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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN JR., ATTORNEY GENERAL,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Defendants.

– and related cases –

No. CIV 2:05-cv-0211 MCE GGH

PLAINTIFF'S REPLY BRIEF REGARDING REMEDY

Date: December 19, 2008
Time: 9:00 a.m.
Place: Courtroom 3
Judge: Hon. Morrison C. England, Jr.

Related Case Nos.
CIV 2:05-cv-0205 MCE GGH
CIV-2:05-cv-0953 MCE GGH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Federal Statutes and Regulations

State Cases

INTRODUCTION

In their opening briefs in this remedy proceeding, the Forest Service and the defendant-interveners fundamentally misconstrue the both the issues and the task before this Court. As a result, the defendants file volumes of briefing and declarations arguing the wisdom of the Forest Service's policy choice to adopt the 2004 Framework, a question not at issue here. At the same time, defendants ignore the well-established principle that the remedy for the improper adoption of agency action is to set aside that action while the agency corrects its error, and in the interim, to direct the agency to act in accordance with the valid rule or plan previously in effect, subject to any specific relief necessary to prevent interim harm or hardship to either party.

This Court has ruled that the 2004 Framework was illegally adopted in violation of the National Environmental Policy Act (NEPA) because the Supplemental Environmental Impact Statement (FSEIS) prepared by the Forest Service failed to evaluate *any* alternatives to the Forest Service's preferred course of action to reject the 2001 Framework, which took a conservative approach to forest management, in favor of the 2004 Framework, which intensifies extractive uses of forest resources such as logging and grazing. Under Ninth Circuit precedent, the Forest Service's failure to consider any alternative is a fundamental flaw that goes to the heart of the NEPA process. Contrary to defendants' assertions, it is not a minor, technical violation. Because the Forest Service's error undermines the adequacy of the entire FSEIS, it in turn undermines the adequacy of the decision to adopt the 2004 Framework.

California has made a specific showing of harm warranting an injunction. California has sustained a procedural injury resulting from the failure of the Forest Service to evaluate any alternative to the 2004 Framework. Moreover, California has made a specific showing that this procedural harm, if not remedied by an injunction pending compliance with NEPA, will result in specific environmental harm from the increased logging and grazing allowed by the improperly adopted 2004 Framework. These harms include the irreversible logging of large and old growth trees that would not be cut under an alternative that did not rely on logging these trees to generate funds. Once these trees are cut, they cannot be replaced.

Despite that the 2004 Framework was adopted in violation of NEPA, the Forest Service

argues that it should be allowed to implement it, virtually without legal consequence, while it proceeds under a multi-year plan of updates to the eleven individual forest plans. To justify this remedy, defendants rely on cases that are confined to their extraordinary facts (such as a recent Supreme Court opinion implicating national security interests) and ignore a long line of precedent establishing that when a programmatic decision is invalid under NEPA, the previous programmatic decision – the pre-violation status quo – is reinstated and applied in the interim until the NEPA violation is corrected.

In objecting to reinstatement of the 2001 Framework, the Forest Service and the interveners have provided largely generalized arguments that the 2004 Framework better meets their particular needs, and therefore should not be enjoined despite its legal flaws. Shifting the focus of the remedy proceedings to a battle of the experts about which Framework – the 2001 version or the 2004 version – is the "better" plan does not address the issues before this Court. The relevant question instead is whether the short-term implications of applying the 2001 management standards will result in any real, site-specific risks to the defendants' or to the public's interest. Given that, for the most pressing fire risks, the plans are virtually identical, the defendants have failed to show that the balance of harms tips in their favor.

As discussed below, ample precedent supports the reinstatement of the 2001 Framework until the NEPA violation is corrected, because it is the plan that was in place at the time that the agency improperly attempted to replace it without any consideration of alternatives. Only by reinstating the 2001 Framework can this Court ensure both that the Forest Service's ability to consider a reasonable range of alternatives to the complete rejection of the 2001 plan will not be prejudiced, and that the resources of the Sierra Nevada protected by the 2001 plan will not be irreparably harmed in the interim while alternatives are studied. Accordingly, California respectfully requests that this Court set aside the Record of Decision (ROD) adopting the 2004 Framework and the 2004 FSEIS, reinstate the prior management plan that it replaced, and enjoin the Forest Service from engaging in management activity inconsistent with the 2001 Framework that will cause irreparable harm, until such time as the Forest Service corrects its fundamental NEPA violation.

ARGUMENT

I. The Forest Service's Failure to Examine Any Alternative to the 2004 Framework Was a Serious Violation that Contravened the Fundamental Purposes of NEPA and was in No Sense Purely Technical or Harmless.

To be entitled to any remedy, a plaintiff must, of course, establish a violation. In this case, California established and this Court held that the Forest Service rejected the 2001 Framework in favor of the 2004 Framework without considering *any other* alternative to meet the new purposes and needs it identified after 2001. *People of the State of California v. U.S. Department of Agriculture*, No. 2:05-cv-0211-MCE-GGH, 2008 WL 3863479 at *28 (E.D. Cal. August 19, 2008). The Forest Service attempts now to claim that this complete failure to comply with the requirement going to the "heart" of the NEPA process is**,** in effect, harmless and does not warrant setting aside the agency action. This claim is radically at odds with well-established NEPA jurisprudence.

Failure to examine alternatives to the agency's preferred action is not a "merely technical" deficiency, but rather "necessarily implicates the environmental . . . interests of plaintiffs." *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990). It is a "serious deficiency" that undermines the "vital task of exposing the reasoning and data of the agency" to the public. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 94-95 (2nd Cir. 1975). It is the required detailed analysis of alternatives that "sharply defin[es] the issues and provid[es] a clear basis for choice among options by decision-maker and the public." 40 C.F.R. 1502.14. For this reason, the courts – including this Court – have repeatedly determined that the existence of a viable but unexamined alternative renders an EIS, not just deficient, but inadequate as a decision-making document. *People of the State of California*, 2008 WL 3863479, at *27 (quoting *Natural Res. Def. Council v. U.S. Forest Service*, 421 F.3d 797, 813-14).

Under case law that the Forest Service ignores, it is clear that failure to comply with NEPA's requirement to evaluate alternatives warrants injunctive relief that prohibits implementation of the illegal action. To deny California a remedy in this case would undercut the purposes of NEPA and would be inconsistent with a court's duty to fashion a remedy that requires compliance with the law. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814, 816 (9th Cir. 1999) (enjoining "any further activity on the land" undertaken pursuant to a land exchange agreement that

was adopted without consideration of other than closely-related alternatives to the proposed action "until such time as the Forest Service satisfies its . . . NEPA obligations"). While courts of equity may choose among permissible means of enforcing a statute, a decision *not* to enforce the statute would impermissibly "override" the policy choices made by Congress in enacting the statute. *U.S. v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 497-98 (2001). To allow what the Forest Service has requested here – full implementation of its decision adopted without consideration of any alternatives, while it proceeds under its own self-determined timetable to look at alternatives after-the-fact – "would convert an EIS into a mere rubber stamp for post hoc rationalization of decisions already made" and negate the "real meaning" of the statute. *Natural Resources Defense Council*, 524 F.2d at 94-95. *See also Andrus v. Sierra Club*, 442 U.S.347, 351-52, n.3 (1979) (quoting 40 CFR §1502.5) (the purpose of an EIS is to "serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made").

II. California's Proposed Remedy Encourages Compliance with NEPA and is Consistent with Supreme Court and Ninth Circuit Case Law.

