Testimony of Peter Nelson
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Before the
Committee on Energy and Natural Resources
U.S. Senate

Hearing on the Discussion Draft Legislation, the "Wildfire Budgeting, Response and Forest Management Act of 2016."

June 23, 2016

Chairwoman Murkowski, Ranking Member Cantwell, and members of the Committee,

My name is Peter Nelson and I am a senior policy advisor at Defenders of Wildlife where I manage our national forest policy program. Thank you for inviting my testimony today.

I have been professionally involved in national forest science, policy, and management for nearly twenty years. I am a member of the Federal Advisory Committee overseeing implementation of the Forest Service's 2012 Planning Rule, as well as a member of the Beaverhead-Deerlodge Collaborative Working Group in southwest Montana.

Defenders supports fixing the broken wildfire budget, a prompt transition to young growth harvest on the Tongass National Forest, and improving the effectiveness and efficiency of restoration planning and implementation on public forestlands across the country. Unfortunately, as articulated in a recent letter from 28 conservation organizations (attached at the end of this document), the draft fails to effectively resolve the wildfire budget problem, delays the Tongass' transition out of old growth logging and includes provisions that threaten the conservation and management integrity of our forests and bedrock environmental laws.

The Discussion Draft Fails to Solve the Wildfire Funding Problem

There is broad consensus on the need to fix the wildfire funding problem, where non-fire programs are chronically starved in order to pay for fire suppression. The approach proposed in the discussion draft may alleviate short-term fire borrowing, but it fails to solve the larger problem of escalating costs. More than half of the Forest Service budget is now spent to fund fire suppression and as that percentage grows, ever more resources will be siphoned from non-fire programs. We encourage the Committee to pursue a comprehensive fire funding fix that 1) addresses the increasing ten-year average cost of the wildfire program; 2) allows access to disaster funding to respond to exceptionally costly fires; and 3) significantly reduces the need to transfer resources from non-suppression accounts and programs to fire suppression.

The Discussion Draft Obstructs Transition of the Tongass National Forest Timber Program

We urge the Committee to drop the provision that blocks the finalization of the plan amendment to transition the Tongass National Forest timber program out of old growth logging and into harvest of younger trees. More than 165,000 individuals and organizations have participated in this robust public planning process and the Forest Service has sufficient information to proceed with the amendment. Unfortunately, language added to the discussion draft provision would indefinitely delay the much needed transition towards a more diverse and resilient local economy based on sustainable forestry and forest products, fishing, recreation and tourism.

Limiting Analysis to "Action" and "No Action" Alternatives will Not Generate Better Decisions or Better Restoration Outcomes

We appreciate the draft's attempt to set priorities for forest restoration activities. Defenders supports science-based landscape and watershed restoration, including the use of integrated actions, such as prescribed and managed fire, to achieve healthy, resilient forests. However, we believe that the provisions offered for discussion – which seek to bypass the National Environmental Policy Act (NEPA) and undermine judicial review – are extreme, harmful and unlikely to lead to more focused management decisions and improved conditions on the ground. Moreover, legislating truncated decision-making will undermine accountability and legitimacy and invites a backlash that will hinder efforts to advance restoration projects.

For example, the discussion draft proposes limiting analysis of alternatives for a broad range of forest management activities across public lands. Management alternatives are the heart of the NEPA process and exist for a reason – to make better, more informed decisions. Limiting alternatives analysis for a poorly defined and vast suite of activities raises the risk of making uninformed, risky, and controversial decisions. This could be catastrophic in some areas, such as within a community's drinking watershed. We support the appropriate level of analysis for any given proposed action, but legislation that limits or preordains levels of analysis is counterproductive and not good public policy.

The discussion draft appears to be premised on a mistaken assumption that NEPA is the primary culprit barring efforts to plan and implement forest restoration programs and projects. But as someone who has been involved with forest collaboratives, both in Montana and throughout the West, I don't see a NEPA problem as much as I see a capacity and restoration planning problem. There is a lack of tools and incentives to plan and implement forest and watershed restoration at a scale that can significantly improve conditions and achieve project-level efficiencies.

Rather than blindly legislating less NEPA – which always generates a storm of controversy – we should be considering policies and programs that incentivize robust landscape-scale planning processes that can meet multiple restoration objectives. The success of the "4FRI" project in Arizona demonstrates that large, landscape-scale projects can be planned and implemented under existing authorities. We cannot simply legislate our way to legitimate management decisions. Producing durable and defensible restoration decisions requires smarter – not less – analysis.

The Emergency Circumstances Decision Framework Established in the Discussion Draft is Inappropriate

The proposed ponderosa pine pilot program in the discussion draft is admirable in its effort to prioritize restoration in a forest type where we have a good understanding of restoration science and

practices. We must note however that the same degree of consensus does not exist in mixed conifer forests.

