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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SIERRA NEVADA FOREST
PROTECTION CAMPAIGN, SIERRA
CLUB, and LASSEN FOREST
PRESERVATION GROUP,

NO. CIV. S 06-00351 FCD DAD

Plaintiffs,

AMENDED MEMORANDUM AND ORDER¹

v.

LAURIE TIPPIN, in her official
capacity as Forest Supervisor
of the Lassen National Forest,
BERNARD WEINGARDT, in his
official capacity as Regional
Forester; and UNITED STATES
FOREST SERVICE,

Defendants.

_____ /

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¹ This amended memorandum and order makes minor
modifications to the order filed on August 16, 2006, relating to
non-substantive, typographical errors brought to the court's
attention by plaintiffs' Request for Correction, filed Sept. 5,
2006. That order is hereby VACATED and the instant order
supercedes it in all respects.

1 This matter is before the court on cross motions for summary
2 judgment filed by plaintiffs, Sierra Nevada Forest Protection
3 Campaign, Sierra Club, and Lassen Forest Preservation Group
4 (collectively "plaintiffs"), and defendants, Laurie Tippin,
5 Bernard Weingardt, and the United States Forest Service
6 (collectively "defendants" or "Forest Service"). The court heard
7 oral argument from parties' counsel on August 4, 2006.

8 **FACTUAL AND PROCEDURAL BACKGROUND²**

9 **A. The Creeks Forest Health Recovery Project**

10 The present controversy surrounds the Creeks Forest Health
11 Recovery Project ("the Project"), a resource management project
12 located within the Lassen National Forest, Almanor Ranger
13 District. (Pls.' Resp. To Defs.' Statement of Undisputed Facts
14 ("DSUF"), filed July 21, 2006, ¶ 1). The Project area
15 encompasses approximately 33,000 acres and is located twelve
16 miles south of Chester, California, within Plumas County. (DSUF
17 ¶ 2).

18 As outlined, the Project includes various techniques for
19 resource management, including the construction of a strategic
20 system of fuel breaks called defensible fuel profile zones
21 ("DFPZs"), and two uneven-aged methods of timber harvest: group
22 selection and harvest by selection of individual trees. (DSUF ¶
23 4). DFPZs are a strategic system of linear fuelbreaks with open
24 forest cover and dominated by larger, fire-tolerant trees. (DSUF
25 ¶ 4). The stated purpose of DFPZs is to create a system of
26 fuelbreaks to provide fire suppression personnel relatively safe

27 ² The following facts are undisputed, except where noted
28 to the contrary.

1 locations from which to take action against wildfires. (DSUF ¶
2 8). Group selection involves harvest of patches (.25 to 2 acres)
3 of forest for the purposes of regenerating uneven-aged stands and
4 promoting the growth of shade-tolerant trees. (DSUF ¶ 4). The
5 stated purpose of group selection to achieve an all-age, multi-
6 story, fire-resilient forest while contributing to the local
7 economy through a sustainable output of forest products. (DSUF ¶
8 10). The stated purpose of individual tree selection is to lower
9 forest stand densities by removing small to intermediate-sized
10 trees in order to improve forest health, assist in the
11 maintenance of late-successional forest conditions, and assist
12 the DFPZs in creating a strategic network of areas with reduced
13 fuel concentrations where fire severity and spread would be
14 reduced. (DSUF ¶ 9).

15 Specifically, the Project authorizes approximately 10,376
16 acres of logging, including 5,905 acres of DFPZs, 3,285 acres of
17 individual tree selection (area thinning), and 1,245 acres of
18 group selection treatments. (DSUF ¶ 6). In all treatment areas,
19 trees greater than 30 inches diameter at breast height ("dbh")
20 would be retained, except where removal is required for
21 operability or safety reasons. (DSUF ¶ 6). In the group
22 selection areas, approximately 1,150 acres would be interplanted.
23 (DSUF ¶ 6). Approximately 150 acres of group selection treatment
24 would be left to regenerate naturally. (DSUF ¶ 6).

25 **B. Regulatory Framework**

26 Forest planning decisions are impacted by several
27 overlapping statutory and regulatory regimes.

28 ///

1 **1. National Environmental Policy Act**

2 The National Environmental Policy Act, 42 U.S.C. § 4321, et
3 seq., ("NEPA"), was enacted by Congress in 1969 to "declare a
4 national policy which will encourage productive and enjoyable
5 harmony between man and his environment; promote efforts which
6 will prevent or eliminate damage to the environment . . . [and]
7 to enrich the understanding of the ecological systems and natural
8 resources important to the nation. . . ." 42 U.S.C. § 4321.

9 Despite this ambitious declaration of purpose, NEPA has been
10 interpreted as essentially procedural. See Blue Mountains
11 Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir.
12 1998) (noting that the purpose of NEPA is to "ensure a process,
13 not to ensure any result."). The NEPA process is designed to
14 "ensure that the agency . . . will have detailed information
15 concerning significant environmental impacts; it also guarantees
16 that the relevant information will be made available to the
17 larger [public] audience." Blue Mountains, 161 F.3d at 1212.

18 **2. National Forest Management Act**

19 The National Forest Management Act of 1976, 16 U.S.C. §
20 1604, et seq., ("NFMA"), requires the Secretary of Agriculture to
21 "develop, maintain, and, as appropriate, revise land and resource
22 management plans for units of the National Forest System." 16
23 U.S.C. § 1604(a). The Forest Service, which manages the System,
24 develops land and resource management plans pursuant to the NFMA,
25 and uses these forest plans to "guide all natural resource
26 management activities," including use of the land for "outdoor
27 recreation, range, timber, watershed, wildlife and fish, and
28 wilderness." 16 U.S.C. § 1604(e) (1); 36 C.F.R. § 219.1(b). In

1 developing forest plans, the Service must take both environmental
2 and commercial goals into account. See e.g., 16 U.S.C. §
3 1604(g); 36 C.F.R. § 219.1(a).

4 Forest planning occurs at two levels: forest and project.
5 At the forest level, the Forest Service develops a Forest Plan,
6 which is a broad, long-term programmatic planning document for an
7 entire National Forest. Each Forest Plan includes goals and
8 objectives for individual units of the forest and provides
9 standards and guidelines for management of forest resources.
10 Consistent with its obligations under the NFMA, in 1993, the
11 Forest Service adopted the Lassen National Forest Land and
12 Resource Management Plan (the "Lassen LRMP"), which provides
13 standards and guidelines for project-level planning within the
14 Lassen National Forest. In 1999, the Forest Service adopted the
15 Herger-Feinstein Quincy Library Group (QLG) record of decision
16 (ROD) which amended the LRMP for the Lassen National Forest and
17 other national forests in the Northern Sierra Nevada. In 2001,
18 the Forest Service approved the Sierra Nevada Forest Plan
19 Amendment (SNFPA), also known as the Sierra Nevada Framework,
20 which amended the LRMPs for all national forests in the Sierra
21 Nevada (the "2001 Framework"). Finally, in 2004, the Forest
22 Service replaced the 2001 Framework with a new plan, referred to
23 as the 2004 Framework or 2004 Supplement, which also amended the
24 LRMPs for all Sierra national forests. Because the Project lies
25 within the Lassen National Forest, it must be consistent with the
26 1993 Lassen LRMP, as amended by the QLG ROD and the 2004
27 Framework.

28 ///

1 **C. History of the Creeks Forest Health Recovery Project**

2 The Forest Service initiated the scoping process for the
3 Project in June 2004. (Defs.' Resp. To Pls.' Statement of
4 Undisputed Facts ("PSUF"), filed June 26, 2006, ¶ 13). On June
5 4, 2004, a scoping letter, including a detailed description of
6 the proposed action and a map showing the location of the
7 proposed action, was sent to interested parties. (DSUF ¶ 11).
8 Plaintiffs submitted detailed comments in response, describing
9 the kind of information, analysis, and alternatives that should
10 be included in the environmental analysis for the project. (PSUF
11 ¶ 13). On February 14, 2005, the Forest Service initiated a
12 second scoping process and announced that an Environmental Impact
13 Statement ("EIS") would be prepared in connection with the
14 Project. (DSUF ¶ 12). Plaintiffs also submitted comments in
15 response to the second scoping period, in particular, urging that
16 the EIS consider all reasonable alternatives, including
17 alternatives that would protect trees 20" diameter and greater,
18 that maintain canopy cover at 50% or greater, and that are
19 consistent with the 2001 Framework. (PSUF ¶ 13).

20 In May 2005, the Forest Service issued a draft EIS ("DEIS")
21 for the Project, including a proposed action. (PSUF ¶ 14; DSUF ¶
22 13). Other than the proposed action and "no action," the DEIS
23 failed to consider in detail any alternatives. (PSUF ¶ 14). On
24 June 6, 2005, the Forest Service initiated a formal 30-day notice
25 and comment period on the Project DEIS by publishing a notice in
26 the Lassen County Times. (DSUF ¶ 13). Plaintiffs filed comments
27 on the DEIS, together with critiques from experts in the field of
28 wildlife biology and fire ecology. (PSUF ¶ 14). In their

1 comments, plaintiffs argue that the Forest Service had (1) failed
2 to disclose important information about environmental impacts;
3 (2) failed to analyze all significant issues; and (3) failed to
4 consider reasonable alternatives. (RSUF ¶ 14). Wildlife
5 biologists who reviewed the plan concluded that the Project would
6 adversely affect the spotted owl, marten, and fisher, potentially
7 threatening the viability and distribution of these species.
8 (RSUF ¶ 14). The Forest Service prepared a substantive response
9 to the comments received on the DEIS, which plaintiffs assert was
10 not legally adequate. (RSUF ¶ 15).

