of wildlife conservation lands while working to reduce dispersal barriers. To accomplish this, the administration should bolster land protection efforts by strongly supporting the primary source of federal land acquisition dollars, the Land and Water Conservation Fund (LWCF).

The LWCF, established in 1964, is one of our greatest tools to address the increasingly significant loss of open space, forests and wildlife habitat by providing funding for acquisition of lands for our national wildlife refuges, parks, and forests, and for state purchase of open space and development of recreational facilities. Although LWCF on paper receives \$900 million annually from federal revenues from offshore oil and gas drilling and other sources, the amounts actually spent fall far below that level. The full \$900 million has been spent only once in the history of LWCF and more than \$16 billion remains in the fund on paper as an unspent balance, but has been diverted to the federal treasury. In FY 2008, only \$154.3 million was spent for LWCF purposes and the President's FY 2009 budget asks for only \$41.8 million for LWCF purposes, much of which is going to administration rather than land acquisition. Expending the full \$900 million each year would go a long way in protecting additional habitat in our national wildlife refuges, parks, forests and other special places.

The LWCF has funded all or a major part of some of our nation's most treasured public lands, such as Redwoods National Park and the Lower Rio Grande Valley National Wildlife Refuge. The administration must ensure that similar national treasures are saved from permanent loss, and that LWCF dollars are fully appropriated and spent on the conservation purposes they were intended for.

For more information about the land protection and realty office needs of the four federal land management agencies see Appendix B.

First Year:

The new administration should request a significant increase in funding for federal land acquisition under the LWCF for FY 2010.

The administration also should take inventory of the entire backlog of acquisitions for federal lands and develop a strategic plan for addressing the backlog so that lands can be acquired before they are lost, degraded, or priced beyond reach.

The new administration should assess the current realty appraisal process for the four land management agencies and ensure that a process is in place that is cost effective, allows for speedy transactions, and involves on the ground agency personnel.

Since the land appraisal responsibilities were removed from the various Department of the Interior agencies in 2003 and reestablished at the department level, rising costs and bureaucratic inefficiencies have cost the Fish and Wildlife Service, Bureau of Land Management, and National Park Service many land acquisition opportunities. The move was made with the promise of greater efficiency, but since that time costs have doubled and response time has been agonizingly slow. For example, if a landowner wishes to sell property to an interested national wildlife refuge, they can now expect to wait from between nine months and 1.5 years before a final appraisal is completed. Each agency must first send its request to DOI's Appraisal Services Directorate (ASD), which in turn accepts bids from a restricted number of contractors for appraisal services. A number of factors have resulted in higher overall cost since the transfer of the appraisal function to DOI, including the self-imposed limitation on the number of bidding contractors that drives prices up, and the higher average salaries of ASD employees. Further, final appraisals have an expiration date, or "date of value", of one year. So after much bureaucratic paperwork and other delays, the agencies may only have a few months to organize funding and make an offer to the landowner before the appraisal expires. Clearly, this is a broken system in need of serious common-sense reform.

The Secretary should restore the appraisal function back to the agencies for greater efficiency, cost savings, and response time. People at the agency level are often more connected with the resource base; more in touch with the lands they are working to protect and the mission they are striving to uphold. Safeguards should be established to prevent abuse and ensure transparency in the appraisal process.

First Term:

The administration should work with Congress to achieve full and permanent funding of the Land and Water Conservation Fund by the end of its first term.

Over the long-term, full and permanent funding for the LWCF will require legislation clarifying that the funds deposited into the LWCF must actually be spent.

XI. Restore protection of all wetlands by clearly defining them as waters of the United States under Section 404 of the Clean Water Act.

Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Wetlands are among the most important, and most threatened, of our nations’ waters, providing invaluable benefits to the American public by protecting against flooding, purifying our water of contaminants, and providing essential habitat for fish and wildlife. Since its enactment in 1972, the Clean Water Act has protected wetlands from degradation and destruction through the Section 404 program, which regulates discharges of fill or dredged material into wetlands and other waters. Unfortunately, two decisions by the U.S. Supreme Court in this decade, and vacillating agency guidance and administration of the Section 404 program in their wake, have created widespread uncertainty about the scope of regulatory protection under the Clean Water Act, exposing many of the nation’s most valuable wetlands to destruction.

