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January 23, 2012

Appeal Deciding Officer
Regional Forester
Attn: 1570 Appeals
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36 CFR 215 APPEAL Orchard Environmental Assessment

In accordance with 36 CFR 215, we hereby appeal the Decision Notice and Finding of No Significant Impact (FONSI) of the **Orchard Environmental Assessment** timber sale, Clackamas Ranger District, Mt. Hood National Forest.

Title of Decision Document: Orchard Environmental Assessment.

Description of Project: 230 acres commercial thinning; 16 acres riparian reserve thinning; 4 acres regeneration logging; 2.2 miles road construction; including road construction in an LSR; and .75 miles road obliteration.

Location: Clackamas Ranger District, Mt. Hood National Forest; T 5S, R 5E, sections 4 & 5.

Date Decision Notice and FONSI Published: August 26, 2002.

Deciding Officer Name and Title: Gary L. Larsen, Mt. Hood Forest Supervisor, Mt. Hood National Forest.

I. APPELLANT'S INTERESTS

Bark has a specific interest in this sale. We have previously expressed our interest in this specific sale, and have standing to appeal this decision according to 36 CFR § 215.11 (a)(2).

Bark is based in Portland, Oregon and is a 501(c)(3) non-profit corporation that is comprised of grassroots activists working to defend wilderness and biodiversity from further human degradation. Bark's mission is to conserve, protect and restore environmental health, forest ecosystems, clean water, and biological diversity. Recognizing the rapid loss of biological diversity as a threat to all life, Bark works to protect and restore wilderness habitat. Bark and its members actively participate

in governmental decision-making processes on public lands and focus exclusively on the Mt. Hood National Forest in Oregon. Bark encourages just, sustainable communities in the Mt. Hood National Forest of the Cascade Bioregion and neighboring areas. Bark believes that a diversified and sustainable economy depends on the wisest use of our natural resources. To that end, Bark works for the protection and restoration of forest ecosystems with a primary goal to reform destructive and unsustainable practices on public forestlands.

Bark's interests will be adversely affected by this timber sale. We use and enjoy the Mt. Hood National Forest, including the Orchard area, for recreational, educational, aesthetic and other purposes. The value of those activities will be irreparably damaged by this timber sale. We have a long-standing interest in the sound management of this area, and the right to request agency compliance with applicable environmental laws.

II. REQUEST FOR STAY

Although an automatic stay is in effect for this sale as per 36 CFR 215.10(b), we formally request a stay of **all** action on this timber sale, including sale preparation, layout, road planning, any advertising, offering for bids, auctioning, logging, road construction, or other site preparation by a purchaser pending the final decision on this appeal.

A full stay is essential to prevent unnecessary expenditure of taxpayers' money and to prevent irreversible environmental damage. Without a stay, the federal government may waste taxpayer money preparing a sale that may later be canceled. Because we intend to pursue our legal challenge to this sale with or without this stay, offering this timber sale may unnecessarily expose the government to liability and the purchaser to financial losses.

III. REQUESTED RELIEF

1. That the Decision Notice for the Orchard project be withdrawn.
2. That this timber sale be modified to meet the objections presented in Appellants' Statement of Reasons.
3. That the project be revised to ensure consistency with the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Clean Water Act (CWA), Administrative Procedures Act (APA), these statutes' implementing regulations, and the Mt. Hood National Forest Land and Resource Management Plan (Mt. Hood LRMP) as amended by the Northwest Forest Plan (NWFP).
4. That a no-harvest, restoration alternative be developed that addresses the need to close and obliterate roads and improve watershed conditions without the negative impacts of a timber sale.

IV. STATEMENT OF REASONS

1. Failure to Adequately Consider Cumulative Effects

The Forest Service is required to identify and consider cumulative effects:

"For each alternative, estimate the direct, indirect, and cumulative environmental effects, including the effectiveness of the mitigation

measures, that would result from implementing each of the alternatives, including the no action alternative. Also, identify any additional mitigation measures that may be required, such as measures common to all alternatives." 1909.15 FSH § 15.