Despite defendants' suggestions to the contrary, California does not argue in these remedy proceedings that a NEPA violation "always" requires a "blanket" injunction prohibiting all federal agency action pending NEPA compliance. Federal Defendants Opening Brief on Remedy ("Forest Service Opening Br.") (Document 186) at p.4. Nor does California argue that the APA "compels" that illegal action be set aside,[1/] or that either irreparable harm or an injunction is "presumed" in a NEPA case. *Id*. at p.6-7. Rather, California's opening brief repeatedly recognizes that district courts must consider the traditional equitable principles in fashioning injunctive relief for a NEPA violation, pending the agency's NEPA compliance. *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 844 n.30 (9th Cir. 2007). At the same time, district courts cannot ignore, as defendants argue,

1. Because California does not argue, and the Ninth Circuit *Sierra Forest Legacy* did not hold, that an injunction is presumed, the Forest Service's reference to *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), *cert. granted sub nom. Summers v. Earth Island Institute*, __ U.S. __, 128 S. Ct.1118 (Jan.18, 2008) is irrelevant. Forest Service's Opening Br. at p. 4, n.4.

the well-established principle that if environmental injury is "sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

A. California's Proposed Remedy Properly Balances the Equities and Considers the Public Interest.

California is entitled to injunctive relief upon showing: "(1) that it has suffered an irreparable injury; (2) that remedies available at law . . .are inadequate; (3) that considering the balance of hardships . . . remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Northern Cheyenne*, 503 F.3d at 843 (quoting *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006)). *See also Amoco*, 480 U.S. at 542.[2/] As the cases all demonstrate, application of this test involves the exercise of discretion critically dependant on the facts and circumstances of the individual case. The balancing process, however, also must be informed by precedent. As the Chief Justice recognized in his concurrence in *eBay*:

> [T]here is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate. 'Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.' *Martin v. Franklin Capital Corp*., 546 U.S. 132 (205). When it comes to discerning and applying those standards, 'a page of history is worth a volume of logic.' *New Your Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

eBay, 547 U.S. 388, 395 (Roberts, C.J., concurring); *see also id.* at 396 ("[t]he lesson of the historical practice, therefore, is most helpful and instructive when the circumstances of a case bear substantial parallels to litigation the courts have confronted before") (Kennedy, J., concurring). Accordingly, the scope of the injunction issued in this case must be consistent with the outcome of like cases.

California, in its opening brief, and as discussed below, has established each of the elements justifying its requested remedy based on the applicable equitable principles and the proper

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2. The Court's holding in *Amoco* was re-affirmed by the Supreme Court in *eBay Inc.*, 547 U.S. 388 and, most recently, in *Winter v. Natural Res. Def. Council*, __ U.S.___, 129 S.Ct. 365 (2008). In both cases, the Court expressly cites *Amoco* as the source of the "well-established principle[] of equity, [that] a plaintiff seeking an injunction must satisfy a four-factor test before a court may grant such relief." *eBay*, 547 U.S. at 391; *see also Winter*, 129 S. Ct. at 374.

application of prior cases presenting a similar situation to the one here.

B. California Has Suffered Irreparable Harm That Cannot be Remedied by Monetary Damages.

1. Procedural Injury Results from the Forest Service's Violation of NEPA

California has already sustained irreparable procedural harm caused by the Forest Service's failure to examine any alternatives prior to committing to a course of action that substantially increases logging and grazing. Both this Court and the Ninth Circuit have acknowledged the procedural harm that already has occurred in this case. *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1234 (9th Cir. 2008) (the public has an interest in enforcement of the law intended to protect the environment); *People of the State of California*, 2008 WL 3863479, at *6, *28 (California's alleges procedural injuries that are protected by NEPA; since NEPA is violated, that injury has occurred).

Defendants grossly mischaracterize the Forest Service's NEPA error as a minor modeling defect. Forest Service's Opening Br. at pp. 1-3 (claiming that the FSEIS for the 2004 Framework was "generally . . . validly promulgated," and that the agency decision was reversed only on the "very narrow grounds" that the Forest Service improperly conducted the "modeling" of the differences between the 2004 and 2001 Frameworks); *see also, e.g.*, TuCare's Opposition to Plaintiff's Requested Remedy ("TuCare Opening Br.") (Document 185) at p. 10; California Ski Industry Association's Opposition to California's Request for Permanent Injunction ("Ski Industry Opening Br.") (Document 187) at p. 4. Defendant's characterization does not accurately reflect either this Court's or the Ninth Circuit's rulings on the merits. The Ninth Circuit held that the Forest Service violated NEPA by failing to consider any alternative to the 2004 Framework and, in particular, any alternative method of funding other than the cutting of larger trees that pose no fire danger. *Sierra Forest Legacy*, 526 F.3d at 1231-32, 1233. The Forest Service argued to the Ninth Circuit that it did in fact consider alternatives to the 2004 Framework, specifically, all alternatives that were considered and rejected in 2004. The Ninth Circuit held that the Forest Service could not "rely on its discussion of alternatives in the 2001 FEIS to satisfy this requirement for the 2004 SEIS" in part because it had changed its modeling in the interim. *Id.* at 1231. The Ninth Circuit also held

that the alternatives were not alternatives to the 2001 Framework, because in 2004, the Forest Service was considering "substantively new objectives from those contained within the 2001 FEIS." Id. at 1232. Thus, the modeling discrepancies were merely a symptom of the Forest Service's fundamental failure to consider alternatives in 2004. Re-running the models after the fact, then, cannot cure the violation.[3/]

Similarly, this Court found that the 2004 FSEIS was flawed because "the alternatives developed in 2001 were designed to address a significantly different purpose and need than that identified in 2004." *People of the State of California*, 2008 WL 3863479 at *27. The Court therefore adopted both parts of the Ninth Circuit's ruling on the merits. *Id*. at * 28 (this Court's ruling on the merits is based on the "clear precedent" of the Ninth Circuit's "unequivocal conclusion" on the alternatives issue). Thus, the Forest Service's error was much more significant than a minor failure to update the modeling.[4/]

The Forest Service also claims that its NEPA violation was "harmless error" because, although it failed to evaluate alternatives, it did not act "without considering the *environmental impacts* of the smaller diameter based treatments . . . [in] the 2001 Framework." Forest Service Opening Br. at p 6 (emphasis in original). This argument is incorrect, as a matter of law, because

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3. Because of the Forest Service's error was not limited to modeling, the Forest Service's attempt to offer new evidence on this point is unavailing. *See* Forest Service Opening Br. in *Sierra Forest Legacy*, at p. 14, citing the Declaration of Klaus H. Barber. The Forest Service ignores that the Ninth Circuit found fault in the agency's failure to formulate alternatives to address the purpose and need that gave rise to the 2004 Framework.

Further, even assuming the Barber Declaration relevant and factually correct, it is improper because it is a post-hoc justification to support a decision already made, and therefore cannot supply the missing NEPA analysis after the fact. *Cady v. Morton*, 527 F.2d 786, 794 (9th Cir. 1975) (citations omitted) ("[a]n ex post facto justification generally is not an acceptable substitute" for a valid NEPA document).

4. If the Ninth Circuit had ruled as the defendants claim, then as a remedy it would have preliminarily enjoined the three projects only until such time as the Forest Service corrected its "modeling problem." In fact, however, the Ninth Circuit's remedy reflected the scope of its ruling: It enjoined implementation of the three projects only to the extent that they are inconsistent with the prior valid rule, the 2001 Framework. *Sierra Forest Legacy*, 526 F.3d at 1243. The remedy requested by California is consistent with the preliminary injunction imposed by the Ninth Circuit in this case.

it collapses the two separate NEPA requirements to evaluate alternatives to agency action and to evaluate environmental effects into one requirement. *See* 42 U.S.C. § 4332(2)(C)(i) and (iii). Further, it misses the point. Obviously, the Forest Service considered the environmental impacts of the 2001 Framework at the time it adopted it. What it did not do was evaluate alternatives to its decision to abandon that plan in its entirety in favor of the 2004 Framework.[5/]

The Forest Service's commitment of agency resources to implementing the 2004 Framework without any analysis of viable alternatives is far from a trivial violation of NEPA. As the Supreme Court stated in the recently decided case of *Winter v. Nat. Res. Defense Council*, __ U.S.__, 129 S.Ct. 365, 376 (2008) ("[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures.") *See also id.* at 383 (opinion of Breyer, J., concurring in part and dissenting in part) ("when a decision to which EIS obligations attach is made without the informed environmental consideration that NEPA requires, much of the harm that NEPA seeks to prevent has already taken place"). NEPA case law repeatedly emphasizes that significant injury is caused by failure to follow the statute's procedures. *See, e.g.*, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) ("irreparable injury flows from the failure to evaluate the environmental impact . . .[of] a broad programmatic action;" the physical risks to natural resources are "compounded by the added risk to the environment that takes place when governmental decision makers make up their minds without . . . an analysis (with public comment) of the likely effects of their decision on the environment"); *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989)

