10 of 39 DOCUMENTS

LEAGUE OF WILDERNESS DEFENDERS -- BLUE MOUNTAINS BIODIVERSITY PROJECT, CASCADIA WILDLANDS PROJECT, KLAMATH-SISKIYOU WILDLANDS CENTER, and NORTHWEST ENVIRONMENTAL DEFENSE CENTER, Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant, and D.R. JOHNSON LUMBER CO., an Oregon corporation, Defendant-Intervenor

Civil No. 04-488-HA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2004 U.S. Dist. LEXIS 24413

November 19, 2004, Decided

PRIOR HISTORY: *League of Wilderness Defenders - Blue Mts. Biodiversity Project v. United States Forest Serv., 2004 U.S. Dist. LEXIS 8897 (D. Ore., May 12, 2004)*

DISPOSITION: The plaintiffs' Motion for Summary Judgment , the Cross Motion for Summary Judgment filed by the United States Forest Service and the Motion for Summary Judgment filed by Intervenor D.R. Johnson were granted in part and denied in part.

COUNSEL: [*1] Attorneys for Plaintiffs: Stephanie M. Parent, Susan Jane M. Brown, Portland, Oregon; Ralph O. Bloemers, Christopher G. Winter, Cascade Resources Advocacy Group, Portland, Oregon.

Attorneys for Federal Defendants: Karin J. Immergut, United States Attorney, Jeffrey Handy, Assistant United States Attorney, Owen L. Schmidt, Special Assistant U.S. Attorney, USDA -- Office of the General Counsel, Portland, Oregon.

Attorneys for Intervenor-Defendant D.R. Johnson Lumber Company: Scott W. Horngren, Julie A. Weis, Haglund Kelley Horngren & Jones L.L.P., Portland, Oregon; Michael W. Dundy, D.R. Johnson Lumber Company, Riddle, Oregon.

JUDGES: Ancer L. Haggerty, United States District Judge.

OPINIONBY: Ancer L. Haggerty

OPINION:

OPINION AND ORDER

HAGGERTY, Chief Judge:

Plaintiffs filed a Complaint seeking declaratory and injunctive relief on April 8, 2004. This court subsequently denied plaintiffs' Motion for a Temporary Restraining Order (Doc. # 12-1), and the parties filed cross motions for summary judgment. Oral argument on these motions was heard on August 12, 2004. For the following reasons, plaintiffs' Motion for Summary Judgment (doc. # 57), the Cross Motion for Summary Judgment filed [*2] by the United States Forest Service (doc. # 65),

and the Motion for Summary Judgment filed by Intervenor D.R. Johnson (doc. # 72) are granted in part and denied in part.

BACKGROUND

In 1994, the Forest Service began preparing an "Eastside Environmental Impact Statement" (hereinafter the "Eastside EIS") for the management of public lands east of the Cascade Crest. Pending completion of this, the Forest Service adopted interim standards designed to preserve late successional forests and crucial elements of the Eastside ecosystems. These standards are referred to as the "Eastside Screens," and their implementation amended all Land and Resource Management Plans ("LRMPs") east of the Cascade crest, including the Malheur National Forest LRMP. The amendments prohibit logging green trees that are wider than twenty-one inches in diameter at breast height ("dbh"), but fail to address the salvaging of dead or dying trees. The Eastside Screens also require the Forest Service to maintain 100 percent "population potential" of cavity excavators.

This litigation arises from salvage efforts following the forest fire on the Malheur National Forest in 2002. The fire, referred to as the "Flagtail [*3] fire," burned 8,200 acres, including 7,120 acres (6,180 forested) on the Blue Mountain Ranger District of the Malheur National Forest ("MNF" or "the Malheur") and 1,080 acres on private land.

This court previously issued a Temporary Restraining Order on February 14, 2003, pertaining to salvage logging on this site that occurred as a part of the Forest Service's Flagtail Fire Recovery Project (hereinafter referred to as the "Recovery Project"). This court concluded that plaintiffs established a likelihood of success in showing that the Forest Service was misapplying a "road hazard maintenance" exception by allowing the commercial harvest of approximately 15,000 trees along a 200-foot corridor bracketing certain roads located on the site of the Flagtail fire without a more searching inquiry into the environmental impact of the harvest.

The Forest Service subsequently completed the Flagtail Fire Recovery Project Environmental Impact Statement (hereinafter referred to as the "EIS") on March 5, 2004. The accompanying Record of Decision identified "Alternative Five" as the Forest Service's choice for implementation in the Recovery Project. Alternative Five proposes post-fire logging on [*4] 3,920 acres, mostly accomplished through ground-based tractor logging, to obtain 15 million board feet of timber. This logging coincides with a combination of management activities, including both restoration and timber harvest, which allegedly would address six identified needs, including: (1) reducing future fuel loading to be responsive to the National Fire Plan; (2) capturing the economic value of the fire-killed and damaged trees expected to die; (3) providing safe and adequate road access in the fire area; (4) reducing the effects of roads on wildlife and water quality; (5) reestablishing upland vegetation, and (6) designating suitable dedicated old growth and replacement old growth areas to replace those degraded by the fire.

On April 8, 2004, plaintiffs filed a Complaint contending that this EIS is improper. Plaintiffs also challenge the request made initially in November 2003 by the Malheur National Forest for an "emergency situation determination" from the Regional Forester pursuant to *36 C.F.R. § § 215.2* and *215.10*, regulations that were adopted in June 2003.