The Clean Water Act regulates discharges of pollutants, including dredged or fill material, into “navigable waters,” which it defines as “waters of the United States.”⁴⁴ The Act’s structure and legislative history indicate that Congress did not intend the Act’s protections to be limited to traditionally “navigable” waters (*i.e.*, waters that are or can be used as highways for commerce, trade, and travel). The Environmental Protection Agency and the U.S. Army Corps of Engineers have therefore construed their jurisdiction broadly to further the Act’s intent of restoring and maintaining the integrity of the nations’ waters. That broad approach was confirmed in 1985 by the Supreme Court’s decision in *United States v. Riverside Bayview Homes, Inc.*,⁴⁵ in which the Court affirmed the Corps of Engineers’ regulation of wetlands adjacent to traditionally navigable waters. The Court in *Riverside Bayview* concluded that broad jurisdiction was supported by important ecological considerations, and deferred to agency expertise regarding the scope of protection needed to achieve the goals of the Act. The Court noted that wetlands “function as integral parts of the aquatic environment,” filtering and purifying water, helping to prevent flooding and erosion, and providing important food and habitat for aquatic species.⁴⁶

In 2001, however, the Supreme Court created significant uncertainty concerning the extent to which the Clean Water Act protects large categories of the nation’s waters that are relatively isolated and lack surface connection to other waters. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”),⁴⁷ the Court held that the Corps of Engineers had improperly asserted jurisdiction over the filling of isolated ponds that had formed in abandoned gravel pits in an urban area. The narrow majority opinion concluded that the presence of migratory birds was not sufficient, by itself, to establish federal jurisdiction over such “isolated” non-navigable intrastate waters.

⁴⁴ 33 U.S.C. §§ 1311(a), 1362(12)(A), 1362(7).

⁴⁵ 474 U.S. 121 (1985).

⁴⁶ *Id.* at 134-35.

⁴⁷ 531 U.S. 159 (2001).

Although troubling, the *SWANCC* decision was narrow; it did not overturn the Corps' regulations, and did not preclude the Corps and EPA from asserting jurisdiction over waters that affect interstate commerce by providing habitat for migratory birds. The Bush Administration responded to *SWANCC* by proposing a rulemaking to redefine jurisdiction under the Clean Water Act, but abandoned that effort in the face of overwhelming public comment, including more than forty states, conservation organizations, fishing and hunting groups, and 220 members of Congress, favoring keeping the current, broadly-protective rules.

The fall-out from *SWANCC* was nonetheless substantial: the Court's apparent underlying sense that isolated waters – *i.e.*, waters lacking direct surface connection to traditionally navigable waters – were outside the Act's coverage created significant doubt about federal authority over large and enormously valuable categories of wetlands. Such waters include wetlands such as prairie potholes, playa lakes, and vernal pools that are among the most biologically important of the nation's waters, providing critically-needed habitat for migratory waterfowl and other birds, amphibians, and other wildlife, including many endangered species. The uncertainty concerning the federal ability to protect such isolated waters opened a dangerous gap in the wetlands regulation, since most states do not protect such waters in their own wetlands programs, leaving them exposed to heedless destruction.

The Supreme Court further muddled the waters regarding the scope of Clean Water Act jurisdiction in June 2006 in its badly-fractured decision of *Rapanos v. United States*.⁴⁸ In *Rapanos*, the Court addressed a relatively narrow question: whether wetlands that are adjacent to non-navigable tributaries that flow into traditionally navigable waters are protected by the Clean Water Act. The two consolidated cases involved wetlands connected by surface flow to tributaries ranging from natural rivers to intermittently-flowing man-made or altered conveyances that flowed into navigable waters 11 to 20 miles away, and a wetland adjacent to, but not shown to have a surface connection to, a ditch carrying water into a navigable lake one mile away.

The Court issued five opinions in *Rapanos*, none of which garnered a majority. Four Justices (Justices Scalia, Alito, Thomas and Chief Justice Roberts) joined in a plurality opinion authored by Justice Scalia that declared that the Act covered only “relatively permanent, standing or continuously flowing bodies of water” and “*only* those wetlands with a continuous surface connection to [other regulated waters].”⁴⁹

A majority of the Court, in separate opinions, rejected Justice Scalia's test, however. Justice Stevens, writing for a four-member dissent, deferred to the Corps' current regulation of all tributaries and their adjacent wetlands, finding that the Corps had reasonably interpreted its jurisdiction to cover non-isolated wetlands given the important

⁴⁸ 547 U.S. 715 (2006). *Rapanos* was consolidated with another case raising similar issues, *Carabell v. United States*, and the Court's consolidated opinions deciding both cases are generally cited simply as *Rapanos*.