11 In September 2005, the Forest Service issued a record of
12 decision (ROD) and final EIS ("FEIS") approving the Project.
13 (PSUF ¶ 15; DSUF ¶ 16). The FEIS considered fourteen
14 alternatives to address the enumerated purpose and need³ of the

15 _____
16 ³ The stated purpose and need of the Project in the FEIS
is as follows:

- 17 1. Implementation of the Herger-Feinstein Quincy Library
18 Group ("HFQLG") Act , which requires the construction
of a network of DFPZs, group-selection timber harvest,
and individual tree selection (area thinning);
- 19 2. Implementation of a DFPZ as part of an extensive fuel
20 treatment network that is effective in reducing the
potential size of wildfires, and providing safe
21 locations for fire suppression personnel in the event
of a wildfire;
- 22 3. Implementation of individual tree selection (area
thinning) to promote forest health and provide an
uneven-aged structure to forested stands;
- 23 4. Implement of group selection as directed in the 1998
24 HFQLG Act to achieve desired future condition of all-
age, multistory, fire-resilient forests while
contributing to the local economy though a sustainable
25 output of forest products;
- 26 5. Implementation of economically efficient treatments to
reduce hazardous fuels and to contribute to community
stability; and
- 27 6. Providing the necessary access for the construction of
the DFPZs, group-selection timber harvest, and area

28 (continued...)

1 Project; three studies were considered in detail, while eleven
2 were considered but eliminated from detailed study.⁴ (DSUF ¶
3 17). The FEIS analyzed in detail a new alternative, Alternative
4 14, which differs in only minor respects from Alternative 1, the
5 proposed action in the DEIS. (PSUF ¶ 15). The FEIS failed to
6 consider in detail any alternative other than Alternative 14,
7 Alternative 1, and no action. (PSUF ¶ 15).

8 On September 9, 2005, Forest Supervisor Laurie Tippin signed
9 the record of decision (ROD) for the Project. The ROD implements
10 Alternative 14, as described in the FEIS, and sets forth the
11 rationale for the decision. (DSUF ¶ 19).

12 In November 2005, plaintiffs appealed the Project decision.
13 (DSUF ¶ 20; PSUF ¶ 17). By letter dated December 19, 2005, the
14 Appeal Deciding Officer denied the appeals and affirmed the
15 Forest Supervisor's decision to approve the Project. (DSUF ¶ 21;
16 PSUF ¶ 17). This decision constituted the final administrative
17 determination of the Department of Agriculture. (PSUF ¶ 17). In
18 January 2006, the Forest Service awarded three of four timber
19 sale contracts implementing the Creeks Project to Sierra Pacific
20 Industries.⁵ (DSUF ¶ 22).

21
22 ³(...continued)

23 thinning, and to reduce impacts on the transportation
system.

24 (Creeks Forest Health Recovery Project FEIS ("FEIS") provided in
25 the Creeks Forest Health Recovery Project Administrative Record
(CR), filed April 20, 2006, at 01867-68).

26 ⁴ Plaintiffs dispute that the Forest Service adequately
27 considered reasonable alternatives. (DSUF ¶ 17).

28 ⁵ On April 6, 2006, Sierra Pacific Industries ("SPI")

(continued...)

1 On February 17, 2006, plaintiffs filed this lawsuit
2 challenging the Project and seeking to have the Project set
3 aside. The parties agree that "no logging or other ground
4 disturbing activities will occur to implement the Creeks Project
5 until 14 days after this Court issues a final judgment." (DSUF ¶
6 22; PSUF ¶ 17). Plaintiffs assert that defendants' decision to
7 approve the project is contrary to NEPA because the FEIS failed
8 to consider reasonable alternatives and failed to take a hard
9 look at significant environmental issues. Plaintiffs also assert
10 that the implementation of the Project violates NFMA because (1)
11 the conclusion that the Project will insure the viability and
12 distribution of old forest wildlife is based upon flawed analysis
13 and insufficient evidence and (2) the Forest Service failed to
14 obtain and analyze required wildlife monitoring data prior to
15 approving the Project. Defendants contend that the Project,
16 including the FEIS, fully complies with NEPA and NFMA.

17 STANDARD OF REVIEW

18 A. Summary Judgment

19 The Federal Rules of Civil Procedure provide for summary
20 adjudication when "the pleadings, depositions, answers to
21 interrogatories, and admissions on file, together with
22

23 ⁵(...continued)
24 moved to intervene as a defendant in this matter. On May 15,
25 2006, the court granted SPI's motion to intervene only as to the
26 remedial issues in this case. (Mem. & Order, filed May 15, 2006,
27 Docket No. 23). However, on June 26, 2006, defendant-intervenor
28 SPI filed a 16-page brief, primarily addressing the merits of
plaintiffs' claims. Because SPI's role in this case is limited,
the court will not consider SPI's briefing on issues relating to
the merits of the claim. However, the court will consider SPI's
arguments that relate to the injunctive relief sought by
plaintiff, which are set forth in large part on pages 15-16.

1 affidavits, if any, show that there is no genuine issue as to any
2 material fact and that the moving party is entitled to a judgment
3 as a matter of law." Fed. R. Civ. P. 56(c).

4 In considering a motion for summary judgment, the court must
5 examine all the evidence in the light most favorable to the
6 non-moving party. United States v. Diebold, Inc., 369 U.S. 654,
7 655 (1962). If the moving party does not bear the burden of
8 proof at trial, he or she may discharge his burden of showing
9 that no genuine issue of material fact remains by demonstrating
10 that "there is an absence of evidence to support the non-moving
11 party's case." Celotex Corp. v. Catret, 477 U.S. 317, 325
12 (1986). Once the moving party meets the requirements of Rule 56
13 by showing there is an absence of evidence to support the
14 non-moving party's case, the burden shifts to the party resisting
15 the motion, who "must set forth specific facts showing that there
16 is a genuine issue for trial." Anderson v. Liberty Lobby, Inc.,
17 477 U.S. 242, 256 (1986). Genuine factual issues must exist that
18 "can be resolved only by a finder of fact, because they may
19 reasonably be resolved in favor of either party." Id. at 250.

20 Where as here, the court's review is limited to the
21 administrative record, stipulated to by the parties, there are no
22 triable issues of fact, and summary judgment is appropriate. See
23 Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture, 18 F.3d
24 1468 (9th Cir. 1994).

25 **B. Administrative Procedures Act**

26 Under the Administrative Procedures Act ("APA"), the court
27 may set aside a final agency action only where the action is
28 "arbitrary, capricious, an abuse of discretion, or not otherwise

1 in accordance with the law." 5 U.S.C. § 706. Review under the
2 APA is "searching and careful." Ocean Advocates v. United States
3 Army Corps of Eng'rs, 361 F.3d 1108, 1118 (9th Cir. 2004).
4 However, the court may not substitute its own judgment for that
5 of the agency. Id. (citing Citizens to Preserve Overton Park,
6 Inc. v. Volpe, 401 U.S. 402 (1971), overruled on other grounds by
7 Califano v. Sanders, 430 U.S. 99 (1977)). In short, the court
8 must ensure that the agency has taken a hard look at the
9 environmental consequences of its proposed action. Oregon
10 Natural Resources Council v. Lowe, 109 F.3d 521, 526 (9th Cir.
11 1997). As part of this inquiry, the court should ask "whether
12 the [] decision was based on a consideration of the relevant
13 factors and whether there has been a clear error in judgment."
14 Ocean Advocates, 361 F.3d at 1118. In addition, the court
15 determines "whether the agency articulated a rational connection
16 between the facts found and the choice made." Id. at 1118-1119
17 (quoting Arizona Cattle Growers' Ass'n v. United States Fish and
18 Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001)).

19 ANALYSIS

20 Plaintiffs challenge defendants' decision to implement
21 Alternative 14 of the Creeks Forest Health Recovery Project on
22 the basis that this decision violates the National Environmental
23 Policy Act ("NEPA"), 42 U.S.C. § 4321, and the National Forest
24 Management Act ("NFMA"), 16 U.S.C. § 1604.

25 I. National Environmental Policy Act (NEPA)

26 NEPA mandates that federal agencies prepare a detailed
27 Environmental Impact Statement ("EIS") for all "major Federal
28 actions significantly affecting the quality of the human

1 environment." 42 U.S.C. § 4332(2)(c). These statements must
2 include a description and analysis of the environmental impact of
3 the proposed action, any adverse environmental effects that
4 cannot be avoided if the action is implemented, alternatives to
5 the proposed action, the relationship between short-term uses and
6 long-term productivity, and any irreversible or irretrievable
7 commitment of resources that would be involved if the action were
8 to be implemented. Earth Island Inst. v. U.S. Forest Serv., 442
9 F.3d 1147, 1153 (9th Cir. 2006) (citing 42 U.S.C. § 4332(2)(c)).
10 "In short, NEPA requires that a federal agency 'consider every
11 significant aspect of the environmental impact of a proposed
12 action' and 'inform the public that it has indeed considered
13 environmental concerns in its decisionmaking process.'" Id.
14 (quoting Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066
15 (9th Cir. 2002)).

16 **A. Failure to Analyze an Adequate Range of Alternatives⁶**

17 Plaintiffs also challenge the adequacy of the FEIS,
18 asserting that it failed to address an adequate range of
19 alternatives. NEPA mandates that an agency consider and discuss
20 the range of all reasonable alternatives to the proposed action,
21 to "provid[e] a clear basis for choice among options by the
22 decisionmaker and the public." 40 C.F.R. § 1502.14. An agency
23

24 ⁶ Plaintiffs also assert that the FEIS failed to take a
25 hard look at fire and fuels issues and to disclose and respond to
26 contrary scientific information and opinion. Many of the
27 arguments that plaintiffs set forth in support of that assertion
28 overlap with the arguments made in support of the assertion that
defendants did not adequately analyze the range of reasonable
alternatives. As such, and for the reasons set forth herein, the
court does not separately analyze plaintiffs' assertion that
defendants failed to take a hard look at fire and fuels issues.