The emergency was termed an economic one, based upon an initial projected loss of over $ 1 million if salvage logging [*5] was not undertaken quickly. The projected loss was recalculated twice. After the emergency determination request was granted on February 13, 2004, the Malheur National Forest "updated" the Regional Forester by

acknowledging that the previously reported economic loss of over $ 1 million was projected to actually be $ 440,000. The Regional Forester issued a reply on April 5, 2004, concluding that the "emergency situation determination continues to be appropriate."

When plaintiffs learned that a timber sale contract was being awarded and logging was set to begin on April 23, 2004, they moved for a second restraining order and a preliminary injunction. The motion for a restraining order was denied, and the parties proceeded to file cross motions for summary judgment. Oral argument on these cross motions was heard on August 12, 2004, and plaintiffs subsequently filed supplemental briefing which addresses recent relevant rulings from the Ninth Circuit, to which the Forest Service has filed a Response. The parties' briefing and the authorities cited in support of their positions have been considered carefully in the rendering of this ruling.

STANDARDS

Pursuant to *Rule 56(c) of the Federal Rules of Civil Procedure* [*6] , a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Fed. R. Civ. P. 56(c)*; *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991)*. The moving party bears the initial burden of proof. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1435 (9th Cir. 1995)*. The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. *Id.*

In assessing whether a party has met its burden, the court must view the evidence in the light most favorable to the nonmoving party. *Allen v. City of Los Angeles, 66 F.3d 1052 (9th Cir. 1995)*. All reasonable inferences are drawn in favor of the nonmovant. *Id.* If the moving party meets its burden, the burden shifts to the opposing party to present specific facts which show there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*; *Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995)*. [*7] The nonmoving party cannot carry its burden by relying solely on the facts alleged in its pleadings. *Leonard v. Clark, 12 F.3d 885, 888 (9th Cir. 1994)*. Instead, the party's response, by affidavits or as otherwise provided in *Rule 56*, must designate specific facts showing that there is a genuine issue for trial. *Id.*

Judicial review of agency actions and factual determinations involving the *National Forest Management Act* ("NFMA") and the *National Environmental Act of 1969* ("NEPA") is governed by Section 706 of the Administrative Procedure Act ("APA"). *5 U.S.C. § 706*; *see also Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957 (9th Cir. 2002)*. Under the APA, reviewing courts shall hold unlawful and set aside any agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." *5 U.S.C. § 706(2)(A)*.

This "arbitrary and capricious" standard does not shield agency action from a "thorough, probing, in-depth review" of those actions. *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)*. This court can uphold the Forest [*8] Service's decision only on grounds that the reasoning found in those decisions is sound, and cannot substitute reasons for agency action when such reasons are not in the record. *Anaheim Mem'l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997)*.

The purpose and intent of NEPA is to foster better decision-making and to facilitate informed public participation for actions affecting humans and nature. *42 U.S.C. § 4321*; *40 C.F.R. § 1501.1(c)*. The statute "is our basic national charter for protection of the environment." *40 C.F.R. § 1500.1(a)*. Under NEPA, federal agencies are required to assess

the environmental consequences of their actions before those actions are undertaken.

The Ninth Circuit recognizes that:

> NEPA imposes a procedural requirement that an agency must contemplate the environmental impacts of its actions. *Inland Empire Pub. Lands v. United States Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996)* (finding that NEPA is concerned with the process of disclosure, not any particular result). NEPA "ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant [*9] environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989)*; *Inland Empire, 88 F.3d at 758*.

Idaho Sporting Congress, Inc. v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998).

Accordingly, for "major Federal actions significantly affecting the quality of the human environment," agencies are required to prepare an EIS. *42 U.S.C. § 4332(2)(C)*. Under NEPA requirements, an EIS should consist of a thorough analysis of the potential environmental impacts and should "provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *40 C.F.R. § 1502.1*.

Courts may apply a "rule of reason" standard in reviewing the adequacy of a NEPA document. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 2004 U.S. App. LEXIS 22435, 2004 WL 2406557, at *15267 (9th Cir. 2004)* [*10] (citing *Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001))*. The "rule of reason" standard asks whether an EIS contains a reasonably thorough discussion of the probable environmental consequences. *Churchill County, 276 F.3d at 1071* (quotation and citation omitted). This standard is not materially different from the "arbitrary and capricious" standard. *The Lands Council v. Powell, 379 F.3d 738, 743 n.5 (9th Cir. 2004)* (citing *Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1071 (9th Cir. 2002))*.

Under either standard, the goal is to ensure that the agency has taken a "hard look" at the potential environmental consequences of the proposed action. *Churchill County, 276 F.3d at 1072*.

However, although an agency's actions under NEPA are subject to careful judicial scrutiny, courts must also defer to agency expertise, especially regarding scientific matters within the purview of the agency. *Klamath-Siskiyou Wildlands Center, 387 F.3d 989, 2004 U.S. App. LEXIS 22435, 2004 WL 2406557, at *15268* (citing *Anderson v. Evans, 371 F.3d 475, 489 (9th Cir. 2004))*.