⁴⁹ *Id.* at 739, 742.

role such wetlands play in maintaining water quality.⁵⁰ Justice Kennedy, in a solo concurring opinion, largely agreed with Justice Stevens that broad protection under the Act is warranted, and squarely rejected Justice Scalia's jurisdictional test as being "without support in the language and purposes of the Act or in our cases interpreting it."⁵¹ Justice Kennedy concluded, however, that to support jurisdiction for wetlands adjacent to certain non-navigable tributaries, a showing needs to be made that such waters have a "significant nexus" to traditionally navigable waters.⁵² Such a nexus exists, he concluded, "if the wetlands, either alone or in combination with similarly situated lands in the regions, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"⁵³ Because he did not think the Corps had made such a showing for the wetlands at issue, Justice Kennedy voted with the plurality to remand the cases to the agency.

The Court's fractured decision in *Rapanos* has created massive uncertainty regarding the proper test for determining whether federal agencies have jurisdiction to protect large categories of the nation's waters under the Clean Water Act. In June 2007, EPA and the Corps issued a guidance memo and interagency agreement on how to determine jurisdiction over waters following *Rapanos*. The guidance memo retreated from the broad coverage established under the agencies' long-standing formal regulations, directing agency staff to make detailed case-by-case determinations using a blend of the plurality's narrow approach with Justice Kennedy's broader, case-by-case focus on "nexus." The agencies' 2006 guidance puts intermittent and ephemeral streams, wetlands adjacent to such streams, and isolated waters most at risk of losing protection. Twenty million acres of wetlands in the lower 48 states are considered "isolated," and EPA has estimated that intermittent and ephemeral streams comprise 59% of all stream miles in the United States.

In March 2008, EPA's Assistant Administrator for Enforcement, Granta Y. Nakayama, concluded in a memo to EPA's Assistant Administrator for Water that the guidance had impeded enforcement of the Act, leading agency staff to abandon enforcement or lower the priority of wetlands cases because of jurisdictional concerns in almost 500 instances since the guidance was issued in 2006.⁵⁴ The Nakayama memo, subsequently released by the House Committee on Oversight and Government Reform, concluded that the resource-intensive factual analysis required by the guidance was a significant burden on enforcement efforts for wetlands, particularly for the most common types of waters in the country, intermittent and ephemeral tributaries. He also noted that the *Rapanos* decision and the new agency guidance "have created uncertainty about EPA's ability to maintain an effective enforcement program with respect to other CWA obligations," such as the NPDES permit program for regulating discharges of chemical and other pollutants.⁵⁵

⁵⁰ *Id.* at 796 (Stevens, J., dissenting).

⁵¹ *Id.* at 768 (Kennedy, J., concurring).

⁵² *Id.* at 779-80.

⁵³ *Id.* at 780.

⁵⁴ Memorandum from Granta Y. Nakayama, EPA Assistant Administrator for Enforcement, to Benjamin Grumbles, EPA Assistant Administrator for Water (March 4, 2008).

⁵⁵ *Id.*

First 100 Days:

The new administration should immediately rescind the EPA-Corps 2006 guidance memo, and issue revised guidance that protects wetlands and other waters to the fullest extent permitted under the Clean Water Act.

The 2006 EPA-Corps guidance memo has compounded the uncertainty related to federal authority to protect wetlands and other waters under the Clean Water Act, and has restricted and unduly burdened proper enforcement of the Act. We call upon the new administration to rescind immediately the 2006 EPA-Corps guidance, and to issue revised guidance that protects wetlands and other waters to the fullest extent permitted under the Act and applicable court decisions. The new guidance should:

- make clear that tributary streams remain fully protected. Tributary streams are categorically protected under both agencies' longstanding regulations, and the guidance should state unequivocally that such streams remain so after *Rapanos* (both because the Supreme Court's decision in *Rapanos* does not affect those rules and because such streams in general have a "significant nexus" to other covered waters).
- authorize EPA and the Corps to make regional determinations that wetlands have a significant nexus to navigable waters. Justice Kennedy's concurrence in *Rapanos* explicitly recognizes that the connection of a wetland to the chemical, physical, and biological integrity of traditional navigable waters should take into account the cumulative contribution of similar wetlands in a region. The 2006 guidance ignores that point, requiring narrow, burdensome case-by-case determinations of each wetland under consideration. The new guidance should authorize field staff to look broadly at the wetland resources over a large geographic region to determine whether a significant nexus is present.
- protect "isolated" waters to the maximum extent possible based on wildlife and interstate commerce values. The agencies' current administrative practice is to deny protections to all non-navigable "isolated" waters, including vitally-important playa lakes, prairie potholes, and vernal pools, without consideration of whether their connections with interstate commerce would support federal jurisdiction. The new guidance should authorize field staff to consider use by migratory waterfowl and other wildlife, as well as other connections to interstate commerce, in determining whether so-called "isolated" wetlands should be protected under the Act.