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5. In its Notice of Supplemental Authority, filed on November 18, 2008, the Forest Service argues that the Supreme Court's recent decision in *Winter v. Natural Res. Def. Council* "affirms the validity" of the argument that there is no harm from failure to analyze alternatives because the environmental impacts of the project and the 2001 Framework were already fully disclosed. Forest Service's Notice of Supplemental Authority (Document 190) at p. 2. Even assuming this premise is true, *Winter* does not address the question of injury resulting from the failure of an agency to examine alternatives in an EIS. Instead, the language cited by the Forest Service expresses doubt that the plaintiffs there suffered any real injury at all from the failure to prepare an EIS, because the impacts had already been evaluated in a 293 page environmental assessment, and because numerous mitigation measures had already been imposed by the district court's injunction. *Winter*, 129 S. Ct. at 376. The case does not stand for the proposition that an agency can use its evaluation of *impacts* as an excuse to ignore *alternatives*.

("because NEPA can do no more than require the agency to produce and consider a proper EIS, the harm that NEPA intends to prevent is imposed when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires"). Because of the Forest Service's NEPA violation, California has been denied not only the opportunity to participate in the process of selecting the least environmentally damaging alternative to meeting the Forest Service's purpose, but has also been deprived of a fully informed decision affecting millions of acres of national forest in its borders and the State's resources that are dependent on those forests.[6/] This significant procedural injury warrants injunctive relief.

2. Implementing the 2004 Framework Will Harm Forest Resources

In addition to procedural injury, California has established "on the ground" environmental injury that is certain to occur. It is undisputed that the Sierra Forests provide unique and necessary habitat for sensitive species, which the State of California is entrusted to protect on behalf of the People. SNFPA 00957, 2001 FEIS, Vol. 3, pt. 4.2 at p. 5, Table 4.2.1a (AR, CD #6); *id.* at pp. 17-22, Table 4.2.1e (AR, CD #6)[7/] (the survival of the unique and sensitive wildlife of the Sierra Nevada depends on the continued existence of numerous types of distinct habitat in the national forests); *People of the State of California*, 2008 WL 3863479, at *5 (California owns, and hold in trust for its population, all wildlife, water, state-owned land, and public trust lands in and around the Sierra Nevada.") It is also undisputed that the 2004 Framework allows removal of larger trees (between 20 and 30 inches in diameter) than is permitted under the previously approved forest management plan on 11.5 million acres of Sierra Nevada forest. SNFPA 2998. Although these trees pose no fire danger, under the 2004 Framework, the Forest Service is certain to remove them for the

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6. In its comments on the 2004 FSEIS, the California Resources Agency highlights the damage to the public participation process from by the failure to consider viable alternatives to increased logging. SNFPA 03801 ("[W]e could imagine a range of alternatives that epitomizes options . . . [for]. . . fuels treatments and the variety of funding sources . . .[that] would allow the public to consider . . .an optimal level of timber harvest needed. . . . Yet the EIS fails to illuminate the options available to deal with funding").

7. Because the references to the 2001 Framework are only on CD and not in the paper record, California is attaching the pages cited in this reply brief for the Court's convenience, as Exhibit A.

purpose of funding forest treatments, even though it has conducted no NEPA analysis of viable alternatives to this course of action. This harm is not only certain, it is irreparable: Once the trees are cut, they can not be put back. None of the declarations claiming that the 2004 Framework is more "environmentally beneficial" can refute the fact that the taking of large trees for no fire benefit is irreparable harm in itself. *The Lands Council v. Martin*, 479 F.3d 636, 643 (9th Cir. 2007) (logging large trees 21 inches in diameter and greater is a "permanent environmental injury" justifying injunctive relief).

Harm to large and old growth trees is not the only likely environmental harm. The Ninth Circuit has already noted the risk of irreparable damage to sensitive species.[8/] *Sierra Forest Legacy*, 526 F.3d at 1233-34. In addition, both their opening and reply briefing, the Sierra Forest Legacy plaintiffs have provided overwhelming evidence from the record, and from expert testimony contained in several declarations, that demonstrates that implementation of the 2004 Framework will adversely affect not only the spotted owl, but other sensitive species imperiled in the Sierra, including the American marten and the Pacific fisher. California incorporates this briefing and the accompanying declarations by reference. Reply Memorandum in Support of Plaintiff's Motion for Permanent Injunctive Relief ("Sierra Forest Legacy Reply Br."), CIV-S-05-0205 (Document Number 273).

3. California Has Established Harm to State Interests

In 2004, the Forest Service rejected the 2001 Framework's cautious approach to management activities in wildlife habitat in favor of increased logging and grazing activity, without considering alternatives to that approach. The Forest Service's decision substantially increased timber harvesting in the Sierra Nevada forests – by 4.7-fold over the projected 2001 plan levels in the first decade, and by 6.4-fold in the second decade. SNFPA 03389. And, the decision eliminated restrictions on logging trees between 20 and 30 inches in diameter. SNFPA 02998. With respect to grazing, the decision loosened several restrictions on grazing in willow flycatcher habitat. First, the 2004 Framework eliminated restrictions on at sites that were known to be occupied by willow

8. While the Ninth Circuit discussed the "possibility" of harm, there is ample evidence in the record to demonstrate that this harm is "sufficiently likely" to warrant injunctive relief.

flycatcher nests in the past, if those sites were not currently occupied. SNFPA 03357-58. Second, even at occupied sites, prohibitions on grazing that might disturb nests were abandoned, in favor of site-specific management that allows grazing under certain conditions. SNFPA 03358. The same areas to be grazed under the 2004 Framework serve as habitat for the sensitive Yosemite toad. SNFPA 3372-73. As the Forest Service noted, "livestock grazing in occupied meadows where the species has not been discovered may contribute to local extirpations[.]" SNFPA 03374.

The Forest Service now suggests that its decision to increase the intensity of these activities on the 11.5 million acres of national forest land in California is not likely to cause irreparable injury to California's interests in protecting the wildlife, water, and other natural resources that the State is entrusted to protect in and around those forest lands. Forest Service's Opening Br. at pp. 8-9. This suggestion is not credible. As the California Regional Water Quality Control Board, Central Valley Region, has commented, increased timber harvesting and reduction in grazing restrictions are accompanied by "increased road construction"; "increased timber volume"; "increased mechanical treatment for fuels and forest health;" and "decreased protection of wet meadows and associated streams and springs." SNFPA 03891. The Forest Service itself concedes, "[l]ogging operations, grazing and other activities that disrupt forest floor and compact soil" lead to increased sedimentation of streams. SNFPA 00957, 2001 FEIS, Vol. 2, Ch. 3, pt. 3.4 at p. 203; *id.* at pp. 206-207 (discussing impacts of timber harvesting and roads). Because there are 24 major river basins and 150 major watersheds in the area subject to the Forest Service's planning (*see* 2001 FEIS, Vol. 2, Ch. 3, pt. 2, p. 34 (AR, CD #6)) that supply millions of water consumers in California's Central Valley, San Francisco Bay Area and Southern California (*see* 2001 FEIS, Vol.2, Ch. 3, pt. 3.4 at pp. 195-196 and Table 3.4a (AR, CD #6)), increased sedimentation from timber harvesting on the scale contemplated by the 2004 Framework necessarily will have impacts to California's water resources. The California Regional Water Quality Control Board specifically concluded that because of the less conservative management standards for logging and grazing in the 2004 Framework, that plan was not as effective as the plan it replaced in meeting the

requirements of California's water quality laws.[9/] With respect to the harm caused by grazing to the willow flycatcher – a state-listed endangered species – the California Department of Fish and Game concluded that loosening grazing restrictions will present "a *high probability* of promoting continued decline in abundance of the willow flycatcher populations . . . thus bring[ing] it closer to extirpation in California." SNFPA 03903 (emphasis added).