Both the CEQ Regulations and the Forest Service Handbook are clear that cumulative effects involve impacts from other projects, but the Orchard EA neither mentions nor identifies the impacts from a number of similar projects being proposed in this area.

The CEQ Regulations define "Cumulative impact" as:

"the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (Emphasis added.)

The CEQ Regulations also state:

"'Effects' include: . . . (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8.

Several Sections of the Forest Service Handbook echo these requirements in regards to cumulative effects:

"Individual actions when considered alone may not have a significant impact on the quality of the human environment. Groups of actions, when added together, may have collective or cumulative impacts which are significant. Cumulative effects which occur must be considered and analyzed without regard to land ownership boundaries. Consideration must be given to the incremental effects of past, present, and reasonably foreseeable related future actions of the Forest Service, as well as those of other agencies and individuals." 1909.15 FSH § 15.1.

"Cumulative Impact. . . . the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 1909.15 FSH § 05.

While the cumulative impacts of **past** harvesting in the riparian areas (Orchard EA, p. 17) of the watershed are examined, the current analysis fails to address the cumulative impact of present Memaloose subwatershed riparian thinning (Oscar, South Fork Thin) in addition to the riparian thinning of the Orchard Sale. This analysis also fails to include current South Fork of the Clackamas management in riparian areas (Guard).

Chapter 3 of the Orchard EA (p. 16) states that cumulative impacts for "all management activities" within the watershed were considered. Yet, the EA goes on to cite the ARP index as an

example of how cumulative (“past and future”) impact is analyzed even though it only studies management activities within the subwatershed (p. 17, 18). It goes on to state that “[t]here are no projects being concurrently planned in the Memaloose watershed that were included in this analysis,” even though both South Fork Thin and the Oscar timber sale occur within the Memaloose subwatershed.

Consequently, the results returned by the demonstrably incomplete ARP model are wrong. Due to the omission of current management activities in the subwatershed and watershed the ARP index is incorrect and consequently the Orchard EA study of cumulative impact incomplete.

Cumulative impacts to water quality suffer from the same incomplete analysis. Neither the Record of Decision which states that the “[s]ediments, if any,” would not occur in great enough quantities to harm fish (p. 6) nor the Orchard EA – Appendix – Public Comments which states “[s]hort-term sediment risks would gradually decrease **after** road decommissioning and **after** erosion control measures take effect...” (p. 46, emphasis added) include the effects of past harvest where exposed soil still exists (Fork thin), current subwatershed management activities (Oscar, South Fork Thin), or watershed management activities (Guard, Unguard).

Cumulative impacts on water temperature are not examined. While cumulative effects of past harvest activity acting to raise stream temperatures are examined in the Orchard EA (p. 19) and mitigation measures for Orchard’s harvest activity are examined, there is no cumulative analysis done that includes other subwatershed (Oscar, South Fork Thin) or watershed (Guard, Unguard) harvests.

Cumulative impacts created by temporary roads suffer from the same incomplete analysis observed with the study of hydrologic effects (ARP index), riparian harvesting and water quality. While the Orchard EA – Appendix – Public Comments (p. 48-49) discusses the “impacts to resources” of temporary roads from the Orchard timber sale, it fails to address the cumulative impact from previous timber sales (such as the adjacent Fork thin) nor does include additional impacts to resources from the current timber sales within the subwatershed (South Fork Thin, Oscar) or the watershed (Guard, Unguard).

Within this same discussion (Orchard EA – Appendix – Public Comments p. 48-49) it notes that the impact from the road alignment will be evident for many years. There is no analysis of the cumulative impact (subwatershed or watershed) created by the past, present and foreseeable future road alignments on the Visual Quality Objectives of the Mt. Hood Forest Plan.