Unfortunately, the pilot program goes down the wrong road in its use of an "emergency circumstances" framework for planning and implementing restoration projects.

First, we don't believe this scheme can be effectively applied to potential future emergencies on public forestlands. Recent research found that less than 8 percent of forests treated to reduce fuels subsequently experienced a moderate or high-severity fire in the 20 years following the treatment. We simply don't have the ability to confidently predict where or when the next big wildfire will occur for the purposes of declaring an emergency.

In addition, while we agree that grave risks to public safety may warrant emergency response, non-imminent threats to other more ambiguous values do not justify jettisoning normal decision-making and judicial review processes. We support restoration planning that identifies areas for priority actions based on science and risks to social and environmental values, and would welcome more discussion on that matter.

Detailed Comments on Title III, Subtitles A and D

Defenders evaluates forest management policy based on whether it will be effective in promoting positive outcomes (for example, by restoring fire-adapted ecosystems and ecological resiliency, and protecting public safety). We have extensive experience in this regard, including developing and evaluating forest resiliency projects under the Collaborative Forest Landscape Restoration Program and the insect and disease management provisions in the 2014 Farm Bill.

In general, Defenders does not support the forest management, NEPA decision-making and judicial review authorities in Title III of the discussion draft. The provisions are unlikely to lead to improved conditions on the ground, and would do much to inflame conflict and controversy over forest management.

It must be noted that the Forest Service is already doing much to reduce hazardous fuels and restore ecological processes on national forests. Congress passed significant new authorizations for restoring National Forest System (NFS) lands in the 2014 Farm Bill and the Secretary of Agriculture has designated over 45 million acres of forestlands for priority restoration under those provisions, along with establishing numerous Good Neighbor Agreements with state forestry partners. Furthermore, and despite the current wildfire budget problem, the Forest Service is increasing the pace and scale of restoration on NFS lands, treating over 4.5 million acres in 2014 while producing nearly 3 billion board feet of timber.

Considering the above, we are not convinced that NEPA is the primary barrier to the development and implementation of effective forest resiliency programs and projects. The success and scale (600,000 acres) of the recent Four Forest Restoration Initiative (4FRI) decision on national forests in Arizona call this assumption into question. In our experience, the lack of capacity (and program direction) to conduct robust, science-based landscape assessments that identify and prioritize project-scale resiliency restoration activities has been a major barrier to ecological restoration. For example, one national forest in Montana where Defenders is working with the Forest Service and other partners on the implementation of Farm Bill resiliency projects lacks sufficient landscape-level

ecological information to support collaborative prioritization and development of projects. Congressional attention on this tangible constraint would be welcome.

Much of the problem lies in outdated forest plans that fail to reflect current restoration priorities; producing robust forest plan decisions that support implementation of broad, science-based restoration activities must be a high priority.

Title III, Subtitle A – Environmental Analysis for Certain Forest Management Activities – Section 301, appears to assume that limiting the number of alternatives considered in environmental assessments and environmental impact statements will lead to more efficient decision-making processes and effective outcomes for a range of forest management activities.

However, it is well established that alternatives are the heart of the NEPA process and exist for a reason – to make better, more informed decisions (and avoid making poor decisions that miss important information yielded via comparative analysis). Limiting alternative analysis thus immediately raises the risk of making bad decisions. It is also problematic in that if analysis reveals a flaw in a proposed action, the absence of other management alternatives make it difficult, if not impossible to modify or improve the action in the final plan. Arguably the discussion draft legislation attempts to ameliorate this risk by confining the authority to limit alternative analysis to proposed management actions generated by a "collaborative process" or community wildfire protection plans (CWPP) that serve at least one of five primary purposes identified in the legislation.

Based on our experience, using collaboration or CWPPs as a vehicle to reduce the risk of poor decision-making, particularly with regard to actions that will have significant effects on the environment, is too risky. We do appreciate that the criteria provided in the definition of "collaborative process" would help ensure accountability in the project planning process. However, we have seen too many collaboratives that do not have the expertise or knowledge to develop uniformly good proposals in complex forest management decision-making situations. In fact, in our experience, collaboratives can benefit from the comparative tradeoff analysis offered within NEPA for complex, comprehensive environmental decision-making. As a general matter, we place collaborative processes on a higher level than CWPPs and do not believe they should be afforded the same weight (this comment applies to Subtitle D as well).