Courts should afford agencies wide [*11] discretion to define the purpose of a project. *Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998)* (quotation omitted). Moreover, a court reviewing an EIS must make a pragmatic judgment regarding whether the EIS promoted sufficiently informed decision-making and public participation, while refraining from substituting its judgment for that of the agency concerning the wisdom or prudence of a proposed action. *California v. Block, 690 F.2d 753, 761 (9th Cir. 1982)*. An EIS should be upheld if its discussion of the significant aspects of the

probable environmental consequences is reasonably thorough. *Morrison, 153 F.3d at 1062-63* (quotation omitted). A court's review should end once it is satisfied that the proposing agency took a hard look at a decision's environmental consequences, and the court should not "fly-speck" the EIS for inconsequential deficiencies. *Id. at 1063* (citations and quotations omitted).

The NEPA statute is also accompanied by implementing regulations promulgated by the Council on Environmental Quality ("CEQ") and found at *40 C.F.R. § § 1501.1-1508.28*. Courts must strictly [*12] interpret these regulations in a manner consistent with the policies embodied in NEPA. *Klamath-Siskiyou Wildlands Center, 387 F.3d 989, 2004 U.S. App. LEXIS 22435, 2004 WL 2406557, at *15267-68* (citations omitted).

ANALYSIS

Previously in this litigation this court concluded that neither the seriousness of the questions raised nor the likelihood of plaintiffs' success regarding their challenge to the EIS was sufficient to warrant the extraordinary relief obtainable from a temporary restraining order, especially in light of the greater deference afforded to the process invoked by an agency in presenting an EIS. While the Forest Service is still entitled to that deference at this stage in the litigation, the standards for obtaining summary judgment, as reviewed above, are significantly different than those for an injunction or restraining order.

1. Was Reliance Upon DecAID Arbitrary and Capricious or Against the Rule of Reason?

Plaintiffs' primary argument in support of its motion for summary judgment is that defendant Forest Service improperly addressed species viability by using a habitat "tool" or database referred to as DecAID (adopted from a program titled the "Decayed Wood Advisor for [*13] Managing Snags, Partially Dead Trees, and Down Wood for Biodiversity in Forests of Washington and Oregon"). Plaintiffs contend that DecAID is inapplicable to post-fire projects, and that defendant's reliance upon that tool, with its limitations and inapplicability to post-fire environments, was arbitrary and capricious.

Agencies are required under NEPA to insure the professional and scientific integrity of the discussions and analyses in every EIS. *40 C.F.R. § 1502.24*. Plaintiffs assert that by utilizing the DecAID tool to determine snag retention levels in the Flagtail project, the Forest Service failed to meet this standard. Moreover, plaintiffs assert that in using this tool, the agency also failed to meet its NFMA obligation to maintain viable populations of primary cavity excavators ("PCEs") that are management indicator species ("MIS," or collectively referred to as "PCEMIS") on the Malheur National Forest.

In the Administrative Record ("AR"), defendant Forest Service described DecAID as "an Internet-based summary, synthesis, and integration of published scientific literature, research data, wildlife databases, forest inventory databases, and expert judgment and experience. [*14] " AR at 1055. When describing the scales of planning to which DecAID may be applicable, there is no mention of environments affected by wildfire. AR 1067. Forest Wildlife Biologist Karen Haines concurred in the AR that DecAID is an advisory system being developed from a synthesis of data and research results pertaining to forests in Oregon and Washington. AR 4955. Acknowledging that the DecAID Advisor is referred to as a planning tool intended to assist managers in conserving snags, partially dead trees, and down wood for biodiversity, Haines commented that "DecAID does not model biological potential or population viability." *Id.* Haines went on to acknowledge that "DecAID does not provide wildlife tolerance for down wood," and that "data in DecAID is from live, green forests; no data is available for recent

post fire conditions." AR 4956. Her report summarized various assumptions employed in using DecAID information, including the assumption that post-fire conditions "are not well-represented in DecAID" and that pre-fire conditions are "very different" from post-fire forest conditions, but that these differences should decrease as the forest "develops." *Id.*

The Forest Service [*15] asserts in response that DecAID was simply one of several resources utilized in analyzing dead and dying wood habitat, and that "information obtained from DecAID helped the Forest Service to better understand historical trends for snag habitat in dry forests like the Project area, and to better understand PCE use of various snag densities and sizes in unharvested dry forest areas similar to the Project area." Federal Defendants' Cross Motion for Summary Judgment at 11. The Forest Service acknowledges that the EIS addresses DecAID's limitations:

> The DecAID tool suggests using caution when applying distributions in post-fire environments.

EIS at 164.

The Forest Service characterizes its reliance upon DecAID's "snag inventory data" as being limited to the purposes of a "historical reference to understand how dry forests had typically supported snags." Federal Defendants' Cross Motion for Summary Judgment at 12-13. With this "historical reference," the Forest Service was able to conclude in the EIS that "because of the fire, the Flagtail project area may currently support snags at a much higher level than would be typically expected in dry forest types." *Id.*, quoting [*16] EIS at 164. The Forest Service contends that this use of DecAID was reasonable, consistent with the expressed, applicable limitations of the database, and well within the boundaries of professional and scientific integrity mandated by NEPA.