1 is not required to extensively analyze alternatives that do not
2 meet the purpose and need of the Project. Laguna Greenbelt, Inc.
3 v. United States Dept. of Trans., 42 F.3d 517, 523-525 (9th Cir.
4 1994). Nor, however, can the agency narrowly define its purpose
5 and need so as to winnow down the alternatives until only the
6 desired one survives. See Muckleshoot Indian Tribe v. United
7 States Forest Serv., 177 F.3d 800, 814 n. 7 (9th Cir. 1999)
8 (noting that, in the EIS context, "[o]ne obvious way for an
9 agency to slip past the strictures of NEPA is to contrive a
10 purpose and need so slender as to define competing reasonable
11 alternatives out of consideration. . . .").

12 Here, the Forest Service evaluated three action alternatives
13 in detail: (1) no action, (2) Alternative 1, and (3) Alternative
14 14, which differs only in minor respects from Alternative 1 in
15 order to address connectivity concerns that may affect the
16 viability of the American marten. (CR 01869) The two
17 alternatives analyzed by the Forest Service are nearly identical,
18 as is evidenced by the fact that the Forest Service analyzes them
19 in tandem throughout most of the FEIS. (See, e.g., CR 01892-
20 01912; 01916-01920) Both proposals contain identical quantities
21 of DFPZs and area thinning. Alternative 14, however, provides
22 that 612 acres of DFPZ would be treated with Prescription E,
23 which would leave small "leave islands" up to 1/4 acre in size
24 untreated over approximately 20% of the treatment units to
25 provide a greater component of small sized trees and stand
26 heterogeneity. The similarity between the two action
27 alternatives raises concern that the Forest Service may not have
28 ///

1 taken the requisite hard look. (Compare CR 01929 with CR 01955;
2 compare CR 01933 with CR 01956; compare CR 01936 with CR 01957).⁷

3 Plaintiffs assert that defendants should have considered, in
4 detail, alternatives involving less intensive logging.

5 Specifically, plaintiffs assert that defendants should have
6 considered (1) at least one option that retained higher canopy
7 cover (e.g., 50%, rather than 30-40%); (2) at least one option
8 that did not direct logging of medium and large trees (e.g.,
9 trees larger than 12-20" diameter, rather than 30" diameter); and
10 (3) at least one option based upon the 2001 Framework.

11 Defendants respond that while certain fuel reduction goals of the
12 project may be met by plaintiffs' proposed alternatives, other
13 important goals of the project would not be met, such as
14 providing a safe place for fire-fighting personnel from which to
15 fight wildfire, and improving forest health and economic
16 efficiency.⁸

17 ///

18 _____
19 ⁷ These citations are set forth as examples of the
20 similarities between the alternatives as illustrated by charts
21 which describe the effect of each alternative's techniques on
22 treated stands within the Project area. These examples by no
23 means exhaust the examples of similarities between the
24 alternatives set forth in the FEIS.

25 ⁸ At oral argument, defendants also relied heavily on the
26 fact that the Project FEIS "tiers" to the 2004 Framework FEIS.
27 However, while the court acknowledges that this tiering approach
28 is generally acceptable, 40 C.F.R. § 1508.28, the ROD
implementing the 2004 Supplement provides that "[s]ite-specific
decisions will be made on projects in compliance with NEPA, ESA,
and other environmental laws following applicable public
involvement and administrative appeal procedures." CR 00124, at
20; see Earth Island, 442 F.3d at 1154. Further, site-specific
analysis and decisions are referred to consistently throughout
the ROD in the area of species conservation as well as in
relation to less-intensive logging measures. See e.g., CR 00124,
at 9-11, 17, 27.

1 **1. Canopy Cover**

2 Plaintiffs assert that numerous commenters on the DEIS,
3 including experts in fire ecology and wildlife biology,⁹ argued
4 that the Forest Service's fuels objectives can be met with less
5 adverse impacts to old forest wildlife by retaining higher canopy
6 cover and urged that the Forest Service consider such an
7 alternative in the EIS. However, in the FEIS, any alternatives
8 that provided for retaining more canopy closure were rejected.
9 The Forest Service's stated reasons were that "the alternative
10 does not meet Purpose and Need Statements 1 through 3," (CR
11 01913), and that to reduce canopy closure "any further would
12 compromise the effectiveness of the DFPZs," (CR 01914). The
13 Forest Service provided no further explanation as to why canopy
14 closure would not meet the Purpose and Need statements or why
15 reduction would compromise the effectiveness of DFPZs.

16 In their briefing, defendants assert that plaintiffs'
17 suggested canopy cover limits would prevent the Forest Service
18 from accomplishing its goal of promoting forest health because
19 high stand densities force individual trees to compete for
20 resources and are at risk for insect and disease outbreaks. As
21

22 ⁹ For example, Dr. Dennis Odion, a fire ecologist at the
23 University of California, Santa Barbara, concluded that fuels
24 reduction goals can be met by logging only small trees and by
25 retaining greater canopy cover. CR 01836; see also 01830-32.
26 While an appendix to the FEIS quotes his comments, neither the
27 appendix nor the text of the FEIS discusses the basis for his
28 scientific opinion or responds to the scientific information
provided. See Sierra Club v. Eubanks, 335 F. Supp. 2d 1070, 1078
(E.D. Cal. 2004) (finding that despite disclosure of expert
comments and conclusions, including one from Dr. Odion, the
Forest Service failed to take a hard look because there was "no
indication that any views [] expressed contrary to the logging
proposed by the [project] were duly weighed").

1 an initial matter, this justification was not listed by the
2 Forest Service as a reason for rejecting the alternatives calling
3 for greater retention. See Motor Vehicle Mfrs. Ass'n of U.S.,
4 Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)
5 ("It is well established that an agency's action must be upheld,
6 if at all, on the basis articulated by the agency itself."). To
7 support their argument, defendants point to a number of pages in
8 the FEIS, none of which were cited to or referenced in the FEIS
9 as an explanation why the alternatives were summarily dismissed
10 without detailed analysis. This runs contrary to the public
11 disclosure purpose of NEPA, which requires that "the public
12 receive the underlying environmental data from which a Forest
13 Service expert derived her opinion." Ecology Center v. Austin,
14 430 F.3d 1057, 1067-68 (9th Cir. 2005) (quoting Idaho Sporting
15 Cong., 137 F.3d at 1150) (holding that the Forest Service
16 violated NEPA by failing "to either adequately explain its impact
17 assessment or provide the information that is necessary to
18 understand and evaluate the Forest Service's decision"); see also
19 Earth Island, 442 F.3d at 1159 (quoting Native Ecosystems Council
20 v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005) (holding
21 that a review of the adequacy of an FEIS's hard look includes "a
22 pragmatic judgment whether the [FEIS's] form, content, and
23 preparation foster both informed decision-making and *informed*
24 *public participation*") (emphasis added).

25 Further, defendants citations to the administrative record
26 do not fully support their proposition. Defendants argue that
27 maintaining 50% canopy cover would result in excess crown bulk
28 density. However, plaintiffs point to evidence in the record

1 that stands logged to 50% canopy cover would on average result in
2 49% of maximum stand density after logging, CR 00858, which is
3 within the range of "desirable stand densities," CR 01883. In
4 response, defendants point to evidence that thinning to 50%
5 canopy cover would retain undesirably high stand densities on
6 modeled stands. CR 00861. Given these conflicting conclusions
7 that could be reached based upon the agency's own findings, how
8 can the Forest Service justify that "it was immediately clear"
9 that the proposed alternatives retaining higher canopy cover
10 would inhibit the goal of promoting a healthy forest? The Forest
11 Service offers no explanation for this conclusion.

12 Finally, defendants' arguments only address the alleged
13 insufficiencies of retaining 50% canopy cover, but do not address
14 why alternatives were not considered that retained higher canopy
15 cover than Alternatives 1 or 14, but less than 50%. The Forest
16 Service again offers no explanation for the failure to do so.

17 In light of the above deficiencies, the court finds that
18 defendants have simply failed to adequately explain why the goal
19 of "forest health" justifies the wholesale rejection of all
20 alternatives involving retaining higher canopy cover.

21 **2. 12-20" dbh Limit**

22 Plaintiffs also assert that various commenters and experts
23 argued that the Forest Service's fuel objective could be met by
24 less intensive logging which would not log medium and large trees
25 (trees 12-20" dbh).¹⁰ However, in the FEIS, any alternatives
26

27 ¹⁰ For example, Chad Hanson, a Ph.D student at the
28 University of California, Davis with a research focus on fire

(continued...)

1 that provided for retaining medium and large trees were rejected.
2 The Forest Service's stated reasons were that "the alternative
3 does not meet Purpose and Need Statements." (CR 01912-13). The
4 Forest Service provided no further explanation.

5 In their briefing,¹¹ defendants assert that setting a 12"
6 dbh limit or 20" dbh limit would make it difficult to implement
7 the project in a cost-effective manner. In support of this
8 assertion, defendants point to the 2004 SNFPA, which modified the
9 2001 SNFPA to "improve the cost-effectiveness of treatments." CR
10 124, at 9; CR 124, at 91 ("[E]xisting diameter limit restrictions
11 have significantly reduced managers' ability to design and
12 implement cost-efficient fuels treatments."). Yet nowhere in the
13 FEIS does the Forest Service provide any analysis regarding the
14 cost-effectiveness of each of the various alternative approaches.
15 Rather, the Forest Service simply dismissed out of hand without a
16 reasoned explanation any proposal which would have called for a
17 lower diameter limit. This does not constitute a hard look at
18 reasonable alternatives. See Klamath-Siskiyou Wildlands Ctr. v.
19 U.S. Forest Serv., 373 F. Supp. 2d 1069, 1089-90 (E.D. Cal.
20 2004).