First year:

The new administration should encourage the introduction and passage of legislation that restores full protection to all “waters of the United States” without regard to their navigability.

Even with clear administrative guidance, the Supreme Court’s splintered decisions regarding the scope of federal jurisdiction under the Clean Water Act, and the sharply-restrictive view of federal authority taken by a 4-Justice plurality of the Court, will create damaging uncertainty and confusion. As Assistant Administrator Nakayama’s memo makes clear, that uncertainty is impeding proper administration not just of the wetlands program under the Clean Water Act, but of the NPDES permit program and other regulatory programs under the Act. Moreover, the Court’s restrictive holding in the 2001 SWANCC decision makes protection of “isolated” waters, including some of the most important categories of wetlands, difficult at best and legally doubtful.

We call on the new administration to support the introduction and passage of legislation that will end this dangerous confusion by declaring unequivocally that the Clean Water Act protects all “waters of the United States” without regard to their navigability. One such bill, the Clean Water Restoration Act,⁵⁶ was introduced in the 110th Congress and enjoyed bipartisan support, with 176 co-sponsors in the House and 21 co-sponsors in the Senate. Key principles to maintain in any such effort include: clarifying legal scope of the Clean Water Act, restoring protections to all “waters of the United States,” without regard to navigability, and including those waters historically protected by EPA and Army Corps regulations, in order that the scope of protections is returned to the waters covered before the Supreme Court’s interventions.

⁵⁶ H.R. 2421 (introduced by Rep. James Oberstar); S. 1870 (introduced by Sen. Russell Feingold).

APPENDIX A. Categorical exclusions to NEPA promulgated by the Bush administration

“The Healthy Forest Initiative” and the Healthy Forest Restoration Act of 2003

As part of these efforts, the administration widely expanded categories of U.S. Forest Service and U.S. Bureau of Land Management (BLM) actions that are exempted from substantive NEPA review by crafting targeted administrative and legislative changes to the rules and policies governing Forest Service and BLM actions. Typically, exemptions from substantive review are reserved for non-controversial, routine actions that are demonstrated to have insignificant impacts on the environment. The Bush administration expanded these exemptions into the scientifically complex and socially controversial realm of fire policy.

On the administrative front, the administration’s 2002 Healthy Forest Initiative (HFI) exempted large controversial pre and post-fire logging projects from substantive environmental review. HFI employed categorical exclusions to fast track fuels reduction projects and shield them from substantive review and traditional public participation processes. Historically, and with good reason, categorical exclusions are generally not used when certain “extraordinary circumstances” are present, if, for example, a project occurs within a roadless area or endangered species habitat. The Bush administration mistakenly deviated from this standard when it adopted a rule in August 2002 that broadened the Forest Service’s discretion to use a categorical exclusion despite the presence of such extraordinary circumstances.⁵⁷ HFI exempted logging projects up to 1,000 acres in size, and post-fire rehabilitation activities up to 4,200 acres in size, from NEPA’s environmental analysis and public participation provisions.

HFI gave wide discretion to the Forest Service to approve a host of controversial Forest Service logging activities without the benefit of substantive environmental review, and with little opportunity for the public to provide meaningful input. The end result of this truncation is counterproductive to efficient and effective land management planning and decision-making. By definition, the presence of extraordinary circumstances necessitates close environmental review and heightened public involvement. To ignore these circumstances erodes public confidence in agency behavior and generates controversy where none may have existed before.

The administration was also active on the legislative front. The Healthy Forest Restoration Act (HFRA) was aggressively pushed by the administration, and passed by Congress in 2003, at the height of a devastating and costly fire season. HFRA operated in conjunction with HFI to further limit environmental analysis and public participation requirements for “forest health” projects. Rather than requiring the Forest Service to examine a full suite of alternatives to a proposed project as part of its environmental analysis, as NEPA mandates, HFRA only requires that forest managers evaluate the proposed action and only one alternative. In some circumstances only the proposed action is required to be evaluated. HFRA also created another categorical exclusion, this time for timber harvesting, thinning

⁵⁷ See *Clarification of Extraordinary Circumstances for Categories of Actions Excluded From Documentation in an Environmental Assessment or an Environmental Impact Statement*, 67 Fed. Reg. 54622 (August 23, 2002), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=02-21075-filed.pdf.

and prescribed fire projects up to 1,000 acres to purportedly address and research insect and disease infestations.

Furthermore, HFRA diminished the public's ability to challenge fuels reduction projects on Forest Service lands, by limiting challenges to these projects solely to an administrative pre-decisional review process. Consequently, if a member of the public does not challenge a project through this pre-decisional review process, they have no recourse to challenge the project, either administratively or in court.