Thus, California does not merely "assert in passing" a "vague and speculative" claim that its resources are threatened as the Forest Service claims.[10/] Forest Service's Opening Br. at pp. 8-9. California is "sufficiently likely" to suffer irreparable injury from increased logging and grazing in the forests of the Sierra Nevada. Although the Forest Service, at least in the declarations it submits in this case, disagrees about the amount of risk posed to sensitive habitat, species and natural resources by substantially increasing logging and grazing, the public and California should be afforded the ability to participate in an open and public NEPA process to air these issues and to have the opportunity to establish that less-intrusive alternatives will still accomplish the goals of the Forest Service.

C. Proper Balancing of Harms Favors California's Proposed Injunctive Relief.

Plaintiffs have established a fundamental NEPA violation and sufficient irreparable procedural and substantive harm to justify the imposition of an injunction that invalidates the illegal plan and reinstates the previous plan – in effect, a remedy that reestablishes the pre-violation status quo so that the Forest Service may properly consider alternatives as NEPA requires. Thus, the

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9. In light of these comments from the Regional Water Board officials, there is no merit to the Forest Service claim that California has shown no harm to water quality. Forest Service's Opening Br. at p. 9, n.7. As the Ninth Circuit noted, "special solicitude" should be afforded California's stake in protecting its natural resources. *Sierra Forest Legacy*, 526 F.3d at 1233 (citing *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007)).

10. In addition, the Forest Services makes an unsupported claim that there are only a "limited number of locations where a project on Forest Service land might impact neighboring state-owned land." Forest Service's Opening Br. at p.8-9. This contention is wrong. The natural resources that California is entrusted to protect do not recognize either federal or state ownership boundaries. For example, the State of California holds title to the beds of all the Sierra Nevada's naturally-navigable rivers, lakes and streams (42 U.S.C. § 1311(a)) and to the navigable waterways themselves. *See Graf v. San Diego Unified Port Dist.*, 7 Cal. App. 4th 1224, 1228 (1992).

balance of harms should favor the issuance of an injunction to protect the environment. *Amoco*, 480 U.S. at 545.

The Forest Service's claims of harm largely rest on the presumption that, if it can make a defensible showing that permanently applying the 2004 Framework over the 11.5 million acres of Sierra forests is in some abstract sense "better" than permanently applying the 2001 Framework, the Court in its discretion may deny plaintiffs any remedy for the Forest Service's violation of NEPA. *See* Forest Service Opening Br. at 12 (identifying the relevant balance of hardships as "between reinstatement of the 2001 Framework and leaving the 2004 Framework in place"); *see also* Forest Service Opening Br. in *Sierra Forest Legacy*, CIV-S-05-0205 (Document 270) at pp. 26-28. The Forest Service attempts to make this showing of harm in sixteen declarations submitted with its opening brief. For various reasons, none of these declarations establishes the requisite hardship to tip the balance of harms in favor of the Forest Service's proposed remedy.

As a threshold matter, the overwhelming majority of the Forest Service's declarations focus on why, in general and in the declarant's opinion, the 2004 Framework is superior to the 2001 Framework as the long-term management plan for the Sierra Nevada. (*See* Declarations of Patricia A. Krueger, Diane Macfarlane, Donald A. Yasuda, Kathleen S. Morse, Wayne Spencer, Carl N. Skinner, Hugh D. Safford, Peter A. Stine, Joseph W. Sherlock, Nancy, Grulke, Christopher J. Fetting, filed with Forest Service's Opening Br. in *Sierra Forest Legacy*, CIV-S-05-0205 (Document 270).) The Forest Service attempts, by the use of these general declarations, to make an "all or nothing" case that the 2004 Framework must continue to be applied. Accordingly, these declarations do not focus on the questions at issue in this remedy hearing.

Management expressly is allowed and required under the 2001 Framework, and there is no dispute that the treatments within the areas closest to communities will occur at full intensity under the 2001 Framework. SNFPA 0333. Moreover, the injunction requested would be of limited duration, applying only until the Forest Service corrects its NEPA violation. Accordingly, to show harm from the application of the 2001 Framework, the Forest Service must make a legally-defensible showing that would include: (1) a good faith estimate of how long the agency needs to correct the NEPA violation, and therefore how long the 2001 Framework will function as a default

management plan, (2) an identification of the specific projects that are necessary to address compelling, immediate, site-specific risks to public safety and that necessarily must be accomplished in this period; (3) and a description of the extent, if any, in which the 2001 Framework would prevent the Forest Service from adequately addressing the specific harms and risks it identifies. The Forest Service's failure to provide any specific information about how the 2001 Framework would foreclose its efforts to address specific risks means that neither California not the Court has any basis to evaluate, first, whether there is any real harm, and, second, whether specific amendments or modifications to the 2001 Framework as applied to a specific project may be appropriate pending the Forest Service's compliance with NEPA. Absent this showing, the Forest Service fails to identify any harm to it that should be remedied by this Court.

Further, a legitimate showing of the harm cannot derive from the delay that may come from the Forest Service being required to consider alternative sources of funding other than the logging of large trees. That argument has been resoundingly rejected by the Ninth Circuit. *Sierra Forest Legacy*, 526 F.3d at 1234 (it is the Forest Service's "choice of funding for fire reduction - rather than fire reduction itself" that is properly balanced against the harm to plaintiffs). In addition, in light of the agreement of the Forest Service's experts (*see* discussion of Bahro Declaration below) that treatments that retain trees greater than 20 inches diameter and at least 50 percent canopy cover are effective at modifying stand-scale fire behavior, a claim that a serious risk of fire is presented by application of the 2001 standards restricting the taking of large trees would, similarly, not be a basis for a legitimate showing of harm.

California agrees that we must take action to address the very real risk of wildfire and beetle bark infestation, problems that are discussed in general terms in the Macfarlane, Morse, Skinner, Stine, Sherlock, and Grulke, Fetting and Golnick declarations. For the reasons stated in Sierra Forest Legacy's reply brief in their companion case, there is ample evidence in the record and in these proceedings that the fuels reduction treatments allowed under the 2001 Framework will effectively protect against fire risk during the time the 2004 standards are enjoined, allowing important management projects to proceed, especially because the 2001 Framework allows for substantial management activities and aggressive fuels treatment in the wildland-urban interface.

Sierra Forest Legacy Reply Br. at pp. 8-9.

The Forest Service's generalized claims of harm from reinstatement of the 2001 Framework are further undercut by its own experts' admissions that problems of forest health such as impacts and disease are "a normal part of forest dynamics" (Sherlock Decl. at ¶ 7), and thus neither are caused nor necessarily exacerbated by enjoining the 2004 Framework and requiring the Forest Service to proceed under the 2001 Framework for a limited time. The specificity of the Forest Service's declarations stand in marked contrast to the decision in *Alpine Lakes Protection Soc'y v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975), where an injunction was denied in response to site-specific claims that a logging project was necessary to prevent the spread of a particular stand of diseased timber.