The five primary purposes intended to constrain the authority to limit NEPA analysis on a project are much too broad and do not instill confidence that Title III, Subtitle A will lead to good decisions and positive environmental outcomes. For example, it is highly unusual anymore to see a vegetation management project proposed by the Forest Service that does not have "forest health and resiliency" as part of the "primary purpose" of a project proposal. There is also no indication of how a primary purpose will be determined, and the undefined nature of the primary purposes is problematic. For example, "protecting" a municipal water supply (ostensibly from wildfire) requires a sophisticated and robust comparative analysis. When it comes to a community's drinking water, the risk of missing key information in conducting a truncated environmental analysis is simply too high. As a general principle – and this is the system already in place with NEPA's categorical exclusions, environmental assessments, and environmental impact statements – as risk, significance and uncertainty increase, more robust analysis is preferred and leads to better decisions and outcomes. We support the appropriate level of analysis for any given proposed action, but it is disingenuous for legislation to predetermine and authorize the appropriate level of analysis as proposed in the discussion draft.

NEPA requires a comparative analysis of taking no action with the effects of taking action under various management alternatives. The discussion draft appears to presume that this analytical requirement is insufficient and layers additional ambiguous criteria on top of the existing NEPA framework. "Forest health," "wildlife habitat," "wildfire potential," "insect and disease potential" and "economic and social factors" all lack definition and therefore do not provide utility in establishing criteria for effects analysis. The language only serves to give the impression that the proposed legislation is designed to bias decision-making in favor of these undefined concepts. The result is an introduction of biased ambiguity that will likely only result in heightened controversy and conflict over management decisions, an undesirable policy outcome. In addition, it is questionable how the effects of future events would be estimated under this authority. For example, for "wildfire potential," would the effects analysis assume a range of fire intensities? How would management adjust to changing conditions?

Regarding the exclusion of critical habitat designated under the Endangered Species Act (ESA) from the limited alternatives provision, first and foremost it is paramount that legislation require compliance with the law. We are also concerned that the text does not reference the role of the National Marine Fisheries Service in the consultation process under the ESA. This comment applies to both this subtitle and Subtitle D.

Title III, Subtitle D – Accelerated Restoration Program for Ponderosa Pine and Dry-Site Mixed Conifer Forests – Section 331, as currently drafted, may be a solution in search of a problem, and in fact is a major problem. The proposed subtitle undermines NEPA and associated regulations and caselaw, as well as public and judicial review of decision-making processes.

The proposed "pilot program" on its face offers a positive purpose – the restoration of ponderosa pine and other forest types. As a policy matter, there is generally broad agreement on the ecological objectives and methods for restoring ponderosa pine. It is important to note that similar agreement does not exist for mixed conifer systems, where the science, objectives and methods are less well defined. For this reason, in a policy context, we caution against lumping these forest and ecosystem types.

The actual purpose of the proposed program, however, is not ecological restoration but rather the reduction of hazardous fuels, both within and outside of the wildland-urban interface. In our experience, restoration and reduction of hazardous fuels are not synonymous and reflect different management objectives, with the latter being much narrower than the former. Hazardous fuels reduction is a defensible purpose within the wildland-urban interface (WUI). Outside the WUI, the goal should be restoration of natural fire regimes and ecological resiliency. On that point, the section does refer to "areas…that are not in a desired condition relative to fire regime" ((b)(1)(B)(ii)(I)), which implies an objective to restore natural fire regimes, but does not establish the criteria or the defensible, science-based method for how desired conditions for fire regimes would be developed. As a principle, policy proposals that articulate the defensible science-based criteria for determining which lands will be prioritized for treatment are better than those that do not specify such criteria.

There are numerous definitional issues in the hazardous fuels reduction project procedures. For example, land and resource management "procedures" ((b)(4)(A)(i)) is unclear; "highly erodible land" ((b)(4)(A)(iii)) should be defined; and it is not clear why the phrase "is no longer needed" is

inserted into ((b)(4)(B)(ii)), adding ambiguity to the requirement, and deviating from language in Subtitle A on the same issue.

We have significant concerns with the reasoning and construction of the "emergency circumstances" framework for decision-making and the complete dismantling of NEPA under somewhat dubious grounds. To our knowledge, the concept of emergency circumstances, as used in NEPA, has never been extended to long-term preventive actions. The Council on Environmental Quality's regulations refer to controlling the "immediate impacts" of an emergency (40 C.F.R. § 1506.11). We don't believe the concept can be effectively applied to potential future "emergencies" that may be nearly impossible to predict with any degree of confidence.