The EIS also acknowledges that the analysis of the retention of snags and down logs is driven by the applicable Forest Plan as amended by the Eastside Screens. As noted above, the Eastside Screens directed Forests to "manage snags at the 100% population potential and to use the best available science to determine actual numbers." EIS at 163. The EIS then describes DecAID as a "comparison tool" that "provides two sets of data with which to analyze snag habitats: 1) snag inventory data and 2)wildlife use data." *Id.*

Despite the post-EIS attempts to understate the Forest Service's reliance upon DecAID by referring to the tool merely as a helpful "historical reference to understand how dry forests had typically supported snags," an examination of the EIS and AR plainly establishes that calculations derived directly from DecAID formed the basis for the Forest Service's critical and specific decisions regarding snag retention. *See, e.g.*, EIS [*17] at 163-64; 168-69; 181, 183 ("Alternative 5 [the alternative selected in the EIS] may come closest to mimicking the DecAID snag distributions. . ."); 184, and 185 ("At the landscape level, down logs would meet or exceed levels suggested by the DecAID for dry forest types"). Similarly, the EIS portrays Table WL-13, which in part summarizes "snag densities, cavity excavator use as quantified by DecAID" and instructs that the differences identified in the Table of each of the five EIS alternatives "are best evaluated by comparing 1) predicted snag distributions for each alternative against DecAID snag distributions and 2) predicted woodpecker tolerance or use levels as derived from DecAID," and repeating that "Alternative 5 may come closest to mimicking the DecAID snag distributions". EIS at 187.

The Forest Service's efforts to deny that it employed DecAID as an essential tool for

determining critical aspects of its Recovery Project are unpersuasive after any objective reading of the EIS. Rather, it is clear that the Forest Service employed DecAID as a dispositive, prescriptive resource for assessing snag retention in post-fire environments. This must be deemed unreasonable, and arbitrary [*18] and capricious, in light of the recognized limitations presented by DecAID and the explicit words of caution provided by the database's authors and Forest Service biologists.

In a document titled "What is the DecAID Advisor?", DecAID's authors state bluntly that "at present, DecAID does not specifically address effects of fire." AR at 10878. Instead, the authors promote DecAID in part as "a summary of the patterns of use of decayed wood elements by wildlife species in Oregon and Washington," and advise that the program provides no analysis of "wildlife population viability" and is not a substitute for making "professional decisions based on experience." AR at 10879.

Moreover, DecAID does not account for "population dynamics and demographics, fire likelihoods, and ecosystem health," and the authors explicitly advise that any "dynamic changes in forest and landscape conditions would have to be modeled or evaluated outside the confines of the DecAID Advisor." *Id.* at 10880. Additionally, in another passage from the AR titled "Caveats and Cautions in Using the Inventory Summaries," DecAID's authors state that "the inventory data likely do not represent recent post-fire conditions [*19] very well because the plots sample conditions arising from a variety of disturbances, including but not limited to fire." AR at 10912.

Given the extensive limitations regarding the scope of the database, especially pertaining to the profoundly sensitive conditions of a post-fire environment, the Forest Service's heavy reliance upon DecAID for its land management activities in such ecosystems -- as indicated by the repeated adoption of snag retention numbers for PCEMIS based directly from DecAID calculations -- was unreasonable. Heavy reliance upon a model may fall short of regulatory requirements when there is inadequate disclosure of the model's limitations. *The Lands Council, 379 F.3d at 749-50*. What few disclosures there were in the EIS at issue here regarding DecAID's limited applicability were dwarfed and rendered meaningless by the Forest Service's repeated endorsement and utilization of calculations derived from DecAID.

The Forest Service's reliance upon a resource with such significant limitations for post-fire environments gutted the relevancy of much of the analysis in the EIS of the potential environmental impacts of the Recovery Project. Because DecAID [*20] lacks data pertaining to post-fire conditions, the EIS's discussion "of the significant aspects of the probable environmental consequences" cannot be deemed to have been being reasonably thorough, and therefore fails to meet the "rule of reason" standard. *Churchill County, 276 F.3d at 1071* (quoting *Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)*). This court's pragmatic judgment is that the challenged EIS, by employing DecAID so extensively without adequately addressing its limited applicability, failed to sufficiently promote informed decision-making and public participation. *See Block, 690 F.2d at 761*.

2. Non-Compliance with NFMA

Plaintiffs also challenge the Forest Service's compliance with NFMA. Under this statute, the Forest Service is required to create, and act in accordance with, a comprehensive Forest Plan for each national forest. *16 U.S.C. § 1604(a)*; *see also Inland Empire, 88 F.3d at 757*. After adoption of such a Plan, any site-specific activities that are inconsistent with the Plan are prohibited. *Inland Empire, 88 F.3d at 757*.

The currently [*21] applicable regulations implementing NFMA requires the Forest Service to survey for MIS and assess

population trends of those species. 36 C.F.R. § 219.19(a)(6). The Malheur LRMP also imposes a forest-wide requirement to manage snag habitat to provide for at least forty percent of the potential populations of primary cavity excavator species designated as MIS. The Eastside Screens amended this to provide habitat for 100 percent of potential populations, requiring 2.39 snags per acre. The LRMP also requires surveys to be conducted to determine whether the expected primary excavators are occupying the habitat. AR 4291 at V-13. These surveys have not been performed.