21 _____
22 ¹⁰ (...continued)
23 ecology in forest ecosystems, cited specific research which
24 demonstrates that severe fire could be prevented by logging only
25 trees 8-10" in diameter. CR 01697-99. While an appendix to the
26 FEIS quotes his comments, neither the appendix nor the text of
the FEIS discusses the basis for his scientific opinion or
responds to the scientific information provided. See Sierra
Club, 335 F. Supp. 2d at 1078.

27 ¹¹ Because defendants failed to include these reasons in
28 the FEIS, these explanations suffer from the same problems as
those relating to canopy cover. See Motor Vehicle Mfrs. Ass'n
of U.S., Inc., 463 U.S. at 50.

3. 2001 Framework

1
2 Finally, plaintiffs assert that defendants should have
3 analyzed in detail an alternative that implements the 2001
4 Framework. Experts, including Dr. Tom Kucera, an expert cited by
5 the Forest Service in the FEIS, stated that this would be an
6 "obvious alternative that should be analyzed" because "[s]uch an
7 alternative would have a much less adverse impact on marten
8 populations and habitat connectivity while meeting the project's
9 purpose and need." CR 01775. In response, the FEIS states that
10 "[t]he 2004 SNFPA ROD has superceded the 2001 SNFPA ROD. . . .
11 This alternative would not be consistent with the 1993 Lassen
12 LRMP, as amended by the 2004 SNFPA ROD." CR 01912.

13 To the extent that defendants assert that the 2004 Framework
14 supercedes the 2001 Framework such that implementation of a plan
15 in accordance with the 2001 Framework would be inconsistent with
16 the 2004 Framework, they are mistaken. The 2004 Framework
17 amended the 2001 Framework to provide the Forest Service with
18 increased flexibility, but *did not mandate* more intensive logging
19 measures. CR 00119-20 (setting more flexible maximum guidelines
20 for logging, but not mandating minimum requirements). Further,
21 the U.S. Environmental Protection Agency ("EPA"), in its scoping
22 comments on a similar project in the Sierra Nevada, recommended
23 that the Forest Service include a comparison of the 2001
24 Framework and the 2004 Framework as well as an evaluation of an
25 alternative which would implement the 2001 Framework in the
26 environmental documentation. CR Supp. 05215. The stated reason
27 for these recommendations was the "on-going public debate . . .
28 regarding the scientific basis for; the fuel management,

1 environmental, and social benefits of; and the adverse effect
2 associated with the 2004 [Framework] versus the [2001
3 Framework]." CR Supp. 05215. As such, an alternative applying
4 the 2001 Framework would not necessarily be inconsistent with the
5 2004 Framework.

6 In their briefing, defendants argue that because the
7 plaintiffs focus on the retention of canopy cover and the 12-20"
8 dbh limit aspects of the 2001 Framework, this alternative is
9 merely a repackaging of plaintiffs previous two arguments.¹² To
10 the extent that this argument has any merit, the court has found
11 that defendants failure to consider those alternatives violated
12 NEPA.

13 Accordingly, the court finds that the Forest Service
14 arbitrarily and capriciously failed to analyze an adequate range
15 of alternatives or to explain sufficiently why other alternatives
16 would not accomplish the Project's purpose and need.

17 **B. Failure to Take a Hard Look at Environmental Impacts**

18 NEPA does not contain substantive environmental standards
19 but instead establishes procedural requirements to ensure that
20 agencies take a hard look at the environmental impacts of their
21 actions. Earth Island, 442 F.3d at 1154 (citing Kern, 284 F.3d
22 at 1066). "A hard look includes 'considering all foreseeable
23 direct and indirect impacts.'" Id. at 1159 (quoting Idaho
24 Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir.
25 2002)). A hard look also includes "a discussion of adverse

26
27 ¹² Because defendants failed to include these reasons in
28 the FEIS, these explanations suffer from the same problems as
those relating to canopy cover and dbh limits. See Motor
Vehicle Mfrs. Ass'n of U.S., Inc., 463 U.S. at 50.

1 impacts that does not improperly minimize negative side effects.”
2 Id. at 1159 (citing Native Ecosystems Council v. U.S. Forest
3 Serv., 428 F.3d 1233, 1241 (9th Cir. 2005)). The Forest Service,
4 therefore, must “undertake a thorough environmental analysis
5 before concluding that no significant environmental impact
6 exists.” Id. (citing Native Ecosystems, 428 F.3d at 1239). In
7 reviewing the adequacy of an EIS, the Ninth Circuit applies the
8 “rule of reason” standard, “which requires ‘a pragmatic judgment
9 whether the EIS’s form, content and preparation foster both
10 informed decision-making and informed public participation.’”
11 Native Ecosystems, 418 F.3d at 960 (9th Cir. 2005) (quoting
12 California v. Block, 690 F.2d 753, 761 (9th Cir. 1982)).

13 Pursuant to NEPA, “[a]gencies shall insure the professional
14 integrity, including scientific integrity, of the discussions and
15 analyses in environmental impact statements.” 40 C.F.R. §
16 1502.24. “Agencies have wide discretion in assessing scientific
17 evidence, but they must ‘take a hard look at the issues and
18 respond to reasonable opposing viewpoints.’” Earth Island, 442
19 F.3d at 1160. An agency must be permitted discretion in relying
20 on the reasonable opinion of its own qualified experts, even if
21 the court might find contrary views more persuasive. See Kleppe
22 v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). However, NEPA
23 does not permit an agency to rely on the conclusions and opinions
24 without providing both supporting analysis and data. Idaho
25 Sporting Cong., 137 F.3d at 1150. An agency must also evaluate
26 and disclose credible scientific evidence that contraindicates a
27 proposed action. 40 C.F.R. § 1502.9(b).

28 ///

1 **1. American Marten**

2 Plaintiffs contend that the FEIS fails adequately to analyze
3 and disclose the project's likely adverse impacts to the American
4 marten and its habitat. Specifically, plaintiffs assert that the
5 FEIS fails to disclose new research that indicates that the
6 marten's population in the northern Sierra is far more precarious
7 than assumed in the FEIS and that the FEIS fails adequately to
8 analyze and disclose the project's adverse impacts to marten
9 habitat, particularly habitat connectivity.

10 The FEIS provides that "marten appear to occupy much of its
11 historic range in California particularly in the Sierra Nevada."
12 CR 02047 (citing Kucera et al 1995). However, Dr. Thomas Kucera,
13 the same expert cited by the Forest Service, submitted comments
14 on the DEIS and FEIS, asserting that "the statement in the FEIS
15 is misleading and fails to recognize the marten's imperiled
16 status in the area." CR 03876. Kucera relies on a 2005 peer
17 reviewed paper by Forest Service carnivore expert Dr. William
18 Zielinski¹³ and an earlier 2004 paper by Zielinski that included
19 similar information. "The research concluded that the marten is
20 a species 'with substantial changes in distribution,' including
21 'large gaps between contemporary detections that were not present
22 historically' in the northern Sierra Nevada and southern
23 Cascades." CR 03876 (citing Zielinski 2004, Zielinski et al.
24 2005a). The research also concludes that marten "populations in
25 the southern Cascades and northern Sierra Nevada now appear
26 discontinuous," CR 03876 (citing Zielinski et al. 2005a: 1394),

27
28 ¹³ The FEIS also cites to previous research conducted by
Dr. Zielinski in its analysis of the marten and fisher.

1 and that "the apparent reduction in the range of the marten and
2 other forest carnivores is most likely due to a combination of
3 factors, including 'loss of mature forest habitat,'" CR 03876
4 (citing Zielinski et al. 2005a: 1385-86). Kucera summarizes
5 that this research indicates that the marten's status in the
6 northern Sierra Nevada is precarious. CR 03876. The FEIS fails
7 to consider this research.

8 Pursuant to the Ninth Circuit's rule of reason standard, the
9 FEIS's form, content and preparation should foster both informed
10 decision-making and informed public participation. Native
11 Ecosystems, 418 F.3d at 960 (9th Cir. 2005). Defendants, citing
12 CR 02047, argue that no new published data cited by plaintiffs
13 contradicts the statement that the marten occupies most of its
14 historic range.¹⁴ However, the statement in the FEIS would
15 likely lead a reasonable person to believe that the marten is not
16 imperiled in the Sierra Nevada, specifically in light of the
17 absence of any reference to the 2004 or 2005 research conducted
18 by Zielinski. As such, the FEIS does not foster informed public
19 participation. This issue is also particularly troubling because
20 the expert cited by the Forest Service, Dr. Kucera, maintains
21

22 ¹⁴ Defendants also note that the paper cited to defendant
23 was published in August 2005, while the FEIS is dated September
24 14, 2005. The implication that the agency does not have to
25 consider "eleventh-hour" research to comply with NEPA is without
merit. Further, defendants do not address the 2004 research by
Zielinski that included similar information.

26 Zielinsky's 2004 research cited by plaintiffs is not
27 included in the administrative record. As such, the court will
28 not examine the research itself. However, the court will analyze
the research to the extent that it is referenced in Kucera's
comments to the FEIS, which is included in the administrative
record.

1 that the science relied upon is outdated and the characterization
2 is misleading. CR 03876.

3 Defendants also contend that the FEIS analyzes ranger
4 district and Forest Survey records from within the Creeks project
5 area, sufficient to satisfy NEPA. However, defendants have
6 excluded from their analysis any reference to the most recent
7 research conducted by the very experts whose past opinions they
8 relied upon in formulating the FEIS. Further, the most current
9 research raises serious questions about the viability of the
10 marten in the Project area. See Seattle Audobon Soc. v. Espy,
11 998 F.2d 699, 704 (9th Cir. 1993) (finding that the Forest
12 Service failed to take a hard look for purposes of NEPA where it
13 did not address in any meaningful way a report that concluded the
14 spotted owl was declining more substantially and more quickly
15 than previously thought). Therefore, because defendants failed
16 to address the most recent research regarding the viability of
17 the marten and because the exclusion of such reference is
18 misleading, defendants failed to take a hard look at the impact
19 of the project on the American marten and its habitat.