The Forest Service may argue that the declaration of Bernard Bahro, Regional Fuels Specialist for Planning in the Pacific Southwest Region discusses specific projects that are necessary to prevent compelling, immediate, site-specific risks to public safety, but are foreclosed by the 2001 Framework. The declaration does not, however, support this contention. Mr. Bahro states: "I generally agree with the statement in Carol Rice's declaration, which I have reviewed, that treatments that retain trees greater than 20 inches diameter at breast height (dbh) and at least 50 percent canopy cover can, in many cases, be effective in modifying stand-scale fire behavior, provided that surface and ladder fuels are treated." Bahro Decl., ¶ 10. Mr. Bahro then explains how certain types of *hypothetical* projects under the 2001 Framework may not allow this level of treatment. The Forest Service did not, unfortunately, take the next step and identify real management projects that would fall into the categories identified by Mr. Bahro and that are necessary to prevent specific harms, *e.g.* risks to public safety or major disease outbreaks.[11/]

The Forest Service also attempts to show economic harm contending that "[r]einstating

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11. To ensure that any injunction does not cause harm by preventing identified and necessary fire management projects, California would not oppose a requirement that the parties meet and confer to agree on a list of specifically identified pest and fire management projects, if any, that should proceed in the near term, that would retain trees greater than 20 inches diameter at breast height and at least 50 percent canopy cover, but that could not proceed to these specifications under the 2001 Framework.

the 2001 Framework would in extensive contract claims to the Forest Service on existing contracts." Golnick Decl., ¶ 20. Beyond the cursory assertions in one paragraph in the Golnick declaration, however, the Forest Service has provided very little specific information on existing contracts. The Forest Service has offered no suggested amendments or modifications to the application of the 2001 Framework that would balance the need to preserve the Forest Service's ability to consider alternatives with costs that may be incurred by applying the 2001 Framework to existing contracts. Based on the record, including the declarations submitted by the environmental plaintiffs, however, California believes that the environmental plaintiffs' proposal to exempt a specified list of projects for which there are final contracts from application of the 2001 Framework is a reasonable compromise, and California would not object to a remedy that includes this modification.

In addition to general assertions about fire and pest infestations that fail to identify any specific harm that will be incurred during the limited time it takes the Forest Service to comply with NEPA, the Forest Service also attempts to argue that reinstituting the 2001 Framework will cause economic harm to the communities surrounding the HFQLG project, and to the timber and biomass industries. *See* Parker and Golnick Decl. Ms. Parker speculates that delay in implementing HFQLG projects could cause socio-economic impacts to local communities (Parker Decl., ¶ 8),[12/] but she does not explain whether serious impacts are likely in the period that it takes the Forest Service to correct its NEPA violation or, if they are likely, why it is reasonable to assume such impacts are tied to the 2001 Framework and not the result of long-standing changes to the timber industry that already have occurred and are independent of the 2001 Framework.[13/]. Similarly, Mr. Golnick states

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12. Ms. Parker also complains of the costs associated with bringing HFQLG projects into compliance with the 2001 Framework because, she asserts, eleven projects would require some new analysis. Parker Decl., ¶ 6. She posits a worse-case scenario that the cost to reanalyze would be $12 million, but also states that it is "impossible" to predict what reanalysis would be required. The statement is unpersuasive, as it assumes that the projects must proceed in the near term in a way that is at odds with the 2001 Framework, and that no revised projects could be devised that would be consistent with the 2001 Framework. These assumptions is not supported by any evidence in her declaration or elsewhere.

13. As Mr. Golnick's declartion notes, there have been many mill and wood products factory closures since the early 1990s that pre-date the 2001 Framework. Golnick Decl. ¶ 2.

summarily that the timber output of the 2001 Framework is insufficient to support "active and successful timber and biomass industries" (Golnick Decl., ¶ 9), but he does not support this statement with specific facts or explain how the application of the 2001 Framework until NEPA compliance will substantially harm these industries. California acknowledges that there may be some costs to third parties associated with requiring the Forest Service to comply with NEPA. However, in general, the "loss of anticipated revenues" to third parties does not "outweigh potential irreparable damage to the environment." *National Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (holding that losses to tour boat companies from injunction preventing entries into Glacier Bay pending compliance with NEPA did not outweigh potential harm to environment). *See also Montana Wilderness Ass'n v. Fry*, 408 F.Supp.2d 1032, 1033 (citing *National Parks Conservation* for the proposition that "[a] third party's potential financial damages from an injunction generally do not outweigh potential harm to the environment"). This is especially true where, as here, all third parties have been on notice of the challenge to the 2004 Framework from virtually the day of the 2004 ROD and certainly by the time this case was filed in 2005. *National Parks Conservation*, 241 F.3d at 738 (noting that tour boat companies and passengers could not claim "surprise" at injunction in light of challenges and request for injunction that preceded injunction by five years).[14/]

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14. The declarations submitted the defendant-intervenors suffer from the same defects as those submitted by the Forest Service (e.g., largely focusing on why, in their view, the 2004 Framework is preferable to the 2004 Framework) and, for this reason, California does not address them in detail. Defendant-Intervenors all seek blanket exemptions from the 2001 Framework for the benefit of their constituent members, but have not focused on specific, irreparable, non-economic harm that will occur in the interim period pending the Forest Service's compliance with NEPA or why such harm outweighs California's interest in compliance with NEPA and protection of the environment of this State. *See National Parks Conservation Ass'n*, 241 F.3d at 738. In addition, none of the "new" information now provided by the interveners show that these consequences would be attributable to enjoining the 2004 Framework, rather than to general industry or economic trends. *See* Sierra Forest Legacy's Reply Br., CIV-S-05-0205 (Document Number 273) at p. 16-17.

D. The Public Interest Supports California's Requested Injunction

The Ninth Circuit has already recognized that public interests favor enjoining the Forest Service's actions under the 2004 Framework until NEPA compliance is achieved: "Public interests are further implicated: the importance of preserving the environment and of enforcing the law intended to preserve it." *Sierra Forest Legacy*, 526 F.3d at 1234 (citing *Amoco*, 480 U.S. at 545). Indeed, injunctions ordering compliance with NEPA are usually granted in part because enforcement of the statute's purpose to foster better decision-making is in the public interest: "[A]llowing a potentially damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA," *Sierra Club v. Bosworth*, 510 F.3d at 1033.

In addition to the public interest in informed decision making, there is a strong public interest in the protection of natural resources. *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1177 (9th Cir. 2006) ("The preservation of our environment, as required by NEPA . . . is clearly in the public interest."). This is particularly true where, as here, the implications of not protecting natural resources are irreparable. "[O]nce trees are removed from the landscape, they cannot be replaced" (*Sierra Club v. Eubanks*, 335 F.Supp.2d at 1083), unlike "restrictions on forest development and human intervention [that] can be removed if later proved to be more harmful than helpful" (*Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002)). Given that the 2004 Framework would only be enjoined for the limited time it takes to correct the NEPA violation, the public interest is better served by being cautious. Defendants assertions of a general public interest in reducing fire risk, forest health and economic injury should also be weighed in light of the limited time that the injunction will remain in effect and that the 2001 Framework allows substantial forest management, including fired reduction activities, to proceed in the interim. As discussed above, the Forest Service has not established specific harm to these interests during this limited period.

Defendants also claim that the public interest would benefit from "full implementation"of the Herger-Feinstein Quincy Library Group Forest Recovery Act ("HFQLG Act"), despite the failure to evaluate alternatives. Forest Service Opening Br. at p. 11. As with the defendants' other public interest claims discussed above, this claim fails to identify specific projects that, if required

to be implemented consistent with the 2001 Framework, will cause either harm to the environment or specific, cognizable economic harm. Specifically, defendants fail to discuss what projects could proceed under the 2001 Framework and why, specifically, these projects would not serve the public's interest in the interim period pending the Forest Service's compliance with NEPA.

For the reasons stated in Sierra Forest Legacy's reply brief, any interference with HFQLG projects is likely to be minor and short term, during the limited duration of plaintiffs requested injunction. Sierra Forest Legacy Reply Br., CIV-S-05-0205 (Document Number 273) at p.18-19. In addition, it is simply not correct to state that Congress mandated that the area's logging potential must be fully exploited. As has been repeatedly stated by plaintiffs in these actions, the Act itself directs that it is to be implemented only to the extent that it is consistent with other federal environmental laws. Pub. L. 105-277, Div. A, § 101(e) [Title IV, § 401], Oct. 21, 1998, 112 Stat. 2681-305 (codified at 16 U.S.C. § 2104 note). Thus, in enacting the HFQLG, Congress fully recognized that its provisions were subject to the requirements of other laws, such as NEPA and the National Forests Management Act. In addition, to the extent that the QLG interveners claim any harm to the economic interests of their community or timber industry, they have failed to demonstrate that the feared harm would be caused by enjoining the 2004 Framework and reinstating the 2001 Framework until the Forest Service complied with NEPA, and not by other economic and industry trends and forces. *See infra*, at n. 17.