In some instances, a habitat model may be used as a proxy to determine MIS viability in lieu of surveys. *See generally, Inland Empire, 88 F.3d at 761*. However, where the Forest Service's "methodolgy does not reasonably ensure viable populations of the species at issue," using habitat evaluation as a proxy for monitoring population trends can be deemed arbitrary and capricious. *Rittenhouse, 305 F.3d at 972*. As in *Rittenhouse*, the habitat model employed here was inadequate for use as a proxy [*22] for population monitoring. DecAID has not been field-tested and was expressly deemed inappropriate for post-fire environments by its authors and by Forest Service biologists. Moreover, it was explicitly recognized as being inapplicable to wildlife viability determinations. Biologist Haines stated that "DecAID does not model biological potential or population viability." AR at 4955. DecAID's authors acknowledge that the database provides no analysis of "wildlife population viability" and is not a substitute for making "professional decisions based on experience." AR at 10879.

At best, the EIS suggests that DecAID is useful for presenting "information on wildlife use based on snag density and snag diameter." EIS at 165. This information is presented "at three statistical levels" that are identified as low, moderate and high "tolerance levels." *Id.* A few sentences later it is noted that "DecAID does not model biological potential or population viability. *There is no direct relationship between tolerances, snag densities, and sizes used in DecAID and snag densities and sizes that measure potential population levels." Id.* (citations omitted)(emphasis added).

In light of this, [*23] this court must conclude that the Forest Service's extensive reliance upon a database that measures tolerance and not population viability in an effort to comply with NFMA's viability requirements was arbitrary and capricious. Accordingly, the Forest Service has failed to meet its requirements under NFMA to establish that the Recovery Project will maintain viable populations of PCEMIS or that it will maintain 100 percent population potential of PCEMIS as mandated by the Eastside Screens. A close and fair reading of the EIS reveals that the Forest Service lacks sufficient population data (that it is required to collect), proposes to undertake action that will result in a loss of PCEMIS habitat and species diversity rather than their maintenance, and has relied too heavily upon a tool that is inapplicable to assessing wildlife viability.

3. Disclosure of the Results from Using the Scott Mortality Guidelines

Plaintiffs next challenge the Forest Service's failure to adequately disclose the results of its determinations regarding which trees measuring twenty-one inches or greater at dbh in the planning area will die. This information is critical because pursuant to the Eastside [*24] Screens, trees in that category that are not dead or dying cannot be removed. Plaintiffs argue that the Forest Service has failed to adequately disclose the data regarding the identification of dead or dying trees, because "actual numbers" of trees identified for removal by the Forest Service's application of the Scott Mortality Guidelines is unavailable. The Forest Service contends that gathering such specific information about individual trees would be time-consuming, prohibitively expensive, and ultimately of little value to the

public. Intervenor construes, and opposes, the challenge from a different perspective.

Intervenor emphasizes that Forest Service personnel were taught the "art" of tree marking, then soon practiced this art by memory without creating a record. Intervenor's Mem. Opp. to Pls.' Mo. for Summ. J. and in Supp. of Def.'s Mo. for Summ. J. at 10-11 (quoting Decl. of Michael R. Burgett). Intervenor urges the court to "decline plaintiffs' invitation to fly-speck' the way in which Forest Service employees performed their job duties in evaluating trees in the project area." *Id.* (citing *Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998))*. [*25]

Plaintiffs contend that the failure on the part of the agency to disclose how it reached its mortality determination and its experts' conclusions in that regard violates NEPA's disclosure requirements. "NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion." *Idaho Sporting Congress, 137 F.3d at 1150*.

Plaintiffs' challenge amounts to a request for documented information necessary to verify the Forest Service's decisions about every tree greater than twenty-one inches at dbh that it has deemed is dead or dying. Although the court disagrees that such a request is "fly-specking," the court is also unconvinced that compelling the Forest Service to download data from the tree inspectors' handheld electronic recorders described in the Burgett Declaration and then matching the data to a Global Positioning System device to assign each tree a unique reference number, location coordinates, and a mortality rating evaluation, would be as "relatively easy" as plaintiffs suggest. Pls.' Reply Mem. at 16. Nor would such efforts appear to be an efficient and worthy use of Forest Service resources, or mandatory [*26] under NEPA requirements.

The court concludes that the essential "underlying environmental data" that NEPA requires disclosed in these circumstances are the guidelines the Forest Service employees used in evaluating the trees. Plaintiffs raise no challenges regarding the disclosure of the Scott Mortality Guidelines, the application of those Guidelines, and the calibration of those Guidelines to the Recovery Project's planning area. Pls.' Reply Br. at 16, n.12. Compelling the Forest Service to further document the individual evaluations of every marked tree in the planning area would exceed what is required under NEPA, presumably at significant expense, with little meaningful value. Pragmatically, if what plaintiffs seek are grounds for a public challenge of harvest determinations made about individual trees by the Forest Service, the information necessary to launch such challenges is already provided. The public knows the standards being used by the Forest Service to evaluate the trees' mortality, and, through visual inspection of the Forest Service markings, it can ascertain which trees have been determined to be dead or dying. In the event the public obtains evidence that the Guidelines [*27] are being misapplied, or have become inapplicable, there has been sufficient NEPA compliance to allow for a meaningful challenge. Plaintiffs' arguments for summary judgment derived from the Forest Service's refusal to document its evaluations of individual trees are rejected.