The impact on animal habitat is discussed in the Public Comments (p. 50, 26d): “the alternatives address habitat impacts...combined with the impacts of adjacent existing plantations and proposed road construction.” It does not include the cumulative habitat impact of past thinning (such as the immediately adjacent Fork thin) within the subwatershed or watershed, nor does it include the cumulative habitat impact of current subwatershed timber sales (Oscar, South Fork Thin). In consideration of the large scale habitat needs of various avian and large mammal species the lack of cumulative habitat impact analysis including other watershed management activities (Guard, Unguard) needs to be resolved.

Chapter 3 of the Orchard EA (p. 16) states that cumulative impacts for “all management activities” within the watershed were considered. The deer and elk analysis of optimal cover and optimal & thermal cover from the Orchard EA (p. 26) differentiates between pre- and post- Orchard harvest conditions in both the Memaloose subwatershed and the South Fork watershed. But, this analysis does not include other current management activities within the subwatershed (Oscar, South Fork Thin), nor does it include the other current management activities within the watershed (Unguard, Guard).

While the negative soil impacts from the Orchard sale are analyzed on page 29 of the Orchard EA, there is no cumulative soil impacts analysis that includes past (i.e., Forks), present-subwatershed (Oscar, South Fork Thin) or present-watershed (Guard, Unguard) management activities. NEPA requires this analysis, and the failure to provide it violates the law. 40 C.F.R. § 1508.7.

2. Reliance on BMPs

The Orchard EA states that “All of the action alternatives for the project were designed to meet the Clean Water Act’s requirements for nonpoint-source pollution control through the use of BMPs.” Orchard EA at p. 18. *See also* Orchard EA at p. 9.

The courts have determined that just stating that Best Management Practices (BMPs) will be used does not guarantee compliance with standards for water quality. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986) (holding that compliance with BMPs does not equate to compliance with the CWA). BMPs are just an effort to protect water quality, but the NEPA analysis must describe the likely implementability and efficacy of those efforts and the environmental consequences of the proposed BMPs and a range of reasonable alternative measures to protect water quality.

A recent USDA Office of the Inspector General Report concluded that reliance on speculative mitigation measures in order to reach a FONSI significantly compromised environmental quality. OFFICE OF INSPECTOR GENERAL, U.S. DEPT' OF AGRIC., EVALUATION REPORT NO. 08801-10-AT: FOREST SERVICE TIMBER SALE ENVIRONMENTAL ANALYSIS REQUIREMENTS (1999). The OIG concluded that: "Applicable mitigation measures contained in 10 of 12 decision notices and referenced environmental assessments reviewed, were not always implemented. In addition, mitigation measures were either omitted or incorrectly incorporated into 4 of 12 accompanying timber sale contracts.

3. Failure to Disclose Sufficient information in the EA

In an attempt to include the entire Analysis File in the EA, the Analysis Files (primarily the specialists’ reports) were listed in Appendix 2 to the EA. The Decision Notice and FONSI, plus the responses to public comments (Appendix 1 to the DN & FONSI), are full of references to this Appendix 2 as if all the information contained within the Analysis Files was indeed in the EA. *See* DN & FONSI at p. 3, paragraph 5, and at p. 4, paragraph 2.

However, listing the names of the documents in the Analysis Files in an Appendix to the EA does not mean that the information within those reports is available to the public. Indeed, the public cannot even obtain those documents without a request under the Freedom of Information Act. In effect, the information within the Analysis Files is not available to the public, nor is it immediately available to anyone, including the decision maker, who is relying on the EA for information on the Orchard project.