20 Plaintiffs also assert that defendants failed adequately to
21 analyze the impact of the project on habitat connectivity between
22 northern and southern marten populations. The FEIS acknowledges
23 that Alternative 1 would negatively affect marten habitat
24 connectivity, CR 2054, but provides that Alternative 14 includes
25 a new DFPZ Prescription (Prescription E) which will maintain
26 north-south habitat connectivity, CR 2062-65. Plaintiffs argue
27 that the FEIS is deficient because it fails to indicate where the
28 ///

1 prescription will be applied and fails to provide any specific
2 information about the habitat quality. The FEIS provides that:

3 Prescription E combines a higher retention of canopy
4 (40-45% minimum) with untreated areas within 10% of the
5 stand and a higher retention of down logs (>12 inch
6 small end diameter) to improve conditions for subnivean
7 foraging and provided sufficient cover. These
8 prescriptions were placed strategically to link the
9 areas of highest habitat quality. This included areas
10 within the former habitat management area, linking
11 areas to the south (Storrie Fire area) to the higher
12 quality red fir and linkages from the Butt Creek
13 drainage north to the higher quality habitat identified
14 in Alternative 1. This alternative also maintains
15 existing linkages to the north and west within the
16 former HMA.

17 CR 02062.

18 However, while the FEIS acknowledges that the Project would
19 create consequences to marten habitat connectivity, the Forest
20 Service failed to analyze Zielinski's research from both 2004 and
21 2005. Zielinski's 2005 report includes a map of marten habitat
22 in the Sierra Nevada's, demonstrating that most of the treatments
23 in the Project area overlap with areas determined to have
24 moderate habitat suitability for marten. CR 03898, 03903. The
25 map also illustrates that the Project occurs within the area
26 directly between two areas of high quality marten habitat and
27 includes the best habitat between those areas. CR 3903. As
28 such, the research and expert analysis demonstrates that the
Project area likely plays an important role in ensuring north-
south habitat connectivity for marten and reducing the
possibility that marten populations to the north and south will
become isolated from one another. CR 3903. While Zielinski's
2005 study is included in the administrative record in this case,

1 along with analysis and comments by an expert,¹⁵ there is no
2 indication that this information was duly weighed in the FEIS.
3 See Sierra Club v. Eubanks, 335 F. Supp. 2d 1070, 1078-79 (E.D.
4 Cal. 2004).

5 The FEIS acknowledges the limits to the scientific
6 information available relating to the marten. CR 02047. Because
7 the Forest Service failed to analyze and evaluate the most recent
8 scientific information on the marten, which was prepared by a
9 leading Forest Service expert and that offered more detailed
10 information relating to habitat connectivity issues implicated by
11 the Project, the court cannot find that the Forest Service
12 sufficiently evaluated the effects of the Project on habitat
13 connectivity. See Seattle Audobon Soc'y, 998 F.2d at 704 ("If
14 [the project] is based on an incomplete NEPA analysis of the
15 consequences continued logging will have on . . . old growth
16 dependant species' viability over both the short and long term,
17 there will be a gap in planning that cannot be closed.").
18 Therefore, the court finds that the Forest Service abused its
19 discretion in failing to disclose and analyze this information
20 and thus, failed to take a hard look at the impact of the Project
21 on marten habitat connectivity as required by NEPA.

22 2. Pacific Fisher

23 Plaintiffs contend that the FEIS entirely failed to consider
24 the project's impacts on the Pacific fisher and its habitat.

26 ¹⁵ Dr. Susan Britting, a biological consultant with a
27 Ph.D. in Biology from University of California, Los Angeles,
28 submitted a report establishing the overlap between the Project
and areas identifies by Zielinski in his 2005 research as
important to fisher and marten conservation. CR 03900-04.

1 Specifically, plaintiffs object to the finding in the FEIS that
2 "the project area provides little or no habitat potential for
3 this species therefore the project would have little or no affect
4 on the totality of habitat within its former range." CR 02049.
5 Plaintiffs assert that this conclusion is flatly inconsistent
6 with a recent analysis by leading Forest Service researchers,
7 specifically Zielinski, that indicates that the project area
8 provides moderate to moderately-high potential habitat for the
9 fisher. CR 03902. Defendants contend that the Forest Service's
10 conclusions regarding fisher are well-founded.¹⁶ Specifically,
11 defendants assert that the conclusion is supported by: (1) the
12 absence of some vegetative components favored by fisher; (2)
13 higher elevations of the project areas and deep winter snow packs
14 that persist for long periods; and (3) overlap with marten. CR
15 02048-49.

16 While defendants could have disclosed and examined the
17 recent research by Zielinski in the FEIS but chose not to, the
18 failure to do so was not an abuse of discretion. The research by
19 Zielinski referenced by plaintiffs was an exercise "designed to
20 identify general areas for consideration" for fisher conservation
21 and reintroduction. CR 03894. However, Zielinski's research
22 also provides that

23 ///

24 _____
25 ¹⁶ Defendants also contend that the predictive habitat
26 model relied upon by plaintiffs was not available during the
27 Project's analysis and the utility and accuracy of the research
28 remains unknown. However, the research by Dr. Zielinski, a
Forest Service expert relied upon throughout the FEIS for his
research on marten and fisher, is dated June 27, 2005, CR 03890,
whereas the Project was not approved until September 9, 2005. As
such, the court finds this argument unavailing.

1 Regional marten habitat connectivity should also be
2 considered in selecting fisher conservation areas. For
3 example, if the Plumas County candidate site is used as
4 a fisher reintroduction location it would appear to be
more disruptive to the goal of martens maintaining
north-south continuity between the Sierra Nevada and
the Cascades.

5 CR 03894. Further, Zielinski's research indicates that "[t]he
6 literature is replete with references to the potential for
7 negative competitive interactions between the [] fisher and the
8 [] marten, usually with the martens suffering from the
9 interaction." CR 03890. Because Zielinski's research states
10 that sites such as the Project area may not be suitable for
11 fisher conservation or reintroduction due to the overlap with
12 marten and areas dedicated to maintaining habitat connectivity
13 for the marten, this research is not inconsistent with the Forest
14 Service's conclusions set forth in the FEIS that the Project
15 would not impact fisher habitat due to overlap with the marten.

16 Plaintiffs also assert that the FEIS failed to take a hard
17 look at the impact of the project on the fisher because the
18 Forest Service's conclusion is based upon the incorrect premise
19 that "fisher do not appear to overlap with marten." Plaintiffs
20 contend that this conclusion is inconsistent with research from
21 the Sierra Nevada and elsewhere documenting that fisher and
22 marten can and do occur in the same area. CR 3879-80. However,
23 the FEIS acknowledges that "marten and fisher occasionally occupy
24 the same areas," but notes that "in general there is very little
25 overlap of fisher sighting with those of marten." CR 02048.
26 Therefore, plaintiffs' contention that the Forest Service relied
27 upon an incorrect premise is erroneous.

28 ///

1 The conclusion in the FEIS that the project area would not
2 impact fisher habitat is not premised on the conclusion that
3 fishers and martens cannot co-exist, but rather because of the
4 overlap between fisher and marten. Further, the recent Zielinski
5 research is not inconsistent with this conclusion. Thus, despite
6 defendants' failure to analyze this data, the FEIS took the
7 necessary hard look at the Project's impact on the Pacific fisher
8 and its habitat.

9 3. California Spotted Owl

10 Plaintiffs contend that the FEIS fails adequately to analyze
11 and disclose the project's likely adverse impacts to the
12 California spotted owl and its habitat. At the outset,
13 plaintiffs contend that the FEIS underestimates the owl's
14 imperiled status in the project area. The EIS cites a 2003
15 analysis of owl population trends to support the conclusion that
16 spotted owl populations "are either stable or only slightly
17 declining." CR 02012. However, plaintiffs point to the comments
18 and statistics submitted by Dr. Jennifer Blakesley,¹⁷ an expert
19 relied upon in the FEIS for her studies relating to the
20 California spotted owl, that demonstrate that the number of
21 territories within the Project area occupied by resident spotted
22 owls has declined from 11 in 1992 to 5-6 in 2002-2004. CR 03906.
23 Blakesley describes this as an "alarming decline in the number of
24 owls within the Creeks project area." CR 03906. However, the
25 Forest Service does not evaluate this information in the FEIS.

26
27 ¹⁷ Dr. Jennifer Blakesley, holding a Ph.D. in Wildlife
28 Biology from Colorado State University, has conducted research on
northern and California spotted owls over the past 17 years. CR
03905.

1 Plaintiffs also attack the Project's reliance on the minimum
2 threshold requirements for suitable habitat for the owl.
3 Defendants argue that in all but two of the nest core areas
4 within or adjacent to the Project area, the Project will maintain
5 suitable habitat above the 50% threshold suggested by plaintiffs.
6 However, defendants confuse the threshold minimums applied to owl
7 nest core areas and owl home ranges.

8 With respect to owl home ranges - which are 4500 acre areas
9 surrounding the activity center - plaintiffs assert that the FEIS
10 inexplicably waters down a 50% standard and instead bases its
11 analysis on the assumption that 30% habitat within each home
12 range is "the minimum threshold." Defendants rely on a study
13 which sets a threshold of 30% to 50% suitable habitat in home
14 ranges to ensure long-term viability. CR 02022. Plaintiffs
15 contend that this same study was referenced in the 1999 QLG FEIS,
16 but in that case, a 50% minimum was used and therefore, to the
17 extent that defendants seek to use a lower threshold, it is
18 changing its methodology and needs to provide a rational
19 explanation for its change. See Native Ecosystems, 418 F.3d at
20 964. However, the Forest Service has not changed its underlying
21 methodology. The Forest Service continues to rely on the study
22 which sets a minimum percentage somewhere in the range of 30%-
23 50%. The Forest Service's decision to use a 30% minimum in this
24 Project as opposed to a 50% minimum is not inconsistent with the
25 underlying study relied upon in the FEIS and does not require
26 further explanation.