4. Cumulative Impacts Analysis

Plaintiffs next challenge the adequacy of the Forest Service's cumulative impacts analysis. A cumulative impact is defined under NEPA 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. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *40 C.F.R. § 1508.7*. Agencies must provide "quantified or detailed information" about cumulative impacts. *Neighbors of Cuddy Mountain v. United States Forest Serv., 137*

F.3d 1372, 1379-80 (9th Cir. 1998). "General statements about possible effects' and some risk' do not constitute a hard look' absent a justification regarding why more definitive information could not be provided." *Id. at 1380*. Agencies must [*28] go beyond merely cataloguing projects and must include a helpful analysis of the cumulative impacts of past, present, and future projects. *Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 809-10 (9th Cir. 1999)*.

Plaintiffs raise five major sources of possible cumulative environmental effects: 1) roadside hazard tree logging that occurred under the Flagtail categorical exclusion; 2) fire suppression activities; 3) adjacent private land salvage logging; 4) grazing in the planning area; and 5) future wildfires and their suppression in the planning area. Plaintiffs assert that the Forest Service has failed to adequately discuss the cumulative impacts of any of these five areas of concern. As plaintiffs correctly assert, the Forest Service is required to assess cumulative impacts within an EIS, not merely refer to them in appendices. *See generally, Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998)*.

The Forest Service contends that each of these topics were discussed within the body of the EIS "under several different discussions." Forest Service Reply Br. at 9. During oral argument on the summary [*29] judgment motions, counsel for the Forest Service reiterated that the body of the EIS provided a thorough cumulative impacts analysis, and acknowledged that the Forest Service was not relying solely upon Appendix J to the EIS, which lists actions that were considered in the cumulative impacts analysis. This list included "all reasonably foreseeable projects expected to occur within each resources' defined scope of analysis (includes all projects that overlap each resources cumulative impact area)." Appendix J at J-1. In accordance with the applicable legal standards recognized by both plaintiffs and defendant Forest Service, this court turns to evaluating the adequacy of the cumulative impacts analysis pertaining to plaintiffs' areas of concern.

A.) Roadside hazard tree logging that occurred under the Flagtail categorical exclusion

Plaintiffs contend that the EIS lacks assessments of the roadside logging that occurred before plaintiffs obtained a restraining order halting the logging, and also lacks assessments of other specific instances of similar, possibly improper, logging that occurred this year. The Forest Service contends that roadside logging is adequately analyzed, citing [*30] in part to the following:

> . a sentence on page 8 of the EIS that some trees viewed as hazardous "will need to be felled prior to the road being reopened to the public or used for hauling logs;"
>
> . a brief reference on page 11 of the EIS to the "foreground of the visual corridor" having "stumps resulting from the removal of hazard trees;"
>
> . a reference to removing hazard trees and making open roads safe as a "Short-term Desired Condition" on page 18 of the EIS;
>
> . a description on page 23 of the EIS of a proposal to remove roadside hazard trees along open roads and along any roads used for implementation of the project, apparently under Alternative 2;
>
> . reference to hazard tree removal under Alternative 1 on pages 48 and 49 of the EIS;

> . reference to hazard tree removal under Alternative 2 on page 51 of the EIS;
>
> . reference to hazard tree removal under Alternative 3 on page 56 of the EIS.

The court acknowledges that there are approximately forty-four more citations provided by the Forest Service in support of its assertion that the cumulative impacts associated with roadside tree removal was adequately analyzed within the text of the EIS. *See* [*31] Def. Forest Service's Cross Mo. for Summ. J. at 30. Presumably, if any were more informative or analytical than those reviewed above, counsel would have taken pains to emphasize them. In light of the fact that the Forest Service has provided instead what appears to be a long list of citations that refer to every instance that roadside logging is merely mentioned in the EIS, this court agrees with plaintiffs that a sufficiently "hard look," or searching and thorough analysis of the cumulative environmental impacts of roadside tree removal is lacking in this EIS.

B.) Fire suppression activities

Plaintiffs next challenge the analysis provided for fire suppression activities. The Forest Service cites to the numerous detailed reports that are part of the AR and that specialists relied upon that address forest conditions, and specifically refers to a section of the EIS titled "Fire Suppression Activities, Completed Fire Rehabilitation, and Ongoing Fire Recovery Projects." EIS at 3. This section "provides information on the Flagtail Fire and activities associated with the fire. In the following chapters these activities are considered as part of the existing condition as well as in [*32] the cumulative effects (see also Appendix J)." The analysis that follows represents a reasoned discussion of the creation of fire lines, the paths of fire fighting and support vehicles, the designation of safety zones, rehabilitation efforts, and other fire suppression issues. EIS at 3-7. The court concludes that the EIS's analysis and "hard look" of the cumulative effects of fire suppression is adequate.

C.) Adjacent private land salvage logging

Plaintiffs next challenge the analysis provided for impacts of adjacent land salvage logging. In response, the Forest Service cites to a passing reference on page 127 of the EIS:

> *Ongoing and reasonably [foreseeable] actions, as listed in Appendix J, that could affect fire and fuels include; fuel treatments (private lands), livestock grazing, personal use firewood, hazard tree removal, and riparian fuel treatment.*
>
> * * *
>
> *Fuel treatment on private lands would reduce the fuel loading on adjacent lands [.] This would improve suppression capabilities on that land should another fire occur.*

Additionally, the Forest Service refers to page 186 of the EIS, which states:

> *Private lands typically do not provide* [*33] *large diameter snags. In the past, adjacent landowners have generally harvested damaged or dying trees to capture their economic value before they decay to a level where they no longer have any market*

> *value. Timber management has favored harvest of large diameter trees because of their higher economic value; removal of overstory trees releases smaller trees that are then managed over the next harvest cycle. Adjacent private lands that burned in the Flagtailfire have already been salvage logged.*

No other references are provided regarding analysis in the EIS pertaining to the cumulative environmental impacts of adjacent private land salvage logging. This analysis falls short of being a sufficiently "hard look," or searching and thorough analysis of the cumulative environmental impacts of such logging.