E. California's Requested Injunctive Relief is Not Overbroad

Defendants claim that California's requested injunction is overbroad in seeking to enjoin activities other than timber harvest pending compliance with NEPA, and in not exempting areas operated by the ski industry.[15/] For the reasons stated above, however, the scope of the injunction

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15. The ski industry contends that the failure of the Forest Service to create an exemption for recreation activities was "unintended" and that the "carve out" they request is "fully consistent with the findings of the 2001 Framework regarding the importance of recreation." Ski Industry Opening Br. at p. 1, 5. If true, it is unclear why the Forest Service could not undertake the steps necessary to correct its inadvertant error outside of this litigation. In any event, the ski industry makes only general claims that operations may be affected by the 2001 Framework, with no reference to the limited time the 2004 Framework would be enjoined. *Id*. at 9-10.

is fully appropriate given that the Forest Service's failure to consider any action alternative other than its preferred alternative was a fundamental defect that infected the validity of the entire decision to adopt the 2004 Framework. Case law supports the proposition that the remedy should match the violation; the requested remedy is programmatic because the agency action at issue is programmatic. Moreover, only a return to the pre-violation statute quo – management under the 2001 Framework – will preserve the Forest Service's ability fully to consider alternatives that may serve the Forest Services stated purposes through different approaches, *e.g.*, different levels of logging and grazing, different method of funding other than the cutting of large trees, and different approaches to addressing short and long-term risks to habitat.

Defendants' claim that California's lawsuit implicated only timber harvesting projects is wrong. California's case specifically highlighted that the Forest Service's loosening of restrictions on grazing has impacts for other forest resources, including impacts to sensitive species, such as the willow flycatcher and the Yosemite toad. California's Mem. of Points & Auth. in Support of Mo. for Summ. J. at 19-23 (Document 69) at pp. 9-15, 19-23. And the judgment in this case was not limited to the Forest Service's failure to examine alternative levels of harvesting or alternative methods of funding other than increased logging. Rather, this Court granted summary judgment to California on its Fourth Cause of Action that the Forest Service failed to evaluate a single alternative other than its preferred course to reject the 2001 Framework in favor of the 2004 plan. California's Fourth Cause of Action alleged that the Forest Service failed to consider alternatives that would have addressed all of the Forest Service's goals and objectives in 2004. *Id*. at pp. 19-23 (listing four specific examples of feasible but unexamined alternatives, including an alternative that would have authorized project-specific variances to the 2001 Framework standards and guidelines; an alternative that would have lessened impacts to grazing permittees by either making other, less-sensitive land available or by conducting experiments based on adaptive management; an alternative that would have considered partial implementation of the Quincy Library Group Pilot Project; and an alternative

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that would have considered sources other than logging larger trees to fund fuels treatment).[16/]

Defendants cite to no precedent for parsing out the individual parts of a programmatic decision from the scope of an injunction necessary to remedy the legal deficiencies of the decision. Accordingly, the 2001 Framework should apply to all forest management decisions pending the Forest Service's compliance with NEPA, unless defendants can show that in some specific instance, the 2001 Framework will cause real, irreparable, non-economic harm.

III. California's Requested Relief is Similar to that Routinely Granted by Courts for Similar Violations.

In claiming that it should suffer no legal consequence for its failure to comply with NEPA, the Forest Service chooses to ignore direct precedent governing the scope of injunctive relief where, as here, an agency illegally attempts to replace one course of action with another. As noted above, district courts cannot disregard the precedential value of prior cases (*eBay*, 547 U.S. 388, 395 (Roberts, C.J., concurring) (the courts' equitable discretion is properly limited by standards set out in prior precedent)), including those cases decided under the well-established principle that "[i]f environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545.

The defendants supplemental briefing is wrong to suggest that the Supreme Court in *Winter* called this principle from *Amoco* into question. *See, e.g.*, TuCare's Notice of Recent Supreme Court Authority (Document 189) at p. 2. *Winter* does not support the Forest Service's

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16. The Ninth Circuit's ruling in *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, is consistent with this Court's judgment in California's case. In that case, the Ninth Circuit concluded that the plaintiffs showed a strong likelihood of success on the claim that the Forest Service failed to examine alternatives to the 2004 Framework, because it failed to consider alternative methods of funding other than the logging of larger trees: "So long as all these alternatives remain unexamined or unreexamined, so long does the SEIS fail to conform to the law." *Sierra Forest Legacy*, 526 F.3d at 1233. The Ninth Circuit's ruling addressed the merits of the *entire* 2004 Framework, not just a part of it, because the Court held that the Forest Service could not "rely on its discussion of alternatives in the 2001 FEIS to satisfy this requirement for the 2004 SEIS." *Id.* at 1231. The Ninth Circuit ruled that the Forest Service considered only one alternative to the 2001 Framework – the 2004 Framework – in all of its applications, which by no stretch is a "reasonable range of alternatives" for any part of the plan, as required by NEPA.

claim that no meaningful injunctive relief against implementation of the 2004 Framework is warranted. Rather, in *Winter*, the Court merely reiterates the already well-settled point that the Court has equitable discretion to craft an appropriate remedy, and then balances the harms *in that case*. *Winter*, 129 S. Ct. 376-78, 380. Although the Court left in place a substantial portion of the district court's injunction not challenged by the Navy, the Court vacated the remainder of the injunctive provisions because the serious national security interests in the implementation of the Navy's unimpeded sonar training exercises outweighed the possible injury to an unknown number of marine animals. *Winter*, 129 S. Ct. at 378. In *Winter*, the environmental injury was not "sufficiently likely" to tip the balance of harms to the environment, as in a "usual" environmental case. Other than clarifying that a plaintiff seeking an injunction must establish a "likelihood," rather than a "possibility" of irreparable injury, there is nothing in the *Winter* decision that impacts this remedy proceeding.[17/]

By focusing on cases like *Winter* that present exceptional circumstances, the defendants ignore the entire line of precedent dealing with the situation that is presented here – what remedy is warranted when an agency illegally adopts a plan or rule, like a land use management plan, that replaces a prior enacted plan. These cases include *Paulsen v. Daniels*, 413 F.3d 999, 1008-09 (9th Cir. 2005), ignored by the defendants, which articulates the rule in the Ninth Circuit that "[o]rdinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid," and "[t]he effect of invalidating an agency rule is to reinstate the rule previously in force." *Id.* (citing cases). Also on point is *Klamath-Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006), which applies these rules to forest plan decisions, finding that when new forest plan decisions are found invalid, they are set aside, and the prior forest plan standards are reinstated. In these kinds of cases, the courts do not, as the Forest Service suggests is appropriate, allow the agency to implement its illegal decision. Instead, they require the agency to follow the rules previously in force until the agency properly adopts new rules. Thus, the agency is not enjoined from all activity because there are standards from prior plans to fill any management void; for this

17. As described in its Opening Brief and in this reply, California has amply demonstrated here that irreparable injury is sufficiently likely.

same reason, it is not always necessary for the courts to fashion interim remedial orders. This is exactly the remedy that California requests here.

Similar cases reach a similar result. In particular, in *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d.1114, 1145 (9th Cir. 2008), the Bureau of Land Management violated NEPA in approving a land use plan governing large portion of Oregon public lands; the court set aside the ROD approving the EIS and the land use plan and enjoined the BLM from implementing the plan without remedying the gaps in EIS. *See also, Northwest Ecosystem Alliance* v. *Rey*, 2006 WL44361 (W.D. Wash. 2006) (setting aside ROD adopted in violation of NEPA, reinstating prior forest plan direction, and enjoining projects not in compliance with prior forest plan).

The Forest Service is misplaced in its reliance on the Ninth Circuit opinion in *High Sierra Hikers*, 390 F.3d 630 (9th Cir. 2004) as support for its proposal to allow activities under the 2004 Framework to continue despite the legal deficiencies. In *High Sierra Hikers*, the court found that the Forest Services' practice of issuing multi-year special use permits and renewals to commercial packstock operators in wilderness areas without an EIS violated NEPA, and ordered the Forest Service to complete both permit-specific NEPA analysis and programmatic analysis of the cumulative impacts of all the permits. *High Sierra Hikers*, 390 F.3d at 636-37. The court did not prevent all packstock activity during the compliance period, but instead fashioned interim orders that reduced and restricted the number and locations of permits. *Id*. This case does not support that injunctive relief should be denied for a NEPA violation, but rather supports California's request that the court direct the agency to comply with NEPA, and limit activity in the interim in a way that does not cause irreparable harm.