Limitations on Administrative and Judicial Review

As further evidence of the Bush administration's targeted campaign to diminish public participation in Forest Service decision-making, new appeal procedures under the Appeals Reform Act were adopted in June 2003 for Forest Service projects. These procedures excuse the Forest Service from providing notice, opportunity to comment, and a right of appeal on projects that are categorically excluded from NEPA including, but not limited to, those outlined above. The effect of these procedures is to virtually eliminate the public's ability to both provide input on and challenge projects that the agency, in its discretion, determines to have no environmental impact, virtually quashing all ability of the public to participate in the decision-making process on these activities.

The administration rationalized these rollbacks under the pretext that these changes enhanced efficiency in the Forest Service's decision-making process. The administration claimed that litigation brought on behalf of, and appeals by, environmental groups, stalled critical fuels reduction projects designed to protect communities from catastrophic fire. However, the General Accountability Office (GAO) has issued multiple reports finding that the administration's claims of "analysis paralysis" are a myth. In fact, in 2003 the GAO found that 95 percent of the 818 Forest Service fuels reduction projects in FY 2001 and 2002 were ready for implementation within the standard 90-day review period, and that 97 percent of the 818 Forest Service fuels reduction projects in FY 2001 and 2002 proceeded without litigation.⁵⁸ An earlier 2001 report found that 99 percent of proposed FY 2001 Forest Service hazardous fuels reduction projects were not appealed, and none were litigated.⁵⁹

Regardless of where one stands on the use of large scale mechanical treatments to prevent and recover from unnaturally large forest fires, it makes little sense to exempt such large, inherently controversial and scientifically complex projects from substantive environmental review and public participation processes. In doing so, the Bush administration effectively eroded an already strained trust between the land management agencies and the public. The legitimate use of categorical exclusions, and other mechanisms designed to streamline land management activities, should be reserved to non-controversial, well-structured scenarios where the land management problem has been well-defined, where scientific knowledge

⁵⁸ U.S. General Accountability Office, *Forest Service: Information on Appeals and Litigation Activities Involving Fuels Reduction Activities* (Washington, D.C., 2003), 4, <http://www.gao.gov/new.items/d0452.pdf>.

⁵⁹ The Wilderness Society, *Forest Service Continues to Blow Smoke: Latest GAO Report, University Study Show McInnis Wildfire Bill Based on Flawed Assumptions*, May 20, 2003, <http://www.wilderness.org/Library/Documents/upload/GAO-Report-Finds-Appeals-Do-Not-Slow-Fuel-Reduction-Projects.pdf>.

concerning the dimensions of the scenario is strong, and where there is consensus that the proposed action will alleviate the problem. And although consensus actions concerning fire and fuels reduction problems are emerging, generally “forest health” policy has not developed to the point where entire suites of actions can be exempted from environmental review and public involvement. Indeed, collaborative processes that were highlighted in the HFRA hold some promise in resolving complex forest health problems. However, the solution to a complex and unstructured problem is the generation of more knowledge (i.e. environmental review) and more public involvement. There was a time when the agencies held sufficient trust from the public to carry significant discretionary authority on these matters. The next administration should develop forest and planning policies that build trust between agencies and the public, not fragment it.

Categorical Exclusion for Forest Service Land and Resource Management Plans

Most recently, with the adoption of the 2008 planning rule, the Bush administration has ensured that the processes governing the amendment, revision and adoption of land and resource management plans are also exempt from NEPA review. The administration has repeatedly argued that forest plans, which guide all forest activities, including timber, oil and gas, forest health and wildlife projects, on each national forest have no direct, indirect or cumulative impact on the environment and therefore do not warrant review under NEPA. This is in contravention of both the National Forest Management Act (NFMA), which requires that forest plans be prepared in accordance with NEPA,⁶⁰ and the Council on Environmental Quality (CEQ) regulations implementing NEPA. The CEQ regulations specifically provide that “[a]doption of formal plans, such as official documents prepared or approved by federal agencies which *guide or prescribe* alternative uses of Federal resources, upon which future agency actions will be based”⁶¹ is considered to be a “federal action” within the scope of NEPA. There is no question that these plans have significant and immediate affects on the environment, warranting environmental review under NEPA, as they govern nearly every action on every acre of every national forest and grassland.