NEPA requires government agencies to disclose and take a “hard look” at the foreseeable environmental consequences of their decisions. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21, 96 S. Ct. 2718, 2730 n.21 (1976); 40 C.F.R. § 1502.16. Although an E.A. need not conform to the same requirements as an EIS, it must nevertheless include sufficient information to determine what the impacts of a proposed action will be, and “must support the reasonableness of the agency’s decision

not to prepare” a full EIS. 40 C.F.R. § 1508.9; Southern Oregon Citizens Against Toxic Sprays v. Clark (SOCATS), 720 F.2d 1475, 1480 (9th Cir. 1983), cert. denied 469 U.S. 1028, 105 S. Ct. 446 (1984). In addition, 43 CFR 1500.1 (b) states that: “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”

The Administrative Procedures Act requires reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

In this case, much of the environmental information necessary for the requisite “hard look” is contained within documents that are not part of the EA and are not readily available to the public nor readily available to the decision maker.

4. Effects to Spotted Owls

The planning documents fail to thoroughly analyze the impact of the Orchard project on the northern spotted owl. The proposed action occurs within known spotted owl habitat and may adversely impact the owl. But the planning documents fail to provide a mitigation plan for owl habitat.

The Orchard EA states that this proposed action “May Affect, Not Likely to Adversely Affect” the spotted owl and “In the short term, the action alternatives would degrade 246 acres of dispersal habitat.” Orchard EA at p. 26. The EA states that seasonal restrictions on all units would minimize the risk of disturbance to spotted owls during nesting season. *Id.*

The Forest Service should be managing to preserve options for recovery rather than managing in a way that obeys the letter of the law with the minimum amount of effort. With the Forest Service’s continued practice of managing for habitat rather than for actual owl populations, spotted owl populations will continue to decline. Monitoring should be undertaken to determine what the actual spotted owl populations is in the South Fork watershed in which the Orchard project is located.

Additionally, the biological evaluation from the Fish & Wildlife Service dates back to 1998, however since then there has been a significant amount of new information regarding spotted owl recovery. These newer studies are indicating that the northern spotted owl population is declining, and declining at a rate faster than predicted.

5. Riparian Reserve Logging

The Northwest Forest Plan states that “Standards and Guidelines prohibit and regulate activities in Riparian Reserves that retard or prevent attainment of the Aquatic Conservation Strategy Objectives.” NWFP at p. B-12.

The Aquatic Conservation Strategy Objectives (ACSOs), in turn, make it clear that silvicultural activities in Riparian Reserves are allowed only if “needed” to attain ACSOs. NWFP S&G at p. C-32. Thinning in the Reserves in this sale is not “needed” as it is only meant to hasten what would naturally occur if left alone.

The Orchard EA states that the reason for logging in the Riparian Reserves is to “accelerate” the desired development of Riparian Reserve forest stands.” Orchard EA at p. 18. No need other than a desire to “accelerate” conditions is stated.

6. Roadbuilding in an LSR

The proposed road-building through LSR in Unit 1 of the Orchard Project could adversely affect soil quality in the area, causing loss of soil productivity and harm to mycorrhizae. The Decision Notice and FONSI fail to explain how Alternative B meets soil productivity, soil compaction and soil disturbance standards set by the Mt. Hood LRMP and the NWFP. Road-building through LSR in Unit 1 of the Orchard Project will likely cause these adverse environmental effects, and thus should not occur. Moreover, as stated in the Appendix 1, Response to Public Comments, that the road alignment will be evident for many years. Appendix 1 at pp. 48-49.

Perhaps more significantly, road-building in Unit 1 of the Orchard Project may introduce invasive, exotic species to the area. Again, neither the EA nor the Decision Notice provided an in-depth discussion of the anticipated adverse environmental effects of road-building upon project area soil quality, plants or wildlife, nor how the USFS will mitigate these particular effects in the Orchard Project area.

7. Suspect Economic Analysis

It is clear from reading the Decision Notice that this decision is being made based on economics (faulty economics at that), yet other factors need to be taken into consideration in the decision.