D.) Grazing in the planning area

Plaintiffs next challenge the lack of analysis provided for the impact of grazing on a burned landscape and possible cattle trespass. The Forest Service refers to an acknowledgment on page 9 of the EIS that "most stream channels and draws as shown on Figure 16 (Map Section) are not functioning properly due to sedimentation or erosion problems [*34] caused [in part] by historical grazing (sheep and cattle)," and to an explanation on page 63 that "resumption of livestock grazing would be subject to the Forest's post burn grazing guidelines. These guidelines would allow grazing to resume at current levels after two or more growing seasons depending on fire severity and the results of range monitoring. Grazing may be delayed for a longer period if necessary to meet other resource objectives." The two-year exclusion is reiterated on pages 104, 186 and 233 of the EIS. This analysis falls short of being a sufficiently "hard look," or searching and thorough analysis of the cumulative environmental impacts of grazing on burned landscapes.

E.) Future wildfires and their suppression

Plaintiffs next challenge the lack of meaningful analysis regarding where future fires may burn and what types of suppression efforts should be undertaken. Such analysis is appropriate. "While scientific thought and agency priorities are always subject to change, the necessity of maintenance is not so speculative or unforeseeable that analysis of its effects can reasonably be deferred to a later date." *Sierra Club v. Bosworth, 199 F. Supp. 2d 971 at 984* [*35] (citing *40 C.F.R. § 1508.7*, which requires that an EIS consider reasonably foreseeable future actions). The Forest Service must take a hard look and provide a meaningful analysis of the cumulative environmental impacts of the likely locations of future fires and the likely suppression efforts that will be undertaken.

5. Notice of Common Appeal Regulations

Plaintiffs also assert that the Forest Service erred in failing to prepare an EIS or an Environmental Assessment regarding the National Forest Management Act 2003 Notice, Comment, and Appeal Procedures for the National Forest Projects and Activities Regulations. Although the initial AR filed by defendant omits documents pertaining to these regulations, they have been litigated and briefed extensively before this court, and plaintiffs' standing to pursue this challenge is recognized.

Adopted by the Forest Service in June 2003, *see 36 C.F.R. § § 215.2*, *215.10*, the administrative appeal regulation at issue authorizes a Regional Forester to make an "emergency determination" and proceed with implementing a project immediately. Plaintiffs contend that the regulations amount to a statutory program that implements a specific [*36] policy of the Forest Service that impacts

the administrative comment and appeals rights of the public. Accordingly, plaintiffs assert, the regulations should qualify as a major federal action significantly affecting the quality of the human environment and require an environmental analysis under NEPA prior to adoption.

The Ninth Circuit has recognized that in some instances, the Forest Service's land management planning regulations can be construed as major federal actions that may significantly affect the quality of the human environment. *See Citizens for a Better Forestry v. United States Dept. of Agric., 341 F.3d 961, 969-70 (9th Cir. 2003)*. Under the circumstances presented here, there is no stay during a challenge to the agency's decision, and adverse environmental impacts "on the ground" may occur while the challenge is pending.

The Forest Service and the intevenor contend that the administrative action, by itself, did nothing to alter the natural physical environment, and that therefore NEPA review was unnecessary. *See Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995)* (holding that NEPA is inapplicable to federal actions "that [*37] do nothing to alter the natural physical environment"). The Forest Service and intervenor also refer to the Seventh Circuit decision in *Heartwood, Incorporated v. United States Forest Service*, in which the court rejected contentions that the Forest Service should be required to conduct environmental assessments when undertaking administrative actions such as adopting a rule that expanded categorical exclusions ("CE") by "excluding certain classes of Service action from procedural safeguards designed to determine the environmental impact of those actions. . . ." *230 F.3d 947, 948 (7th Cir. 2000)*. The court reasoned that the "creation of new CEs is an agency procedure. The CEs are not proposed actions, they are categories of actions for which an EA or EIS has been deemed unnecessary." *Id. at 954*. Just as the district court reasoned in the *Heartwood* litigation, the Forest Service asserts here that preparing environmental assessments for actions that do not concern a specific proposed activity in a specific location would be problematic. *Id. at 953* (discussing lower court's reasoning that because the assessment the plaintiffs sought [*38] would have to be performed prior to the adoption of the individual categorical exclusions, an accurate analysis of the potential environmental consequences would be impossible).

This court finds the *Heartwood* reasoning persuasive. Requiring the Forest Service to prepare environmental assessments of the possible consequences of changes to its administrative policies is not required under current federal law, and would be nearly impossible to compel. Moreover, the applicable federal regulations assign the responsibility for defining what type of actions may be categorically excluded from NEPA review to the individual agencies, and an agency's classification of a proposed action as falling within a particular categorical exclusion "will be set aside only if a court determines that the decision was arbitrary and capricious." *Citizens' Committee to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1023 (10th Cir. 2002)* (citing *40 C.F.R. § 1507.3(b)(2)(ii)*).