27 However, the Forest Service's discretion to use a 30%
28 threshold for owl home ranges does not resolve the issue of the

1 minimum thresholds applied to *owl nest core areas*. With respect
2 to owl nest core areas - which are 500 acre areas surrounding the
3 activity center - the FEIS states that "Blakesley's data
4 indicates that 50% habitat within the core area is an important
5 threshold." CR 02022. However, in her comment to the FEIS,
6 Blakesley states that "[t]his statement is completely erroneous."
7 CR 03905. Blakesley contends that her research has never
8 indicated that there is such a "critical threshold." CR 03905.
9 Further, Blakesley provides that her data indicates that 83%
10 suitable habitat within nest core area is a reasonable minimum
11 target, and that anything less than 71% should be unacceptable as
12 a management target. CR 03905. There is no indication that the
13 Forest Service responded to or weighed these comments. This is
14 particularly troubling where the expert, upon whose data the
15 Forest Service relies, submits that the Forest Service is
16 misinterpreting that data and that the conclusions reached by the
17 Forest Service are not supported by that data. Nor does the
18 Forest Service cite any other experts for its interpretation of
19 Blakesley's data. CR 02022. Therefore, without offering a
20 rational explanation for its conclusion that Blakesley's data
21 supports a 50% minimum threshold for owl nest core areas and
22 without a discussion of Blakesley's assertion that the Forest
23 Service misstated and misapplied her data, the court cannot find
24 that the Forest Service took the requisite hard look at the
25 Project's effect on the California spotted owl's habitat.

26 **4. Pileated Woodpecker**

27 Plaintiffs contend that the FEIS overlooked the Project's
28 impact on the pileated woodpecker and its habitat. Specifically,

1 plaintiffs assert that the FEIS fails to offer a rational
2 explanation for its conclusion that the Creeks projects would
3 have no effect on the pileated woodpecker, despite the logging of
4 large snags and the reduction of future recruitment of such
5 snags. Defendants contend that a wide range of recent research
6 was used to develop the conclusions in the FEIS¹⁸ and that while
7 plaintiffs may disagree with the conclusions reached, the agency
8 was within its discretion to adopt the research and findings of
9 its experts.

10 The FEIS acknowledges that the "current snag densities are
11 below the Forest Guidelines" and that "there would be a general
12 reduction in the number of snags within the areas treated." CR
13 02006, 02008. However, the FEIS predicts that after the initial
14 small drop in the overall percentage, snags and snag numbers
15 "would continue to increase within the project area due to
16 natural recruitment process." CR 02008. The FEIS also predicts
17 that "down wood material are expected to increase within the
18 project area over time" and that "large wood recruitment [] would
19 increase due to project activities." CR 02008. In analyzing the
20 Project's impact on the pileated woodpecker, the FEIS again
21 states that most lands within the project area would not meet the
22 criteria for high or moderate quality habitat "due to the snag
23 densities and age and size class of the stands." CR 02081. To
24 the extent that there are lands that would fall into the moderate

25
26 ¹⁸ Defendants cite: (1) Bull, E., 2005 Study of the
27 effects of thinning on Pileated Woodpecker (CR 02654), (2)
28 Robinson and Alexander, 2002 - Habitat Descriptions (CR 03441),
(3) Sauer et al. 1999 - Population trends (CR 03494), and (4)
local distribution data specific to the Lassen area (CR 02736).

1 to high quality suitability category, the Forest Service relied
2 upon a 2005 study by Bull, which concluded "that fuels reduction
3 projects do not necessarily preclude use by pileated woodpecker,
4 if sufficient down wood and snags are retained." CR 02082. The
5 Forest Service concluded that "[b]ased upon the data supplied,
6 the snag and down log retention guidelines are expected to retain
7 sufficient foraging substrates as described by Bull." CR 02082.

8 Plaintiffs argue that a recent study on landbirds in the
9 Lassen area, commissioned by the Forest Service, recommended that
10 "as many snags as possible" be retained, with an "absolute
11 minimum" of 4 snags/acre with "priority given to the largest
12 ones." CR 5270. However, the FEIS does address the issue of
13 maintaining minimum snag requirements, but concludes that "it is
14 more important to ensure that a landscape has continual snag
15 replacement as opposed to direction that requires a set number of
16 snags within a given area." CR 02008.

17 Therefore, because defendants' conclusion that the Project
18 would not affect the pileated woodpecker is supported by expert
19 studies, and because defendants' considered a minimum snag
20 requirement (although ultimately rejecting it), the FEIS took the
21 requisite hard look at the Project's impact on the pileated
22 woodpecker.

23 **II. National Forest Management Act**

24 Plaintiffs also seek a declaration that the Project violates
25 the National Forest Management Act in that it is inconsistent
26 with the Lassen LRMP, as amended. As an initial matter, the
27 parties dispute which regulations apply to the Project.
28 Defendants assert that the 1982 regulations do not apply because

1 these regulations were repealed on January 5, 2005 and replaced
2 by new planning regulations.¹⁹ While that is generally true, the
3 Project continues to be governed by the 1982 regulations because
4 the Lassen LRMP was prepared under the 1982 regulations,²⁰ and
5 thus, those regulations continue to govern all management of the
6 Lassen National Park until a new LRMP is passed under the 2005
7 regulations. Idaho Wildlife Fed'n v. Tower, No. CV 04-371, 2006
8 WL 988494, at *1 (D. Idaho Apr. 13, 2006) (citing Utah Envtl.
9 Cong. v. Bosworth, 439 F.3d 1184, 1191 (10th Cir. 2006) ("stating
10 that 1982 regulations extend beyond preparation of LRMP and
11 'continue [] throughout the [LRMP's] existence'"). The Forest
12 Service cannot later dilute its obligations, including monitoring
13 designated management indicator species ("MIS"), "by passing new
14 regulations without also amending the LRMP that relied on the
15 greater obligations. . . . That would violate a cardinal
16 principle of NFMA that the management of an area be consistent
17 with its LRMP." Id. (citing Ecology Center, Inc. v. Austin, 430
18 F.3d 1057 (9th Cir. 2005)). Therefore, the court will apply the
19 1982 regulations.

20 **A. Viable, Well Distributed Populations of Wildlife**

21 Plaintiffs contend that the Project fails to insure viable,
22 well-distributed populations of the California spotted owl and

23
24 ¹⁹ While agencies are entitled to deference to their
25 interpretation of their own regulations, Forest Guardians v. U.S.
26 Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003), that deference
must give way when the agency's interpretation of its regulation
runs counter to the governing statute. See Auer v. Robbins, 519
U.S. 452, 457 (1997).

27 ²⁰ The Ninth Circuit has recently held that "NFMA
28 regulations promulgated in 1982 apply to the 2001 Framework and
2004 Supplement." Earth Island, 442 F.3d at 1173.

1 the American marten. The regulations that applied when the
2 Forest Service adopted and amended the Lassen National Forest
3 plan require that:

4 Fish and wildlife habitat shall be managed to maintain
5 viable populations of existing native and desired non-
6 native vertebrate species in the planning area. For
7 planning purposes, a viable population shall be
8 regarded as one which has the estimated numbers and
9 distribution of reproductive individuals to insure its
10 continued existence is well distributed in the planning
area. In order to insure that viable populations will
be maintained, habitat must be provided to support, at
least, a minimum number of reproductive individuals and
that habitat must be well distributed so that those
individuals can interact with others in the planning
area.

11 36 C.F.R. § 219.19. This regulation has been interpreted to
12 require that the Forest Service "ensure a proposed action will
13 not cause a loss of viability of an existing species." Inland
14 Empire Public Lands Council v. United States Forest Service, 88
15 F.3d 754, 761 (9th Cir. 1996). Further, the ROD implementing the
16 2004 Framework provides that management direction strategy is
17 "aimed at sustaining viable populations of at-risk species
18 associated with old-forest ecosystems well-distributed across
19 Sierra Nevada national forests." CR 00082.

20 In this case, the Forest Service concluded that the Project
21 "may affect individuals, but is not likely to result in a trend
22 toward Federal listing or loss of viability" for the California
23 spotted owl or the American Marten. CR 00752. Defendants assert
24 that this finding is well supported in the Biological
25 Evaluation/Biological Assessment ("BE/BA") of the Project. In
26 support of this assertion, defendants reassert the same arguments
27 that they made in relation to plaintiffs' claims that the Forest
28 Service failed to take a hard look at the Projects impact on the

1 owl and the marten in violation of NEPA. As set forth above in
2 the court's analyses of this issue, defendants failed to take a
3 hard look at the effect of the Project on the marten, its
4 habitat, and habitat connectivity because the Forest Service
5 failed to evaluate the most current research on the marten. Cf.
6 Inland Empire Pub. Lands Council. v. U.S. Forest Serv., 88 F.3d
7 754, 762 (9th Cir. 1996) ("We believe that an analysis that uses
8 all the scientific data currently available is a sound one.").
9 Also, as set forth above, defendants failed to take a hard look
10 at the effect of the Project on the spotted owl through the
11 failure to address conflicting information about the current
12 status of the owl and through the failure to provide a rational
13 explanation for the use of a 50% threshold for owl nest core
14 areas. Because the Forest Service failed to consider scientific
15 data currently available in relation to the marten and failed to
16 adequately explain its conclusions in relation to the spotted
17 owl, the court cannot be reasonably certain that the Project -
18 which the Forest Service concedes may harm individual martens and
19 spotted owls - will not jeopardize the marten's and spotted owl's
20 viability. See Ecology Center v. Austin, 430 F. 3d 1057, 1068
21 (9th Cir. 2005) ("Because the Forest Service failed to provide
22 the factual basis for its analysis and failed to adequately
23 explain its decision, we cannot be reasonably certain that the
24 salvaging . . . will not jeopardize . . . viability.").