The legislation attempts to define emergency circumstances in cases where it is extremely difficult to predict that such an emergency event is actually going to occur (by definition, an emergency is unexpected). The legislation demonstrates how difficult it is to construct a preventive emergency circumstances framework. Undefined terms create ambiguity that limit policy effectiveness and raise the likelihood of controversy, including "average severe fire weather" ((c)(1)(A)), "difficult to contain with suppression resources likely to be available" ((c)(1)(A)(i)), and a "significant threat to the forest ecosystem" ((c)(1)(A)(ii)(I)). As a general policy matter, we agree that significant threats to human life could warrant an emergency declaration, but a more ambiguous threat to a "forest ecosystem" does not rise to the same level. Similarly, the requirement to analyze effects to human life in the emergency environmental assessment ((c)(2)(C)) is warranted, but the inclusion of a bias towards jobs and federal revenue from timber sales, while of significant social value, are inappropriate within an emergency decision-making framework.

Furthermore, determining the probability that a wildfire will occur in a particular area is extremely difficult. Recent research found that fuel treatments have a mean probability of 2.0-7.9% of encountering moderate or high-severity fire during an assumed 20-year period of reduced fuels (Rhodes and Baker 2008). In other words, the legislation will encourage decision makers to essentially guess where they think fire will strike, and in the absence of a defensible method to target treatments, designate extremely broad swaths of forest as wildfire emergency areas. This is not a good policy outcome as it would likely result in the declaration of "emergencies" in countless places all the time.

Finally, the proposed pilot program fundamentally changes the judicial review of forest projects by establishing an unprecedented and undefined standard of "substantial deference" for decisions made under the program, which would have the effect of further reducing opportunities for oversight of forest projects. The key to securing durable restoration decisions is through solid collaboration, planning, prioritization and analysis, not legislative intervention in the judicial review process.

** ATTACHMENT **

Alaska Wilderness League * Bark * Center for Biological Diversity
Cherokee Forest Voices * Conservatives for Responsible Stewardship Conservation Northwest *
Defenders of Wildlife * Earthjustice
Environment America * Epic-Environmental Protection Information Center Georgia ForestWatch
* Greater Yellowstone Coalition
High Country Conservation Advocates * Kentucky Heartwood
Klamath Forest Alliance * Los Padres ForestWatch
National Audubon Society * National Parks Conservation Association
Natural Resources Defense Council * San Juan Citizens Alliance
Sierra Club * Southeast Alaska Conservation Council
Southern Environmental Law Center * The Wilderness Society
Umpqua Watersheds, Inc. * Western Watersheds Project
Wild Earth Guardians * Wild Virginia

June 13, 2016

The Honorable Lisa Murkowski
Chairwoman
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

The Honorable Maria Cantwell
Ranking Member
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

RE: Concerns regarding the Wildfire Budgeting Response and Forest Management Act discussion draft

Dear Chairwoman Murkowski and Ranking Member Cantwell,

On behalf of our millions of members and supporters, we write to highlight serious concerns with the Wildfire Budgeting, Response and Forest Management Act policy discussion draft that was released for public comment on May 25, 2016. We understand the draft may be the subject of a hearing in the coming weeks. Unfortunately, the draft fails to effectively resolve the wildfire budget problem and includes provisions that threaten the conservation and management integrity of our public forestlands and our bedrock environmental laws.

This proposal limits environmental review and opportunities for public input on management of national forests and other public lands, and alters judicial review of certain forestry projects. It carves huge loopholes in the National Environmental Policy Act. Further, the draft lacks consistent requirements for forest management projects to: utilize best available science, maintain old-growth forests, focus on restoration, and preserve roadless areas. Alarmingly, the bill also promotes old-growth logging in the Tongass National Forest and could delay indefinitely any plan to transition to

a more sustainable regional economy in that area. These provisions are certain to generate conflict and are unlikely to yield defensible decisions and positive environmental outcomes. They should not be a part of the discussion.

The draft also falls short of a real fire funding fix, and the undersigned groups do not support this approach. Among other things, any solution to the fire funding problem must address both fire borrowing and the dramatic erosion of the remaining Forest Service budget over time. This discussion draft only deals with the former and not the latter. It ignores the fact that over half of the Forest Service budget is already expended on fire suppression and that unless Congress addresses this budget erosion problem, soon only 30 percent of the agency's budget will be available for all other agency functions. Moreover, we understand that the language in the draft regarding fire borrowing is simply a placeholder suggestion to the Budget Committee.

While many of our respective organizations are providing individual, detailed comments on the draft, we wanted to take this opportunity to convey to you and other members of the Energy and Natural Resources Committee our strong and collective overarching concerns with the proposal. We urge you to oppose anything short of a comprehensive response to the challenge of fire funding, to reject efforts to tack on harmful forest management provisions that promote ill-conceived logging and to steadfastly defend national forests, including essential safeguards that help protect wildlife, public access, and public participation in forest management.