Categorical Exclusions for Grazing Activities on Forest Service Lands

Activities exempted from NEPA analysis by the Bush administration are not limited to timber and oil and gas activities. The 2005 appropriations bill (Public Law 108-447, Sec. 339) for the Department of Interior categorically excluded authorizations for Forest Service grazing allotments from Fiscal Year 2005 through Fiscal Year 2007, perpetuating the administration’s policy of limiting environmental review of grazing activities on Forest Service lands.⁶²

Categorical Exclusions for Oil and Gas Activities under the Energy Policy Act of 2005

The administration’s misguided changes to NEPA were not limited to the controversial arena of fire and forest policy, nor to the Forest Service. Through the passage of the Energy Policy Act of 2005 (EPA), the administration also adopted categorical exclusions for

⁶⁰ See National Forest Management Act § 1604(g)(1).

⁶¹ Council on Environmental Quality Regulations, 40 C.F.R. § 1508.18(b) (2007) (emphasis added).

⁶² See e.g., Pub. Law 108-108, § 325, signed into law by President Bush on November 10, 2003.

various oil and gas activities on both National Forest System and BLM lands. The BLM has interpreted the statute as also prohibiting consideration of “extraordinary circumstances” precluding the use of a categorical exclusion. For other activities on BLM lands that are categorically excluded from the requirements of NEPA, if there are extraordinary circumstances present, then the use of categorical exclusion cannot go forward. However, for activities categorically excluded under the EPOA, the “extraordinary circumstances” exception cannot be used. Consequently, if an activity qualifies for a categorical exclusion under the EPOA, there will be no environmental analysis, regardless of whether the activity has significant impacts on healthy and safety, drinking water supplies, wetlands, migratory birds, endangered and threatened species habitat, or ecologically significant areas.

As in the case of fire and forest policy, the administration chose to shield the types of oil and gas activities that would benefit most from substantive environmental review and public participation processes. Again, the administration sacrificed the long-term relationship between the people and the agencies that manage the people’s lands for short-term project implementation. Restoring public confidence in BLM energy policy decision-making should be a high priority for the incoming administration – you can’t fast track public confidence in our land management institutions.

Additional BLM Categorical Exclusions

In August 2007, the BLM revised its procedures implementing NEPA, and exempted a host of activities previously subject to the statute. The new procedures mirrored the Bush administration’s exemptions from NEPA for the Forest Service, including exemptions for harvests of live trees up to 70 acres; salvage harvests up to 250 acres, including live trees that are “likely to die within a few years”; commercial and non-commercial harvest of trees to control insects or disease up to 250 acres; vegetation management activities, including thinning, pruning, cutting, and prescribed fire, up to 4,500 acres per prescribed fire project and 1,000 acres for other projects. The only standard for these latter projects is that the activity be necessary for “the management of vegetation on public lands.” In addition, the BLM procedures exempt the issuance of certain grazing leases.

APPENDIX B. Land Protection and Realty Office Needs of the Four Federal Land Management Agencies.

National Wildlife Refuge System

Recognizing the various threats to the nation's wildlife and environment, the visionary National Wildlife Refuge System Improvement Act of 1997 called on the Department of the Interior to orchestrate "the continued growth of the System in a manner that is best designed to accomplish the mission of the System, [and] to contribute to the conservation of the ecosystems of the United States...." Despite the dramatic ecological changes profiled above, the Fish and Wildlife Service (FWS), the agency that administers the Refuge System, has yet to systematically or proactively prioritize needed land acquisitions to preserve the astounding biodiversity found in this country. An independent evaluation of the Refuge System conducted by Management Systems International (MSI)⁶³ actually failed the FWS in this metric, calling it "ineffective" at strategically growing the Refuge System. The MSI report cited the significant decline in land acquisitions in recent years, due in part to the Refuge System sharply decreasing the amount of land it requests to purchase each year. Other observations included that the land ultimately purchased often "does not match the priorities identified by the Refuge System's Land Acquisition Priority System." Finally, the report criticized the land appraisal process, stating it "cannot be relied upon to produce timely or accurate appraisals, [which] causes available land deals to be lost."

In light of both an agency mission and a congressional mandate to conserve wildlife and strategically plan for land acquisitions, the Refuge System must develop a national land acquisition policy, in accord with the provisions found in the Refuge Improvement Act, which emphasizes science-based conservation at multiple scales to build resilience, redundancy, and protect species and ecosystem functions.