However, while the Forest Service's position that the promulgation of the new appeals rules fell within the scope of a "rules and regulations" categorical exclusion cannot be deemed arbitrary or capricious, [*39] the court recognizes that the new amendments can and will lead to actions that may impact significantly upon the environment. Adjusting the appeals process to permit the implementation of actions without stays under circumstances deemed an emergency may justifiably expedite some agency projects in some instances, but may well also lead to more protracted, expensive "emergency litigation" between increasingly polarized parties. The Tenth Circuit also found it "worth noting" that CEQ regulations do "require that agencies

provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.'" *Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443 at 1446 n.7*.

Plaintiffs also contend that the Forest Service's subsequent exercise of an "Emergency Situation Determination" ("ESD") was unjustified and inappropriate. This court disagrees.

An "emergency situation" under the regulations is defined as a situation "that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed." *36 C.F.R. § 215.2*. Although the initial economic loss was projected to be over $ 1 million, [*40] this amount was amended and reduced to $ 448,000. AR at 3750-54. Plaintiffs have questioned the fluctuating nature of this calculation, but do not, and cannot, challenge directly that a "substantial loss of economic value to the Federal Government" was occurring as a result of salvaging delays. This is so even if sale-preparation costs outstrip the expected revenue derived from the salvage sale. Plaintiffs' argument that an economic emergency is lacking and was improperly declared is rejected.

6. Adequacy of Scientific Opinion Review

Plaintiffs also contend that the Forest Service violated the mandates of NEPA by failing to adequately disclose and address the science that counsels for and against the proposed action of removing large trees (also referred to as snags) from the planning area for the purpose of reducing the risk of future wildfires. Some of the opposing scientific views suggest that large trees act as a natural fire retardant and can cool high intensity fires, and that the large volumes of fine slash that can result from salvage logging operations could increase the risk of future high intensity fires.

Because a "reasoned discussion of major scientific objections" [*41] regarding the proposition that removing large trees may not reduce future fire risk is lacking in the EIS, plaintiffs assert the EIS is inadequate. *See Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992)*. Plaintiffs argue that the EIS fails to discuss the opposing scientific opinions that the Forest Service consulted before preparing the EIS, overlooks the opinions that conclude that large tree removal may increase fire risk, and misleads the public regarding the extent of the scientific basis for the proposed actions in the EIS. Accordingly, plaintiffs contend that the EIS fails to meet the first of the EIS's six stated purposes and goals, which is to reduce future fuel loadings in accordance with the National Fire Plan.

The Forest Service responds that "at bottom, Plaintiffs' argument is that the chosen alternative will not reduce the fire risk." Def.'s Cross Mo. Mem. at 26. The Forest Service refers to passages in the EIS in which the "fuel loading issue" is addressed, *see generally*, EIS at 114-33, and establishes that the EIS provides thorough explanations of fuel loading and how the fuel reduction efforts will be directed and implemented. [*42] Regarding specific scientific viewpoints that oppose these proposals, the Forest Service refers pages 389-98 of the EIS, which provides a point-by-point analysis of the major assertions made in the 1995 Beschta Report, which generally advocated passive management of post-fire environments. The Forest Service's critique of just the Beschta Report, however, has been recognized as insufficient and "does not explain why the Forest Service failed to disclose or address any contrary scientific opinion in the EIS." *Sierra Club v. Bosworth, 199 F. Supp.2d 971, 981 (N.D. Cal. 2002)*.

The Forest Service describes plaintiffs' complaints that other opposing views were ignored as "misleading," because no other "opposing science" is identified "by name" in plaintiffs' memorandum, and a review of articles referenced in Exhibit D of the Brown

Declaration submitted in support of plaintiffs' Motion for a Temporary Restraining Order suggests that some identified opinions "are mostly in agreement with the Forest Service's stated view of the role of large woody debris in large fires." Def.'s Cross Mo. Mem. at 25-26. The Forest Service then discusses three publications and quotes certain [*43] statements contained within them that could be construed as supporting the Forest Service's position. *Id.* at 26.

This discussion of the publications, provided by counsel during litigation, is a brief example of what should have been provided in the EIS. In light of the need to address other aspects in the present EIS, this court concludes that the Forest Service must provide a reasoned discussion of major scientific objections to the proposed action of removing large diameter trees for the purpose of reducing future fire risk. This reasoned discussion must disclose and analyze the scientific opinion in support of and in opposition to the conclusion that the proposed actions will reduce future fuel loadings in accordance with the National Fire Plan.

CONCLUSION

For the reasons provided, plaintiffs' Motion for Summary Judgment (doc. # 57), the Cross Motion for Summary Judgment filed by the United States Forest Service (doc. # 65), and the Motion for Summary Judgment filed by Intervenor D.R. Johnson (doc. # 72) are granted in part and denied in part. Plaintiffs shall filed a proposed Judgment, within 30 days of the issuance of this ruling. Defendant and intervenor shall [*44] have 30 days to prepare and file a Response to the Proposed Judgment upon its filing.

IT IS SO ORDERED.

Dated this 19 day of November, 2004.

Ancer L. Haggerty

United States District Judge