The proposed action violates NFMA’s requirement that a logging system be selected for reasons beyond economics. There is no justification other than economic considerations for using ground based logging systems and further management given the extensive past and future cutting that has occurred in the planning area. 36 C.F.R. § 219.27(b)(3). The decision to implement an action alternative that provides the greatest revenue but proposes the greatest environmental harm is unfounded.

The Forest Service has a duty to “Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations” NEPA Section 102, 42 U.S.C. § 4332. The Orchard EA fails to take into account any values other than direct economic effect.

And, as we raised in our EA comments, that economic analysis is highly suspect since it indicates that the cost of this project has actually decreased since the original EA was released in 1999.

8. Failure to Define Thinning in the EA

Although the Orchard Project has been in the planning stages for several years, the USFS has yet to describe the planned thinning activity in any detail. The Decision Notice and FONSI state that approximately 230 acres of second-growth stands will be thinned, but do not include discussion of the USFS's definition of "thinning"—*e.g.*, how many trees will be removed per acre, how many trees will be left standing per acre and what size of trees will be removed. The Decision Notice and the EA both failed to provide any specificity with regard to the agency's planned thinning activities. This lack of transparency is secretive and unacceptable.

Other than describing what the *purpose* is for implementing these treatments, there is no description of the type of forest that results post-treatment, the percentage of canopy cover removed or retained, or how the forest will function post-project (i.e., whether interior forest characteristics will remain after the Orchard project). Without this information, it is impossible for the decision maker and the public to determine the nature and extent of the proposed harvest treatments.

The Response to Public Comments at p. 51 cites again to the Analysis Files listed in Appendix A, as if those files were part of the disclosed project. As noted above in issue #3, this failure to include pertinent information in the EA violates existing caselaw and the Code of Federal Regulations.

The CEQ Regulations state:

"NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." 40 C.F.R. § 1500.1(b).

9. Failure to discuss permanency of "temporary" road building

In its Decision Notice and FONSI, the Forest Service states that it will obliterate and revegetate the road it intends to build in Unit 1 after it has completed the project. However, the agency does not suggest a concrete finish date when it will have completed the road-obliteration and revegetation activity. The Forest Service also does not discuss how permanent the road closure will be, or its ability to close the road. The EA and the Decision Notice provide no description of the funding source for road-closure activity, and thus provide no assurance that the agency will actually carry out obliteration and revegetation activity. Funding for road closures often comes from Knutson-Vanderberg funds, which could be cut if timber prices drop. The Forest Service does not discuss its ability to complete road-closure activities in light of this possibility. If the Forest Service cannot close the road, the adverse effects on soil, plants and wildlife will be more long-lasting. Also, we remind the Forest Service that in the event of loss of funding for road closure activities, closure by erecting barriers or installing gates would be insufficient to actually decommission the road. NWFP S&G at B-19.

10. C1 vs. Matrix

The EA states that the orchard Project Area is in the matrix land allocation as identified under the NWFP, and also the C1 Timber Emphasis land allocation as identified in the MHMP. However, under Desired Future Conditions it states that "Desired Future Conditions are derived from the Mt. Hood Forest Plan." Orchard EA at p. 2. There is no mention, in the Desired Future Condition section of the NWFP, whatsoever. It appears the planners of the Orchard project were leaning heavily

towards using the MHMP for their standards and guidelines instead of using both the NWFP and the MHMP in tandem to assure that the most environmentally protective guidelines were followed.

The NWFP, by definition, amends the existing MHMP. NWFP ROD at p. 11. The lands within the Orchard project area are defined as matrix lands under the NWFP. Under the NWFP stands in the matrix can be managed for timber production, but there is no mandate stating they have to be. The NWFP also states that matrix lands will be managed to perform important roles in maintaining biodiversity. Matrix is not, by definition, “Timber Emphasis.” There are many areas in the matrix that are defined as unsuitable for timber production.