Since 2000, the FWS's LWCF program has lost nearly 50 percent of its personnel. Down to only 64 FTEs by 2008, the program is now unable to facilitate purchase of the Refuge System's highest priorities; properties that are critical to saving endangered species, restoring lost habitat connectivity, acquiring important inholdings, or providing appropriate access to public lands. The LWCF program has been so starved for funding that the number of backlogged priority projects continues to climb with each passing year. Program staff are unable to adequately conduct basic activities such as boundary surveys or the GIS mapping of properties. Because of the ballooning backlog, the FWS is unable to be strategic, or even opportunistic, in the few properties it does acquire each year because most appropriated funds are now spent repaying non-governmental organizations such as land trusts and other landowners that have previously purchased and are holding land for the Refuge System. The President's FY 2009 request for acquisition of land on wildlife refuges through LWCF was only \$3.9 million.

⁶³ An Independent Evaluation of the Effectiveness of the U.S. Fish and Wildlife Service's National Wildlife Refuge System. Management Systems International. 2008.

National Forest System

The National Forest System is comprised of 191 million acres, roughly 8 percent of the U.S. landscape, in 175 national forest and grassland units. While the largest forests and grasslands occur in the West, national forests and grasslands are found in 42 states and Puerto Rico. National forests and grasslands play an essential role in protecting our nation's ecological heritage. These areas serve critically important ecological, social and recreational needs, including providing habitat for 422 threatened and endangered species, or 31 percent of all of the endangered and threatened species listed under the Endangered Species Act, and an additional 3,250 sensitive species; unmatched recreational opportunities across an incredibly diverse array of landscapes; and invaluable sources of clean water—approximately 60 million Americans live in communities that draw source water from national forests and grasslands.

Essential to the provision of these services is the Forest Service's ability to acquire land to protect critical resource areas with high ecological, recreational and / or social value. Land acquisition funds have been used to purchase more than 1.5 million acres of land located within or adjacent to existing national forests and grasslands. These purchases have expanded outdoor recreational opportunities, protected clean water supplies, preserved wildlife habitat, protected cultural and historic sites, and benefitted local communities.

The Forest Service's Strategic Plan for Fiscal Years 2007 – 2012 outlines seven strategic goals for fulfilling the agency's mission to "*Sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations.*" Goal 3, as outlined in the Strategic Plan, is to "conserve open space." The agency identifies land acquisition as critical to achieving this goal, as acquisition conserves the integrity of undeveloped lands and prevent their conversion to incompatible uses, while responding to urban and community needs. However, despite acknowledging the importance of this program to fulfilling the agency's mission, the Forest Service has de-prioritized land acquisition to the point where this program is at the verge of collapse. In FY 2009, the President's request for land acquisition dropped to a meager \$5 million, all of which was directed to be used for managing the program, rather than actual land purchases. This level represented an 88 percent drop in funding from the previous fiscal year, and a 97 percent drop in funding from that appropriated in Fiscal Year 2002.

The precipitous decline in funding for this program has acutely affected the ability of personnel to carry out the mission of the program. Since 2001, over 60 percent of staff have been lost. These losses are the result of not only direct staff cuts, but also as FTEs retire, replacements are not being hired. In the Washington office, two key positions were vacated in the past two years, and there are no plans to fill these positions. The bookkeeping position had responsibility for tracking funds in the various national and regional land acquisition accounts. Without this position filled, tracking the obligation and dispersal of funds is now performed only by the Forest Service's Budget Office. Without any land acquisition program staff dedicated to tracking the obligation and dispersal of funds for land acquisition, conflicts over funding and expenditures often result between regional offices' figures and the Forest Service's Budget Office figures. This often results in delays in project approvals. The vacated processing position focused on drafting the various documents for use in reviewing, obtaining approval and funding land acquisitions. The responsibilities for this position have been shifted to another employee, who is now responsible for filling the

needs of two positions without additional compensation. These are just two examples of vacated positions that served functions critical to the Forest Service's land acquisition mission. Other staff have been lost, the effect of which is both to hamper essential functions and render the program vulnerable to an Inspector-General or General Accounting Office audit.

The already-limited budget for land acquisition is also being affected by the Forest Service's policy of transferring funds from non-priority programs in order to address fire suppression costs. As of September 2008, approximately \$10 million was transferred from the land acquisition program budget to address fire costs. With increased duration and occurrence of catastrophic fires expected in the coming years, particularly with a warming climate, it is essential that an adequate, dedicated funding stream is provided for fire suppression and prevention each year, such that programs like the land acquisition program are not tapped for additional funds.

The Bureau of Land Management

The vast landscapes that the Bureau of Land Management manages harbor over 300 endangered and threatened plant and animal species, over 1,500 sensitive species, and encompasses key habitat for big game such as antelope, bison, bighorn sheep, and elk. In fact, the BLM manages more wildlife habitat than any other federal or state agency. The importance of BLM lands for wildlife and habitat is also increasingly being recognized, particularly in light of climate change. BLM lands also provide visitors with more diverse recreation opportunities, across a broader geographic area, than any other federal agency, including hunting, fishing, horseback riding, whitewater rafting, hang gliding, mountain biking, and wildlife viewing and birding.