25 **B. Surveys of Management Indicator Species**

26 According to plaintiffs, the Forest Service violated the
27 NFMA's viability and diversity requirements by not conducting
28 population surveys of Management Indicator Species ("MIS"). As

1 set forth above, the NFMA regulations promulgated in 1982 apply
2 to the 2001 Framework and 2004 Supplement. See Earth Island, 442
3 F.3d at 1173. These regulations require population monitoring.
4 See 36 C.F.R. § 219.²¹ "Because the 2001 Framework and 2004
5 Supplement were developed based on regulations in effect before
6 November 9, 2000, transitional rules, not contained at 36 C.F.R.
7 § 219.14, govern this case." Earth Island, 442 F.3d at 1173-74.

8 The applicable regulation provides:

9 For units with plans developed, amended, or revised
10 using the provisions of the planning rule in effect
11 prior to November 9, 2000, the Responsible Official may
12 comply with any obligations relating to management
13 indicator species by considering data and analysis
14 relating to habitat *unless the plan specifically*
15 *requires population monitoring or population surveys*
16 *for the species.*

17 36 C.F.R. § 219.14(f) (emphasis added); Earth Island, 442 F.3d at
18 1174. Rather than monitor every species present within a project
19 area, agencies may monitor the MIS, which act as proxies for all
20 species within a species association, to determine whether the
21 agencies are satisfying the NFMA's viability and diversity
22 requirements. Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest
23 Serv., 373 F. Supp. 2d 1069, 1089 (E.D. Cal. 2004). "An MIS
24 species is a bellwether, or class representative, "for other
25 species that have the same special habitat needs of population
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24 ²¹ 36 C.F.R. § 219.19(a)(1) provides: "In order to
25 estimate the effects of each alternative on fish and wildlife
26 populations, certain vertebrate and/or invertebrate species
27 present in the area shall be identified and selected as
28 management indicator species and the reasons for their selection
will be stated. These species shall be selected because their
population changes are believed to indicate the effects of
management activities."

1 characteristics." Earth Island, 442 F.3d at 1173 (quoting Inland
2 Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 762
3 n.11 (9th Cir. 1996)).

4 Appendix E to the 2001 Framework identifies certain species
5 as MIS species, for which increased population monitoring is
6 required, and this framework is incorporated into the 2004
7 Supplement. CR 00121 ("This Decision adopts the Monitoring Plan
8 presented in Appendix E of the SNFPA FEIS."); Earth Island, 442
9 F.3d at 1173. The designated MIS listed in Appendix E include
10 the pileated woodpecker and the black bear. The 2001 Framework
11 requires "distribution" monitoring for these species, Id. at E-
12 64, which is defined as data indicating "changes in the presence
13 of species across a number of sample locations" which are
14 designed to reveal "the status and change of populations" of the
15 species. Id. at E-19. Appendix E to the 2001 Framework also
16 provides that the Forest Service "will monitor the status and
17 change in the geographic distribution of martens
18 Monitoring the presence/absence of martens, across large areas
19 that are differentially affected by treatments," was planned in
20 order to "provide information that will inform future decisions
21 about management." CR 42, Vol. 4, App. E at E-56. The Framework
22 also states that "[b]ecause we do not yet have an empirical
23 habitat model that can distinguish suitable from unsuitable
24 habitat, it is necessary to monitor martens directly." Id.

25 As an initial matter, plaintiffs assert that the Ninth
26 Circuit has held in almost identical circumstances that annual
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28

1 monitoring of MIS was required.²² In Earth Island, the court
2 analyzed the same 2001 Framework and 2004 Framework at issue in
3 this case. 442 F.3d at 1175. The plaintiffs in Earth Island
4 challenged the Forest Service's decision not to conduct
5 population monitoring of the hairy woodpecker and Williamson's
6 sapsucker. Id. Both of these species were listed as MIS in
7 Appendix E and were designated to be monitored in the form of
8 "distribution data." Id. The Ninth Circuit stated that "the
9 Framework expressly requires 'population monitoring,'
10 specifically in the form of 'distribution data'" and that "[i]t
11 is difficult to see how distribution data could effectively be
12 gathered in the absence of actual population monitoring." The
13 court therefore rejected that Forest Service's argument that it
14 was under no obligation to determine population trends for the
15 two species at issue and held that the Forest Service's approval
16 and implementation of site-specific projects without appropriate
17 or sufficient population and habitat data is contrary to the NFMA
18 and governing provisions of the forest plan. Id. at 1175-76.

19 In this case, Appendix E of the 2001 Framework, incorporated
20 into the 2004 Framework, requires "population monitoring" of both
21 the pileated woodpecker and the black bear in the form of
22 "distribution data." Pursuant to the Ninth Circuit's decision in
23 Earth Island, the Forest Service has an obligation to determine
24 population trends for the pileated woodpecker and the black bear.
25 Likewise, because the 2001 Framework requires that the Forest

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27 ²² Defendants vigorously contend that population
28 monitoring is not required and that Earth Island was wrongly
decided. However, the Forest Service's petition for rehearing en
banc in that case was denied on July 12, 2006.

1 Service monitor the status and change of the American marten, and
2 provides even greater detail as to why and how the marten should
3 be monitored, the Forest Service has an obligation to determine
4 population trends for the American marten.

5 Plaintiffs contest the Forest Service's decision not to
6 acquire annual monitoring and population trend data for the
7 marten, the pileated woodpecker, and the black bear, in
8 preparation for the Project. Instead, the Forest Service
9 analyzed marten habitat as a proxy for marten population,
10 migratory monitoring information and Wildlife Service's Breeding
11 Bird Survey ("BBS") data as a proxy for woodpecker monitoring,
12 and California Fish and Game data as a proxy for bear monitoring.
13 Parties disagree as to whether the data evaluated by the Forest
14 Service is sufficient. Plaintiffs assert that this information
15 is inadequate to satisfy defendants' obligations because "the
16 Forest Service has cobbled together bits and pieces of
17 information regarding the population or distribution of MIS,
18 gathered at different geographic scales and intensities and by
19 different agencies and organizations." (Pls.' Opp'n, filed July
20 21, 2006, at 18-19).

21 The Ninth Circuit has interpreted 36 C.F.R. § 219.19(a) to
22 permit use of habitat as a proxy for population surveys in
23 certain circumstances. *Inland Empire*, 88 F.3d at 761. In *Inland*
24 *Empire*, the court confronted a challenge to the Forest Service's
25 proposed timber sale in the Kootenai National Forest in
26 northwestern Montana. In evaluating the effect of the Project on
27 species viability within the Project area, the Forest Service did
28 not conduct population surveys. Rather, it "examined each

1 proposed alternative to see how many acres of each type of
2 relevant habitat would remain after timber was harvested," and
3 concluded that "a species would remain viable as long as the
4 threshold percentage of each type of habitat remaining in the
5 chosen alternative was greater than the percentage required for
6 that species to survive." *Id.* at 759-760. The court recognized
7 that such an approach "necessarily assumes that maintaining the
8 acreage of habitat necessary for survival would in fact assure a
9 species' survival." *Id.* at 761. However, the court found the
10 assumption "eminently reasonable" and concluded that the habitat
11 analysis as a proxy for population surveys was not arbitrary and
12 capricious. *Id.* Similarly, in Idaho Sporting Cong. v. Thomas,
13 the Ninth Circuit upheld use of habitat as a proxy for population
14 where the Forest Service performed further analysis that
15 demonstrated the Project would result in "no appreciable habitat
16 disturbance." 137 F.3d 1146, 1154 (9th Cir. 1998).

17 The Court confronted the proxy on proxy issue again in Idaho
18 Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957 (9th Cir.
19 2002). Distinguishing both Inland Empire and Thomas, the
20 Rittenhouse Court held that use of habitat as a proxy was
21 inappropriate in that case because the methodology used for
22 monitoring habitat was unsound. *Id.* at 972. Specifically, the
23 court noted that the Forest Service's methodology for identifying
24 old growth habitat was demonstrably inaccurate and could not
25 "reasonably ensure viable populations of the species at issue."

26 Id.

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1 **1. American Marten**

2 Plaintiffs argue that the Forest Service has failed to
3 gather and analyze adequate monitoring data for the American
4 marten. The FEIS states that marten data was obtained by placing
5 baited camera stations in a designated grid pattern and that
6 twenty-three camera stations have been placed in various
7 locations throughout the project area from 1996. CR 02047.
8 However, the most recent survey work was completed in 2003. CR
9 02047. Further, the FEIS explicitly states that the

10 [s]urveys only offer presence data and cannot provide
11 any estimation of population numbers, reproductive
12 success, or territorial data. Therefore, assumptions
13 on the status of the local population, other than to
14 say that marten are present throughout the project
15 boundary, cannot be made.

16 CR 02048. Because the Framework requires that the Forest Service
17 "monitor the status and change in the geographic distribution of
18 martens," the statement in the FEIS that the data gathered and
19 analyzed by the Forest Service cannot provide population numbers,
20 reproductive success, territorial data, or even status of the
21 local population severely undermines the assertion that the
22 Forest Service adequately monitored the marten population. Based
23 upon this lack of information, the Forest Service cannot
24 "reasonably ensure viable populations of the species at issue."
25 As such, the Forest Service failed to satisfy the requirements
26 for population monitoring for the American marten.