Moreover, NFMA requires the Forest Service to provide animal and plant diversity in the national forests. 16 U.S.C. § 1604(g)(3)(B). As a result, the Mt. Hood LRMP does actually state that “Management activities shall preserve and enhance the diversity of plant and animal communities including endemic and desirable naturalized plant and animal species. The diversity of species shall be at least as great as that which occurs in a natural forest.” Mt. Hood LRMP at p. 67; 36 CFR 219.27.

USFS regulations implementing this requirement also direct the Service to manage forests for viable populations of native vertebrate and desired non-native species. 36 C.F.R. § 219.19. The regulations define viable populations as a population that has “the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.” *Id.*

The Orchard EA fails to address these issue of preserving and enhancing biodiversity. It is clear that any action plan should enhance diversity, not decrease it as the proposed action does.

11. Failure to Consider a Restoration Only Alternative

The Forest Service failed to analyze a reasonable range of alternatives in the Orchard EA. The EA. must address a no-harvest restoration alternative that implements prescribed burning, snag recruitment, waterhole construction, placement of nest boxes, and road obliteration alone, without commercial timber harvest. There is ample evidence in the literature that such an alternative would achieve the restoration goals of the project in a cost efficient manner without creating any of the ecological and economic damage of treatments that include commercial logging, including in this case the construction of 2.2 miles of new “temporary” roads. In all projects involving “stewardship” goals, the Forest Service Handbook and Manual explicitly require consideration of alternatives without commercial logging:

“Where timber harvest is proposed primarily for the purpose of achieving forest stewardship purposes...a full range of alternatives, including practical and feasible non-harvest options, must be analyzed in the environmental analysis process.” (FSM 2432.22c).

Further, the Forest Service is required to analyze such an alternative under NEPA. Because commercial logging, as proposed in the orchard EA causes undesirable impacts on the environment, the agency must include an alternative that does not include such impacts:

“Develop other alternatives fully and impartially. Ensure that the range of alternatives does not prematurely foreclose options that might protect, restore, and enhance the environment. Consider reasonable

alternatives even if outside the jurisdiction of the Forest Service. (40 CFR 1502.22)

Such an alternative must be developed even if implementing such an alternative would not meet current policy:

“Reasonable alternatives which may require a change in existing law or policy to implement shall be formulated if necessary to address a major public issue, management concern, or resource opportunity identified during the planning process. (36 CFR §219.12, f [5]).

Environmental analysis documents must “[r]igorously explore and objectively evaluate all reasonable alternatives” to the project. 40 C.F.R. § 1502.14(a). The Council on Environmental Quality (CEQ), which promulgated the regulations implementing NEPA, characterizes the discussion of alternatives as “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. A decisionmaker must explore alternatives in sufficient enough detail to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” *Id.* § 1502.14. All reasonable alternatives must receive a “rigorous exploration and objective evaluation . . . , particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects.” *Id.* § 1500.8(a)(4). The analysis of the alternatives must be “sufficiently detailed to reveal the agency’s comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative.” *Id.*

The Forest Service is required to analyze a non-logging alternative under NEPA. Because commercial logging causes undesirable impacts on the environment, the agency must include an alternative that does not include such impacts. The regulations implementing NEPA explain that the agency must “develop other alternatives fully and impartially. Ensure that the range of alternatives does not prematurely foreclose options that might protect, restore, and enhance the environment. Consider reasonable alternatives even if outside the jurisdiction of the Forest Service.” 40 C.F.R. § 1502.14(c). The agency must develop such an alternative even if implementing such an alternative would not meet current policy. The NFMA regulations note that “reasonable alternatives which may require a change in existing law or policy to implement shall be formulated if necessary to address a major public issue, management concern, or resource opportunity identified during the planning process.” 36 C.F.R. § 219.12(f)(5).

The agency has failed to comply with these mandates. As such, the proposed project should not go forward.

V. CONCLUSION

For the above stated reasons, we request that you Bark the Request Relief.

Sincerely,

Gregory J. Dyson

Bark