More on-point is the later district court decision, *High Sierra Hikers Ass'n v. Moore*, 561 F.Supp.2d 1107 (N.D. Cal. 2008). After the cumulative impact analysis for the permit program was released in 2005, plaintiffs challenged it under NEPA for failing to take a "hard look" at impacts on species and water quality. *High Sierra Hikers*, 561 F.Supp.2d at 1111. That decision challenged was more analogous to the programmatic 2004 Framework. After considering of the relevant equitable factors, the district court granted the plaintiffs the precise remedy requested by California

here. It set aside the 2005 decision in its entirety, based on the rule that the "normal" remedy for an unlawful agency action is to set aside the action, and reinstated the management provisions in the prior validly adopted wilderness plan. *Id* at 1113-14. The Forest Service was required to comply with the standards in the prior plan, except where they were in conflict with specific permit administration provisions ordered by the court to address specific issues of economic and environmental harm raised by the parties. *Id* at 1117-18. In granting relief similar to what California is requesting here, the court did not prohibit all management activity, but instead allowed activity under the terms of the prior, validly adopted plan, as supplemented with specific equitable orders.

Similarly, the court in *California ex rel. Lockyer v. U.S. Department of Agriculture*, 459 F.Supp.2d 874 (N.D. Cal. 2006), followed the same approach after upholding a NEPA challenge to the Forest Service's management plan for inventoried "roadless" areas.[18/] The court there found that the Forest Service illegally repealed the 2001 Roadless Rule and replaced it with the 2005 State Petitions Rule without environmental analysis. *Id*. at 913. After balancing the equitable factors, the court invalidated the State Petitions Rule, reinstated the Roadless Rule – based on the authority of *Paulsen v. Daniels* – and enjoined the Forest Service from taking action inconsistent with the Roadless Rule pending compliance with NEPA.[19/] In a separate order, the court issued specific injunctive provisions to address specific projects and projects already underway based on the State Petitions Rule. *California ex rel. Lockyer v. U.S. Department of Agriculture*, 468 F.Supp.2d 1140 (N.D. Cal. 2006). This case presents a close parallel to the issues in this Framework case.

The Forest Service is also misplaced in relying on the recently-decided case of *Northern Cheyenne*, 503 F.3d 836, to support its claim that the 2004 Framework should remain in place indefinitely while it updates its individual forest plans. *Northern Cheyenne*, however, does not sanction the Forest Service's proposed remedy here. In marked contrast to the Forest Service's 2004

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18. This case is currently on appeal, and has been argued and submitted to the Ninth Circuit.

19. The court noted that although the Forest Service opposed reinstating the Roadless Rule under *Paulsen*, it "cite[d] no Ninth Circuit authority contrary to *Paulsen*." *Id*. at 916.

FSEIS for the Framework, the EIS prepared by the Bureau of Land Management in *Northern Cheyenne* "analyzed five alternatives in detail," but was nevertheless improper because it failed to consider a viable "phased development" alternative advocated by the plaintiffs. *Id.* at 840-41. The Forest Service wrongly characterizes *Northern Cheyenne* as allowing "continued implementation of a decision notwithstanding a procedural NEPA violation." Forest Service's Opening Brief at p. 5. Instead, what the court actually did was to *enjoin the BLM from implementing its improperly adopted plan*, while it achieved NEPA compliance – the same remedy requested by California here. Although the court did allow the agency to proceed with some development, it was only allowed to take action consistent with "the [phased] alternative that the plaintiffs wanted BLM to consider, while it was being considered." *Id. See also Geertson Seed Farms v. Johanns*,541 F.3d 938, 945 (9th Cir. 2008) ("The injunction [in *Northern Cheyenne*] permitted one method to proceed and prohibited other activity pending full compliance with NEPA.") The court exercised its equitable discretion to require the agency to remedy its NEPA violation, but allowed it to proceed in a way that *did not prejudice* the final outcome, precisely because the alternative the plaintiffs studied was not only to be considered, it was *implemented* while the agency studied it. Prejudice to the final outcome could therefore be avoided there, in a way that it clearly cannot here, if the Forest Service implements the very action that was found invalid because of the agency's failure to evaluate alternatives to that action.

None of the other cases cited by the Forest Service support its claim that continued implementation of the 2004 Framework is warranted. In some cases, the injunctive relief granted was more limited than the plaintiffs requested and in some it was denied. But each of the cases was decided on its unique facts, and none involved a decision to replace an existing rule or land use plan without NEPA compliance. *Cf. National Wildlife Federation v. Espy*, 45 F.3d 1337 (9th Cir.1995) (in a challenge to a sale of property completed without NEPA compliance, plaintiffs' requested order rescinding the sale was denied because of buyer's good faith reliance); *Warm Springs Dam Task Force*, 621 F.2d 1017 (9th Cir. 1980) (failure to prepare a supplemental EIS to evaluate new information relevant to agency approval of a dam project did not warrant injunctive relief because at the time of appeal a further study had already been completed that addressed the new

information); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002) (BLM issued grazing permits without environmental review in violation of NEPA and was ordered to prepare expedited NEPA analysis; the court imposed management restrictions in the interim to protect sensitive resources rather than ordering a halt to all grazing); *Alpine Lakes Protection Soc'y*, 518 F.2d at 1090 (injunction pending appeal of a specific logging project denied because of imminent harm from insect damage). As a whole, these cases stand for nothing more than that undisputed rule that an injunction is not automatic when environmental laws are violated or alleged to be violated.

The Forest Service also cites cases where no injunctive relief was granted because the agency did not violate NEPA, or otherwise act contrary to law. *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (no injunction granted in challenge to commercial logging project where court determined plaintiffs were not likely to succeed on the merits of their NEPA claim); *Native Ecosystem Council v. U.S. Forest Service*, 428 F.3d 1233 (9th Cir. 2005) (no NEPA violation where Forest Service prepared EA instead of EIS for a forest thinning project); *Laguna Greenbelt v. U.S. Dep't of Transportation*, 42 F.3d 517 (9th Cir. 1994) (NEPA was not violated when the EIS for a toll-road project discussed but failed to identify certain property by name because the requisite information was provided to the public). While these cases discuss the undisputed view that a court may consider a defendant's claims that it will be harmed by a requested injunction, they do not support the claim that an invalid NEPA decision should be allowed to stand pending NEPA compliance.

IV. The Forest Service's Proposed Remedy Does Not Encourage Compliance with NEPA and is Inconsistent with Case Law.

A. The Forest Service's Proposed Remedy Fails to Result in Meaningful Injunctive Relief

The typical remedy for a land use plan adopted in violation of NEPA is to set aside the plan and reinstate the pre-violation status quo while the NEPA violation is corrected. *See, e.g., High Sierra Hikers v. Moore*, 561 F.Supp.2d 1107, *Oregon Natural Desert Ass'n*, 531 F.3d.1114, *Northwest Ecosystem Alliance*, 2006 WL 44361.

The Forest Service, instead, takes a novel approach to its proposed remedy, suggesting limited "substantive" and "procedural" remedies that fail to deliver any meaningful relief. *See*

Forest Service Opening Brief on Remedy in *Sierra Forest Legacy*, CIV-S-05-0205 (Document 270) at pp. 34-36. Procedurally, to correct the NEPA violation, the agency proposes the long and laborious process of meeting its requirement to consider alternatives when it conducts its regular 15 year forest plan updates, undertaken under the new 2008 forest planning rules, for each of the eleven forests that comprise the Sierra Nevada. Not only does this proposal take what should be a relatively simple exercise and prolong it over a number of years,[20/] its remedial benefits are entirely illusory, because the 2008 planning rules do not even require the preparation of an EIS for a forest plan revision. As the Forest Service itself has acknowledged, "a plan revision pursuant to the 2008 planning rule would typically not include a NEPA range of alternatives." Forest Service's Opening Br. on Remedy in *California Forestry Ass'n v. Kimbell*, No. CIV-S-05-0905 MCE/GGH (Document 139) at p.3.