27 **2. Pileated Woodpecker**

28 Plaintiffs also argue that the Forest Service has failed to
gather and analyze adequate monitoring data for the pileated
woodpecker. Specifically, plaintiffs point to the section of the

1 FEIS which states that "[t]here is no local data on population
2 numbers." CR 02090.

3 Defendants argue that the data for the pileated woodpecker
4 is sufficient to serve as a proxy for population monitoring
5 because the Forest Service relies on BBS data as well as landbird
6 monitoring being completed by the Point Reyes Bird Observatory
7 ("PRBO"). In regards to the sufficiency of the BBS data, the
8 Ninth Circuit has previously held that "BBS data alone cannot
9 satisfy the population monitoring requirement." Earth Island,
10 442 F.3d at 1176. In this case, the Forest Service's reliance on
11 BBS data is particularly problematic because the data tracks the
12 national population from 1966-1999. CR 02080.²³ In regards to
13 the sufficiency of the PRBO data, the information was derived
14 from 10 transects of various lengths within the proposed
15 treatment area from which point counts are taken and all birds
16 heard within 50 meters are noted. CR 02068. However, despite
17 this methodology and information acquired, the FEIS still
18 concedes that "[t]here is no local data on population numbers."
19 CR 02090. As such, the court cannot conclude that the Forest
20 Service "reasonably ensure[d] viable populations" of the pileated
21 woodpecker.

22 Defendants also assert that the Forest Service performed a
23 detailed analysis of snags in the project area, a habitat
24 attribute essential for woodpeckers. CR 02006-10. However, the

25
26 ²³ When confronted with the Ninth Circuit's conclusion
27 that BBS data was insufficient to meet the population monitoring
28 requirement in Earth Island, the defendants again asserted that
they believed the case was wrongly decided. However, this court
is not free to disregard Ninth Circuit precedent merely because
defendants disagree with it.

1 pages of the FEIS cited by defendant discuss only the effect of
2 the project on "selected vegetative decadence," but do not
3 discuss its relationship to the pileated woodpecker. Therefore,
4 the court cannot conclude that the analysis of snags performed by
5 the Forest Service adequately substituted for the required
6 population monitoring. See Earth Island, 442 F.3d at 1175 ("It
7 is difficult to see how distribution data could effectively be
8 gathered in the absence of actual population monitoring.").

9 **3. Black Bear**

10 Finally, plaintiffs argue that the Forest Service has failed
11 to gather and analyze adequate monitoring data for the black
12 bear. Specifically, plaintiffs point to the section of the FEIS
13 that states that "little data is available on the current status
14 of the bear." CR 02074

15 Defendants argue that the data analyzed relating to the
16 black bear is a sufficient proxy for population data because the
17 FEIS incorporates data from the California Department of Fish and
18 Game. Specifically, the FEIS provides that "[p]resently the
19 statewide population *is believed* to be between 25,000 and 30,000"
20 in comparison to between 10,000 and 15,000 in 1982. CR 02074
21 (emphasis added). The FEIS also provides that "[t]he Department
22 of Fish and Game *estimates* that within Plumas County bear
23 populations average .5 to 1.0 bear per square mile." CR 02074
24 (emphasis added).

25 Defendants' data is insufficient to serve as a proxy for
26 population monitoring. First, the FEIS explicitly states that
27 the population numbers set forth by the California Department of
28 Fish and Game are beliefs and/or estimates about the current

1 status of black bears statewide and not specifically within the
2 Project area. Second, the FEIS sets forth no information
3 regarding the methodology used to obtain this data. Finally,
4 defendants fail to offer any analysis or factual basis for
5 determining the quantity or quality of suitable habitat.
6 Therefore, the Forest Service's analysis does not satisfy the
7 population monitoring requirement of the NFMA.

8 Based upon the foregoing analysis, the Forest Service's
9 approval of the Project without appropriate or sufficient
10 population and habitat data for the American marten, the pileated
11 woodpecker, and the black bear is contrary to the NFMA and
12 governing provisions of the forest plan.

13 **III. Injunctive Relief**

14 Plaintiffs seek to enjoin the Forest Service from
15 implementing the Project until the Forest Service complies with
16 NEPA, NFMA, and the Lassen LRMP. To determine whether injunctive
17 relief is appropriate, the court applies the traditional balance
18 of harms analysis. National Parks & Conservation Ass'n v.
19 Babbitt, 241 F.3d 722, 737 (9th Cir. 2001) (quoting Forest
20 Conservation Council v. United States Forest Serv., 66 F.3d 1489,
21 1496 (9th Cir. 1995). "Environmental injury, by its nature, can
22 seldom be adequately remedied by money damages and is often
23 permanent or at least of long duration, i.e., irreparable." Id.
24 (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542
25 (1987)). "If such injury is sufficiently likely, therefore, the
26 balance of harms will usually favor the issuance of an injunction
27 to protect the environment." Amoco, 480 U.S. at 545. Further,
28 the Ninth Circuit has repeatedly held that "absent 'unusual

1 circumstances,'²⁴ an injunction is the appropriate remedy for
2 violation of NEPA's procedural requirements." Thomas v.
3 Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (citing Save Our
4 Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984); Alpine
5 Lakes Protection Soc'y v. Schlapfer, 518 F.2d 1089 (9th Cir.
6 1975); Lathan v. Volpe, 455 F.2d 1111, 1116-17 (9th Cir. 1971)).

7 In this case, the record demonstrates that it is
8 sufficiently likely that implementation of the Project will cause
9 irreparable harm to old forests through the unnecessary cutting

10 _____
11 ²⁴ Defendant-intervenor SPI asserts that "unusual
12 circumstances" exist in this case because it has been awarded
13 timber sale contracts in relation to the implementation of the
14 Project. However, SPI cites to no applicable cases where a court
15 has denied injunctive relief in an environmental case based upon
16 the award of timber sale contracts. Defendant-intervenor cites
17 to the Ninth Circuit's decision affirming the denial of
18 injunctive relief in Forest Guardians v. Dombeck, 131 F.3d 1309
19 (1997). However, in Forest Guardians, plaintiffs sought to
20 retroactively apply amendments to the applicable Land and
21 Resource Management Plan, and the court held that the Forest
22 Service did not err in applying the old standards to prior
23 existing agreements and applying the new standards to new
24 authorizations, contracts, and permits. In this case, plaintiffs
25 seek to enforce federal statutes, specifically NEPA and NFMA,
26 that were applicable when the contracts were awarded to SPI. As
27 such, Forest Guardians is inapplicable.

28 Further, based upon Ninth Circuit precedent relating to the
weight given economic harm in an environmental case, the court
finds SPI's argument unavailing.

Federal defendants also assert that they should be allowed
further proceedings to present evidence that "unusual
circumstances" weigh against injunctive relief. (Mem. P.&A. in
Supp. of Federal Defs.' Mot. for Summ. J., filed June 26, 2006,
at 7 n.3). However, when asked at oral argument what "unusual
circumstances" they referred to, federal defendants deferred to
SPI's counsel to present argument.

Federal defendants also request additional proceedings to
present evidence to assist the court in fashioning the
appropriate scope of any injunctive relief awarded. However,
when asked at oral argument how relief might be shaped, federal
defendants offered no suggestions or insight into how they might
assist the court.

1 of trees that might otherwise survive. See Earth Island, 442
2 F.3d at 1177. The record also demonstrates that the Project will
3 likely cause irreparable harm to the wildlife that inhabit the
4 project area, including the California spotted owl and the
5 American marten.

6 In light of the above finding of potential irreparable harm
7 to the environment, the balance of hardships tips in plaintiffs'
8 favor. Defendant-intervenor SPI argues that it will suffer
9 economic losses by enjoining the Project, and thus, the timber
10 sales. SPI also argues that curtailments and layoffs will likely
11 occur at its Quincy sawmill and cogeneration facility. (Decl. Of
12 Mark Bosetti in Supp. of SPI's Mem. of P.&A., filed June 26,
13 2006, ¶ 5). The court is not unmindful of the adverse economic
14 consequences that can result when environmental laws are
15 violated. Such consequences may include loss of revenues to both
16 the government and private business. Importantly, workers, their
17 families, and the community also may be adversely affected by a
18 finding that the Forest Service has failed to abide by the legal
19 requirements of NEPA and NFMA. Nevertheless, the "loss of
20 anticipated revenues . . . does not outweigh the potential
21 irreparable damage to the environment." Babbitt, 241 F.3d at
22 738; Earth Island, 442 F.3d at 1177. The Ninth Circuit has noted
23 "the importance of preserving the public's interest in
24 'preserving precious, unreplaceable resources.'" Earth Island,
25 442 F.3d at 1177 (quoting Earth Island, 351 F.3d at 1309).²⁵

26
27 ²⁵ The court is troubled that the Ninth Circuit has
28 expressed concern over "a disturbing trend in the Forest
(continued...)

1 The environment is a vital constituent public interest that must
2 be recognized and protected by federal law even in the face of
3 adverse economic consequences.

4 **CONCLUSION**

5 For the reasons stated above, the court finds the following:

6 (1) The Forest Service violated NEPA by failing to analyze
7 an adequate range of alternatives, particularly
8 alternatives involving less intensive logging.

9 (2) The Forest Service violated NEPA by failing to take a
10 hard look at the Creeks Forest Health Recovery
11 Project's impact on the American marten and the
12 California spotted owl.

13 (3) The Forest Service violated NFMA by failing to insure
14 viable, well-distributed populations of the American
15 marten and the California spotted owl.

16 (4) The Forest Service violated NFMA by approving the
17 Project without appropriate or sufficient population
18 and habitat data for the American marten, the pileated
19 woodpecker, and the black bear.

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25 ²⁵ (...continued)
26 Service's recent timber-harvesting and timber-sale activities,"
27 Earth Island, 442 F.3d at 1177-78 (collecting cases), observing
28 that, in many recent cases analogous to this case, the Forest
Service "appears to have been more interested in harvesting
timber than in complying with our environmental laws." Id. at
1178.

1 Based upon the above findings, the court hereby enjoins the
2 Forest Service from implementing the Creeks Forest Health
3 Recovery Project until and unless the Forest Service complies
4 with NEPA, NFMA, and all applicable laws, and an EIS is prepared
5 in conformity with NEPA and NFMA.

6 IT IS SO ORDERED.

7 DATED: September 6, 2006.

8 /s/ Frank C. Damrell Jr.
9 FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

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