The Land and Water Conservation Fund program allows the BLM to purchase land needed to manage key natural resources, to acquire legal ownership of land to enhance the management of existing public land and resources, and to provide public access. The BLM is authorized to purchase land and interests in land for the purpose of enhancing and providing for these ecological, recreational and social values, including maintaining open space, providing opportunities for environmentally responsible recreation, preserving natural and cultural heritage resources, restoring at-risk botanical, fisheries and wildlife resources, and maintaining functioning ecosystems. Land acquisition funds are generally targeted to specific projects, including the National Landscape Conservation System (NLCS), Areas of Critical Environmental Concern (ACEC) or Special Recreation Management Areas (SRMA), to purchase land and interests in land for open space and recreation.

The BLM's land acquisition suffered a similar fate as that of the Forest Service. In order to accomplish the agency-declared goals of this program, land acquisition must be prioritized by the new administration. For Fiscal Year 2009, BLM field offices requested a total of \$56 million for land acquisition projects; yet the President's budget request provided only \$2.1 million. In the past ten years, BLM's land acquisition program is working with 25 percent less staff. Currently, the program is only budgeted for 14 FTEs. Not only are staff being furloughed, but when staff retire, replacements are not hired, leaving fewer people to do more work. Agency-wide, most new staff are hired to work in energy and minerals – a fact that evidences the agency's skewed prioritization of energy development over other values

such as wildlife conservation and recreation. Budgetary shortfalls have also resulted in critical backlogs that prevent high profile properties critical to the mission of the agency from being funded. Over 80 percent of BLM land acquisitions are completed with the assistance of non-profit partners, which often pre-purchase priority properties for assignment, sale or re-sale to the BLM. However, with drastic cuts in its land acquisition budget, the BLM has been faced with the situation of being unable to purchase these properties from partners. As a consequence, many partners have stopped purchasing priority properties.

National Park System

The mission of the National Park System is to manage the national park units to provide the highest quality of use and enjoyment for visitors today and in the future. While most Americans are familiar with the iconic park sites such as the Grand Canyon and Yellowstone, few know there are 391 national parks, set aside to protect and preserve scenic, natural, cultural and recreational treasures. Today, the National Park System covers more than 84 million acres in 49 states, the District of Columbia, and the U.S. territories.

National parks commemorate historical and cultural sites associated with American presidents, early explorers, human and civil rights, and American ingenuity and invention, as well as paleontological sites associated with ancient civilizations and fossils dating back millions of years. They also protect America's scenic and natural resource gems and the wildlife that depend on those lands.

The National Park Service's Land Resources Program has responsibility for acquiring additional acres to further the mission of the Park Service. The goal of the land acquisition program is to save nationally significant tracts of land from further development and protect these lands from encroaching development. This program helps to meet the increasingly heavy visitor demand for Federal recreation areas, conserves outstanding resources for public recreational use before they are converted to incompatible uses, and preserves the Nation's natural and historic heritage. Despite the importance of this program to the Service's mission, funding for both acquisition and staff has precipitously decreased over the past eight years. Currently, the Land Resources Program is operating with 76 FTEs, up from a low of 66 FTEs in Fiscal year 2007, but still down from the 155 FTEs the program was operating with prior to receiving a significant (almost \$4 million) cut in Fiscal Years 2005 and 2006. If funding for this program was restored to a figure that would allow the program to operate at a fully-functional level, at least 100 FTEs would be necessary to address the workload of the program.

As a result of the significant staff losses over the past few fiscal years, the program lacks the technical depth it once had, and there is decreased ability to address crisis acquisition situations. Before funding cuts to the program, at least one FTE in each region could conduct environmental site assessments. However, now, with less staff and limited funds, the Program relies on staff in other offices, such as construction, for that special skill. In addition, "needed now" acquisition projects such as one in Olympic National Park previously would have called for staff from other regions to go on detail to assist for a short period to complete urgent projects. With limited staff and funds this is not possible. In Olympic National Park, only one realty specialist is working to acquire thousands of acres

for an important project that will allow two dams to be removed from the Elwha River without a disruption in electrical power to the region.

With less funding for land acquisition each year, the Service has developed a backlog of acquisition projects. The backlog anticipated following activity in fiscal year 2008 is expected to be 1,806,414 acres remaining to be acquired at an estimated cost of approximately \$1.95 billion, yet the President requested only \$11 million for land acquisition in our National Parks for FY 2009.