In addition, the Forest Service's proposes to remedy its programmatic NEPA violation with project-specific review; specifically, by examining "a non-commercial funding alternative" during site-specific review of "hazardous fuel reduction projects." This proposal is inappropriate, because a programmatic NEPA violation is not properly remedied by site-specific analysis. *City of Tenakee Springs*, 915 F.3d at 1312 (for programmatic actions, it is improper to consider single projects is isolation without considering the net impact of all the projects). Even if allowed by law, however, the Forest Service's proposal is too narrowly constrained to provide any meaningful remedy. It excludes all but one type of project and proposes to only look at one narrow alternative.[21/] This "procedural remedy" should be rejected out of hand.

"Substantively," the Forest Service claims that no remedy is required because the 2004 Framework results in no environmental harm. This is patently wrong, even considering only the impacts on large trees in isolation of the other impacts of the 2004 plan. As a fall-back, the Forest

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20. The Forest Service makes no commitment to finish this process by any date certain. Even under the Forest Service's current assumptions it would take a minimum of five years before the agency even commences the updates of all of the plans. Experience has shown that forest plans are rarely updated on the schedule originally envisioned.

21. The Forest Service proposal would exempt all HFQLG projects. Forest Service's Opening Brief in *Sierra Forest Legacy*, CIV S-05-0205 (Document 270) at p.36, n.23.

Service offers a limited restriction on logging in three habitat types, but only in mixed conifer zones, and only if the logging is not proposed for a Wildland Urban Intermix or a Defensible Fuel Profile Zone. As discussed in Sierra Forest Legacy's reply brief in the companion case and the accompanying scientific declarations filed with the reply, all of these exemptions and loopholes inherent in this proposal mean that it does not materially or meaningfully reduce the irreparable harm, even considering only the impact on large trees and the habitat they support. Sierra Forest Legacy Reply Br., CIV-S-05-0205 (Document Number 273) at pp. 23-25.

In combination with these "remedies," the Forest Service flatly opposes any retroactive application of the 2001 Framework, regardless of the legal status or factual circumstances of the various proposed projects in various stages of development and review. But, for the most part, the Forest Service fails to engage in a project-specific analysis of harm. For example, although the Forest Service states that the "investment" in about 70 projects could be lost under reinstatement of the 2001 Framework (Glonick Decl. at ¶19), the agency does not identify which of these projects would be likely to go forward during the limited time the NEPA violation is being corrected, nor does it recognize the multiple projects that would be allowed to go ahead under the 2001 Framework standards. See Declaration of David B. Edelson, filed with the Sierra Forest Legacy Reply Br. (Document 273) at ¶¶5-8. Accordingly, the Forest Service does nothing more than ask for a blanket exemption from relief, despite that its actions violated NEPA.

Stripped bare, the Forest Service's proposals offer no remedy at all, but just more rhetoric that the 2004 Framework should be allowed to stand despite its legal deficiencies, because the Forest Service prefers its mix of policy choices over the balance struck in the 2001 Framework. The Forest Service simply attempts to continue in this remedy proceeding its "yes or no" exercise – defining the choice as all or nothing between either the 2001 Framework or the 2004 Framework – that gave rise to the NEPA violation in the first place. To continue to implement the 2004 Framework without consequence turns NEPA on its head.

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B. The Forest Service has Failed to Establish any Particularized Harm that May Result from Requiring Compliance with the 2001 Framework for the Interim Period Until the Forest Service Complies with NEPA.

California acknowledges that consistent with the cases discussed above (*see, e.g.*, *Amoco*, 480 U.S.531, *Winter*, 129 S. Ct. 365, *Northern Cheyenne*, 503 F.3d 836, *High Sierra Hikers*, 390 F.3d 630), equitable principles allow this Court to impose other orders addressed to any specific harms or hardship that might ensue from the application of the 2001 Framework standards to any specific situation during the limited period of time that it will take the Forest Service to correct the NEPA deficiencies. Accordingly, as discussed above, the Forest Service could have attempted in this remedy proceeding to establish that implementing a particular project under the pre-violation regulatory structure, the 2001 Framework, during the interim period until the Forest Service corrects its fundamental NEPA violation will work some specific hardship or harm.

The Forest Service, however, has not identified any specific harm that will be incurred from operating under the 2001 standards until that plan is properly amended. Instead the agency insists that this Court simply allow it to implement the 2004 Framework across 11.5 million acres of Sierra forest as if it had complied with NEPA. No case suggests that such a result is equitable, and it would deprive California of the only remedy that will ensure compliance with NEPA. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 1804 (1982) (denying request for injunction prohibiting Navy''s discharge of ordnance until it obtained a permit under Federal Water Pollution Control Act in part because other remedies, including fines, were available). The Court should decline the Forest Service's request to effect such an unprecedented result.

As discussed above, however, California is amenable to an order that would exempt the specifically identified projects set forth in the environmental plaintiff's revised proposed order, as these exemptions would strike a reasonable balance between preserving the Forest Service's ability fully to correct its NEPA violation and allowing some portion of projects in process to proceed.

VI. The Defendants "Jurisdictional" Arguments are Without Merit

Industry defendant-interveners make a number of jurisdictional arguments that are easily dismissed. First, TuCare argues that this Court is without jurisdiction to consider remedy issues with respect to its merits ruling because the Ninth Circuit has not yet issued its mandate in the

preliminary injunction proceeding. TuCare's Opening Br. in *Sierra Forest Legacy* (Document 267) at pp.3-5. That claim is without merit. *Human Resources Management, Inc. v. Weaver*, 442 F. Supp. 241, 249. Likewise, TuCare's argument in this case that California may not obtain any "substantive relief,"such as setting aside the 2004 Framework, because California brought only "procedural" NEPA claims, is similarly without merit, as evidenced by any number of Ninth Circuit decisions discussed in this brief. *See, e.g., Oregon Natural Desert Ass'n* , 531 F.3d 1114, *Klamath -Siskiyou Wildlands Ctr.*,468 F.3d 549, *High Sierra Hikers*, 561 F.Supp.2d 1107. If TuCare's assertion were true, then a plaintiff bringing only NEPA claims could never obtain "programmatic relief . . .when suits are premised on environmental injury" (TuCare Opening Br. (Document 185) at p.3), and violations of NEPA would never be capable of redress.

Finally, in passing, the Forest Service suggests that the APA somehow does not allow relief "regarding actions other than those specific actions that were challenged" in the case. Forest Service Opening Br. in *Sierra Forest Legacy*, CIV-S-05-0205 (Document 270) at p. 31. Were this the case, then a plaintiff like California that brings only NEPA claims and no project-specific claims would never obtain relief when a programmatic land use plan is adopted without adequate environmental review. That obviously is not the law. *See, e.g., People of the State of California*, 468 F.Supp2d at 1143-44; *Northwest Ecosystem Alliance*, 2006 WL 44361 at *7 (although plaintiffs broadly challenged a record of decision and not individual timber sales, "[i]t would be incongruous . . . to set aside the 2004 ROD and reinstate the 2001 ROD, while at the same time allowing timber projects that do not comply with the 2001 ROD to proceed").

CONCLUSION

For the reasons stated above, California respectfully requests that the Court (1) set aside the 2004 Framework and the Record of Decision (ROD) through which it was adopted; (2) reinstate the 2001 Framework as the management plan that existed prior to adoption of the 2004 Framework; (3) enjoin the Forest Service from engaging in any proposed projects or other management activity that is inconsistent with the 2001 Framework until such time as the Forest Service remedies the NEPA violations associated with adoption of the 2004 Framework, with the exceptions set forth in California's Revised Proposed Order, filed with this brief.

Respectfully submitted:

Dated: November 26, 2008

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